United States Department of State
Bureau of Economic and Business Affairs

BATTLING INTERNATIONAL BRIBERY 2000

The Second Annual Report on Enforcement and Monitoring of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions as Required by Paragraph (c) (1) of the Senate Resolution of Advice and Consent dated July 31, 1998

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Contents

Executive Summary

Bribery of foreign public officials by businesses is a serious problem in the international marketplace. This corrupt practice penalizes firms that play by the rules and compete on the merits of their products and services. But the damage is not limited to billions of dollars of lost exports. Bribery of public officials in commercial dealings undermines good governance, retards economic development and is especially damaging to developing countries and those in transition to market economies.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions represents a concerted effort by the world's major trading nations to combat this pernicious practice. *Battling International Bribery 2000* is the Department of State's second of six annual reports on enforcement and monitoring of the OECD Convention. The reports are required by Paragraph (c)(1) of the Senate Resolution of Advice and Consent to ratification of the Convention dated July 31, 1998. The report is the result of close collaboration among a number of federal agencies, including the Departments of State, Commerce, Justice and Treasury, the Office of the United States Trade Representative, and the staff of the United States Securities and Exchange Commission. The analysis reflects the same key points and findings as those contained in the Department of Commerce's second annual report to the Congress required under the International Anti-Bribery and Fair Competition Act (IAFCA) of 1998.

The OECD Convention marks a major milestone in U.S. efforts over more than two decades to have other major trading nations join us in criminalizing the bribery of foreign public officials in international business transactions. The Convention, which has been signed by all 29 OECD members[1] plus Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic, entered into force for the United States and 11 other signatories on February 15, 1999. As of June 10, 2000, an additional 9 countries had deposited their instruments of ratification of the Convention with the OECD and several more were expected to do so in the near future.

This second annual report continues to focus on the progress that is being made by each signatory country in ratifying and implementing the OECD Convention. National legislation is critical for governments to fulfill their commitments under the Convention to criminalize the bribery of foreign public officials and to implement the OECD Council recommendation to end the tax deductibility of bribes. The assessment of implementing legislation in Chapter 2 of this report represents the views of the U.S. government agencies that prepared it. The assessment is based on information from a variety of sources, including the implementing legislation of the countries, reporting of U.S. embassies, publications, private sector comments, and other public sources. Our views are not necessarily those of other governments. The report also addresses other related issues raised in the Senate Resolution. These include the adequacy of enforcement, an assessment of the need for strengthening the Convention and the desirability of expanding the membership of the Convention to other countries.

Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

Key Points

- Over the past year, further progress has been made on the first priority of ensuring that all signatories deposit an instrument of ratification with the OECD. As of June 10, 2000, twenty-one of the thirty-four signatories, representing approximately 78 percent of OECD exports, had completed their internal approval processes and deposited an instrument of ratification with the OECD secretariat. Nevertheless, a number of significant exporting countries important for the global fight against bribery, including Brazil, France, Italy, and the Netherlands, had not yet taken the necessary steps to bring the Convention into force. The United States will continue to press these countries to complete their legislative and ratification processes without further delay.

- The procedures established by the OECD to monitor implementation of the Convention have proven effective in providing a thorough, unbiased examination of parties' implementing legislation. The review process is continuing. Examination of implementing legislation to date has been rigorous, comprehensive, and frank in identifying shortcomings. Thus far, the OECD Working Group on Bribery has reviewed the implementing legislation of twenty-one countries, including the United States.

- The State, Commerce, Justice, and Treasury departments are working together as a team to monitor implementation and enforcement of the Convention. U.S. agencies have established a comprehensive monitoring process that includes active participation in OECD meetings on the Convention, bilateral discussions with other governments on implementation issues, and careful tracking of bribery-related developments overseas.

- Countries that have ratified the Convention have generally taken a serious approach to fulfilling their obligations on criminalizing the bribery of foreign public officials. The relevant legislation of twenty foreign countries is reviewed in this report. We have concerns, however, about the implementation of the Convention by several countries, including Japan and the United Kingdom, whose current legislation appears inadequate to accomplish the goals of the Convention. Bilaterally and multilaterally in the OECD Working Group on Bribery, the United States is urging countries to take action to correct deficiencies in implementing legislation.

- Since the Convention has been in force for only a short time and not yet for all signatories, it is still too early to make judgments regarding the effectiveness of enforcement measures. Now that the review of implementing legislation is well advanced, the United States is urging the Working Group on Bribery to begin the review of enforcement actions later in 2000, as originally endorsed by OECD ministers. Future reports, therefore, should begin to develop a record of enforcement. As far as we have been able to determine, the United States remains the only country to have prosecuted persons for the bribery of foreign public officials.

- Both government authorities and nongovernmental organizations have made greater efforts over the past year to promote public awareness of the Convention and support anticorruption initiatives. Notable efforts have been made in Australia, Bulgaria, Canada, the Czech Republic, Germany, Korea, Poland, the Slovak Republic, and Sweden. The United States continues to encourage all signatories to promote public awareness of the Convention and the importance of combating corruption.

- Substantial progress has been achieved in implementing the OECD Council recommendation to eliminate any remaining tax deductibility for bribes to foreign public officials. We remain concerned, however, about the effectiveness of some countries' actions to disallow tax deductibility. The United States, in cooperation with other OECD members, is providing technical assistance to the OECD's Fiscal Affairs Committee in order to improve its monitoring of national laws and practices and to help the Committee establish a more complete record of each signatory's legal, regulatory, and administrative framework for disallowing tax deductibility.

- As the Convention enters into force for more signatories, greater attention is being given to considering new participants and using the OECD to promote antibribery activity among interested nonsignatory countries. The most appropriate candidates for accession to the Convention are likely to be significant global or regional exporters whose governments are well equipped to take on the responsibilities of implementing the Convention. The OECD has undertaken initial outreach activities with these criteria in mind.

- The United States has succeeded in keeping issues related to strengthening the Convention on the agenda of the OECD Working Group on Bribery despite

the lack of support from many members. We have made special efforts to focus attention on issues of particular importance to the United States: bribery acts in relation to foreign political parties, party officials, and candidates for public office. Developing support for addressing our key issues of concern is expected to require a long-term effort as we differ sharply with other Working Group members on the need to expand the scope of the Convention. Other issues on the agenda relating to the Convention include making bribery of foreign public officials a predicate offense for money laundering legislation and the roles of foreign subsidiaries and offshore financial centers in bribery transactions.

■ U.S. business associations and nongovernmental organizations, such as Transparency International, are playing an important role in helping the U.S. government monitor implementation of the Convention and educating the public and the business community in signatory countries on the need to enact and enforce antibribery laws. The U.S. government will continue to involve the private sector in its efforts to monitor the Convention and promote its goals. The U.S. government also actively assists the business community on corruption issues. The Department of State has published a brochure, "Fighting Global Corruption: Business Risk Management," and the Department of Commerce has opened a bribery hotline on its Internet site. The Department of Justice, under its Foreign Corrupt Practices Act Opinion Procedure, will issue opinions regarding the antibribery provisions of the Foreign Corrupt Practices Act (FCPA) with respect to certain prospective business transactions.

■ A classified annex to this report (transmitted separately) demonstrates that a large number of competitor firms from other countries have been engaged in bribery of foreign public officials. The annex covers the six-year period since May 1994, most of which period was prior to the entry into force of the Convention. It lists foreign firms on which credible information exists indicating that they have been engaging in activities that would be prohibited by the Convention. During that period, we received allegations that bribes had been offered in some 353 international contracts worth about $165 billion. In deals where there were bribery allegations, reported U.S. competitors, and known outcomes, American firms lost 92 contracts worth approximately $26 billion. The annexes to future reports will help to indicate the effectiveness of the Convention in leveling the playing field for American business.

The fight against corruption is a high priority in U.S. foreign policy, and the OECD Convention represents a key element in this broader campaign. Our leadership in combating international corruption started with the FCPA of 1977. Since then our efforts against corruption have not only involved the OECD. Another important initiative was Vice President Al Gore's first Global Forum on Fighting Corruption held in February 1999, in which 90 countries participated. The United States is cosponsoring a second Global Forum scheduled to be held in the Netherlands in 2001. Over the past year, the United States has also developed or supported anticorruption and transparency initiatives in a number of other global and regional forums. These include the Organization of American States (the Inter-American Convention Against Corruption, which the United States signed in June 1996, is currently before the U.S. Senate), the Global Coalition for Africa, the Organization for Security and Cooperation in Europe, the Stability Pact for Southeast Europe, the Council of Europe, the Asia-Pacific Economic Cooperation forum, and the World Trade Organization. In January 2000, the United Nations Ad Hoc Committee Negotiating the Organized Crime Convention concluded that a global instrument against corruption is desirable and that work in the United Nations toward such an instrument should begin once the Organized Crime Convention and its three protocols are complete. Concerned U.S. government agencies are considering our approach to this initiative and are consulting with other governments.

Through all the above initiatives, the United States seeks to capitalize on the growing international political will to combat corruption and to employ it to achieve concrete actions supporting our good governance goals.

Ratification Status

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the Convention") entered into force on February 15, 1999.[1]

As of June 10, 2000, twenty-one countries had deposited an instrument of ratification with the OECD: Australia, Austria, Belgium, Bulgaria, Canada, the Czech Republic, Finland, Germany, Greece, Hungary, Iceland, Japan, Korea, Mexico, Norway, the Slovak Republic, Spain, Sweden, Switzerland, the United Kingdom, and the United States. The table on page 6 provides information on all signatories with regard to domestic ratification, enactment of implementing legislation, deposit of an instrument of ratification, and entry into force of the Convention.

In most of the signatory countries that have not completed the steps necessary to bring the Convention into force, there has been notable progress in preparing implementing legislation and obtaining the necessary authorizations for ratifying the Convention. Most of these countries should complete this process by the end of 2000 or early 2001. The following status report on their internal legislative process is based on information obtained from U.S. embassies and reporting from the countries themselves to the OECD, which is now publicly available at http://www.oecd.org/daf/nocorruption/annex2.htm.

Argentina

On November 12, 1999, the government submitted the Convention for ratification to Parliament. The Chamber of Senators' Committee on Foreign Relations approved the ratification bill without objection on February 28, 2000, and the full Senate is expected to approve it without debate as soon as a vote is scheduled. The bill could clear the Senate before the July recess. The Chamber of Deputies must also approve the bill for it to become law. Separately, the international affairs unit of the Ministry of Justice is reviewing draft legislation to bring the criminal code into harmony with the Convention. The legislation will be submitted after the instrument of ratification is deposited. The government expects to complete ratification of the Convention and enact implement-

[1]Article 15 of the Convention states that the Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest shares of OECD exports and which represent by themselves at least 60 percent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification with the OECD Secretariat. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.

Ratification Status of Signatory Countries to the OECD Anti-Bribery Convention (As of June 10, 2000)

Signatory Country	Ratified	Legislation Approved	Instrument of Ratification Deposited With OECD Secretariat[1]	Convention Enters Into Force
Totals: 34	25	21	21	21
Argentina				
Australia	NA	June 17, 1999	October 18, 1999	December 17, 1999
Austria	April 1, 1999	October 1, 1998[2]	May 20, 1999	July 19, 1999
Belgium	June 9, 1999	April 3, 1999[2]	July 27, 1999	September 25, 1999
Brazil				
Bulgaria	June 3, 1998	January 15, 1999	December 22, 1998	February 15, 1999
Canada	December 17, 1998	December 10, 1998	December 17, 1998	February 15, 1999
Chile				
Czech Republic	December 20, 1999	April 29, 1999	January 21, 2000	March 21, 2000
Denmark		March 30, 2000		
Finland	October 9, 1998	October 9, 1998	December 10, 1998	February 15, 1999
France	May 25, 1999			
Germany	November 10, 1998	September 10, 1998	November 10, 1998	February 15, 1999
Greece	November 5, 1998	November 5, 1998	February 5, 1999	February 15, 1999
Hungary	December 4, 1998	December 22, 1998	December 4, 1998	February 15, 1999
Iceland	August 17, 1998	December 22, 1998	August 17, 1998	February 15, 1999
Ireland				
Italy				
Japan	May 22, 1998	September 18, 1998	October 13, 1998	February 15, 1999
Korea	December 17, 1998	December 17, 1998	January 4, 1999	February 15, 1999
Luxembourg				
Mexico	April 21, 1999	April 30, 1999	May 27, 1999	July 26, 1999
The Netherlands				
New Zealand				
Norway	December 18, 1998	October 27, 1998	December 18, 1998	February 15, 1999
Poland	April 13, 2000			
Portugal	March 31, 2000			
Slovak Republic	February 11, 1999	September 1, 1999[3]	September 24, 1999	November 23, 1999
Spain	December 1, 1998	January 11, 2000	January 14, 2000	March 14, 2000
Sweden	May 6, 1999	March 25, 1999	June 8, 1999	August 7, 1999
Switzerland	December 22, 1999	December 22, 1999	May 31, 2000	July 30, 2000
Turkey	February 1, 2000			
United Kingdom	December 14, 1998	(Need for implementing legislation still under review)	December 14, 1998	February 15, 1999
United States	November 20, 1998	November 10, 1998	December 8, 1998	February 15, 1999

NA = Not available.
[1] The Convention entered into force February 15, 1999. The Convention will enter into force for all other signatories on the sixtieth day after each signatory deposits an instrument of ratification with the OECD.
[2] Date legislation came into effect.
[3] Date partial implementing legislation came into effect.

ing legislation before the end of 2000.

Brazil

The bill to ratify the Convention has been approved by the Chamber of Deputies and is being examined by the Senate's Foreign Affairs Committee. Following the Senate Committee's approval, the Convention will move to the Constitution and Justice Committee and then on to a plenary vote. The Foreign Ministry expects that the bill could be passed in June or July 2000. After the bill to ratify the Convention is approved by Congress, implementing legislation will be drafted. Once the bill to ratify the Convention and the implementing legislation are approved, both texts will go to the President for signature. The government expects to complete this process in 2000.

Chile

The Chamber of Deputies approved the draft bill to ratify the Convention on March 23, 2000. The draft bill was then sent to the Senate, which is expected to approve it, possibly in October 2000. Ratification requires the approval of both congressional chambers. Normal procedures would require three months, at a minimum, before Senate action. Following ratification, the government will formally propose implementing legislation. Studies on the necessary amendments to national law are under way.

Denmark

Draft implementing legislation was submitted to Parliament in the spring of 1999. The legislation was approved on March 30, 2000, and went into effect on May 1, 2000. The government expects to obtain ratification of the Convention in the second half of 2000.

France

The French government completed its internal process for ratification of the Convention with the adoption of law number 99-424 dated May 27, 1999, authorizing ratification. France, however, has not yet formally deposited its instrument of ratification with the OECD or enacted its implementing legislation. The bill containing the French implementing legislation has undergone two readings in the Senate and the National Assembly, in November–December 1999 and in February 2000. A reading by a joint parliamentary commission followed on March 21, 2000. The Senate approved the implementing legislation after a third and final reading on April 4, 2000. The bill has been scheduled for a third reading and adoption by the National Assembly on June 20, 2000. France is expected to deposit its instrument of ratification with the OECD shortly after its implementing legislation is enacted. We have some concerns regarding the draft French legislation and have been tracking it very closely. We will continue to monitor France's progress and provide additional information in next year's report.

Ireland

Legislation to ratify and implement the Convention, entitled the Prevention of Corruption Bill 2000, was submitted to Parliament in January 2000. The government expects that all stages in both houses will be completed before the end of 2000.

Italy

The Chamber of Deputies approved the bill to ratify and implement the Convention on March 24, 1999. The Senate approved a similar bill on May 10, 2000, which was submitted for a second reading by the Chamber of Deputies on June 7, 2000. The Chamber of Deputies approved the draft bill with some further amendments, which must be resubmitted for approval to the Senate. The Italian government is endeavoring to complete the entire ratification procedure before the OECD ministerial meeting on June 26–27, 2000.

Luxembourg

On February 15, 2000, the State Council gave its approval to ratify and implement the Convention. The bill was originally submitted to the Council on January 12, 1998, and amended twice by the government, on December 16, 1998, and on January 31, 2000. With the Council's review complete, the Convention moved to the Legal Affairs Committee of the Chamber of Deputies for consideration, the final stage in the legislative process prior to a vote by the full Chamber and signature by the Grand Duke. However, the Committee made some amendments to the bill, which will have to be resubmitted to the State Council. It is expected that implementing legislation will be adopted by Parliament during the second half of 2000.

The Netherlands

Bills to ratify and implement the Convention were sent to Parliament in April 1999. The implementing bill has been amended to take account of questions raised by Parliament's Justice Committee. A full reading of the implementing legislation by Parliament was scheduled for June but was removed due to more urgent matters. The bills must be adopted by both chambers of Parlia-

ment. The government is looking to complete the ratification process during 2000.

New Zealand

A bill to ratify the Convention was initially introduced to Parliament in September 1999 but consideration was delayed by the change in government. The bill is now being reviewed by a new parliamentary committee, which completed the public comment phase on the bill on March 3, 2000. Subject to decisions of the new government on the substance of the bill, passage could come by the end of 2000 or possibly earlier.

Poland

The ratification bill was approved by the two chambers of Parliament in January 2000 and thereafter by the President. It has since been published in Poland's Official Journal. Draft implementing legislation was submitted to Parliament on February 15, 2000, and is expected to be adopted in 2000.

Portugal

The National Assembly approved ratification by resolution number 32/2000 of December 2, 1999. Presidential decree number 19/2000 authorizing ratification was issued on March 31, 2000. Ratification of the Convention became effective with its publication in the *Diary of the Republic* on March 31, 2000. However, the legislation necessary to bring Portugal's criminal law into conformity with the Convention is still at an early stage of preparation.

Turkey

The bill ratifying the Convention received parliamentary approval on February 1, 2000, and entered into force on February 6, 2000. Approval by the cabinet, however, must be obtained before an instrument of ratification can be deposited with the OECD. Once secured, articles of ratification will be forwarded to the President for signature, and then an instrument will be deposited with the OECD. An inter-ministerial committee has prepared draft implementing legislation, including amendments to the penal, income tax, and tender codes. The draft bill has been sent to the Ministry of Justice for review. Following cabinet approval, the bill is expected to be sent to Parliament after the summer recess.

Efforts to Encourage Implementation

The Convention's effectiveness for reducing bribery will be constrained until all signatories—particularly important exporters such as Brazil, France, Italy, and the Netherlands—have brought the Convention into effect. The United States has therefore continued to give a high priority to encouraging signatories to complete their ratification procedures and enforce the Convention. Over the past year, U.S. officials have encouraged signatories to ratify and implement the Convention in both public statements and direct contacts with foreign governments. The Secretaries of Commerce, State, and the Treasury, as well as senior officials of these agencies, have used a variety of opportunities to comment on the importance of the Convention and underscore U.S. concern that all signatories implement it as soon as possible. U.S. agencies have also continued to encourage the U.S. and foreign private sectors to support the Convention and work to eliminate the bribery of foreign public officials in international business.

2

Review of National Implementing Legislation

The Departments of Commerce, State, and Justice and the staff of the United States Securities and Exchange Commission (SEC) have reviewed the implementing legislation of the following twenty countries: Australia, Austria, Belgium, Bulgaria, Canada, the Czech Republic, Finland, Germany, Greece, Hungary, Japan, Korea, Mexico, Iceland, Norway, the Slovak Republic, Spain, Sweden, Switzerland, and the United Kingdom. Legislative reviews of eleven of these countries appeared in last year's report; they have been revised and updated as necessary. In addition to these reviews, this chapter also provides a summary of the 1998 amendments made to the Foreign Corrupt Practices Act (FCPA) to implement the OECD Convention.

The views contained in this chapter are those of the U.S. government agencies and staff mentioned above and not necessarily those of the Working Group on Bribery, the body at the Organization for Economic Cooperation and Development that is reviewing the implementing legislation of the signatories to the Convention in the OECD monitoring process. Information for the reviews in this chapter was obtained from implementing legislation and related laws of the countries listed above, reporting from U.S. embassies, private sector comments, publications, nongovernmental organizations, and other public sources. The Working Group's assessment of implementing legislation is expected to be made public later this summer and will be linked to the Department of Commerce's website when available.

Our methodology for analyzing implementing legislation was to compare it with the requirements of the Convention. We looked first at whether the legislation contains provisions implementing the basic statement of the offense, set forth in Article 1 of the Convention, which obligates the country to criminalize the bribery of foreign public officials. We also looked closely at the definitions of the offeror and offeree of the bribe, to ensure that transactions within the scope of the Convention are adequately covered, pursuant to Article 1 of the Convention. Article 1 requires each party to criminalize the bribery of foreign public officials by "any person." Article 1.4 defines "foreign public official" as: any person holding a legislative, administrative, or judicial office, whether they are appointed or elected; any person exercising a public function; and any official or agent of a public international organization. We then examined the manner and extent to which the country will exercise its jurisdiction in enforcing its law, in accordance with Article 4 of the Convention.

We have paid special attention to the penalties imposed for the offense of bribery of foreign public officials, which Article 3 of the Convention states must be "effective, proportionate, and dissuasive." Where possible, we have examined other issues, such as bribery as

a predicate offense to money laundering (Article 7), provisions on books and records (Article 8), mutual legal assistance and extradition (Articles 9 and 10), and conspiracy, attempt, and authorization (Article 1.2).

Drawing from this methodology, each country review follows the same format:

- Basic statement of the offense.
- Jurisdictional principles.
- Coverage of payor/offeror.
- Coverage of payee/offeree.
- Penalties.
- Books and records provisions.
- Money laundering.
- Extradition/mutual legal assistance.
- Complicity (including incitement, aiding and abetting, or authorization), attempt, conspiracy.

Analyzing a party's implementing legislation is a complex undertaking that requires an understanding of not only the party's new laws implementing the Convention but also the existing body of legislation relevant to bribery and corruption. Convention implementation differs markedly among the parties depending on their individual legal systems. Some parties enacted separate new legislation, whereas others amended existing domestic antibribery provisions of their laws. We have taken into consideration throughout the review process that the Convention seeks to assure functional equivalence among the measures taken to sanction bribery, without requiring absolute uniformity or changes in fundamental principles of a party's legal system.

We are continuing to review information on relevant legislation and to monitor the signatories' implementation of the Convention, independently, as well as within the OECD Working Group on Bribery. Further analysis of implementing legislation and related laws is required for us to have a thorough understanding of how each country is attempting to fulfill its obligations to meet the Convention's standards for criminalizing the bribery of foreign public officials. Completing this analysis remains a high priority of the U.S. government agencies responsible for monitoring implementation of the Convention.

Concerns About Implementing Legislation

Based on information currently available, we are generally encouraged by the efforts of other parties to implement the Convention. However, for a number of countries, we have concerns about how requirements have been addressed and, in some cases, the absence of specific legislative provisions to fulfill obligations under the Convention. Several countries, including Japan and the United Kingdom, have implementing or pre-existing legislation that we believe falls short of the Convention's requirements. We have called upon these two countries in particular, since they are key exporters and influential OECD members, to act expeditiously to bring their implementing legislation into conformity with the Convention. The following concerns are especially noteworthy and will require further examination as we progress to the enforcement stage of the monitoring process of the Convention:

• *Deficiencies in Japan's Implementation*: Japan's implementing legislation raises several issues. For example, the Japanese legislation contains a "main office" exception, which provides that the legislation will not apply where the person who pays a bribe to a foreign public official is employed by a company whose "main office" is in the corrupt foreign official's country. Thus, a Japanese national employed by a foreign company may not be prosecuted for the bribery of an official of that company's home country even if the bribe is offered or paid in Japan. We believe that this exception is a substantial loophole in the Japanese implementing legislation. Also, we believe that given the large size of Japanese companies and the high value of many international transactions, a maximum fine equivalent to approximately $2.8 million does not provide "effective, proportionate, and dissuasive" penalities for legal persons. In addition, there are serious questions concerning Japan's ability to confiscate the proceeds of bribery.

• *Deficiencies in the U.K.'s Implementation*: For the United Kingdom, existing corruption laws do not explicitly address bribery of foreign public officials and their adequacy for implementing the requirements of the Convention is not, even in the views of British legal commentators, certain. The U.K. is expected to enact new anticorruption legislation, but passage of the new legislation appears unlikely before the May 2001 elections.

• *Nationality Jurisdiction*: Canada, the U.K., and Japan have declined to extend nationality jurisdiction to offenses committed under their laws implementing the Convention, although their legal systems do provide for nationality jurisdiction over other offenses. Further, some countries, including, Austria, Belgium, and Finland, while asserting nationality jurisdiction, make it contingent upon the principles of dual criminality or reciprocity, thus requiring that the laws of the country whose official is bribed or a third country where the bribe is paid also prohibit bribery of foreign officials. These requirements will significantly limit the ability of these parties to prosecute bribery of foreign officials.

• *Liability of Legal Persons*: Many countries, including Austria, Bulgaria, the Czech Republic, Hungary, the Slovak Republic, Switzerland, and Spain, have not provided for effective, proportionate, and dissuasive criminal or noncriminal sanctions for legal persons. Austria, Bulgaria, the Czech Republic, Hungary, the Slovak Republic, and Switzerland have indicated that they are in the process of amending their legislation in this respect.

• *Differing Standards for Bribery of EU Officials*: A number of European Union member countries implemented the Convention in conjunction with various EU anticorruption instruments. The implementing legislation of some of these countries contains several definitions of the term foreign public official, or different jurisdictional requirements, depending on whether or not the foreign official is an official of an EU country or an EU institution or another foreign public official. We have concerns that this may lead to different penalties or uneven application of a country's jurisdiction over bribes to EU officials vis-a-vis bribes to other foreign public officials.

• *Limited Statutes of Limitations*: Several countries, such as Japan, Norway, Iceland, and Hungary, have statutes of limitations periods that are three years or less. We are concerned that such short statutes of limitations may not fulfill the Convention requirement that statutes of limitations be sufficiently long so as to provide an adequate period of time for investigation and prosecution.

• *Definition of Foreign Public Official*: In some countries, such as Mexico, the implementing legislation provides for a definition of foreign public official based on "applicable law." This is a concern as it could mean that the definition would depend on the law of the foreign country where the offense occurred, instead of the autonomous definition in the Convention.

• *Inappropriate Defenses*: Several Eastern European countries, such as the Czech Republic, the Slovak Republic, and Bulgaria, have included a defense in their implementing legislation that exempts an individual from prosecution or the imposition of sanctions if the bribe is solicited, the individual pays or agrees to pay the bribe, and thereafter the individual voluntarily and immediately reports the bribe or promise to pay a bribe to the authorities. Although there may be a rationale for permitting such a defense for domestic acts of bribery, the U.S. believes this defense is inappropriate for instances of transnational bribery and may constitute a loophole.

As we continue our analysis of implementing legislation and more information becomes available in the enforcement stage, we will be in a better position to assess the overall conformity of parties' laws with the Convention. The analysis will be useful for our participation in the Working Group on Bribery and our dialogue with signatories on promoting effective implementation of the Convention.

Summary of Amendments to the FCPA

Through the FCPA, the United States declared its policy that American companies and companies traded on U.S. stock exchanges should act ethically in bidding for foreign contracts and should act in accordance with the U.S. policy of encouraging the development of democratic institutions and honest, transparent business practices. Since 1977, the FCPA has required issuers and U.S. nationals and companies to refrain from offering, promising, authorizing, or making an unlawful payment to public officials, political parties, party officials, or candidates for political office, directly or through others, for the purpose of causing that person to make a decision or take an action, or refrain from taking an action, or to use his influence, for the purpose of obtaining or retaining business.

The International Anti-Bribery and Fair Competition Act of 1998 (IAFCA) amended the FCPA to implement the OECD Convention. First, the FCPA formerly criminalized payments made to influence any decision of a foreign public official or to induce him to do or omit to do any act in order to obtain or to retain business. The IAFCA amended the FCPA to include payments made to secure "any improper advantage," the language used in Article 1.1 of the OECD Convention.

Second, the Convention calls on parties to cover "any person." The FCPA prior to the passage of the IAFCA covered only issuers with securities registered under the 1934 Securities Exchange Act and "domestic concerns." The IAFCA expanded the FCPA's coverage to include all foreign persons who commit an act in furtherance of the offer, promise to pay, payment, or authorization of the offer, promise, or payment of a foreign bribe while in the United States.

Third, the Convention includes officials of public international organizations within the definition of "public official." Accordingly, the IAFCA similarly expanded the FCPA's definition of public officials to include officials of such organizations. Public international organizations are defined by reference to those organizations designated by executive order pursuant to the International Organizations Immunities Act (22 U.S.C. §288), or otherwise so designated by the President by executive order for the purpose of the FCPA.

Fourth, the Convention calls on parties to assert nationality jurisdiction when consistent with national legal

and constitutional principles. Accordingly, the IAFCA amended the FCPA to provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the U.S.

Fifth and finally, the IAFCA amended the FCPA to eliminate the current disparity in penalties applicable to U.S. nationals and foreign nationals employed by or acting as agents of U.S. companies. Prior to passage of the IAFCA, foreign nationals employed by or acting as agents of U.S. companies were subject only to civil penalties. The IAFCA eliminated this restriction and subjected all employees or agents of U.S. businesses to both civil and criminal penalties.

One issue that has arisen with respect to U.S. implementation of the Convention is the existing disparity between the maximum term of imprisonment under the FCPA (five years) and that under the domestic corruption statute (fifteen years). (*See* 18 U.S.C. §201.) Article 3.1 of the Convention requires that each party provide for a range of penalties for foreign bribery comparable to those provided for bribery of its own officials. This is an issue that may be addressed in future legislative proposals to Congress.

The following summary of foreign legislation should not be relied on as a substitute for a direct review of the legislation by persons contemplating business activities relevant to these provisions.

Australia

Australia signed the Convention on December 7, 1998, and deposited its instrument of ratification with the OECD Secretariat on October 18, 1999. Australia has implemented the Convention through the Criminal Code Amendment (Bribery of Foreign Public Officials) of 1999 to the Criminal Code Act of 1995. The amendment was enacted on June 17, 1999, and entered into force on December 18, 1999. The following analysis is based on the amendment, related laws, and reporting from the U.S. embassy in Canberra.

Basic Statement of the Offense

Section 70.2(1) of the Criminal Code, "Bribery of a Foreign Public Official," provides that a person is guilty of an offense if

> (a) the person: (i) provides a benefit to another person; or (ii) causes a benefit to be provided to another person; or (iii) offers to provide, or promises to provide, a benefit to another person; or (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
>
> (b) the benefit is not legitimately due to the other person; and
>
> (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to: (i) obtain or retain business; or (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

Under Section 70.2(2), in determining whether a benefit or a business advantage is "not legitimately due," the following are to be disregarded:

> (a) the fact that the benefit/business advantage may be customary, or perceived to be customary, in the situation;
>
> (b) the value of the benefit/business advantage;
>
> (c) any official tolerance of the benefit/business advantage.

The amendments contain exceptions for payments that are lawful in the foreign public official's country (Section 70.3) and for facilitation payments made "for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature." (Section 70.4).

Jurisdictional Principles

Under Section 70.5(1), there is jurisdiction over a person who commits bribery of a foreign public official wholly or partly in Australian territory, or wholly or partly on board an Australian aircraft or ship. Nationality jurisdiction is established under Section 70.5(1)(b), which covers acts of bribery of foreign public officials conducted wholly outside Australia by an Australian national, an Australian resident (subject to the Attorney General's consent), or "body corporate" incorporated under Australian law.

We understand that there is no applicable statute of limitations for prosecutions of bribery of a foreign public official.

Coverage of Payor/Offeror

Section 70.2(1) of the Criminal Code applies to "a person." Under Australian law, "person" refers to natural persons as well as "bodies corporate." We understand that the latter refers to legal persons generally. Under Section 12.3(2) of the Criminal Code, bodies corporate may be held criminally liable where a board of directors carries out or authorizes the conduct; where a "high managerial agent" does so; or where a "corporate culture" exists that permitted or led to the conduct.

Coverage of Payee/Offeree

Under Section 70.1 of the Criminal Code, "foreign public official" is broadly defined to include employees or officials of, or persons who work under contract for or are otherwise in the service of, a foreign government body (or subdivision thereof), including members of legislatures; employees of, or persons who work under contract for or are otherwise in the service of, a public international organization; and authorized intermediaries of such persons. For this purpose, "foreign government body" includes a "foreign public enterprise," which is defined to include instances in which the government exercises de jure or de facto control over the enterprise, or in which the enterprise enjoys special legal rights, benefits or privileges because of its relationship to the government.

Penalties

The Criminal Code provides that natural persons who are convicted of bribing a foreign public official are subject to a fine of A$66,000 (approximately $38,000), imprisonment for a maximum of ten years, or both. Bodies corporate are subject to a fine of A$330,000 (approximately $188,000). These exceed the penalties in the Criminal Code for bribery of domestic public officials.

Under Section 19 of the Proceeds of Crime Act 1987, courts may order the forfeiture of "tainted property," defined as "property used in, or in connection with, the commission of the offense," or "proceeds of the offense."

Books and Records Provisions

Companies are required, under Section 298 of the Corporations Law, to keep financial records that "(a) correctly record and explain their transactions and financial position and performance; and (b) would enable true and fair financial statements to be prepared and audited." Violations of Section 298 are punishable by a criminal fine of up to A$12,500 (approximately $7,100). Under Section 296 of the Corporations Law, annual financial reports (required of most companies) must be consistent with the Australian accounting standards. Failure to comply with those standards can result in civil penalties for company directors. Section 310 of the Corporations Law requires that companies furnish external audit reports to the Australian Securities and Investment Commission.

Money Laundering

Bribery of foreign, as well as domestic, public officials is a predicate offense for the application of the money laundering provisions in the Proceeds of Crime Act 1987. Section 81(3) of that act pertains to actions or transactions involving the proceeds of crime, where the person knows or reasonably should know that the money or other property is derived from some form of unlawful activity.

Extradition/Mutual Legal Assistance

The 1976 U.S.–Australia extradition treaty, as amended in 1990, provides for extradition for offenses that are punishable under the laws of both parties by deprivation of liberty for a maximum period of more than one year. Under the authority of the Extradition Act of 1988, Australia may extradite persons on the basis of bilateral extradition treaties, multilateral treaties with extradition provisions, or bilateral arrangements or understandings based on reciprocity. Accordingly, we understand that Australia is currently able to extradite persons to all of the signatories of the Convention except Bulgaria. Australia generally does not refuse extradition on the grounds that an individual is an Australian national.

A bilateral mutual legal assistance treaty between the United States and Australia entered into force in 1999. Legal assistance can also be provided, in the absence of a treaty, on the basis of reciprocity under the Mutual Assistance in Criminal Matters Act 1987.

Complicity, Attempt, Conspiracy

Section 11.1(1) of the Criminal Code pertains to aiding, abetting, counseling, and procuring the commission of a bribery of a foreign public official, as well as an attempt to commit that offense. Conspiracy to bribe a foreign public official is covered under Section 11.5(1) of the Criminal Code.

Austria

Austria signed the Convention on December 17, 1997. The Austrian Parliament passed legislation amending the Austrian Penal Code in order to implement and ratify the Convention on July 17, 1998. The domestic legislation implementing the Convention became effective on October 1, 1998. Austria deposited its instrument of ratification with the OECD on May 20, 1999. The Austrian legislation entered into force on July 23, 1999. This analysis is based on those amendments as well as information provided by the U.S. embassy in Vienna.

The Austrian legislation raises a number of concerns. At present, it contains no criminal responsibility for legal persons, nor does it provide for sufficient comparable administrative or civil sanctions. The punishment for natural persons is limited to imprisonment of only two years, and there is no provision of fines for natural persons. We also are concerned that Austria may assert nationality jurisdic-

tion only under the condition of dual criminality, i.e., when the offense is also punishable in the country where it was committed, particularly in the case where an Austrian national bribes a foreign public official in a third country.

Basic Statement of the Offense

The basic statement of the offense is contained in Austrian Penal Code Section 307(1), which provides that

> Whoever offers, promises, or grants a benefit for the principal or a third person … to a foreign official for the commission or omission of an official act or a legal transaction in violation of his duties in order to gain or retain an order or other unfair advantage in international trade, shall be punished by imprisonment of up to two years.

Jurisdictional Principles

Austria exercises both territorial and nationality jurisdiction. Under Sections 62, 63, and 67 of the Austrian Penal Code, Austria may exercise jurisdiction over all offenses committed in Austria or on an Austrian aircraft or vessel, irrespective of location. The territoriality principle is broadly interpreted (e.g., even a phone call from Austria in furtherance of the bribe transaction would suffice). However, in order for nationality jurisdiction to apply, Section 65 of the Austrian Penal Code provides that the offense must also be punishable in the country where it has been committed. Austria will exert jurisdiction over non-nationals where the offender was arrested in Austria and cannot be extradited (again, the offense must be punishable in the country where it has been committed).

Coverage of Payor/Offeror

Section 307 of the Austrian Penal Code, cited above, covers bribes made by "whoever." This encompasses only natural persons. We understand that Austria plans on implementing the Second Protocol to the EU Convention on the Protection of the Financial Interests of the European Community by mid-2002 and that it will then hold legal persons responsible for active bribery of foreign public officials.

Coverage of Payee/Offeree

Foreign public officials are defined in Section 74 (4c) of the Austrian Penal Code as:

> any person who holds an office in the legislature, administration, or judiciary of another state, who is fulfilling a public mission for another state or authority or a public entity of another state, or who is an official or representative of an international organization.

Penalties

Section 307 of the Austrian Penal Code provides a maximum term of imprisonment of two years for the payor/offeror, the same penalty imposed for the bribery of domestic officials. As stated above, legal persons are not covered in the amendments to the Penal Code. However, Austrian Penal Code Section 20 does provide for confiscation of illegal gains, and there are also some applicable administrative penalties applicable to legal persons.

Austria will confiscate criminal proceeds pursuant to Penal Code Section 20, paragraph 4, although there are several exceptions under Section 20a paragraphs 1 and 2, i.e., where the enriched person has satisfied or has contractually bound itself to satisfy civil law claims in connection with the offense, or has been sentenced, or if the gains are removed by other legal measures. Also, confiscation is apparently not permitted if the gains are less than 300,000 Austrian shillings (approximately $19,752), the gains are disproportionate to the cost of the proceedings, or it would constitute "inappropriate hardship."

Austria provides for administrative liability for legal persons. Under Section 58, paragraph 1 of the Federal Law on Public Procurement, a legal person may be excluded from public procurement where there is a likelihood that its employee has seriously misbehaved in the conduct of business, even absent the initiation of criminal proceedings or a conviction. Section 123 of the Federal Law on Public Procurement apparently also allows the contracts already awarded to be rescinded where it was obtained through an illegal act of a representative of a legal person. Under Section 13 of the Austrian Business Law of 1994, legal persons whose business conduct was significantly influenced by the conduct of the convicted natural person may be excluded from the exercise of business if the natural person has been sentenced for the offense of bribery to a prison term of more than three months or a fine.

Section 57 of the Austrian Penal Code provides that bribery prosecutions cannot be brought if not initiated within five years after the commission of the offense.

Books and Records Provisions

Section 189, paragraph 1 of the Austrian Code of Commercial Law requires merchants to keep books and records in accordance with correct accounting principles. Section 190, paragraph 2 provides that all entries "must be complete, accurate, up-to-date, and or-

derly." Section 268 provides that annual financial statements and company reports must be examined by an auditor. The general accounting provisions apply to all persons engaged in commercial activities, excluding small merchants. Also, certain small corporations are exempt from the obligatory annual audit. Under Section 122 of the Federal Law of Private Companies, the penalty for violation of the accounting provisions is imprisonment for up to two years or a fine. This applies to managing directors, members of the supervisory board, and agents. The same penalties apply under the Federal Law on Public Companies.

Money Laundering

Section 165 of the Austrian Penal Code establishes all punishable offenses as predicate offenses for money laundering. Persons may be prosecuted for having money laundered property deriving from the predicate crime of bribery even if it was committed abroad. The penalty for money laundering is imprisonment for up to two years or a fine.

Extradition/Mutual Legal Assistance

Under Section 11, paragraph 1 of the Extradition and Mutual Legal Assistance Act, extradition is permitted if the offense is punished under both the law of the requesting country and Austrian law with imprisonment of more than one year. It is our understanding that the requirement of dual criminality will be met in cases arising between Convention parties. Section 12, paragraph 1 of the Extradition and Mutual Legal Assistance Act prohibits the extradition of Austrian nationals. However, it is our understanding that where Austria will not extradite its own nationals, it will exercise jurisdiction over them in conformity with Convention Article 10.3.

Austria has entered into bilateral extradition agreements with three signatories to the Convention: Australia, Canada, and the United States. Austria has also signed the European Extradition Agreement which governs extradition requests amongst Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Finland, France, Greece, Hungary, Ireland, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Sweden, Switzerland, the Slovak Republic, Spain, Turkey, and the United Kingdom. With regard to Belgium, Germany, France, Greece, Italy, Luxembourg, the Netherlands, Portugal, and Spain, the Schengen implementation agreement of 1997 also applies.

Austria has mutual legal assistance treaties with Australia, Estonia, Latvia, Monaco, Slovenia, the former Yugoslavia, and the United States.

It is our understanding that requests originating from countries not mentioned above will be handled in accordance with Austrian Federal Law on Extradition and Judicial Assistance, and on the basis of reciprocity. Consultations are also covered by the same law. The bribery of a foreign public official is an extraditable offense under the extradition treaties to which Austria is a party. It is our understanding that the condition of reciprocity will met with regard to the Convention, unless the requesting state refuses reciprocity. Similarly, dual criminality is required for the granting of mutual legal assistance, but it is our understanding that between Austria and parties to the Convention, the condition will always be met under Article 1.

We understand that Austrian authorities will not decline to render mutual legal assistance for criminal matters within the scope of the Convention on bank secrecy grounds.

Complicity, Attempt, Conspiracy

Austrian Penal Code Section 12 provides that anyone who is an accessory or who instigates a criminal act is punished as a perpetrator. Section 15 covers attempt. Conspiracy is not punishable under Austrian law.

Belgium

Belgium signed the Convention on December 17, 1997, and deposited its instrument of ratification on July 27, 1999. In order to implement the Convention, Belgium enacted two laws. One is the Bribery Prevention Act (known as Act 99/808), which entered into force on April 3, 1999, and which amended provisions of the Criminal Code relating to the bribery of public officials. The other is the Act of May 4, 1999 (known as Act 99/1890), which entered into force on August 3, 1999, and which creates criminal liability for legal persons. The following analysis is based on those acts, related Belgian laws, and reporting from the U.S. embassy in Brussels.

One concern is that the definitions of "foreign public official" under Belgian law are not autonomous. In addition, there are certain limitations on the exercise of nationality jurisdiction.

Basic Statement of the Offense

Article 246, Section 2 of the Criminal Code provides that "the act of proposing, whether directly or through intermediaries, an offer, promise or advantage of any kind to a person exercising a public function, either for himself or a third party, in order to induce him to act in one of the ways specified in Article 247 shall constitute active bribery." Article 247 specifies four different types

of acts: (1) an act within the scope of a person's responsibilities that is proper but not subject to remuneration; (2) performance of an improper act, or refraining from a proper one, in the exercise of one's function; (3) commission of an offense in the exercise of one's function; or (4) use of influence derived from one's function to obtain performance of an act, or failure to perform one, by a public authority. Pursuant to Article 250, Articles 246 and 247 now apply to persons who exercise a public function in a foreign state, as well as in Belgium. Article 251 extends the coverage of Articles 246 and 247 to persons who exercise a public function in an organization governed by public international law. These provisions are not limited to bribes made in order to obtain or retain business or other improper advantage in international business.

Jurisdictional Principles

Under Article 3 of the Criminal Code, jurisdiction is established over offenses committed within Belgian territory by Belgian or foreign nationals. Act 99/808 added Article 10 *quater* to the Code of Criminal Procedure. This provides for jurisdiction in certain cases over persons (foreign as well as Belgian nationals) who commit bribery offenses outside the territory of Belgium. Various limitations apply, however. For example, if the bribe recipient exercises a public function in a European Union member state, Belgian prosecution may not proceed without the formal consent of the other state. If the bribe recipient exercises a public function in a state outside the EU, the formal consent of that state is again required in order to prosecute. In addition, there is a requirement that the act be a violation of the laws of the other state, and that the state would punish such bribery of a person exercising a public function in Belgium. Bribery involving a person who exercises a public function within an EU institution is subject to prosecution. For bribes involving persons exercising a public function within other public international organizations, the formal consent of the organization is required before prosecution can proceed.

Under Articles 21-18 of the Code of Criminal Investigation, the statute of limitations for criminal offenses is ten years from the date the offense was committed. This period may be extended because of the conduct of investigations or prosecutions.

Coverage of Payor/Offeror

Under the Article 5 of the Criminal Code as amended by Act 99/1890, all persons, natural or legal, are subject to prosecution for the bribery of a foreign public official.

Coverage of Payee/Offeree

Under Article 250, Section 2, whether a person exercises a public function in another state is determined in accordance with the law of that state. When the foreign state is not a member of the European Union, it is necessary also to determine whether the function is considered a public one under Belgian law. Under Article 251, Section 1, whether a person exercises a public function in a public international organization is evaluated by reference to the by-laws of that organization. Thus, these definitions are not autonomous.

Article 246, Section 3 provides that corruption offenses also apply in the case of a person who is a candidate for the exercise of a public function, who implies that he will exercise such a function, or who misleads another into believing that he currently exercises such a function.

Penalties

We understand that the applicable penalties are derived not only from Articles 247–249, but also from other provisions of the Criminal Code. Individuals who commit bribery of a foreign public official are subject to fines ranging from BF20,000 to BF40 million (approximately $444–$888,000), and/or imprisonment for a period of six months to fifteen years. Legal persons face fines ranging from BF600,000 to BF72 million (approximately $13,000–$1.6 million). Penalties are more severe if the person to whom the bribe is offered or paid exercises certain functions relating to the investigation, prosecution, or adjudication of offenses, e.g., police officers, prosecutors, jurors,or judges. The existence of a bribery agreement between the payor/offeror and the payee/offeree is also an aggravating circumstance.

Belgian law also provides for certain civil and administrative penalties for the bribery of a foreign public official:

Loss of rights such as holding public office (Articles 31–33 of the Criminal Code).

Disqualification from public procurement (Article 19, Section 1 of the Act of March 20, 1991).

Prohibition from exercising certain professional functions (Section 1 of Royal Order No. 22 of October 24, 1934).

Articles 35–39 and 89 of the Code of Criminal Investigation permit seizure of bribes and the proceeds of bribery. Articles 42-43 of the Criminal Code authorize the confiscation of

items that are the object of the offense or that were used or intended to be used to commit the offense (when they belong to the convicted person), any proceeds of the offense and patrimo-

nial advantages derived directly from the offense, as well as any goods and assets acquired in exchange for these advantages and any income derived from investing them.

Books and Records Provisions

The Act of July 17, 1995, and the Companies Act of 1872 impose accounting requirements on all commercial concerns and prohibit the establishment of off-the-books accounts, use of false documents, and other acts covered under Article 8 of the Convention. Those who violate these provisions are subject to criminal, civil, and administrative penalties.

Money Laundering

Under the Act of January 11, 1993, there is a prohibition on the laundering of "the proceeds of an offense involving bribery of public officials," domestic or foreign.

Extradition/Mutual Legal Assistance

The U.S.-Belgium extradition treaty, which entered into force in 1997, provides that offenses shall be extraditable if punishable under the laws of both parties by deprivation of liberty for a period of more than one year. Bribery of a foreign public official is also an extraditable offense under the Extradition Act of March 15, 1874. Belgium has bilateral extradition treaties with twenty countries and is a party to the European Convention on Extradition of December 13, 1957. Section 1 of the Extradition Act of March 15, 1874, prohibits the extradition of Belgian nationals.

The U.S.-Belgium mutual legal assistance treaty entered into force on January 1, 2000. Belgium may also provide legal assistance under the authority of other bilateral or multilateral mutual legal assistance treaties; the Convention applying the Schengen Agreement of June 19, 1990; the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959; or provisions of the domestic Judicial Code.

Complicity, Attempt, Conspiracy

Complicity—including aiding and abetting, authorization, and incitement—is covered under Articles 66–67 of the Criminal Code. Attempting to bribe a public official, domestic or foreign, is generally not specifically covered under Belgian law, although the mere offer of a bribe is sanctionable.

Bulgaria

Bulgaria signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD Secretariat on December 22, 1998. A Law on Amendment to the Penal Code was passed by Parliament on January 15, 1999, and came into force on January 29, 1999.

Bulgaria's implementing legislation amends Articles 93 and 304 of the Penal Code to cover bribery of foreign public officials in the course of international business activities. The following analysis is based upon the Penal Code and reporting from the U.S. embassy in Sofia and nongovernmental organizations.

Bulgarian law currently does not provide for liability—criminal or otherwise—of legal persons, although the Bulgarian Parliament is considering legislation providing for noncriminal sanctions for legal persons who bribe foreign public officals. There are also concerns over available defenses.

Basic Statement of the Offense

Article 304(1) of the Penal Code provides for criminal penalties for "[a] person who gives a gift or any other material benefit to an official in order to perform or not to perform an act within the framework of his service, or because he has performed or has not performed such an act." Under Article 304(2), this applies to a person who "gives a bribe to a foreign official in relation to the performance of international business activity." Current Bulgarian law does not cover the promising or offering of a bribe, but this is included in legislation that is pending before Parliament. The U.S. embassy in Sofia advises that Bulgarian law was recently amended to cover the promising or offering of a bribe.

Under Articles 306 and 307, there are available defenses for (1) a person who has been blackmailed into giving a bribe or (2) a person who has of his own accord informed the authorities of the bribe. We understand that recent legislation has eliminated provocation as a defense.

Although Article 304 does not address bribes made through intermediaries, Article 305a imposes criminal liability on persons who "mediate" in the giving or receiving of a bribe.

Jurisdictional Principles

Article 3 of the Penal Code states that the code applies to all crimes committed in the territory of Bulgaria. It is not clear how this provision applies to crimes committed only in part in Bulgaria. Under Article 4(1) of the Penal Code, the code applies to crimes committed by Bulgarian citizens abroad.

Under Article 80 of the Penal Code, the statute of limi-

tations for offenses carrying a penalty of imprisonment for three years or less is two years, while for offenses carrying a penalty of imprisonment of more than three years the statute of limitations is generally five years.

Coverage of Payor/Offeror

Article 304 refers to acts by "a person," without reference to nationality.

Coverage of Payee/Offeree

In amended Article 93 of the Penal Code, "foreign official" is defined as any person:

- exercising duties in a foreign country's public institutions (office or agency);
- exercising functions assigned by a foreign country, including for a foreign public enterprise or organization; or
- exercising duties or tasks of an international organization.

Penalties

Under Article 304 of the Penal Code, the penalty for bribery of a domestic or foreign public official is imprisonment for a term of up to three years, unless the official has violated his official duties in connection with the bribe, in which case the penalty is imprisonment for a term of up to five years. "Mediation" of bribery under Article 305a is generally subject to a penalty of imprisonment for up to three years. According to official government sources, legislation recently enacted increases the penalties for all types of corruption.

Legal persons are not subject to criminal liability under Bulgarian law. Currently, there are also no applicable noncriminal sanctions for legal persons who bribe a foreign public official. The Council of Ministers is preparing amendments to the Administrative Offenses and Sanctions Act to introduce noncriminal (monetary) liability of legal persons for such bribery.

Under Article 307a of the Penal Code, "the object of the crime under Articles 301–307 shall be seized in favor of the state and where it is missing, a sum equal to its value is adjudged." Under Article 53, "objects" subject to seizure include those used in the perpetration of the crime as well as those acquired through the crime.

Books and Records Provisions

Article 5 of the Accountancy Act sets forth certain principles that must be observed in the preparation of records by "enterprises," which are defined as "any economically separate legal entities, sole proprietorships and companies without legal personality performing any activity permitted by the law." Under Article 308 of the Penal Code, forgery of official documents is punishable by imprisonment for up to three years.

Under Article 15 of the Law on Public Financial Control, the audit of the books and records of certain enterprises is required, and auditors must report infractions to prosecuting authorities. Obligations on accountants are found in Article 57a(1) of the Accountancy Act.

Money Laundering

Under Article 253 of the Penal Code, "[a] person who concludes financial transactions or other transactions with funds or property of which he knows or supposes that they have been acquired by crime" is subject to punishment of imprisonment for one to five years and a fine of 3 million to 5 million old Bulgarian levs (approximately $1,600–$2,600). In certain cases, these penalties are increased to imprisonment for one to eight years and a fine of 5 million to 20 million levs (approximately $2,600–$10,500).

Extradition/Mutual Legal Assistance

Bribery is not listed as an extraditable offense under the 1924 U.S.-Bulgaria extradition treaty. However, Article 10.1 of the Convention provides that bribery of a foreign public official shall be deemed to be an extraditable offense under extradition treaties between the parties. Dual criminality is required under the treaty and under Article 439 of the Penal Code. Article 25.4 of the Bulgarian Constitution and Article 439b(1) of the Penal Procedure Code prohibit the extradition of Bulgarian nationals.

The United States and Bulgaria do not have a mutual legal assistance treaty. Under Article 461 of the Penal Procedure Code, Bulgaria may provide legal assistance in criminal matters to a requesting state (1) pursuant to the provisions of an international treaty to which Bulgaria is a party, or (2) on the basis of reciprocity.

Complicity, Attempt, Conspiracy

Complicity in criminal acts is covered under Articles 20–22 of the Penal Code. Under Article 21, a person who aids or abets an offense is subject to the same punishment as that which applies to the offense itself, subject to due consideration for the nature and degree of the person's participation. Articles 17–19 of the Penal Code apply to attempts to commit offenses. Article 18 provides that an attempt is subject to the same punishment as that pertaining to the underlying offense, with due consideration given to the degree of implementation and the reasons why the crime was not completed.

Canada

The Canadian Corruption of Foreign Public Officials Act, 46–47 Elizabeth II ch. 34, was adopted on December 7, 1998, assented to on December 10, 1998, and entered into force on February 14, 1999.

Sources for this analysis include the text of the act, diplomatic reporting, and information from nongovernmental organizations.

We are concerned that Canada, which has previously asserted nationality jurisdiction over certain other crimes and thus has constitutional authority to do so, has not done so for offenses created to implement the Convention.

Basic Statement of the Offense

Section 3(1) of the Corruption of Foreign Public Officials Act provides:

> Every person commits an offense who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official;
>
> (a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or
>
> (b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

The act contains exceptions for facilitation payments, payments that are lawful under the written law of the receiving official's country, and payments related to bona fide business promotion and execution of a contract. (*See* Sections 3(3) & (4).

Jurisdictional Principles

The Corruption of Foreign Public Officials Act does not contain any specific provisions governing jurisdiction. It is also our understanding that Canadian courts will assert territorial jurisdiction where a significant portion of the activities constituting the nature of the offense takes place in Canada. There must be a real and substantial link between the offense and Canadian territory.

It is our understanding that the courts in Canada have adopted a two-part test for determining whether a crime took place in Canada. The court will first consider all the relevant acts that took place in Canada that may have legitimately given Canada an interest in prosecuting the offense. Second, the court will consider whether it would offend international comity to assert jurisdiction over those acts and the offense. (*See Libman v. R.*, 2 S.C.R. 178 (1985).

Canada has not asserted extraterritorial jurisdiction for this offense. However, Canadian law provides that any person who, while outside Canada, conspires to commit an indictable offense in Canada shall be deemed to have committed the offense of conspiracy in Canada. (*See* Criminal Code §465(4).) The penalties for conspiracy are the same as those for the substantive offense. (*See* Criminal Code §465(1)(c).)

Coverage of Payor/Offeror

The Corruption of Foreign Public Officials Act applies to "every person," without reference to nationality. "Person" includes "Her Majesty and public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively." (*See* Criminal Code §2.)

Coverage of Payee/Offeree

Section 2 of the Corruption of Foreign Public Officials Act defines a "foreign public official" as

> (a) a person who holds a legislative, administrative, or judicial position of a foreign state;
>
> (b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
>
> (c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

The act further defines a foreign state to include a foreign national government, its political subdivisions, and their departments, branches, and agencies.

The definition of a public official includes persons employed by "a board, commission, corporation or other body of authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function." It is our understanding that the legislature intended that judges interpret the terms of the act by reference to the OECD Convention and Official Commentaries, which provide that a "public enterprise" is "any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly,

exercise a dominant influence." The Act does not address whether state-owned enterprises acting in a commercial context are covered. The Official Commentaries affirmatively state that they are not so covered if the enterprise receives no subsidies or privileges. (*See* OECD Commentary, footnote 14.)

Penalties

The Corruption of Foreign Public Officials Act provides for a sentence of imprisonment of not more than five years. We understand that corporations are subject to fines at the discretion of the court with no maximum set by statute. There does not appear to be any guidance as to the proper calculation of the fine.

The penalties under the act are roughly congruent to the penalties for domestic bribery except that a person convicted of bribery of a foreign public official is not subject to debarment.

In addition to the penalties for bribery, the act contains two other offenses: possession of the proceeds of bribery (Section 4) and laundering of the proceeds of bribery (Section 5). The penalty for violation of these provisions is up to ten years' imprisonment, a penalty that is higher than that for the bribery offense itself.

The act incorporates Section 2 of the Criminal Code which defines "person" to include "bodies corporate." We understand that corporations may be prosecuted criminally in Canada.

The Canadian principle of corporate criminal liability appears to be similar to, but potentially somewhat narrower than, that of the United States. It focuses on an identification of the corporation with the "directing mind," which is anyone who has been authorized to exercise "the governing executive authority of the corporation." A corporation is liable if the criminal acts are performed by the manager within the sector of operation assigned to him or her by the corporation. The sector may be functional or geographic or may embrace the entire undertaking of the corporation.

Sections 7 and 9 of the Corruption of Foreign Public Officials Act adds the three offenses created under the act (bribery, possession of proceeds, and money laundering of proceeds) to the statutory list of "enterprise crimes" (*see* Criminal Code §462.3), thus enabling the government to obtain warrants to search, seize, and detain the proceeds of these offenses and to obtain an order of forfeiture upon conviction. (*See* Criminal Code §§462.32-.5.)

Books and Records Provisions

Canada has a number of statutes that govern books and records. They prohibit falsification of books and documents, false pretense, false statement, false prospectus, forgery, and fraud. (*See* Criminal Code §§361-62, 366, 380, 397, and 400.) However, Canadian business leaders have criticized the Canadian laws as insufficient because they do not prohibit off-the-books accounts, inadequately identified transactions, the recording of nonexistent expenses, and the use of false documents.

The generally accepted auditing standards in effect in Canada require the auditor to obtain a written certification from management that it is not aware of any illegal or possibly illegal acts.

Money Laundering

Sections 5 and 7 of the Corruption of Foreign Public Officials Act criminalize the laundering of the proceeds of any payment in violation of the act and makes offenses under the act predicate offenses under Canada's money laundering legislation. (*See* Criminal Code 462.3.) The act further criminalizes the laundering of the proceeds of any payment that "if it had occurred in Canada, would have constituted an offense under Section 3."

Extradition/Mutual Legal Assistance

Canada will provide mutual legal assistance and extradition with respect to the offenses covered by the OECD Convention. Under Canadian law, there must be an extradition agreement with the country requesting extradition; that country must punish the offense by imprisonment for a maximum term of two or more years; and the equivalent offense must also be punishable under Canadian law by a maximum term of imprisonment of two or more years.

Complicity, Attempt, Conspiracy

Canadian law permits prosecution for attempt and aiding and abetting. (*See* Criminal Code §§21(1), 24.) The Corruption of Foreign Public Officials Act covers any individual who "agrees to give or offer" a payment. (*See* §3(1).) In addition, as noted, Canadian law provides that a conviction for conspiracy carries the same penalties as a conviction for the substantive offense.

Czech Republic

The Czech Republic signed the Convention on December 17, 1997. The Czech Parliament passed implementing legislation on April 29, 1999, which entered into force on June 9, 1999. The Czech President ratified the Convention under national law on December 20, 1999, and the Czech Republic deposited its instrument of ratification with the OECD on January 21, 2000.

The Czech Republic made only minor modifications to its Criminal Code to implement the Convention, particularly with the addition of a definition for the terms "bribe" and "public official." Additional legislation to implement amendments to accounting and auditing standards and the procurement law is still under way and is expected to become effective later this year or in 2001. Sources for this analysis include the Czech implementing legislation, relevant Criminal Code provisions, and information from the U.S. embassy in Prague.

Our main concern with the Czech legislation pertains to the defense of "effective repentance," which provides that the criminal nature of bribery shall not apply if the offender provided or promised a bribe solely because he had been requested to do so and reported the fact voluntarily and without delay to the prosecutor or police authority. We believe this defense is inappropriate for instances of transnational bribery and may constitute a loophole. Also, the Czech law currently does not provide for criminal responsibility for legal persons, or for effective, proportionate, and dissuasive noncriminal sanctions as required by the Convention.

Basic Statement of the Offense

The basic statement of the offense is contained in Section 161, paragraph 2b of the Czech Criminal Code which states that

> (1) Whoever in connection with procuring affairs in the public interest provides, offers, or promises a bribe shall be sentenced to imprisonment for up to one year or to a monetary fine;
> (2) A perpetrator shall be sentenced to imprisonment of one year to five years or to a monetary fine…(a) if he commits the act referred to in paragraph 1 with the intent of procuring a substantial benefit for him/herself or for another person or to cause substantial harm or other particularly serious effect to another person; (b) if he commits the act referred to in paragraph 1 vis-a-vis a public official.

Section 162a paragraph 1 defines a "bribe" as "an unwarranted advantage consisting in direct material enrichment or other advantage that the person being bribed or another person receives or is to receive with its consent, and for which there is no entitlement."

The basic statement of the offense under Section 161, paragraph 2b covers "any person," defined as natural persons. It also covers direct bribes and bribes through intermediaries, and bribes to foreign officials as well as third parties. (Although third parties are not specifically mentioned in the basic statement of the offense (Section 161(2)b), the definition of bribery (Section 162a) which mentions "another person" incorporates the concept of bribes for third parties.) Section 161 also includes the concept of intentionality. The basic statement of the offense also goes beyond the scope of the Convention in that it does not require that the alleged offender acted in the context of international business transactions.

The Czech legislation also contains a defense of "effective repentance" in Section 163, which provides that the criminal nature of bribery and indirect bribery shall not apply if the offender has provided or promised a bribe solely because he has been requested to do so and reported the fact voluntarily and without delay to the prosecutor or police authority.

Jurisdictional Principles

The Czech Republic exercises jurisdiction over any acts committed in whole or in part (or which violated or threatened an interest protected under the Code) in its territory. (Section 17, paragraph 2 of the Criminal Code.) It is our understanding that this would include communication by fax, phone, or acts committed on board a Czech vessel or aircraft. In addition, the Czech Republic will also exert nationality jurisdiction over its nationals and stateless persons who reside permanently in the Czech Republic. (Section 18 of the Criminal Code.) Companies that bribe will be excluded from Czech procurement irrespective of the nationality of their agents, employees, or board members liable for bribery of foreign public officials. Czech law will apply to foreigners and stateless non-Czech residents if the act was committed in a country that also criminalizes the offense, and if the offender is caught in the Czech Republic and was not extradited to a foreign state. (Section 20, Criminal Code.)

Coverage of Payor/Offeror

The basic statement of the offense only covers bribes by natural persons, as Czech law does not provide for penal responsibility for legal persons.

Coverage of Payee/Offeree

The Czech definition of foreign public official includes the definition of domestic public officials under Section 89 of the Criminal Code in addition to a new definition under Section 162a, paragraph 2, extending the definition of public official (found in Section 161, paragraph 2b) to foreign officials.

Section 89, paragraph 9 of the Criminal Code provides that

> A public official shall mean an elected (public) representative or other person authorized by the

state administration or local (municipal) authority, a court or other state organ, or a member of the armed forces or armed corps insofar as he takes part in the fulfilment of the tasks set by society and the state, for which he exercises authority entrusted to him as a part of his responsibility for fulfilment of such tasks. When exercising entitlements and competency according to special legal provisions a public official shall also mean a natural person holding the position of a forest guard, water guard, nature guard, hunting guard or fishing guard. Criminal liability and protection of a public official under individual provisions of this Code shall require that a crime be committed in connection with the official's authority (competency) and responsibility.

Section 162a, paragraph 2 provides that in addition to Section 89, "public official" also includes any person occupying a post (a) in a legislative or judicial authority or the public administration authority of a foreign country, or (b) an enterprise, in which a foreign country has the decisive influence, or in an international organization consisting of countries or other entities of international public law, if the execution of such a function is connected with authority in handling public affairs and the criminal act was committed in conjunction with such authority.

It is our understanding that this definition includes all levels and subdivisions of the foreign government.

Penalties

Bribery of domestic and foreign public officials by natural persons may be punished by imprisonment of one to five years and/or a monetary fine ranging from 2,000 Czech koruna to CZK5 million (approximately $50–$124,000). (Section 161, paragraph 2b, Section 53, Criminal Code.) The guidelines for imposing penalties are contained in Sections 33 and 34 of the Criminal Code. They contain examples for judges to take into account when determining penalties, such as the state of mind of the offender or the nature of the motive for the crime.

Civil sanctions applying to both natural and legal persons apparently are possible under Section 451 of the Civil Code, which provides that the court may render a civil law judgement on the transfer of illegal gains.

The statute of limitations for the offense of bribery of foreign public officials is five years (offenses subject to a maximum prison term of not less than three years). (Section 67, Criminal Code.) The statute of limitations period does not include the period in which the offender could not be tried because of legal impediments, when the offender was abroad, or if there is a conditional stay of criminal prosecution. The period shall be interrupted and a new statute of limitations shall commence where the offender is informed of the alleged offense and a criminal investigation has begun, or if the offender commits a new offense during the statute of limitations period.

Section 55 of the Czech Criminal Code allows for forfeiture of an asset belonging to the offender if the bribe is secured during a criminal proceeding.

Books and Records Provisions

The Accounting Act No. 563/1991 Coll., as amended by the Act No. 117/1994 Coll. and Act No. 219/1997 Coll., governs the maintenance of books and records under Sections 6,7,11–16, 29 and 33. The Accounting Act applies to all legal and natural persons carrying on business that are required to report taxes.

Money Laundering

It is our understanding that as with bribery of domestic officials, bribery of foreign officials is a predicate offense for the application of the Czech money laundering legislation. (Section 1, paragraph 2, Act No. 61/1996 Coll. Concerning Certain Measures Against Legalization of Proceeds of Criminal Activity and amendments.)

Extradition/Mutual Legal Assistance

Under Czech law, the Convention will be considered as a basis for extradition and mutual legal assistance. Bribery of foreign public officials is an extraditable offense under Czech law and the extradition treaties to which the Czech Republic is a party. Where no treaty applies, Section 379 of the Code on Criminal Procedure permits extradition of a person in the Czech Republic to a foreign country if the offense is punishable in both countries, extradition is found admissible by a competent Czech court, the statute of limitations has not expired, and the accused is not a Czech national. It is our understanding that the Czech condition for dual criminality will be considered fulfilled between parties to the Convention. Section 382 provides that a permit is required from the Czech Minister of Justice once a competent court has decided upon the admissibility of the extradition. Czech nationals cannot be extradited. (Section 21, Criminal Code.) Under Section 18 of the Criminal Code, Czech law applies to Czech nationals and permanent residents who commit offenses abroad, and such persons can be prosecuted in the Czech Republic.

Mutual legal assistance may be governed by the 1959 European Convention on Mutual Legal Assistance in Criminal Matters. Where no treaty applies, mutual legal

assistance is governed by Section 384 of the Code on Criminal Procedure. Under Section 56 of the Act on International Private and Procedural Law, Czech judicial authorities will grant legal assistance to foreign judicial bodies if the requirement of reciprocity is met. Consultation procedures are determined on a case-by-case basis by the Supreme Prosecution Office at the request of the competent foreign body for the transfer of criminal proceedings. (Section 383, Code on Criminal Procedures.) Also applicable are the 1972 European Convention on Transfer of Criminal Proceedings and Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters. In noncriminal matters where no treaty governs, the Act on International Private and Procedural Law will apply, along with the relevant provisions in the bilateral and multilateral mutual legal assistance treaties to which the Czech Republic is a party.

Although Section 38 of the Law No. 21/1992 Coll. on Banks, as amended, provides for bank secrecy, the provisions also state that bank secrecy is not violated where such information is provided relating to criminal proceedings.

Complicity, Attempt, Conspiracy

Section 9, paragraph 2 of the Czech Criminal Code provides that where the offense has been committed collectively by two or more persons, each one shall be held individually liable. Section 10 of the Criminal Code defines "participants" in criminal offenses as persons who intentionally organize, instigate, or assist in crime. Sections 7 and 8 of the Criminal Code govern conspiracy and attempt, respectively. Section 7 concerns "especially serious criminal offenses," which are defined as offenses punishable by imprisonment of at least eight years. However, bribery of foreign public officials is punishable by imprisonment of five years or less, so apparently Section 7 would not apply.

Finland

Finland signed the Convention on December 17, 1997, and enacted implementing legislation on October 9, 1998. Finland deposited its instrument of ratification with the OECD on December 10, 1998. The implementing legislation entered into force on January 1, 1999.

Sources for this analysis include the new provisions to the Finnish Penal Code, Chapter 16, entitled "Offenses Against Public Authorities," as well as information from the U.S. embassy in Helsinki.

One concern with the Finnish legislation is that Finland requires dual criminality in order to exercise jurisdiction over Finnish citizens abroad.

Basic Statement of the Offense

The basic statement of the offense of bribing foreign public officials is set forth in Chapter 16 of the Finnish Penal Code, Section 13 on bribery:

> (1) A person who to a public official, to an employee of a public corporation, to a soldier, to a person in the service of the European Communities, to an official of another Member State of the European Union, or to a foreign public official, in exchange for his/her actions in service, promises, offers or gives a gift or other benefit, intended to the said person or to another, that affects or is intended to affect or is conductive to affecting the actions in service of the said person, shall be sentenced for bribery to a fine or to imprisonment for at most two years.
>
> (2) A person who in exchange for the actions in service of a public official or another person mentioned in paragraph (1) promises, offers, or gives a gift or other benefit mentioned in the said paragraph to another person, shall also be sentenced for bribery.

Generally, Section 13 provides that persons who intentionally promise, offer, or give gifts or other benefits either directly or indirectly to a foreign public official to affect the behavior of such an official may be imprisoned for a maximum period of two years or fined. The provision is not limited to bribes in the context of international business. Although intermediaries are not specifically mentioned, the provision says that bribes "intended" for public officials are covered. Payments involving third parties are covered under Section 13(2).

Jurisdictional Principles

Finland practices both territorial and nationality jurisdiction. Chapter 1, Section 1 of the Finnish Penal Code provides that Finnish law shall apply to offenses committed in Finland. Pursuant to Section 10 of the same chapter, acts are deemed to have been committed in Finland if the criminal act occurred in Finland or if the consequences of the offense as defined by statute were realized in Finland. Chapter 1, Section 6 of the Finnish Penal Code allows for the prosecution of a Finnish citizen who commits an offense outside of Finland. Chapter 1, Section 11 of the Finnish Penal Code requires dual criminality for offenses committed abroad by a Finn. The provisions on jurisdiction have been part of Finnish Penal law since 1996, and no changes were needed to implement the Convention.

Coverage of Payor/Offeror

The Finnish legislation covers bribery by any person. It is our understanding that "any person" is to be broadly construed, applying to both natural and legal persons.

Coverage of Payee/Offeree

In Chapter 16, Section 20, of the Finnish Penal Code, a "foreign public official" is defined as

> a person who in a foreign State has been appointed or elected to a legislative, administrative or judicial office or duty, or who otherwise performs a public duty for a foreign State, or who is an official or representative/agent of an international organization under public law.

Although the Finnish definition of foreign public official contains no reference to employees of a "public agency or public enterprise" as required by Article 1.4(a) of the Convention, it is our understanding that Section 13 of the Finnish law, the provision containing the basic statement of the offense, does prohibit bribes to employees of public corporations.

Penalties

Under Chapter 16, Section 13, the Finnish law provides for a fine or a two-year maximum prison sentence for persons who have committed bribery of domestic public officials. No amount for the fine is specified. In addition, for "aggravated bribery," Chapter 16, Section 14 provides that the offender shall be sentenced to a minimum of four months' and a maximum of four years' imprisonment. These provisions also apply to the bribery of foreign public officials, so the penalties for domestic and foreign bribery are the same. Statutes of limitations for bribery by natural persons are covered under the Finnish Penal Code Chapter 8, Section 1, which provides that charges must have been brought within five years after the offense for the imposition of a sentence. For aggravated bribery, the statute of limitations is ten years.

Chapter 16, Section 28 of the Finnish Penal Code provides that the provisions on corporate criminal liability apply to bribery and aggravated bribery. Under Penal Code Chapter 9, Section 5, corporations can be fined from a minimum of 5,000 Finnish Markka (approximately $758) to a maximum of FM5 million (approximately $758,289). Chapter 9, Section 2 of the Penal Code provides that a Finnish corporation may be fined for the actions of its management representatives or employees, when acting within the scope of their employment on behalf of the corporation or for its benefit, if they act as accomplices in committing an offense or allowed the offense to happen. Section 2(2) states that even if a specific person cannot be identified as the offender, the corporation itself can still be fined.

Penal Code Chapter 9, Sections 4 and 6 set forth illustrative lists of factors that must be taken into account when determining sentencing of a corporation to a corporate fine and calculating the fines for corporations, including the lack of corporate oversight; the position of the offender in the corporation; the seriousness of the offense; the consequences to the corporation due to the commission of the offense; measures, if any, taken by the corporation to prevent the offense from occurring; whether the offender sentenced is part of management; the size of the corporation; the amount of shares held by the offender; and the extent to which the offender can be held personally liable for the commitments of the corporation. For fines, the list also takes into account not only the size of the corporation, but also its solvency, earnings, and other indicators of its financial circumstances.

Chapter 9 provides that if the offender is not sentenced to a punishment due to the statute of limitations, then the corporation on behalf of which he acted cannot be sentenced either. The minimum statute of limitations for corporate fines is five years. Chapter 9, Section 9 provides that the enforcement of any corporate fine will lapse five years from the date the fine was imposed.

Chapter 40, Section 4 of the Finnish Penal Code covers forfeiture of bribes: the gift or benefit or the corresponding value will be forfeited to the State from the bribe recipient or beneficiary. Section 4 applies to passive bribery. We understand that, although the Finnish penal code does not specifically address forfeiture for active corruption, Chapter 2, Section 16 of the Penal Code provides for forfeiture generally and can be applied to offenses of active corruption. We understand that there are no additional civil or administrative sanctions for bribery under Finnish law.

Under Chapter 12, Section 94, paragraph 2 of the Act on Credit Institutions, financial institutions must provide prosecution and investigative authorities all information necessary for crime detection. It is our understanding therefore that bank secrecy should not inhibit mutual legal assistance in criminal matters under the Convention.

Books and Records Provisions

The Finnish law on accounting provisions is covered by the Accounting Act, which applies to natural persons and companies. Chapter 1, Article 1 states that anyone carrying out business or practicing a profession must keep accounting records of such activities.

The Finnish law on offenses for accounting provisions is covered under Chapter 30, Section 9 of the Finnish Penal Code:

> If a person with a legal obligation to keep accounts, his/her representative or the person entrusted with the keeping of accounts intentionally (1) neglects in full or in part the recording of business transactions or the balancing of the accounts, (2) enters false or misleading data into the accounts, or (3) destroys, conceals or damages account documentation and in this way essentially impedes the obtaining of a true and sufficient picture of the financial result of the business of the said person or of his/her financial standing, he shall be sentenced for an accounting offense to a fine or to imprisonment for at most three years.

Money Laundering

Money laundering is a crime under Chapter 32, Section 1(2) of the Finnish Penal Code. It covers all assets or property resulting from offenses of the Finnish Penal Code, including bribery of foreign public officials.

Extradition/Mutual Legal Assistance

Section 4 of the Finnish Extradition Act provides that extradition will not be granted unless the request is based upon an act that is an extraditable offense, or the act, if it had been committed in Finland, constitutes an offense for which the penalty is greater than one year. Acts within the scope of Article 1 of the Convention will fulfill the dual criminality requirement, as the Finnish penalty for bribery is a maximum of two years. The Finnish Extradition Act provides that Finnish nationals shall not be extradited. However, under the Extradition Act between Finland and other Nordic countries, Finnish nationals may be extradited to other Nordic countries in some cases. Finland is also a party to the European Convention on Extradition of 1957 and is expected to ratify the 1996 Convention relating to extradition between member states of the European Union soon. After ratification of that convention, Finland will be able, under certain conditions, to extradite Finnish nationals to other European Union states.

We understand that mutual legal assistance is provided for by the Finnish Act on International Legal Assistance in Criminal Matters. Under that act, Finland can provide assistance without the condition of dual criminality, except where coercive measures are requested, unless such measures would be available under Finnish law had the offense upon which the request is based occurred in Finland. Finland has also ratified the 1959 European Convention on Mutual Legal Assistance in Criminal Matters and its 1978 Protocol.

Complicity, Attempt, Conspiracy

Chapter 5 of the Finnish Penal Code contains provisions on complicity, attempt, and authorization. Under Chapter 5, Section 1, if two or more persons have committed a crime together, they will be punished as principals. If the offense is carried out or attempted, under Chapter 5, Section 2 of the Penal Code, a person who encouraged another in committing the offense will be punished for incitement as a principal. Complicity is covered by Chapter 5, Section 3, which provides that a person who acts to further the crime, whether it is carried out or attempted, will be sentenced under the same provisions as a principal. Finnish law does not specifically criminalize an attempt to bribe a foreign public official, as the basic prohibition already covers promising and offering bribes to such officials. Conspiracy is not punishable under the Finnish Penal Code.

Germany

Germany signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on November 10, 1998. The German legislation entered into force on the same date as the Convention, February 15, 1999.

Sources for this analysis include Germany's implementing legislation, "The Act on the Convention Dated December 17, 1997, on Combating Bribery of Foreign Public Officials in International Transactions," dated September 10, 1998 (ACIB), and reporting from the U.S. embassy in Berlin.

Germany will impose sanctions upon legal persons only where an identifiable natural person employed by the legal person has committed an offense. Although an actual prosecution does not seem to be a prerequisite, this provision may create an impediment to effective enforcement, depending on how Germany applies this provision.

Basic Statement of the Offense

Germany's basic statement of the offense is in two parts. With respect to officials, soldiers, and judges, the ACIB prohibits

> bribery concerning a future judicial or official act which is committed in order to obtain or retain for the offender or a third party business or an unfair advantage in international business transactions. [ACIB §2(1).]

Germany implemented the Convention by making judges, officials, and soldiers of foreign governments and international organizations "equal" to domestic judges, officials, and soldiers for purposes of Sections 334 (active bribery), 335 (severe cases of bribery), 336 (omission of public service), and 338 (fine and forfeiture). The basic offense, therefore, is defined in Criminal Code Section 34 as follows:

> Whoever offers, promises, or grants an advantage to any official, any person specifically engaged for public service, or any soldier of the Federal Armed Forces, on behalf of such person or for a third party, in return for the performance of a past or future public service and the past or future breach of his official duties, shall be punished.

Unlike the domestic bribery provisions, the implementing legislation applies to "future judicial or official acts." As Section 334 applies to "offers," the timing of the payment itself, whether before or after the corrupt act, is not determinative. In addition, the implementing legislation refers to "official acts"; the domestic bribery laws use the term "performance of past or future public service and the past or future breach of his official duties."

The second prong of the implementing legislation applies to bribery of foreign parliamentarians. The implementing legislation provides in ACIB §2(2) that

> Anyone who offers, promises, or grants to a member of a legislative body of a foreign state or to a member of a parliamentary assembly of an international organization an advantage for that member or for a third party in order to obtain or retain for him/herself or a third party business or an unfair advantage in international business transactions in return for the member's committing an act or omission in future in connection with his/her mandate or functions, shall be punished.

Jurisdictional Principles

Germany applies the principles of both territorial and nationality jurisdiction. Germany will assert jurisdiction when an offender or participant has acted or ought to have acted within its territory or when the "success of the offense" occurs within its territory. (*See* Criminal Code §§3, 9). In addition, Germany will assert jurisdiction over the acts of its nationals abroad.

Coverage of Payor/Offeror

German law applies to "whoever" offers or pays a bribe, although Germany does not at present provide criminal responsibility for corporations. However, pursuant to Section 30 of the Administrative Offenses Act, a legal person may be fined when a person acting for the corporation was authorized by or was himself or herself "in a leading position." It is our understanding that the corporation may be held liable when a person in a leading position fails to properly supervise his subordinates. (*See* Administrative Offenses Act, §130.)

German law provides that a corporation cannot be held administratively liable if the criminal offense itself cannot be prosecuted for "legal reasons." It is our understanding that this refers to such legal impediments as the statute of limitations and not mere inability to assert jurisdiction over a culpable individual.

Coverage of Payee/Offeree

The implementing legislation covers payments offered or made to (1) judges of a foreign state or an international court; (2) public officials of a foreign state or "persons entrusted to exercise a public function with or for an authority of a foreign state, for a public enterprise with headquarters abroad, or other public functions for a public state; (3) a public official or other member of the staff of an international organization or a person entrusted with carrying out its functions; (4) a soldier of a foreign state or one who is entrusted to exercise functions of an international organization; and (5) a member of a legislative body or parliamentary assembly of a foreign state or international organization. (*See* ACIB §2(1)(1).) In addition, German law covers payments made to a third party.

Penalties

As noted, Germany implemented the Convention by adding bribery of foreign officials to its existing domestic bribery statutes. The penalties, therefore, are the same.

Under Sections 334 and 335, bribery of a public official is punishable under a three-tier system: "less severe offenses" earn a prison term of up to two years, or a fine; "general" offenses earn a prison term of three months to five years; "particularly severe cases" earn a prison term of one to ten years.

There is no statutory definition of "less severe offenses." A "particularly severe case" is one that "concerns an advantage of large proportions," where the perpetrator "continuously accepts advantages which he requested in return for the future performance of a public service," and where the perpetrator "conducts the activity as a business or as a member of a gang, which he joined in order to continuously commit such acts."

As noted, corporations are not subject to criminal liability. However, they may be prosecuted administratively and subjected to fines under the Administrative

Offenses Act. The statutory fines on corporations are up to DM1 million (approximately $461,000) for intentional acts by a leading person and up to DM500,000 (approximately $231,000) for negligent acts. (*See* Administrative Offenses Act, §30.) However, it is our understanding that corporations can be subject to fines up to the amount of the commercial advantage. (*See* Administrative Offenses Act, §17(4).) We have not received any information on how often this provision has been invoked against German corporations.

It is our understanding that both the bribe and the proceeds of bribery are forfeitable under the Criminal Code, Section 73. However, in the case of corporations, a corporation cannot both be fined and subjected to an order of forfeiture.

Books and Records Provisions

We understand that Germany's laws prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of nonexistent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents to justify book entries. These prohibitions are principles to which a corporation must adhere to meet the legal requirement that it conform with legal norms.

Money Laundering

Bribery is a predicate offense for Germany's money laundering provision. (*See* Criminal Code §261.) As with domestic bribery, however, bribery committed within German territory is always a predicate offense, whereas bribery committed abroad is only a predicate offense if it is also punishable at the place of the offense.

Extradition/Mutual Legal Assistance

Pursuant to bilateral agreements and various European conventions, Germany will render mutual legal assistance in investigations of foreign bribery. Germany also has a law permitting non-treaty-based mutual legal assistance.

Pursuant to the Convention, bribery of a foreign public official is an extraditable offense. The United States has an extradition treaty in force with Germany. However, the German Basic Law prohibits the extradition of its nationals.

Complicity, Attempt, Conspiracy

Attempt and complicity are both covered by German law. (*See* Criminal Code §§25(2), 26, 27, and 334 and ACIB §1(2).)

Greece

Greece signed the Convention on December 17, 1997, and ratified it on November 5, 1998. It deposited its instrument of ratification with the OECD on February 5, 1999. Greece's implementing legislation was adopted on November 5, 1998, and became effective on December 1, 1998.

Sources for this analysis include Greek Law 2656/1998 implementing the Convention, as well as other information obtained by the U.S. embassy in Athens.

Under Article 28 of the Greek Constitution, generally approved rules of international law and international conventions that have been ratified under Greek law form an integral part of domestic Greek law and supersede any existing conflicting law, to the extent that they do not conflict with the Constitution. Accordingly, the Convention became an integral part of Greek law when Greece enacted Law 2656/1998 ratifying the Convention and including specific provisions to criminalize bribery of foreign public officials.

Basic Statement of the Offense

The basic statement of the offense is set forth in Article 2(1) of Law 2656/1998:

> Any person who, in the conduct of international business and in order to obtain or retain business or other improper advantage, promises or gives, whether directly or through intermediaries, any undue gift or other advantage, 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, is punished with imprisonment of at least one year.

Jurisdictional Principles

Although the statute itself does not contain any information about jurisdictional principles, Greek law provides for both territorial and nationality jurisdiction. Article 5 of the Greek Criminal Code provides that Greece follow the principle of territoriality: Greek criminal laws apply to all acts committed in Greek territory, either by Greeks or other nationals. Article 16 generally defines the place where acts are committed as the place where the act or omission was carried out in whole or in part. It is our understanding that if only part of the act in furtherance of the bribery took place in Greece, the crime would still fall within Greek jurisdiction. Article 6 of the Criminal Code provides that Greek criminal laws apply to criminal acts committed abroad by a Greek national if the act is punishable under the laws of the country in which it occurs.

Coverage of Payor/Offeror

Article 2 covers bribery by "any person," but does not describe what persons or entities are covered by this term. It is our understanding that "any person" means any individual.

Under Article 71 of the Greek Civil Code, legal entities are generally responsible for the acts or omissions of their representatives, meaning those in management positions, in carrying out the legal entities' functions. Greek law does not provide for criminal responsibility for legal entities. Therefore, corporations are subject only to administrative penalties (see below). It is unclear to what extent a corporation could be held responsible for bribes involving lower-level employees. It appears that under Criminal Code Article 922, the company may also be held responsible in some circumstances for acts and omissions of its employees and auxiliary personnel whose positions have been prescribed by the company's bylaws and when acting in the scope of their positions.

Coverage of Payee/Offeree

The statute itself does not define "foreign public official." However, it is our understanding that the statute incorporates the definitions found in the Convention and Official Commentaries, and specifically that Convention Article 4(a) containing the definition of "foreign public official" and Commentary footnotes 14–18 apply. It is our understanding that the definition of a foreign public official will be interpreted in light of the definitions of domestic public officials under the Greek Criminal Code, Articles 13 and 263(a), which is even broader than the Convention definition.

Penalties

Although Law 2656 states that any person who bribes a foreign public official "is punished with imprisonment of at least one year," it is our understanding that the law is to be read in conjunction with Criminal Code Articles 235 and 236 on bribery of domestic officials, which provide that the penalty for bribery may range between one and five years. There do not appear to be any fines for individuals for the bribery of domestic or foreign public officials.

As stated above, the Greek judicial system does not recognize criminal responsibility for legal entities. Article 5 provides three kinds of administrative penalties for a company whose managerial employees violate the law: fines of up to three times the value of any benefit that it has received, temporary or permanent prohibition from doing business, or provisional or permanent exclusion from state grants or incentives. Article 2(2) provides for the confiscation of the bribe or the value of the bribe. Article 76 of the Greek Code of Criminal Procedure provides for confiscation of the proceeds of a crime. Also, if an act violates the anticorruption laws as well as Article 2(1) of Law 2331/1995 concerning money laundering, then paragraphs 6–10 of that article on the confiscation of goods will also apply. Goods may also be seized during the criminal investigation/inquiry under the Code of Criminal Procedure Articles 258, 259, 260, 261, 266, 288, and 495.

Under Articles 111, paragraphs 3 and 112 of the Criminal Code, the statute of limitations in general for acts of bribery, as for all crimes, is five years after the commission of the act.

Books and Records Provisions

Books and records are covered by Greece's Accounting Code. Violations of the code are punished under Law 2523/1997, which provides for both criminal and civil sanctions. If the violations in question are committed in furtherance of a bribe to a foreign public official, Article 3 of Law 2656/1998 also applies. Article 3 specifically prohibits off-the-books business accounts, false bookkeeping entries, or false documents and provides for a three-year prison term for such offenses, unless a longer term would apply pursuant to another provision of Greek law. Article 4 of Law 2656/1998 gives the authority to investigate violations of Article 3 to the Greek Financial and Economic Crimes Office.

Money Laundering

Bribery of foreign public officials is a predicate offense for the application of the Greek money laundering Law 2331/1995, as is the case with domestic bribery, without regard to where the bribe occurred.

Extradition/Mutual Legal Assistance

Greece has an extradition treaty with the United States that has been in effect since 1932. The treaty includes bribery as an extraditable offense. Generally, under Article 437 of the Code of Criminal Procedure, extradition is permitted if the maximum prison sentence for the act upon which the extradition request is based exceeds two years under both Greek law and the law of the country requesting extradition. Bribery of foreign public officials is an extraditable offense because, as noted above, the maximum prison sentence is five years. The Convention will serve as the legal basis for extradition for the offense of bribery of foreign public officials. Under Article 428 of the Code of Criminal Procedure, Greece cannot extradite its own citizens.

The Greek government will offer mutual legal assistance in accordance with the European Convention on

Mutual Legal Assistance concerning criminal acts, and in accordance with its bilateral mutual assistance treaties. Article 7 of Law 2656/1998 gives the authority for purposes of Convention Article 4 on jurisdiction to the Greek Ministry of Justice.

Complicity, Attempt, Conspiracy

It is our understanding that the Greek Criminal Code Articles 45–49 on complicity and aiding and abetting apply to bribery of foreign public officials.

Hungary

Hungary signed the OECD Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on December 4, 1998. Hungary's implementing legislation entered into force on March 1, 1999.

Our primary source for this analysis is the implementing legislation contained in Title VIII of the Hungarian Criminal Code (Crimes Against the Purity of International Public Life), dated December 22, 1998.

Two major concerns arise from Hungary's implementation of the Convention. First, Hungary currently provides for neither criminal nor civil liability for legal persons. Second, Hungarian law includes a defense for bribes that are solicited by the official and are paid only to avoid an "unlawful disadvantage." In our view, these matters must be addressed for Hungary to fully implement the Convention. In addition, we are concerned that Hungary's three-year statute of limitations is too short and may not fulfill the Convention requirement of an adequate period of time for investigation and prosecution.

The OECD public website indicates that Hungary is currently preparing draft amendments to be submitted to Parliament in Autumn 2000 to correct several deficiencies in its legislation, including its statute of limitations, eliminating the defense of "unlawful disadvantage" and the sanctioning of legal persons.

Basic Statement of the Offense

The basic prohibition for bribery of public officials is Section 258/B of the Hungarian Criminal Code (HCC):

> (1) The person who gives or promises a favor to a foreign official person or with regard to him to another person, which may influence the functioning of the official person to the detriment of the public interest, commits a misdemeanor and shall be punishable with imprisonment of up to two years.
>
> (2) The briber shall be punishable for a felony with imprisonment of up to three years, if he gives or promises the favor so that the foreign official person violates his official duty, exceeds his competence, or otherwise abuses his official position.
>
> (3) The perpetrator of the crime defined in subsection (1) shall not be punishable, if he gave or promised the favor upon the initiative of the official person because he could fear unlawful disadvantage in case of his reluctance.

Jurisdictional Principles

Hungary applies the principles of territorial and nationality jurisdiction. (*See* HCC §3.) In addition, our translation of Hungary's law states that Hungary will apply its law to non-Hungarian citizens abroad, if the acts are violative of Hungarian law and the law of the place of perpetration. (*See* HCC §4.) The statute of limitations for bribery of a foreign public official is three years.

Coverage of Payor/Offeror

The Hungarian statute applies to "person[s]." Hungarian law does not provide for criminal responsibility of legal persons. We are not aware of any administrative or civil sanctions that may be imposed on legal persons for bribery.

Coverage of Payee/Offeree

A foreign official person is defined in the statute to include the following (*see* HCC §258/F(1):

- A person holding a legislative, administrative or judicial office in a foreign state.
- A person at an organ or body entrusted with public power or public administration duties or who fulfills tasks of public power or state administration.
- A person serving at an international organization constituted by international treaty, whose activity forms part of the proper functioning of the organ.
- A person elected to the assembly or other elected body of an international organization that is constituted by international treaty.
- A member of an international court with jurisdiction over the Republic of Hungary or a person serving the international court, whose activity forms part of the proper functioning of the court.

Penalties

The penalties for bribery of a foreign public official are up to two years for purchasing influence and up to three years where the bribe was intended to induce the official to violate his official duty, exceed his competence, or otherwise abuse his official position. These

penalties are identical to those for domestic bribery. (Compare HCC §§253, 258/B.) In addition, Hungary authorizes the confiscation of property "which was obtained by the perpetrator during or in connection with the commission of the crime." (HCC §62, 63.) In addition, the law provides for the confiscation of instrumentalities of crime. (*See* HCC §§77, 77/A.)

Although Hungary does not provide for criminal responsibility of a legal person, it does provide that an officer of a business association may be barred from being an "executive officer of a business association until relieved of the detrimental legal consequences related to his criminal record." (Act CXLIV of 1997 on Business Associations, §23.) In addition, such a person may be barred from being an executive officer in a particular profession for up to three years. (*See id.)*

Books and Records Provisions

Act XVIII of 1991 on Accounting defines the reporting and bookkeeping obligation of economic organizations. In addition, tax provisions include detailed regulations concerning the verification, accounting, and registration of incomes and costs arising in connection with the activity of the enterprise.

Money Laundering

Foreign and domestic bribery are predicate offenses for Hungary's money laundering offense. (*See* HCC §303.)

Extradition/Mutual Legal Assistance

Hungary will extradite non-nationals provided there is dual criminality. (*See* HCC §11.) Hungary will extradite Hungarian nationals only if the person holds dual nationality and is a resident of a foreign state. (*See* HCC §13.)

Hungary has both an extradition treaty and a mutual legal assistance treaty with the United States, both of which entered into force in 1997. Hungary will provide mutual legal assistance provided that doing so will not "prejudice the sovereignty, security, or public order of the Republic of Hungary" (Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters, §2).

Complicity, Attempt, Conspiracy

Hungarian law covers attempt and abetting. (*See* HCC §§16–21.)

Iceland

Iceland has implemented the Convention by enacting Act No. 147/1998, amending its General Penal Code, and Act No. 144/1998, on the Criminal Liability of Legal Persons on Account of Bribery of Public Officials. Both laws were passed on December 22, 1998, and went into effect on December 30, 1998. Act No. 147/1998 amended Section 109 of the General Penal Code to fully equate bribery of a foreign public official or an official of a public international organization with bribery of a domestic public official.

Basic Statement of the Offense

Section 109 of the General Penal Code provides:

> (1) Whoever gives, promises or offers a public official a gift or other advantage in order to induce him to take an action or to refrain from an action related to his official duty, shall be imprisoned for up to three years, or, in case of mitigating circumstances, fined.
>
> (2) The same penalty shall be ordered if such a measure is resorted to with respect to a foreign public official or an official of a public international organization in order to obtain or retain business or other improper advantage in the conduct of international business.

Section 18 of the General Penal Code requires intent for all criminal actions; therefore bribery of a foreign public official must be intentionally committed.

Jurisdictional Principles

Iceland's law provides for both territorial and nationality jurisdiction. Chapter 2 of the General Penal Code allows for prosecution of any offense committed, in part or in whole, in Iceland. The General Penal Code requires only that a significant number of the elements be traced to Iceland. Under Section 7 of the General Penal Code, an offense is deemed to have been committed where its consequences are actual or deliberate.

Section 5 of the General Penal Code allows Iceland to prosecute its nationals for crimes committed abroad if the acts were also punishable under the law of the nation where committed. However, under Section 8 of the General Penal Code, the penalties for such offenses are limited to those of the country where the crime is committed. We understand that the statute of limitations for bribery of foreign public officials is five years with respect to both natural persons and legal persons.

Coverage of Payor/Offeror

Iceland's General Penal Code applies to whoever offers or pays a bribe, without reference to nationality. Legal entities are also covered under Act No. 144/1998 on the Criminal Liability of Legal Persons on Account of Bribery of Public Officials.

Coverage of Payee/Offeree

"Foreign public official" is not specifically defined in the General Penal Code. However, the explanatory notes to the act amending Section 109 of the General Penal Code expressly state that the term "foreign public official" is meant to have as broad a scope as in the Convention. Furthermore, the explanatory notes state that the law will be interpreted in conformity with the Convention.

Penalties

Under Section 109 of the General Penal Code, the maximum prison sentence for bribery of a domestic or foreign public official is three years. Fines may be assessed in certain circumstances.

Act No. 144/1998, on Criminal Responsibility of Legal Persons on Account of Bribery of Public Officials, provides that a legal person may be fined if its employee gives, promises, or offers a domestic or foreign public official a gift or advantage to induce acts or omissions as part of the recipient's official duties. Icelandic law provides for criminal responsibility of legal persons. In May 2000 the maxiumum limit on fines for legal persons was removed.

The Code of Criminal Procedure allows for the seizure of "objects" if obtained by criminal means under Section 78. "Objects" include documents, money, and proceeds. Iceland's implementing legislation does not provide for civil or administrative penalties for bribery of a foreign public official.

Books and Records Provisions

Section 1 of the Business Records Act requires all businesses, regardless of form, to maintain clear records. Section 6 of the Business Records Act requires businesses to maintain records in such a manner as to make all transactions traceable. Section 36 of the Business Records Act makes a violation of any part of the act a criminal offense. Violators may be fined and, in serious cases, imprisoned for a period not to exceed six years.

Money Laundering

Bribery of a foreign public official or a domestic official is a predicate offense for the application of Iceland's money laundering law found in Section 264 of the General Penal Code. Where the bribe occurred is not a relevant consideration.

Extradition/Mutual Legal Assistance

Act 13/1984 on Extradition of Criminal Offenders and Other Assistance in Criminal Matters (Extradition Act) allows the extradition of any suspect so long as the alleged act is punishable under Icelandic law by a prison term of at least one year. However, the extradition of nationals of Iceland is forbidden under Section 2 of the Extradition Act.

The Extradition Act also governs mutual legal assistance. Under the Extradition Act, Iceland will render legal assistance regardless of the applicable penalty. The Code of Criminal Procedure sets forth the procedures for rendering legal assistance to foreign states.

Complicity, Attempt, Conspiracy

Section 20 of the General Penal Code provides that any attempt to commit a crime is punishable. Under Section 22 of the General Penal Code, all accomplices to an offense under the General Penal Code are criminally liable. Section 70 of the General Penal Code provides that when two people commit a crime, both may be prosecuted for the commission of the crime. In addition, under Section 70, acting together to commit a crime is regarded as an aggravating factor. We understand that conspiracy *per se* could constitute a criminal offense only under certain circumstances.

Japan

Japan signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on October 13, 1998. Implementing legislation was adopted on September 18, 1998, and entered into force on February 15, 1999, when the Convention itself entered into force for Japan.

Japan's legislation to implement the Convention is found in amendments to the Unfair Competition Prevention Law (Law No. 47 of May 19, 1993) (UCPL), rather than the Penal Code, where domestic bribery laws are found. The penalties are criminal, however. Provisions of the Penal Code apply generally to all crimes unless specified otherwise.

Sources for this analysis include the UCPL, provisions of the Penal Code and other Japanese laws, information obtained from the government of Japan through diplomatic exchanges, and reporting from the U.S. embassy in Tokyo.

There are concerns as to whether the maximum fines for natural and legal persons are "effective, proportionate and dissuasive," as Article 3(1) of the Convention requires. There is also a concern that Japan will not subject the proceeds of bribery to confiscation, nor will it impose monetary sanctions of comparable effect (other than the criminal fines that otherwise apply to bribery) in lieu of such

confiscation, as required under Convention Article 3(3). The "main office" exception to territorial jurisdiction is problematic, as is the fact that bribery is not included among the crimes subject to the application of nationality jurisdiction. Other concerns relate to the definition of "foreign public official," coverage of payments made to a third party at the direction of a foreign public official, and the length of the statute of limitations.

Basic Statement of the Offense

Article 10 *bis* (1) of the UCPL provides:

> No person shall give, offer or promise any pecuniary or other advantage to a foreign public official, in order that the official act or refrain from acting in relation to the performance of official duties, or in order that the official, using his position, exert upon another foreign public official so as to cause him to act or refrain from acting in relation to the performance of official duties, in order to obtain or retain improper business advantage.

Article 10 *bis* (1) does not include the element of intent. Intent is generally an element in all criminal offenses pursuant to Article 38 of the Penal Code. Article 8 provides that general provisions such as Article 38 apply to crimes under statutes other than the Penal Code. Article 10 *bis* (1) does not address bribes offered, promised, or given through intermediaries, nor bribes paid, on behalf of a public official, to a third party.

Jurisdictional Principles

Article 10 *bis* of the UCPL does not address basic jurisdictional principles. However, Article 1 of the Penal Code sets forth the principle of territoriality. We understand that in order to establish jurisdiction, at least one element of the offense must be committed in Japan. Pursuant to Article 8 of the Penal Code, the provisions of Article 1 apply to the UCPL.

Under Article 10 *bis* (3) of the UCPL, Article 10 *bis* (1) does not apply if the country of the foreign official who is the bribe recipient is the same country in which the "main office" of the briber is located. Under this exception, therefore, a bribe transaction that occurred in whole or in part in Japan would not be covered under the UCPL if the briber's "main office" were located in a certain country and the bribe recipient were an official of the government of that same country.

Under Article 3 of the Penal Code, nationality jurisdiction is applied only for specified crimes: arson, forgery, rape, murder, bodily injury, kidnapping, larceny, robbery, fraud, extortion, or embezzlement. Bribery, either domestic or foreign, is not included.

The statute of limitations for active bribery of foreign officials, like bribery of domestic officials, is three years. Article 250 of the Code of Criminal Procedure prescribes a three-year statute of limitations for offenses with a potential sentence of less than five years. Article 255 *bis* (1) provides that the statute of limitations does not run during the period in which the offender is outside Japan.

Coverage of Payor/Offeror

Article 10 *bis* (1) prohibits conduct by any "person," without reference to nationality.

Coverage of Payee/Offeree

In Article 10 *bis* (2), "foreign public official" is defined to include:

- Persons engaged in public service for a national or local government in a foreign country.
- Persons engaged in service for an entity constituted under foreign special laws to carry out specific tasks in the public interest.
- Persons engaged in business operations in which more than half of the stock or capital is held directly by a foreign government, or in which the majority of the executives are appointed by a foreign government, and that have been granted special privileges by a foreign government.
- Persons engaged in public service for an international organization.
- Persons exercising a public function that falls under the competence of and is delegated by a foreign government or international organization.

This definition of "foreign public official" does not address indirect government control of an enterprise, nor cases of *de facto* control where the government holds less than 50 percent of the shares of an enterprise.

Under Articles 197 and 198 of the Penal Code, laws against active and passive domestic bribery apply in cases in which a person is bribed in anticipation of becoming a public official, if that person actually becomes a public official. It is not clear whether this applies equally to bribery of a foreign public official.

Penalties

Under Article 14 of the UCPL, legal persons can be held criminally liable. Article 14 provides that the maximum fine for legal persons is 300 million yen (approximately $2.8 million). There is no comparable penalty for domestic bribery because the Penal Code, which cov-

ers domestic bribery, does not provide for criminal liability of legal persons.

Under Article 13, the penalties for natural persons are imprisonment for up to three years or a maximum fine of ¥3 million (approximately $27,500). The corresponding penalties in Article 198 of the Penal Code for domestic bribery are imprisonment for up to three years or a maximum fine of ¥2.5 million (approximately $22,900). According to the Japanese legislation, a fine or imprisonment can be applied in the alternative, but not together.

Article 19 of the Penal Code provides for confiscation of the bribe or its monetary equivalent. Under the recently enacted Anti-Organized Crime Law, if there has been a conviction under Article 10 *bis* (1) UCPL, the judge has discretion to confiscate "any property given through a criminal act." Japanese law does not provide for confiscation of the proceeds of bribery, or monetary sanctions of comparable effect. Nor does Japanese law contain other civil or administrative sanctions for bribery of a foreign public official.

Books and Records Provisions

Companies and partnerships with capital equal to or exceeding ¥500,000 (approximately $4,590) must, under Article 32 *bis* (1) of the Commercial Code, keep accounts and balance sheets that reflect the condition of the business and profits/losses. Such accounts must be kept in accordance with the requirements of the Financial Accounting Standards for Business Enterprises. Under Article 498 *bis* (1) of the Commercial Code, directors and others administering the affairs of a company are subject to non-criminal fines of up to ¥1 million (approximately $9,170) for falsification of records.

Articles 281 and 282 of the Commercial Code contain certain requirements for the maintenance of financial records by companies that issue shares of stock. Under Article 266 *bis* (3), directors are liable for falsifying audit reports, prospectuses, etc. Share-issuing companies with capital of ¥500 million (approximately $4.6 million) or more, or total liabilities of ¥20 billion (approximately $183 million) or more, must be audited by external auditors pursuant to Article 2 of the Law for Special Exceptions to the Commercial Code.

Companies that issue securities listed on a stock exchange are covered by the Securities and Exchange Law (SEL). Article 207 of the SEL provides that balance sheets, profit and loss statements, and other documents relating to financial accounting are to be prepared in accordance with the requirements prescribed by the Ministry of Finance. Under Article 207 (2), such records must be audited by independent auditors. Under Article 30 of the Certified Public Accountants Law, accountants who falsely certify the correctness of financial documents are subject to administrative sanctions.

Article 197 (1) of the SEL provides for criminal penalties (imprisonment for up to five years and/or fines of up to ¥5 million (approximately $45,900)) for persons who submit false registration statements. The corporation may also be penalized under Article 207. Individuals submitting false registration statements may also, under Article 18 of the SEL, be held civilly liable to injured investors.

Money Laundering

Under the Anti-Organized Crime Law, the acceptance of a bribe by (but not the act of bribing) a domestic or foreign official is a predicate offense for the purpose of Japan's money laundering laws. Penalties include imprisonment for maximum terms of three to five years, or fines ranging from a maximum of ¥1 million to ¥10 million (approximately $9,170–$91,700).

Extradition/Mutual Legal Assistance

Under the U.S.-Japan extradition treaty, bribery is an extraditable offense so long as it is punishable in both countries by imprisonment for a period of more than one year. The treaty provides that extradition of a party's nationals is discretionary. The United States and Japan do not have a mutual legal assistance treaty. (One is currently under negotiation.) Japan can provide legal assistance to other countries under the Law for International Assistance in Investigation (dual criminality is required) and the Law for Judicial Assistance to Foreign Courts.

Complicity, Attempt, Conspiracy

Complicity is governed by Articles 61–65 of the Penal Code. Article 61 pertains to instigation of criminal acts. Aiding and abetting the commission of an offense is covered under Article 62. Neither the Penal Code nor the UCPL criminalizes attempted bribery. Under Article 60, conspiracy is punishable if a coconspirator carries out the criminal act. These provisions apply equally to offenses under the UCPL.

Korea

Korea signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on January 4, 1999. The implementing legisla-

tion entered into force on February 15, 1999. Sources for this analysis include the Foreign Bribery Prevention Act in International Business Transactions of 1998 (FBPA) and diplomatic reporting from the U.S. embassy in Seoul.

One concern with the Korean legislation is that currently neither domestic or foreign bribery is a predicate offense to Korean money laundering legislation. However, we understand that Korea will enact new legislation so that bribery will be a predicate offense.

Basic Statement of the Offense

Article 1 sets forth the purpose of the FBPA, which is to contribute to the establishment of sound practice in international business transactions by criminalizing bribery of foreign public officials and providing the details necessary for implementing the OECD Convention. The basic statement of the offense of bribery is contained in the FBPA's penalty provisions for natural (Article 3) and legal (Article 4) persons. Article 3, "Criminal Responsibility of Bribery," provides that

> Any person, promising, giving or offering [a] bribe to a foreign public official in relation to his/her official business in order to obtain [an] improper advantage in the conduct of international business transactions, shall be subject to [penalties].

We understand that under Korean law generally a bribe is "any undue advantage in relation to a public official's duty or business." Furthermore, it is our understanding that although its implementing law does not explicitly include liability for payments for the benefit of third parties, the Korean law does cover situations in which payments are made to a third party for the benefit of a public official and in which payments are made to a public official for the benefit of a third party.

Article 4 covers such bribes on behalf of a legal person by a "representative, agent, employee or other individual working for [a] legal person…in relation to its business." There are two exceptions to the basic statement of the offense. Article 3(2) provides an exception for (1) bribes where they are "permitted or required by the law" in the country of the foreign public official and (2) facilitating payments.

Jurisdictional Principles

Article 2 of the Korean Criminal Code provides for territorial jurisdiction. Jurisdiction will be established over any offense that has been committed in the territory of the Republic of Korea. Article 3 of the Korean Criminal Code allows Korea to prosecute its nationals for offenses committed abroad (nationality jurisdiction). Article 6 of the Korean Criminal Code confers Korean jurisdiction over any offenses in which the Republic of Korea or a Korean national is a victim.

Coverage of Payor/Offeror

Article 3 covers bribes made by "any person," without reference to nationality. Article 4 of the FBPA provides for criminal responsibility of legal persons.

Coverage of Payee/Offeree

"Foreign public officials" are defined in Article 2 of the FBPA. Article 2 covers officials, whether appointed or elected, in all branches of government, at either the national or local level. The FBPA covers all foreign public officials who perform public functions, such as those in "business, in the public interest, delegated by the foreign government," people "working for a public organization established by law to carry out specific business in the public interest," officials of public international organizations, and persons working for companies "over which a foreign government holds over 50 percent of its subscribed capital" or over which the government exercises "substantial control." Article 2(2)(c) of the FBPA provides an exception for employees of businesses that operate on a "competitive basis equivalent to entities of [an] ordinary private economy [sic]" and that do not receive "preferential subsidies or other privileges."

Penalties

For individuals, Article 3(1) of the FBPA provides for a maximum prison sentence of five years or a maximum fine which is the greater of 20 million won (approximately $17,900) or twice the profit obtained as a result of the bribe. Article 3(3) provides that where imprisonment is imposed, "the prescribed amount of fine shall be concurrently imposed." The stated intent of Article 3(3) of the FBPA is to effectively deprive the offeror/payor of the profits obtained from the bribery. Under Article 132 of the Korean Criminal Code, the criminal penalty for bribery of domestic public officials is imprisonment for a maximum of five years or a maximum fine of 20 million won (approximately $17,900).

In addition to the fines imposed on representatives, agents, employees, or other individuals working for legal persons under Article 3, the entity itself may be fined under Article 4 where a representative, agent, or other employee of the legal entity, in the ordinary conduct of

the business of the legal entity, commits the offense of bribery of a foreign public official. Article 4 of the FBPA provides for a maximum fine which is the greater of 1 billion won (approximately $895,660) or twice the profit obtained as a result of the bribe. The same provision provides that fines will not be imposed if the legal person has paid "due attention" or has made "proper supervisory efforts" toward preventing the violation.

Article 5 of the FBPA provides for confiscation of bribes in the possession of the briber or another person who has knowledge of the offense. (It is our understanding the Korea has indicated that the language "after the offense has been committed" which appeared in the original Article 5 had been inserted mistakenly and is to be deleted). However, the bribe proceeds are not subject to confiscation. Instead, the FBPA in Articles 3 and 4 provides for a fine up to twice the profits obtained through bribery of a foreign public official (see above). Under Article 249 of the Criminal Procedures Act, the statute of limitations for the bribery of foreign public officials under the act is five years. Article 253 of the Criminal Procedures Act provides that when a prosecution is initiated against one of the offender's accomplices, or the offender remains overseas to circumvent punishment, the statute of limitations is suspended.

Books and Records Provisions

It is our understanding that under Korean law, firms must prepare financial statements in accordance with Korean accounting standards, which prohibit off-the-books transactions and accounts. The accounting standards require all financial transactions to be recorded on the basis of objective documents and evidence. We understand in addition that Korea's External Audit Law obligates auditors to report fraud on the part of managers to shareholders and a statutory auditor. Korea's regulatory authorities can bring administrative measures against firms and auditors for material omissions, falsifications, and fraud.

Administrative penalties may include the suspension of licenses and the issuance of securities. Firms and auditors may, in some circumstances, be subject to criminal sanctions pursuant to the External Audit Law.

Money Laundering

Convention Article 7 requires that each party that has made bribery of domestic public official a predicate offense for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official. Currently, bribery of neither domestic nor foreign officials is a predicate offense for the application of Korean money laundering legislation.

Extradition/Mutual Legal Assistance

It is our understanding that Korea's Extradition Act provides for granting extradition requests on a reciprocal basis even in the absence of a treaty, but reserves discretionary authority to the government to deny extradition in cases involving a Korean national. We understand that dual criminality is a mandatory condition for extradition under the Korean Extradition Act, but that Korea may deem the requirement of dual criminality fulfilled if the offense falls within the scope of Article 1 of the Convention.

Under its International Mutual Legal Assistance in Criminal Matters Act, Korea requires reciprocity before it will provide mutual legal assistance to countries with which it does not have mutual legal assistance treaties. In the absence of contrary treaty provisions, Korea further requires dual criminality. It is our understanding that the requirement of dual criminality will be met for requests made within the scope of the Convention. Banking records may be obtained by court warrant under the International Mutual Legal Assistance in Criminal Matters Act and the Act on Real Name Financial Transaction and Protection of Confidentiality.

Complicity, Attempt, Conspiracy

Complicity is covered under the Korean Criminal Code, which categorizes the offense as coauthoring, abetting, and aiding. Article 30 of the Korean Criminal Code provides that when two or more persons jointly commit an offense, each person shall be punished as an author. Article 31(1) of the Korean Criminal Code provides that any person who abets another person in committing an offense shall be subject to the same criminal liability as that of the actual offender. Article 32 of the Korean Criminal Code provides that any person who aids another person's commission of an offense shall be punished by a penalty, which shall be less than that of the author. Article 8 of the Korean Criminal Code links the above provisions to the FBPA by making them applicable to offenses enumerated in other criminal statutes.

Mexico

Mexico signed the Convention on December 17, 1997, and deposited its instrument of ratification on May 27, 1999. Mexico's implementing amendments to the Federal Penal Code came into force on May 18, 1999.

Mexico's implementation of the Convention raises three concerns. First, Mexico has made prosecution of corporations contingent upon prosecution of a natural person, thus creating a potential bar to prosecution if such a person evades Mexican jurisdiction or is otherwise not subject to prosecution. Second, Mexico has not adopted an autonomous definition of "public official," thus making its prosecutions dependent upon a foreign state's law. Finally, Mexico's penalties for natural persons are based upon multiples of the daily minimum wage and are grossly inadequate when applied to executives of companies engaged in international business.

Basic Statement of the Offense

The basic statement of the offense is contained in Article 222 *bis* of the Federal Penal Code:

> The same penalties provided in the previous article shall be imposed on [a person] who, with the purpose of retaining for himself/herself or for another party, undue advantages in the development or conducting of international business transactions, offers, promises, or gives, whether by himself/herself or through a third party, money or any other advantage, whether in assets or services:
>
> 1. To a foreign public official in order that he/she negotiates or refrains from negotiating the carrying out or the resolution of issues related to the functions inherent to his/her job, post, or commission;
>
> 2. To a foreign public official in order to perform the carrying out or the resolution of any issue that is beyond the scope of the inherent functions to his/her job, post, or commission…

Jurisdictional Principles

Mexico asserts both territorial and nationality jurisdiction. (*See* Penal Code §§1, 2(1), 4.) Mexican law applies when the promise, offer, or giving of the bribe occurs within Mexico or when extraterritorial conduct is intended to have an effect in Mexico. Mexico also asserts jurisdiction over crimes committed in a foreign territory by a Mexican or by a foreign national against a Mexican provided there is dual criminality. Mexico would not have jurisdiction over the extraterritorial acts of a Mexican corporation unless the natural person who commits the offense on behalf of the corporation otherwise comes within its jurisdiction.

Coverage of Payor/Offeror

Article 222 *bis* applies to any individual responsible for the offense. Mexican law imposes only derivative liability on corporations. Thus, a court may impose sanctions on a corporation only after a member or representative of the corporation has been convicted of committing the bribery offense using means provided by the corporation and in the name of or on behalf of the corporation. (*See* Penal Code §11.)

Coverage of Payee/Offeree

Mexican law defines a foreign official as "any person displaying or holding a public post considered as such by the applicable law, whether in legislative, executive, or judicial branches of a foreign State, including within autonomous, independent regions, or with major state participation agencies or enterprises, in any governmental order or level, as well as in any international public organization or entity." (*See* Penal Code §222 *bis*.) This definition, by its reference to "applicable law," raises a question as to whether Mexico has adopted the autonomous definition required by the Convention.

Penalties

For natural persons, Mexican law imposes the same penalties for foreign bribery as it does for domestic bribery. These penalties depend on the size of the advantage obtained or promise made and range from imprisonment of between three months and twelve years, a fine of $108–$1,800 (500 times the daily minimum wage), and dismissal and debarment from holding a public job from three months to twelve years. (*See* Penal Code §222.) In addition, upon conviction, the instruments and the proceeds of the crime are subject to mandatory forfeiture. When, however, those instruments and proceeds are in the hands of a third party, forfeiture is only available if the third party is in possession for the purpose of concealing or attempting to conceal or disguise their origin, ownership, destination, or location.

For legal persons, the sanction is up to "500 days of fine" and the possibility of suspension or dissolution. (*See* Penal Code §222 *bis*.) "Days of fine" is defined as the daily net income of the legal person. In addition, the court considers the degree of knowledge of management, the damage caused by the transaction, and the benefit obtained by the legal entity in fixing the appropriate sanction.

Books and Records Provisions

Mexican law requires natural and legal persons to keep proper accounts, to accurately record transactions and inventory, and to maintain an adequate accounting system that best suits the conditions of business and enables the identification and tracking of each financial transaction. The penalties range from approximately $150

to $3,600 for most accounting offenses. (*See* Federal Fiscal Code §§28, 30; Fiscal Regulations §§26, 29, 30, 32, 32A.) Further, if the accounts are deliberately falsified, e.g., by keeping two sets of books, the penalty for natural persons includes three months to three years of imprisonment. For companies with listed securities the maximum fine is approximately $450,000. (*See* Securities Market Law §26 *bis*.)

In addition, Mexico imposes auditing requirements on large or profitable companies. Under these audit rules, the auditors themselves are required to ensure that a companies books are accurate and are subject to a range of sanctions for noncompliance. (*See* Fiscal Code §§52, 91B, 96.)

Money Laundering

Mexico's money laundering law applies to transactions involving the product of any illicit activity, and thus applies to the proceeds of bribery of a foreign official. (*See* Penal Code §400 *bis*.) However, under Mexican law, a money laundering prosecution may only be brought after there has been a conviction for the underlying offense.

Extradition/Mutual Legal Assistance

Mexico can provide mutual legal assistance in both criminal and civil matters. In addition, Mexico will honor extradition requests. Although Mexico does not, except in exceptional circumstances, extradite its own nationals, it will commence its own prosecution in lieu of extradition.

Complicity, Attempt, Conspiracy

Mexican law holds that accomplices are punishable as principals. (*See* Penal Code §13.) Accomplices include individuals who agree to or prepare the offense, who carry out the offense, individually, in a joint manner, or through a third party, who cause another to commit an offense or assist another in committing an offense, or who otherwise participate in the commission of an offense. In addition, Mexican law punishes attempt and conspiracy, which it defines as "part of a criminal organization or gang of three or more individuals [who] gather together with the purpose of committing a crime." (*See* Penal Code §§12(1), 64.)

Norway

Norway signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on December 18, 1998. The amendments to the Penal Code were passed on October 27, 1998, and entered into force on January 1, 1999.

Norway has implemented the Convention by amending Section 128 of the Norwegian Penal Code to extend existing provisions of law regarding the bribery of domestic public officials to cover the bribery of foreign public officials and officials of public international organizations.

Sources for this analysis include the Penal Code, other Norwegian laws, and information provided by the U.S. embassy in Oslo.

There are concerns that under Norwegian law, the maximum penalty for bribery of a foreign public official is imprisonment for only one year, and that the relevant statute of limitations is only two years.

Basic Statement of the Offense

Section 128 of the Penal Code provides:

> Any person who by threats or by granting or promising a favor seeks to induce a public servant illegally to perform or omit to perform an official act, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding one year. The term public servant in the first paragraph also includes foreign public servants and servants of public international organizations.

Section 128 does not refer to intent. However, Section 40 of the Penal Code states that the provisions of the Penal Code apply only if a person acts intentionally. Section 128 also does not mention bribes paid through intermediaries, nor does it expressly address payments that are made to third parties for the benefit of a public official.

Jurisdictional Principles

Norway exercises territorial jurisdiction over acts of bribery of foreign officials by any person so long as any part of the crime is committed in Norway. In addition to territorial jurisdiction, under Section 12.3(a) of the Penal Code, Norway applies nationality jurisdiction over crimes, including acts of bribery of foreign public officials, committed abroad by Norwegian nationals or persons domiciled in Norway.

Under Section 67 of the Penal Code, the statute of limitations for bribery of foreign officials is only two years. This is linked to the length of the maximum penalty. If Norway increases the maximum term of imprisonment, then the statute of limitations will automatically increase.

Coverage of Payor/Offeror

Section 128 specifically covers acts by "any person."

Coverage of Payee/Offeree

Although Norway's law does not define "foreign public servant," we understand that Norway will inter-

pret this term in accordance with the requirements of the Convention.

Penalties

Under Section 128, the penalty for natural persons for bribery of domestic or foreign public officials is a fine or imprisonment for a term not exceeding one year. It is not clear from the statute whether both a fine and imprisonment could be imposed. There is no stated limit on the amount of the fine.

Under Section 48(a) of the Penal Code, enterprises may be held criminally liable when "a penal provision is contravened by a person who has acted on behalf" of the enterprise. "Enterprise" is defined as "a company, society or other association, one-man enterprise, foundation, estate or public activity." There is no stated limit to such fines; Section 48(b) lists factors that are to be considered in determining the size of the fine. Under Section 48(a), an enterprise may also "be deprived of the right to carry on business or may be prohibited from carrying it on in certain forms."

Confiscation of both the bribe itself and the proceeds of bribery is authorized under Sections 34–37(d) of the Penal Code.

Books and Records Provisions

Section 2.1 of the Norwegian Accounting Act requires that records be kept of all information that is "of importance for the size and composition of property, debts, income and expenditure." Section 8.5 provides that violations of the Accounting Act are punishable by fines or imprisonment ranging from three months to six years.

Under Section 5.1 of the Auditing Act, auditors are required to ensure that accounts are correct, that the company manages its capital in a prudent fashion, and that there are satisfactory internal controls. Pursuant to Section 9.3, violators of the Auditing Act are subject to fines or imprisonment for up to one year.

Money Laundering

Section 317 of the Penal Code makes it a crime to receive or obtain the proceeds of any criminal act under Norwegian law, as well as to aid and abet the securing of such proceeds for another person. As a result, bribery of domestic or foreign officials is a predicate offense for the purpose of application of money laundering legislation.Violations of Section 317 are punishable by fines or imprisonment for a term not exceeding three years. For "aggravated offenses," the penalty is imprisonment for a term not to exceed six years.

Extradition/Mutual Legal Assistance

Under the extradition treaty between the United States and Norway, bribery is an extraditable offense so long as it is punishable in both states by a penalty of deprivation of liberty for a period of more than one year. This dual criminality requirement is also found in Section 3.1 of the Extradition Act. As previously noted, currently Section 128 of the Penal Code provides that imprisonment shall not exceed one year. However, Section 3.2 of the Extradition Act provides that the "King-in-Council" may enter into extradition agreements covering criminal acts with penalties under Norwegian law of one year's imprisonment or less. Section 2 of the Extradition Act prohibits the extradition of Norwegian nationals.

The United States and Norway do not have a mutual legal assistance treaty. Norway is a party to various European conventions relating to mutual legal assistance. It is our understanding that irrespective of other agreements, the OECD Convention provides a sufficient basis for Norway to provide mutual legal assistance to other parties to that Convention.

Complicity, Attempt, Conspiracy

Section 128 of the Penal Code expressly applies to those who are accessories. Section 128 does not directly address attempt; rather the statute includes the phrase "seeks to induce." The Penal Code contains no specific provisions on conspiracy.

The Slovak Republic

The Slovak Republic signed the Convention on December 17, 1997, and deposited its instrument of ratification on September 24, 1999. The Slovak Republic partially implemented the Convention by amendments to its Criminal Code that entered into force on September 1, 1999. However, as noted below, there are significant gaps in the Slovak Republic's legislation, which are expected to be filled by a complete revision of the Criminal Code that is currently under way.

The Slovak Republic's current legislation raises several concerns. First and foremost, the Slovak Republic has not established any criminal or civil liability for corporations. Second, the Slovak Republic has retained the defense of "effective regret," which, in the context of foreign corruption, creates a significant loophole.

Basic Statement of the Offense

The basic statement of the offense of bribing foreign public officials is set forth in Section 161b(1) of the Slovak Criminal Code:

> Whoever offers, promises or gives a bribe or other undue advantage, whether directly or through an intermediary, to a foreign public official in order that the official act or refrain from acting in relation to the performance of official duties with the intention to obtain or retain business or other improper advantage in the conduct of international business, shall be punished…

Section 161c provides similar coverage for bribery of members of foreign public assemblies, judges and officials of international courts, and representatives and employees of intergovernmental organizations of which the Slovak Republic is a member or whose jurisdiction it accepts.

Slovak law recognizes a defense of "effective regret," which applies when the offender is solicited for a bribe by an official and immediately reports the crime to authorities. (*See* Cr. Code §163.) Although the purpose of this defense is to assist law enforcement in detecting and investigating domestic corruption by ensuring that corrupt officials are reported before they take any action in response to the bribe, this defense creates a potential loophole in cases of bribery of a foreign official where the Slovak Republic is not able to intervene immediately and prosecute the official before any benefit is conferred.

Jurisdictional Principles

The Slovak Republic asserts both territorial and nationality jurisdiction over criminal offenses. Pursuant to Section 17 of the Criminal Code, Slovak law applies to offenses committed in whole or in part on Slovak territory as well as offenses committed abroad that were intended to have an effect within Slovak territory. Pursuant to Section 18 of the Criminal Code, Slovak law also applies to extraterritorial acts by Slovak nationals, as well as stateless persons and foreign nationals with permanent residency in the Slovak Republic. This nationality jurisdiction is qualified, however, by a requirement that the offense be punishable in the country in which the crime takes place. Finally, pursuant to Section 20 of the Criminal Code, the Slovak Republic will apply its law to the extraterritorial crimes of a non-national who is apprehended in the Slovak Republic but not extradited to the foreign state in which the crime took place, again subject to the condition of dual criminality.

Coverage of Payor/Offeror

Slovak law imposes criminal liability only upon natural persons. Although there are some limited civil and administrative sanctions available, Slovak law does not provide for effective and dissuasive sanctions against legal persons for the offense of bribery of foreign public officials. We understand that the Slovak Republic intends to address this issue in its recodification of the Criminal Code.

Coverage of Payee/Offeree

Section 89, paragraph 10 of the Criminal Code defines "foreign public official" as

> any person holding a function in the legislative or judicial body or in the public administration of a foreign country [or] in an enterprise in which a foreign country exercises a decisive influence, or in an international organization established by states or other subjects of public international law.

In addition, Section 161c applies specifically to bribery of a

> member of a foreign public assembly, foreign parliamentary assembly, or a judge or official of an international court whose jurisdiction is accepted by the Slovak Republic or to a representative or employee of an intergovernmental organization or body of which the Slovak Republic is a member or has a relationship following from a treaty, or to a person in a similar function.

Penalties

The penalty for violation of the base offense under Sections 161b and 161c is punishment of up to two years and a monetary sanction. However, when the offender acts as part of an organized group or derives an "advantage of a large extent," defined as 22 million Slovakia koruna (approximately $47,600), the range of imprisonment is increased from one to five years. In addition, an offender may be fined up to SKK5 million (approximately $117,000) and, pursuant to Sections 55 and 73 of the Criminal Code, any asset that was used to commit the crime or was obtained as a result of the crime may be forfeited from the offender or confiscated from third parties.

Books and Records Provisions

Slovak law requires all companies, including state-owned enterprises, to maintain "accounts in a complete, open, and correct manner so that they fairly report all events that are subject to accounting." (*See* Law on Accounting No. 563/1991 Coll, §7(1).) Companies that meet certain income requirements are required to have audited financial statements and to publish certain information concerning their financial statements (*id.* at §20.) Auditors are required to report evidence of money

laundering but not other crimes. (*See* Law No. 249/1994 Coll. to Prevent Laundering Proceeds of Most Serious Crimes.) Violations of the Accounting Law are punishable by fines of up to SKK1 million (approximately $23,800). (*See* Law on Accounting, §37.) In addition, the use of false or distorted data in connection with the keeping of commercial records may also be punished under Section 125 of the Criminal Code, which carries with it sanctions that include bans on future business activities, forfeiture of property, and monetary sanctions and, if the offender violated a specific duty resulting from the law or his employment, imprisonment from one to five years.

Money Laundering

Bribery of a foreign official is a predicate offense for the Slovak Republic's money laundering law, provided that the amount laundered exceeds SKK4 million (approximately $9,500). (*See* Cr. Code §252.)

Extradition/Mutual Legal Assistance

The Slovak Republic recognizes the offense of bribery of foreign officials as a basis for extradition, subject to the requirements of dual criminality and reciprocity. Although the Slovak Republic will not extradite its nationals, the Slovak Prosecutor General's Office will proceed against such nationals at the request of a foreign country's authorities. (*See* Cr. Code §21.)

The Slovak Republic can render mutual legal assistance under both treaty and nontreaty mechanisms, subject to a requirement of reciprocity. Dual criminality is not required, and bank secrecy is not a bar in either criminal or civil matters. (*See* Law on Banks No. 21/1992, §38.)

Complicity, Attempt, Conspiracy

Slovak law treats accomplices as principals. (*See* Cr. Code §§9, 10.) A person is liable for the offense if he is involved in preparing, attempting, or committing the offense. A person may be deemed to have participated in the offense by inciting, aiding, abetting, or authorizing the commission of the offense. Slovak law also criminalizes attempt. *(See* Cr. Code §8(1).)

Slovak law provides for the separate prosecution of conspiracy only for offenses that fall within the statutory definition of a "very serious criminal offense," a definition that limits such offenses to offenses with a maximum penalty of eight years' imprisonment or more. (*See* Cr. Code §§7, 41(2), 62(1).) Accordingly, conspiracy to bribe foreign political officials is not covered by the Slovak conspiracy law.

Spain

Spain signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on January 14, 2000. The Spanish implementing legislation, found in the Organic Act 3/2000 of January 11, entered into force on February 2, 2000. In order to implement the Convention, Spain added Article 445 *bis* (the basic statement of the offense of bribery of foreign public officials) to its Penal Code. Sources for this analysis include provisions from the Spanish Penal Code and information from the U.S. embassy in Madrid.

The Spanish legislation divides the offense of bribery of foreign public officials into several categories, making it difficult to determine the respective penalties, statute of limitations, etc., for each type of offense. We are concerned that the amended Spanish Penal Code does not provide criminal responsibility for legal persons, and the administrative and civil sanctions that it does provide may not be effective, proportionate, and dissuasive as required by the Convention. Finally, Spain did not add a separate definition of "foreign public official" to its Penal Code to implement the Convention. Therefore, it is our understanding that Spanish judges will have to read the existing definition for domestic officials in conjunction with the definition found in the Convention itself.

Basic Statement of the Offense

Article 445 *bis* of the Spanish Penal Code provides:

> Whoever, through presents, gifts, offers or promises, bribes or attempts to bribe, directly or through intermediaries, authorities or public officials, whether foreign or from international organizations, in the exercise of their position for themselves or for a third party, or complies with their demands, so that they act or refrain from acting in relation to the performance of official duties, to obtain or retain a business or other improper advantage in the conduct of international business, will be punished pursuant to the penalties set forth in Article 423.

Article 445 *bis* covers the active bribery of foreign public officials or officials of international organizations, and criminalizes donations, presents, offers, or promises. It is our understanding that "to offer or promise" covers offering, promising, or giving.

Jurisdictional Principles

Spain exercises both territorial and nationality jurisdiction. Under Article 23 of the Judiciary Organic

Act, Spanish courts may assert jurisdiction over any acts committed wholly or partly in Spanish territory, and on board Spanish ships or airplanes. Article 23.2 provides that Spain will also have jurisdiction over acts committed abroad by Spanish nationals or foreigners possessing Spanish nationality after committing the act, but only if

- The act (bribery) is punishable under the law of the place where it was committed.
- Either the aggrieved party or Attorney General's office has made a claim before the Spanish courts.
- The accused has not been absolved, pardoned, or punished abroad for the same act. (If he or she already has served part of the sentence, then the Spanish authorities will take this into consideration in deciding what the Spanish sentence should be.)

Coverage of Payor/Offeror

As stated above, Article 445 *bis* applies to "whoever." The Spanish code covers actions by individuals, even though actions may be carried out by a body corporate. The Spanish legal system does not establish criminal liability for legal persons, although it does provide for some administrative and civil penalties.

Coverage of Payee/Offeree

Article 445 *bis* covers bribes to authorities or public officials, whether foreign or from international organizations. There is no separate definition for foreign public officials under the Spanish Penal Code. Instead, Spanish courts will have to read Article 24 of the Spanish Penal Code, which defines public authorities and officers, in conjunction with the Convention's definition of foreign public official in Article 1.4a for a full understanding of the definition.

Penalties

Article 445 *bis* provides that the penalties for bribery of a foreign public official will be those found under Spanish Penal Code Article 423. Article 423 refers to penalties for passive domestic bribery, found in Articles 419, 420, and 421 of the Spanish Penal Code. Article 419 provides for punishment by imprisonment from two to six years and a fine for as much as three times the amount of the bribe. Article 420 provides that for completed unjust acts that are not crimes, the penalty is imprisonment from one to four years; for attempt for such acts, the penalty is imprisonment from one to two years; and for both, a fine for as much as three times the value of the bribe. Article 421 provides that if a bribe is made so that an official would refrain from acting within the scope of his or her duties, the penalty is a fine for as much as three times the value of the bribe.

The Spanish Code does not provide for criminal liability for legal persons. However, the manager of the legal person may be held liable for the acts of his or her employees pursuant to Article 31 of the Spanish Penal Code. Article 31 provides that

> Whoever acts as a "de facto" or "de jure" manager of a legal person, or who acts on behalf of or as a legal or voluntary representative of another, will have to answer personally, even though he may not have the conditions, qualities or relations that the corresponding crime or misdemeanor requires to be the active subject of the same, if these circumstances exist in the entity or person on whose behalf or under whose representation he acts.

Article 20.a of the 13/1995 Act Concerning Contracts with the Public Administration, as amended by the 53/1999 act, provides that a legal person may be prohibited from Spanish government procurements for up to eight years where the legal person's representatives have been convicted of criminal offenses on its behalf.

Pursuant to certain articles under the Spanish Criminal Procedural Act, including Articles 13, 299, 334–338 and 589, Spanish judges may order the seizure of donations, presents or gifts, assets, instruments, and proceeds related to the offense of bribery of foreign public officials. Confiscation is available under Article 127 of the Spanish Penal Code, which provides:

> Penalties imposed for a culpable crime or misdemeanor will bring with them the loss of the effects coming from it and the instruments used to commit it, as well as the profits coming from the crime whatever the transformations they may have suffered. These effects, instruments and profits will be seized, except when they belong to a bona fide third party, who is not responsible for the crime, and who has legally acquired them. Effects and instruments seized will be sold if their trade is legal, and their product will be used to cover the civil responsibilities of the sentenced person. If their trade is illegal, they will be dealt with according to the regulations and if no regulations apply, they will be destroyed.

Article 127 provides that confiscation may only be effected up to the amount needed to cover the offender's "civil responsibilities" such as damages and compensation, the cost of the legal proceedings, and the fine, as set forth in Article 125 and 126.

Pursuant to Spanish Penal Code Articles 131 and 33, the length of the statute of limitations depends on the severity of crime allegedly committed. Accordingly, the statute of limitations for bribery of foreign public officials subject to punishment under Article 419 is ten years, and the statute of limitations for bribery punishable under Article 420 is five years. Article 132 provides that the statute of limitations period begins on the date the offense was committed, or when the last act of a continuous series of offenses took place, or when the illegal activity ceased.

Books and Records Provisions

Bookkeeping is regulated under the Spanish Commercial Code and several other related laws. Article 25.1 of the Spanish Commercial Code provides that "all entrepreneurs must keep orderly accounts suitable to the business conducted to provide for chronological monitoring of all the respective operations, and draw up balance sheets and inventories on a regular basis." Article 1 defines an entrepreneur as an individual who owns a company or a corporate body. Article 25.2 provides that the entrepreneur or duly authorized person must maintain accounting books. Article 29.1 states that all accounting book entries must be in chronological order and clearly comprehensible. Article 30.1 requires that books and records be kept for six years. Financial statements, including balance and income sheets, must be submitted at year-end closing pursuant to Article 34.1. Article 34.2 provides that annual accounts must clearly and accurately disclose the company's financial situation, assets, and liabilities. Accounting principles are also covered under the Royal Decree 1643/90, of December 20, which enacted the General Plan of Accounting. Auditing requirements are set forth *inter alia* in the Law on Accounts Auditing of June 13, 1988, and the Companies Act, adopted under Royal Legislative Decree 1564/1989, of December 22.

Money Laundering

Article 301 of the Spanish Penal Code provides that whoever acquires, converts, or transmits goods, or carries out any other act to help someone else do so, including hiding the illicit origin of the goods, knowing that they originated from a serious crime, will be punished by imprisonment from six months to six years and a fine up to three times the value of the goods. A conviction for the underlying offense is not required. It is our understanding that bribery of foreign public officials will be considered a "serious crime" and therefore a predicate offense for money laundering legislation when punishable under Article 419 and 420 of the Spanish Penal Code. Article 301.4 provides that predicate offenses for Spanish money laundering legislation may occur in whole or in part abroad.

Extradition/Mutual Legal Assistance

Spain generally does not require dual criminality and will provide mutual legal assistance in penal matters. Spain has entered into multilateral agreements on mutual legal assistance, such as the European Agreement on Legal Assistance of April 20, 1959. Spain is a party to multilateral treaties for mutual legal assistance in criminal matters with Germany, Belgium, Austria, Bulgaria, Denmark, France, Hungary, Iceland, Luxembourg, the Netherlands, Portugal, the Czech Republic, Sweden, Turkey, Finland, Greece, Ireland, Italy, Norway, Poland, the Slovak Republic, the United Kingdom, and Switzerland. Spain has entered into bilateral treaties for mutual legal assistance in criminal matters with Argentina, Canada, the United States, Australia, Mexico, and Chile.

Where dual criminality is required under one of the treaties, it will be deemed to exist if the offense upon which mutual legal assistance is based falls under the scope of the Convention. If no treaty applies, Spain will apply the principle of reciprocity. It already does this with Brazil, Japan, New Zealand, and Korea. Where no multilateral or bilateral treaty or the principle of reciprocity applies, we understand that Spain will consider the Convention a sufficient legal basis for mutual legal assistance. According to Article 8.1 of the Constitutional Act, when it is considered to be in the public interest to do so, Spain may not allow a request for legal assistance to be rejected by invoking bank secrecy.

Spain will also extradite persons for crimes committed under the Convention under its existing bilateral and multilateral extradition treaties. Spain has multilateral extradition treaties with Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Sweden, Switzerland, Turkey, and the United Kingdom. Spain has bilateral extradition treaties with Argentina, Australia, Brazil, Canada, Chile, Korea, Mexico, and the United States. It is our understanding that Spain will consider the Convention (in the absence of a bilateral or multilateral treaty) a legal basis for extradition. However, it appears that Spain will not extradite persons who bribed a foreign public official to refrain from doing an act which should have been done within his or her official capacity (as the penalty for such an offense is a fine only). Spain will extradite its own nationals for crimes pursuant to its multilateral and bilateral treaties, or in the absence thereof, using the Convention as a basis. Article 3.3 of the Passive

Extradition Act provides that where extradition is refused due to nationality, the charge will be reported to the Attorney General for appropriate legal action.

Complicity, Attempt, Conspiracy

Article 27 of the Spanish Penal Code provides that principal offenders and accomplices are responsible for crimes and misdemeanors. Article 28 provides that principal offenders are those who carry out the offense, jointly or by using another as an instrument, including those who assist either directly or indirectly and those who cooperate by performing an act necessary for the perpetration of the crime. Article 29 defines accomplices as those not covered by Article 28 who cooperate in the execution of a crime through previous or simultaneous actions. Pursuant to Article 63 of the Spanish Penal Code, accomplices receive a lower penalty than the main perpetrator of the offense.

Sweden

Sweden signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on June 8, 1999. Implementing legislation amending the Penal Code was enacted on March 25, 1999, and entered into force on July 1, 1999. The following analysis is based on those amendments, related Swedish laws, and reporting from the U.S. embassy in Stockholm.

The maximum sentence for bribery of a foreign public official is imprisonment for only two years, raising questions about whether the penalties are sufficiently "effective, proportionate and dissuasive."

Basic Statement of the Offense

Under Chapter 17, Section 7 of the Penal Code, it is unlawful to give, promise, or offer a bribe or other improper reward, whether for one's self or any other person, to, *inter alia*, a minister of a foreign state, a member of a foreign legislative assembly, a person exercising public authority in a foreign state, or a member of the European Commission, the European Parliament, or the European Court of Auditors, or judges of the European Court of Justice for the exercise of official duties. This provision does not expressly address bribes offered or made through intermediaries. The law is not limited to bribes given in order to obtain or retain business or other improper advantage in the conduct of international business.

Jurisdictional Principles

Chapter 2, Section 1 of the Penal Code establishes jurisdiction over crimes committed in Swedish territory. Chapter 2, Section 2 provides that "a crime is deemed to have been committed where the criminal act was perpetrated and also where the crime was completed or, in the case of an attempt, where the intended crime would have been completed." Where a crime is committed in Sweden by an alien on a foreign vessel or aircraft against "another alien or foreign interest," under Chapter 2, Section 5 authorization from the Swedish Government is required to initiate a prosecution. Under Chapter 2, Section 2, jurisdiction may be established over Swedish nationals and foreign nationals domiciled in Sweden for crimes committed outside Sweden (1) if the act is criminal under the law of the place where it was committed, or (2) if the act was committed outside the territory of any state, the punishment involves deprivation of liberty. Prosecution of offenses committed outside Sweden generally requires authorization from the Swedish Government.

Under Chapter 35, Section 1 of the Penal Code, the statute of limitations is five years for crimes punishable by a maximum term of imprisonment of two years.

Coverage of Offeror/Payor

Chapter 17, Section 7 of the Penal Code refers to acts by "a person." Under Swedish law, legal persons are not subject to criminal liability per se. However, under Chapter 36, Section 7 of the Penal Code, entrepreneurs are subject under certain circumstances to "quasi-criminal" corporate fines for crimes committed in the exercise of business activities. ("Entrepreneur" is defined in the Part III of the Commentary to the Penal Code as "any natural or legal person that professionally runs a business of an economic nature.")

Coverage of Payee/Offeree

Chapter 17, Section 7 covers bribes offered or paid to a minister of a foreign state, a foreign legislator, or a member of a foreign directorate, administration, board, committee or other such agency belonging to the state or to a municipality, county council, association of local authorities, parish, religious society, or social insurance office. Also covered are members of the European Union Commission, the European Parliament, and the European Court of Auditors, as well as judges of the European Court of Justice. The statute applies in addition to those who otherwise exercise public authority in a foreign state.

Under Chapter 17, Section 17, cases of bribery involving certain payees/offerees can be prosecuted only if the offense is reported for prosecution by the employer or principal of the payee/offeree or if prosecution is called for in the public interest. This category apparently includes bribes of foreign public officials other than min-

isters of foreign states, members of foreign legislatures, and officials of certain EU institutions.

Penalties

Chapter 17, Section 7 provides that bribery of foreign (or domestic) public officials is punishable by a fine or imprisonment for a maximum of two years. (The maximum sentence in Sweden for the most severe crimes is imprisonment for ten years.) Guidelines for determining the appropriate penalty, including aggravating and mitigating circumstances, are listed in Chapter 29 of the Penal Code. Fines, which are assessed in accordance with Chapter 25 of the Penal Code, generally range from 900 to 150,000 Swedish crowns (approximately $100–$16,500).

Under Chapter 36, Section 8, corporate fines for "entrepeneurs" may range from 10,000 to 3 million Swedish crowns (approximately $1,100–$330,000). Chapter 36, Section 9 provides that in determining the amount of the fine, "special consideration shall be given to the nature and extent of the crime and to its relation to the business activity." Chapter 36, Section 10 sets forth certain circumstances requiring the mitigation or nonimposition of corporate fines.

Chapter 36, Section 1 of the Penal Code authorizes the forfeiture of the "proceeds of crime" unless forfeiture would be "manifestly unreasonable." Under Chapter 36, Section 4, the value of "financial advantages" derived "as a result of a crime committed in the course of business" may be forfeited, unless such forfeiture would be "unreasonable."

Books and Records Provisions

Accounting obligations are set forth in the Bookkeeper Act, which applies generally to persons carrying out business activities. The Companies Act requires that companies have audits performed by independent auditors, and contains rules on reporting irregularities that are discovered during audits. For private partnerships and individuals, audits are required under the Accounting Act. Chapter 11, Section 5 of the Penal Code provides that bookkeeping offenses carry penalties of up to two years imprisonment, with a possible increase up to four years in "gross" cases.

Money Laundering

Money laundering is a crime under Chapter 9, Section 6a of the Penal Code. All crimes by which an individual has enriched himself, or involving a criminal acquisition, are predicate offenses for purposes of this statute.

Extradition/Mutual Legal Assistance

Extradition between the United States and Sweden is governed by a 1961 bilateral treaty (entered into force in 1963), supplemented by a convention that entered into force in 1984. Under the treaty as amended, offenses are extraditable if they are punishable by deprivation of liberty for a period of at least two years under the laws of both parties. Sweden is a party to the European Convention on Extradition and has bilateral extradition treaties with a number of countries. Pursuant to the Act on Extradition of Offenders, Sweden may extradite in the absence of an extradition agreement. Section 4 of that Act authorizes extradition for offenses punishable in Sweden by imprisonment for more than one year. Under Section 2, extradition of Swedish nationals is prohibited except with respect to requests from other Nordic countries.

Legal assistance to foreign states may be provided under the Act with Certain Provisions Concerning International Mutual Assistance in the Field of Criminal Cases, the Act on the Use of Coercive Measures at the Request of a Foreign State, and the Act on Taking Evidence for a Foreign Court. Dual criminality is generally required. A mutual legal assistance agreement with the foreign state is not necessary. The United States and Sweden do not have a mutual legal assistance treaty.

Complicity, Attempt, Conspiracy

Chapter 23, Section 4 of the Penal Code establishes liability for those who further a criminal act by "advice or deed" or who induce another to commit the act. Under Swedish law, attempt per se is not a punishable offense with respect to bribery, although the offense of bribery includes the act of offering a bribe. Likewise, conspiracy is not a punishable offense with respect to bribery.

Switzerland

Switzerland signed the Convention on December 17, 1997. The Swiss Parliament adopted a law ratifying and implementing the Convention on December 22, 1999. Because of a mandatory three-month period (allowing for a possible referendum) which began on January 11, 2000 (the date that the legislation was published in the *Official Gazette*), the law did not enter into force until May 1, 2000. Switzerland deposited its instrument of ratification with the OECD on May 31, 2000. This analysis is based on the relevant Swiss Penal Code provisions and information from the U.S. Embassy in Bern.

Concerns with the Swiss implementing legislation include a lack of legal responsibility for legal persons

and no monetary fines for natural persons. However, it is our understanding that a new provision on the responsibility of legal persons has been introduced within the framework of ongoing revisions of the general provisions of the Penal Code.

Basic Statement of the Offense

The basic statement of the offense of bribery of a foreign public official is contained in Title 19, Article 322 *septies* of the Swiss Penal Code (PC), which provides that

> Anyone who offers, promises, or grants an undue advantage to a person acting for a foreign state or an international organization, as a member of a judicial or other authority, a civil servant, expert, translator, or interpreter employed by an authority, or an arbitrator or military person, for that person or for another, for him to act or not to act in his official capacity, contrary to his duties, or using his discretionary powers, will be punished by five years of imprisonment…

Jurisdictional Principles

Article 3, line 1 of the PC provides that it is applicable to anyone who commits a crime or offense in Switzerland. It is our understanding that bribery of a foreign public official which occurs in whole or in part in Switzerland will fall within Swiss jurisdiction. Switzerland exercises jurisdiction over extraterritorial offenses committed by Swiss nationals in limited circumstances. Under Article 6 of the PC,

> Swiss criminal law may apply to a Swiss person who commits a crime or offense overseas that would be extraditable under Swiss law, if the act is also a crime in the foreign state where committed, and if the actor resides in Switzerland or is extradited to the Confederation because of his infraction. The foreign law will be applicable if it is more favorable to the guilty party.

Although non-Swiss persons within Swiss territory currently cannot be prosecuted, it is our understanding that within the framework of ongoing revisions to the general parts of the PC, the application of Swiss law will be enlarged to cover acts by such persons.

Coverage of Payor/Offeror

The Swiss law currently covers natural persons. A new provision on the responsibility of legal persons has been introduced within the framework of ongoing revisions of the general provisions of the Penal Code.

Coverage of Payee/Offeree

It is our understanding that Article 322 *septies* covers all foreign public officials as defined under the Convention, as it includes "persons acting for a foreign state or an international organization or as a member of a judicial or other authority." We understand that all levels of government, including those at the local and state levels, are also covered. Members of the judiciary are specifically mentioned, as are civil servants, arbitrators, translators, and interpreters. It is also our understanding that by its terms article 322 *septies* includes any person exercising a public function.

Penalties

The new Swiss legislation provides for a maximum prison term of five years for natural persons, which is the same penalty for bribery of domestic officials. There is no minimum sentence. Article 63 of the PC provides that "the court shall determine the sentence based upon the behavior of the offender in committing the offense, taking into account his motives, prior history and personal situation." There are no fines under Swiss law for bribery offenses committed by natural persons. In addition to imprisonment, Swiss law also provides for other sanctions such as: disqualification from holding a public office under Article 51 PC; disqualification from employment under Article 54 PC; deportation of foreigners under Article 55 PC; and publication of the judgment under Article 61 PC.

Although currently legal entities cannot be punished under Swiss jurisprudence, an agent of the legal person can apparently be held criminally liable. Swiss law also provides for civil and administrative sanctions which may be indirectly imposed on Swiss comanies as third parties to an offense.

Article 59 of the Penal Code provides that a judge may confiscate assets or their monetary equivalent resulting from an offense or which would have served as payment to an individual for committing a crime. Confiscation from legal entities is currently only possible when they are considered as third parties to, and not the authors of, the offense. However, it is our understanding that once the new law concerning legal responsibility for legal persons is enacted, companies will also be subject to direct confiscation under Article 59. Seizure is also provided for in the civil codes and in the laws of the cantons.

Article 70 of the Penal Code provides that the statute of limitations for a criminal act is ten years for violations punishable by imprisonment of more than three years, which is the case for bribery of a foreign public

official. According to Article 71, the statute of limitations will run from the day when the accused committed the act; or, if the actions were done in several stages, then from the day of the last of the acts; or, if the actions lasted over a longer period, then from the last day of their completion. Article 72 provides that the statute of limitations will not run during an ongoing investigation or following a judicial decision concerning the accused. In the case of bribery of a foreign public official, the clock may be stopped for a maximum of fifteen years.

Books and Records Provisions

The Swiss Debtors Code ("Obligations") contains the Swiss provisions on books and records. Any company that must register its trade name with the commercial register is required to maintain its books and records in accordance with Swiss accounting rules. It is our understanding that Article 957 of the Swiss Debtors Code generally covers the acts prohibited by Article 8 of the Convention.

Money Laundering

Article 305 *bis* of the Penal Code on money laundering provides that anyone who commits acts that may prevent the identification of the origin, discovery, or confiscation of sums which the person knows or should have known resulted from a crime, will be punished by imprisonment or a fine. Just as with bribery of domestic officials, bribery of foreign public officials will be a predicate offense for the application of Swiss money laundering legislation. Under line three of article 305 *bis* of the PC, the money launderer is punishable when the predicate offense was committed outside of Switzerland and is also punishable in the state where it was committed.

Extradition/Mutual Legal Assistance

Article 35 of the Federal Law on International Mutual Legal Assistance in Criminal Matters (EIMP) provides that extradition may be granted if: (1) the act is punishable under both Swiss law and the requesting country by imprisonment of a maximum of at least a year or a more severe penalty, and (2) Switzerland does not have jurisdiction.

Swiss law on mutual legal assistance is provided for in the EIMP. Mutual legal assistance in foreign criminal proceedings is provided for in Part III of the EIMP. More specifically, discovery of procedural or official Swiss documents is governed by Article 63 of the EIMP. In order to obtain mutual legal assistance which entails coercion under Article 63, Article 64 provides that the requesting country must show that the elements of the crime are also punishable under Swiss law. Articles 85–93 of the EIMP contain provisions on the delegation of criminal prosecutions, and Articles 94–108 of the EIMP contain provisions on the delegation of enforcement of criminal judgments. Dual criminality must exist for there to be mutual legal assistance. This requirement will be satisfied with the entry into force of Article 322 *septies* for bribery of foreign public officials. Switzerland ratified the European Convention on Mutual Legal Assistance on April 20, 1959.

It is our understanding that although Article 47 of the Federal law on banking and accounts protects bank secrecy, such protection is not absolute. Under Federal and cantonal law, banks and their agents and employees must testify and supply certain information to the authorities where the law provides that they have a duty to do so, particularly in criminal proceedings.

Complicity, Attempt, Conspiracy

Complicity is covered in Articles 24 and 25 of the Penal Code. Article 24 defines an "instigator" as a person who intentionally persuades another to commit a crime. That person is punished as the "main author" of the crime if it is carried out. An "accomplice" is defined a someone who intentionally lends his assistance in furtherance of a crime. Article 25 provides that courts may penalize the accomplice to a lesser extent than the "main author," depending on the facts of the case. Although authorization is not specifically covered under Swiss law, it may fall within the articles on complicity. Attempt for bribery of a foreign public official is covered under Swiss Penal Code Articles 21 and 23. Conspiracy does not exist under Swiss law, although Swiss Penal Code article 260 *ter* criminalizes participation in or support of a criminal organization.

United Kingdom

The United Kingdom signed the Convention on December 17, 1997. Parliament approved ratification on November 25, 1998, and the U.K. deposited its instrument of ratification with the OECD on December 14, 1998. The U.K. is considering a new corruption statute. The U.S. embassy reports that the U.K. was scheduled to publish a "consultation paper" in May 2000, which would be followed by a short (approximately ninety-day) public comment period. The full bill may be introduced to Parliament in the fall of 2000.

We based our analysis on the texts of relevant U.K. laws, a March 1998 report of the U.K. Law Commission

that considered how the U.K. would meet the requirements of the Convention, information obtained from nongovernmental organizations, and reporting from the U.S. embassy in London.

Our main concern with the existing legislation on which the U.K. is basing implementation of the Convention is that it is unclear whether it applies to the bribery of foreign public officials. Under U.K. law, bribery of public officials is primarily covered under the common law and under three statutes: the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and the Prevention of Corruption Act 1916, referred to collectively as the Prevention of Corruption Acts. Although these statutes address the bribery of domestic public officials, they do not specifically address the bribery of foreign public officials, and we are unaware of any specific cases that interpret the law as applying to foreign public officials. Another concern we have is that although the U.K. has the constitutional authority to assert nationality jurisdiction, it has thus far declined to consider doing so with respect to offenses covered by the Convention.

Basic Statement of the Offense

The U.K. is basing its implementation of the Convention upon the Prevention of Corruption Acts and the common law. Specifically, the U.K. considers that its laws comply with Article 1 of the Convention under the 1906 act, as amended by the 1916 act. Section 1(1) of the 1906 act states that

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

Generally, the 1906 act criminalizes bribes corruptly offered or given by any person to an agent to induce him or her to act or not to act in relation to his or her principal's affairs or business. "Agent" is defined under the Prevention of Corruption Acts as any person employed by or acting for another, a person serving under the Crown, or any local or public authority. It is our understanding that this definition covers domestic public officials, but it is unclear whether foreign public officials are covered.

Jurisdictional Principles

With very few exceptions, the U.K. exercises only territorial jurisdiction. It is our understanding that if any part of the offense, either the offer or acceptance or agreement to accept, takes place within the territory of the U.K. jurisdiction, it can be prosecuted in the U.K. The Criminal Justice Act of 1998 on Terrorism and Conspiracy provides that any conspiracy in the U.K. to commit crimes abroad is a criminal offense. The U.S. embassy reports that the antiterrorism legislation would apply to a conspiracy in the U.K. to bribe a foreign public official. The U.K. does not exercise nationality jurisdiction over bribery offenses, although it does exercise nationality jurisdiction over other offenses such as murder, high treason against the crown, and piracy.

Coverage of Payor/Offeror

The Prevention of Corruption Acts and the common law concern bribery by "any person" without distinction as to nationality. The 1906 act, which covers bribes by "any person," does not define "person." Schedule 1 of the Interpretation Act of 1978 states that "person" includes a body or person corporate or unincorporate. The U.K. legal system provides criminal liability for legal persons. Companies can be held criminally responsible, and fined, for the acts of those who control the company, including representatives of the company.

Coverage of Payee/Offeree

It is our understanding that under the U.K.'s Prevention of Corruption Acts, a public official is identified based upon his or her position as an officer, member, or servant of a "public body." The 1916 act extended the definition of "public body" to include "local and public authorities of all descriptions." As stated above, the 1906 act uses agency law to criminalize bribes that would encourage an agent in the public or private sector to contravene the principal/agent relationship. Section 1(2) of the 1906 act defines "agent" as "any person employed by or acting for another" and Section 1(3) further provides that "a person serving under the Crown or under any corporation or any borough, county or district council, or any board of guardians, is an agent." The 1916 act provides that a person serving under a "public body" (i.e., under any local or public authority) is an agent within the meaning of the 1906 act. Nothing in either the Prevention of Corruption Acts or the common law indicates with certainty whether the U.K. law applies to foreign public officials. Furthermore, it is our understanding that the 1906 act does not cover members of Parliament or the Judiciary when they are acting in their official capacity.

Penalties

The penalty for corruption in a magistrate's court is a maximum of six months imprisonment and/or a fine of £5,000 (approximately $7,500). For convictions in crown courts, the penalty is a maximum of seven years imprisonment and/or an unlimited fine. There are no express provisions on corporate criminal liability, but we understand that companies can be fined for breaches of the criminal law. There is no statute of limitations under U.K. laws for prosecution of bribery cases. U.K. courts may order confiscation of the bribe and the bribe proceeds under the Criminal Justice Act of 1988, as amended by the Proceeds of Crime Act of 1995. Following a conviction, Section 43 of the Powers of Criminal Courts Act of 1973 allows a court to order forfeiture from the offender of lawfully seized property used to commit or facilitate the offense. It is our understanding that under Section 4 of the Criminal Justice (International Cooperation) Act of 1990, the U.K. Secretary of State may decide whether to grant a request for receiving assistance in obtaining evidence, such as bank records, inside the U.K.

Books and Records Provisions

The Companies Act of 1985, Sections 221, 222, and 722 prohibit generally the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of nonexistent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents. These provisions govern private and public limited companies, companies limited by guarantee, and unlimited companies. Section 223 provides that failure to comply with Sections 221 and 222 is an offense unless the company officer can show that he acted honestly and the default was excusable under the circumstances. On summary conviction, the penalty for an offense under Section 223 is a maximum term of six months and/or a fine of £5,000 (approximately $8,000), on conviction by indictment, the penalty is imprisonment for a maximum term of two years and/or an unlimited fine. For violation of Section 722, the penalty is an unlimited fine, and if the violation persists, a daily fine. Section 17 of the Theft Act of 1968 also contains an offense for false or fraudulent accounting, the penalty for which is imprisonment for a maximum of two years. The Companies Act of 1985 also provides that certain companies must have an external audit.

Money Laundering

It is our understanding that since offering and accepting bribes are indictable offenses, they automatically fall within the purview of the Criminal Justice Act of 1988, as amended by the Criminal Justice Act of 1993, which sets forth the U.K. money laundering legislation, both as to the bribe and the bribe proceeds.

Extradition/Mutual Legal Assistance

The U.K. has extradition agreements with all of the OECD member countries except Japan and Korea. The U.K. is also a party to the Council of Europe Convention on Extradition of 1957. In the absence of an extradition agreement, the U.K. considers extradition requests on an ad hoc basis under Section 15 of the Extradition Act of 1989. If, under the law of the country requesting extradition, the offense is punishable with a prison term of twelve months or more, extradition may be available. U.K. nationals may be extradited.

Under Part I of the Criminal Justice Act of 1990 (International Cooperation), the U.K. can provide mutual legal assistance in criminal matters to other countries without treaties or agreements. It is our understanding that the U.K. will provide assistance to foreign authorities to facilitate any criminal investigation or proceeding in the requesting country, and that there is no threshold penalty level for the provision of mutual legal assistance. We further understand that dual criminality is not required for mutual legal assistance other than in general cases of search and seizure.

Complicity, Attempt, Conspiracy

Complicity, aiding and abetting, incitement, and authorization are addressed in an 1861 act entitled "Aiders and Abettors," which provides that

> Whosoever shall aid, abet, counsel, or procure the commission of [any indictable offense], whether the same be [an offense] at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

The Criminal Attempts Act of 1981, Section 1, provides that a person is guilty of an attempt when he or she "does an act which is more than merely preparatory to the commission of the offense." Under U.K. law, conspiracy to commit a crime is also a crime, and subject to the same penalties as the primary offense. The Criminal Law Act of 1977, as amended by the Criminal Justice (Terrorism and Conspiracy) Act of 1988, defines conspiracy as "an agreement that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offense or offenses by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions."

3

Review of Enforcement Measures

Enforcement of National Implementing Legislation

As of June 2000, the implementing legislation of most parties to the Convention, other than the United States, has not been in effect for a sufficient time to gauge the effectiveness of the parties' enforcement efforts. We are not aware of any prosecution by another party to the Convention for payments to foreign public officials.

In the United States, FCPA investigations of the bribery of foreign public officials and prosecutions are subject to the same rules and principles as govern any federal criminal or civil investigation. To ensure that uniform and consistent prosecutorial decisions are made in this particular area, all criminal investigations under the FCPA are supervised by the Criminal Division of the Department of Justice.

In the twenty-three years since the passage of the FCPA, the Department of Justice has brought approximately thirty criminal prosecutions[1] and six civil injunctive actions. In addition, the SEC has brought several civil enforcement actions against issuers for violations of the antibribery provisions and numerous actions for violations of the books and records provisions of the FCPA. In the period January1999 to June 2000, the Justice Department brought one criminal FCPA prosecution, resulting in a fine and home confinement for one defendant, and one civil injunctive action, resulting in a consent order and a $400,000 fine.

The Department of Justice has also provided assistance to American businesses who were in the process of undertaking international business transactions. Since 1980, the Department has issued thirty-four opinions in response to requests from American businesses stating whether it would take enforcement action if the requestors proceeded with actual proposed transactions.

U.S. Efforts to Promote Public Awareness

For many years prior to the adoption of the Convention, the U.S. government sought to educate the business community and the general public about international bribery and the FCPA. As a result, U.S. companies engaged in international trade are generally aware of the requirements of U.S. law. Since U.S. ratification of the Convention and the passage of the IAFCA, the Clinton Administration has

[1]In addition, there have been several cases where the absence of dual criminality has made it impossible to use foreign evidence obtained under a mutual legal assistance treaty in a FCPA prosecution, and charges were therefore brought under other federal criminal statutes.

stepped up efforts to raise public awareness of U.S. policy on bribery and initiatives to eliminate bribery in the international marketplace.

Over the past two years, Secretary of Commerce William Daley and other senior Commerce officials, including General Counsel Andrew Pincus and Under Secretary David Aaron, have repeatedly spoken out against international bribery to business audiences and urged support for the Convention. Since taking on the position of Acting Under Secretary for International Trade in April 2000, Robert LaRussa has also raised the Convention and antibribery issues in meetings with a number of senior officials of signatory governments.

The secretaries of State and the Treasury and senior officials in both agencies have been supportive as well. At the 2000 World Economic Forum in Davos, Switzerland, Secretary of State Madeleine Albright urged signatory governments to send a clear message against bribery and enact strong implementing legislation that fully meets the requirements of the Convention. In February 2000, Under Secretary of State Alan Larson used the occasion of the first anniversary of the Convention's coming into force to hold a press conference at which he reviewed progress on implementing the antibribery agreement and pressed all signatories to bring it into effect. Under Secretary Larson also raised implementation with his G-8 counterparts during preparations for the Summit of the Eight in Japan. At the IMF/World Bank joint meetings in April 2000, Treasury Secretary Lawrence Summers highlighted the importance of the Convention during bilateral meetings with other ministers attending the sessions.

Officials of the Commerce, State, and Justice Departments are also in regular contact with business representatives to brief them on new developments relating to antibribery issues and discuss problems they encounter in their operations. In addition, as part of a vigorous outreach program, the three departments provide on their Internet websites detailed information on the Convention, relevant U.S. laws, and the wide range of U.S. international activities to combat bribery. In May 2000, the State Department, in cooperation with the Commerce and Justice departments, also published a brochure titled "Fighting Global Corruption: Business Risk Management" that contains information about the benefits of good governance and strong corporate antibribery policies, the requirements of U.S. law and the Convention, and the various international initiatives underway to combat business corruption. The brochure is being made available to U.S. companies and business associations.

Efforts of Other Signatories

Efforts to raise public awareness about business corruption and the importance of the Convention vary widely among other signatory countries. The United States has the most extensive public outreach program of any signatory to the Convention. Several other countries are also taking useful initiatives to raise public awareness on the need to fight corruption, both at home and abroad, and have expanded their activities over the past year. Yet in many signatory countries, including important economies such as Belgium, Italy, Japan, the Netherlands, and Spain, there has been relatively little activity on publicizing the Convention or encouraging a public dialogue on unethical business practices in international trade.

Governments have sought to draw attention to the Convention and the problems of business corruption in a variety of ways, for example, through speeches by high-level officials, publications, well publicized anticorruption programs, and the appointment of an anticorruption spokesperson. Nongovernmental organizations are also playing an important role in raising public awareness of corruption and the need for effective remedies. Transparency International, a nongovernmental organization committed to promoting good governance and fighting bribery and corruption, has been particularly active. Working with a network of representatives and supporters in seventy-seven countries around the world, Transparency International has sought to educate governments and societies on the importance of fighting corruption and enacting effective legislation. Other private national organizations, some founded just since the Convention came into effect, have also emerged to help promote public awareness of corruption and encourage public discussion of possible solutions.

According to reports from U.S. embassies and public sources of information, the following countries have undertaken notable activities to raise public awareness on corruption.

The government of **Australia** developed an extensive campaign to raise public awareness of its anticorruption policies. The Australian government has issued press releases and placed advertisements in trade publications to explain the Convention and government efforts to fight corruption. It has also organized seminars in Australia and overseas to brief Australian companies.

In **Bulgaria,** fifteen nongovernmental organizations have joined together to form Coalition 2000, an advocacy group devoted to fighting corruption. Coalition 2000 is developing an anticorruption action plan and publi-

cizing the Convention. It has its own Internet website with links to the OECD website and the text of the Convention. The Bulgarian government has endorsed and supported activities of Coalition 2000. Among Southeast European countries participating in the Stability Pact, Bulgaria has taken the lead in promoting a new regional anticorruption initiative aimed at promoting trade and investment and improving the overall business climate. The government has posted the Stability Pact initiative on its Internet website and also publicized it at government press conferences.

Canada's Justice Department has published a booklet on the Convention and Canada's antibribery laws titled "The Corruption of Foreign Officials Act" that is being made available to the business community. The Justice, Foreign Affairs, and International Trade Ministries also prepare an annual report to Parliament on the implementation of the Convention. In addition to these government initiatives, several nongovernmental organizations, including Transparency International, the Canadian Bar Association, and the Canadian Association of Manufacturers and Exporters, are helping to raise public awareness by holding seminars on the Convention and related issues.

The government of the **Czech Republic** has organized a number of seminars since November 1999 to brief national and municipal officials on anticorruption legislation. Czech officials have also given numerous broadcast and print media interviews on corruption and bribery issues. In addition to these government initiatives, the Transparency International branch in the Czech Republic has conducted its own public information campaign, distributing posters and pamphlets that incorporate information on the Convention.

In **France,** senior officials have affirmed the government's determination to combat corruption in international trade and its support for the Convention, although we have yet to see the latter translated into final legislative action. The draft French implementing legislation, legislative history, and the parliamentary debates have been made publicly available on the French government's website, and publicly debated in numerous press reports.

We have received reports from our embassy of increased public awareness of bribery issues through greater media coverage. Over the past year, the government's anticorruption policies have also received increased attention as a result of the well publicized investigation of alleged bribes by a major French oil company. The French chapter of Transparency International has also been particularly active.

In **Germany,** public outrage over alleged improper donations to the Christian Democratic Union political party has served to raise awareness of bribery. The German government and business associations have been working together to publicize antibribery laws in seminars and newsletters. Increasingly, German companies are starting to develop internal procedures to promote compliance with the law. To encourage companies in that direction, the German government is now requiring all applicants for Hermes export credit guarantees to declare that financed transactions have been and will remain free of corruption.

Korea has seen a dramatic increase in national anticorruption activities over the past year. President Kim Dae Jung established a presidential anticorruption commission to investigate corruption and make policy recommendations. In February 2000, President Kim personally inaugurated a new anticorruption website, named "Shinmungo," on which Korean citizens could report complaints about unfair treatment and public corruption. Under the leadership of Mayor Goh Kun, the city of Seoul has undertaken a high-profile anticorruption campaign, featuring a new online procurement information system that allows citizens to monitor the entire administrative process of government procurement and civil applications. Mayor Goh spoke out against public corruption and described Korea's new initiatives at the International Anti-Corruption Conference sponsored by Transparency International on October 14, 1999, in Durban, South Africa. In 1999, more than 800 civic groups also formed a new umbrella civic organization called the "Anticorruption National Solidarity" to mobilize public support against corruption and to serve as a clearing housing for complaints on corrupt practices.

In **Poland,** President Aleksandr Kwasniewski hosted an international conference on fighting corruption in March 1999. Deputy Prime Minister and Finance Minister Leszek Balcerowicz has actively supported the activities of nongovernmental organizations that are working for openness and integrity in government. Over the past year, the government has sought to encourage public discussion of the costs of bribery and the need to address the problem. At the request of Minister Balcerowicz, the World Bank prepared a study on bribery and corruption in Poland that was published in April 2000. Local nongovernmental organizations, including the Transparency International branch in Poland, have started projects to raise public awareness of corruption and improve the legal foundations for transparent governance. Poland has also accepted U.S. offers of technical assistance to help promote good governance practices.

The **Slovak Republic,** under the leadership of Prime Minister Mikulas Dzurinda, has called for a national program to fight corruption. Many high-level officials, including the Prime Minister and interior minister, have publicly condemned official bribery and pledged to take action against it. The government has organized several inter-ministerial conferences to discuss the problem. In 1999 the Transparency International branch in the Slovak Republic sponsored a conference on corruption and bribery at which the Convention was discussed. Transparency International also publishes a newsletter that provides information about the Convention and other anticorruption initiatives.

Sweden has been an active supporter of the Convention. Senior officials have spoken out against international corruption and publicly emphasized Sweden's willingness to expand the scope of its international cooperation to combat the problem. Over the past year, the Swedish government also appointed a senior official in the Ministry of Foreign Affairs, Ambassador Lennart Klackenberg, to serve as government spokesman on corruption and to help broaden public awareness. In December 1999, Ambassador Klackenberg released an interagency-approved report on the subject titled "The Fight Against International Corruption—Swedish Positions and Activities." In February 2000, Sweden's Minister for Trade, Leif Pagrotsky, co-hosted and addressed a colloquium on corruption in the arms trade, calling for a sustained and purposeful effort to address the problem.

In addition to the United States, twenty signatories to the Convention have posted their national implementing legislation or draft legislation on their government websites or the OECD Anticorruption Unit website: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Japan, Korea, the Netherlands, New Zealand, Norway, Poland, Spain, Sweden, and Switzerland. (See Appendix D for a list of websites.)

Monitoring Process for the Convention

Monitoring is crucial for promoting effective implementation and enforcement of the Convention by signatory countries. The OECD has developed a comprehensive monitoring process that provides for input from the private sector and nongovernmental organizations. In addition to the OECD process, the U.S. government has its own intensive monitoring process, of which these annual reports to the Congress are an integral part. The United States has encouraged all signatories to participate fully in the OECD monitoring process and establish their own internal mechanisms for ensuring follow-through on the Convention by governments and the private sector. We have also stressed the importance of signatories devoting sufficient resources to ensure that the monitoring process is effective.

OECD Monitoring

The OECD has established a rigorous process to monitor implementation and enforcement of the Convention and the 1997 Revised Recommendation. Our experience with the first stage of the process confirms that it is a serious undertaking that encourages parties to fulfill their obligations under the Convention. Evaluating implementation of the Convention is a challenging project given the diverse legal systems of signatory countries. The OECD review process seeks to accommodate these differences by focusing on the functional equivalence of measures and the identification of the strengths and weaknesses of the various approaches to implementation. Over the past year, the effectiveness of this process has been demonstrated by the willingness of several parties to correct weaknesses identified in their implementation and enforcement regimes after their legislation has undergone the review process.

Framework for Monitoring

Article 12 of the Convention instructs the signatories to carry out a program of systematic follow-up to monitor and promote the full implementation of the Convention through the Working Group on Bribery. Guidance for the Working Group on monitoring and follow-up is provided in Section VIII of the Revised Recommendation of the Council on Combating Bribery in International Business Transactions (Revised Recommendation).

The key elements of the monitoring program are as follows:

- A self-evaluation provided in responses to the Working Group questionnaire, assessing implementation of the Convention and Revised Recommendation, including whether the country disallows tax deductibility of bribes to foreign public officials.
- A peer group evaluation wherein Working Group members have an opportunity to review the questionnaire and seek clarifications from representatives of the signatory government.
- A Working Group report providing an objective assessment of the progress of the participating country in implementing the Convention and Revised Recommendation.
- Regular provision of information to the public on the Working Group's programs and activities and on

implementation of the Convention and Revised Recommendation.

Operation of the Working Group

To carry out its mandate, the Working Group agreed at its July 1998 meeting to certain modalities concerning the system of self-evaluation and peer group evaluation provided for in the Convention and Revised Recommendation. These modalities are summarized below and are also available on the OECD's public website at http://www.oecd.org/daf/nocorruption/selfe.htm.

The monitoring process has been divided into two stages, an implementation phase (Phase I) and an enforcement phase (Phase II). The objective of Phase I is to evaluate whether a party's implementing legislation meets the standards set by the Convention and the Revised Recommendation. The objective of Phase II is to study and assess the structures and methods of enforcement put in place by countries to enforce the application of those laws.

Phase I began in the latter part of 1998 with the distribution of a questionnaire to signatories soliciting information on how their respective laws and legal systems implement the Convention and the Revised Recommendation. The Working Group was instructed to report on the results of the Phase I review to the OECD Ministers at their annual meeting to be held on June 26–27, 2000. An ad hoc subgroup of the Working Group is now developing procedures and questionnaires for the start-up of Phase II.

The Phase I questionnaire contained a comprehensive list of questions on how parties intend to fulfill their obligations under the Convention and the Revised Recommendation. Countries were asked, among other things, to:

- Provide the dates on which the Convention was signed and ratified, necessary implementing legislation was enacted, and the Convention entered into force.
- Review how each of the substantive provisions of the Convention, from the elements of the offense (Article 1) to extradition (Article 10), is implemented.
- Explain their laws and policies regarding the tax deductibility of bribes, accounting requirements, external audit and internal company controls, public procurement, and international cooperation.

To encourage a candid and frank discussion among the Working Group members in evaluating each other's laws, the Working Group agreed that questionnaire responses would be treated as confidential.

The questionnaire responses were circulated to participants in the Working Group and served as the primary basis of analysis for each country examined. At the onset of the monitoring process, each signatory provided the OECD secretariat with the names of two experts to serve as lead examiners in monitoring implementation. The secretariat thereafter developed a timetable for countries to be examined. A team of lead examiners drawn from two states conducted the examination with the assistance of the secretariat.

At the first monitoring session, held April 12–14, 1999, the Working Group examined the implementing legislation of the United States, Norway, and Germany. Since then, the legislation of additional signatories has been reviewed: Finland, Bulgaria, Greece, Canada, and Korea in July 1999; Japan, Hungary, Belgium, Sweden, and Iceland in October 1999; Australia, Austria, and the United Kingdom in December 1999; Mexico, the Slovak Republic, and Switzerland in February 2000; and the Czech Republic and Spain in March 2000.

Several weeks before each Working Group meeting to examine implementing legislation, the OECD secretariat prepares a draft analysis and questions based on the country's responses to the Phase I questionnaire. The designated lead examiners also prepare advance written questions. The examined country then provides written responses to the secretariat's analysis and to the questions posed. At the beginning of each segment of the monitoring meeting, the designated lead examiners and the examined country have the opportunity to make general opening remarks. The lead examiners begin the questioning and discussion by raising issues that were unresolved during the written exchange stage. A discussion and consultation within the Working Group follows. The lead examiners and the secretariat, in consultation with the examined country, then prepare a summary report and a set of recommendations that must be approved by the Working Group.

Working Group members have agreed to keep the summaries and recommendations confidential until the OECD ministers have approved publication of the report. When the OECD releases the report, a link will be provided on the Department of Commerce's website (http://www.mac.doc.gov/tcc/index.html). The OECD Council is expected to approve the release at the ministerial meeting on June 26–27, 2000.

Although Working Group proceedings are confidential, the monitoring process still provides ample opportunities for input by the private sector and nongovernmental organizations. Transparency International has submitted its own assessment of the implementing legislation of a number of the examined countries. In addition, the American Bar Association has provided input with regard to the Foreign Corrupt Practices Act (FCPA)

and on how the FCPA had affected the behavior of U.S. companies.

The Working Group also encourages private sector input through other channels. It has had a number of consultations on the Convention with the Business and Industry Advisory Committee and the Trade Union Advisory Committee (two officially recognized OECD advisory bodies), Transparency International, the International Chamber of Commerce, and international bar groups. Prior to Working Group meetings, U.S. delegates consult with representatives of the private sector and nongovernmental organizations to identify issues of particular concern. The United States will continue to advocate broad public access to information on implementation and enforcement of the Convention.

The Phase I process has proven to be highly useful for monitoring implementation of the Convention. The process is facilitating an open exchange of information among Working Group members and providing opportunities for the private sector to present its views and analysis for consideration.

The timing of Phase II monitoring of enforcement is still under review. Some countries have resisted the initiation of Phase II until more signatories have enacted implementing legislation and brought the Convention in force. The United States has supported the initiation of Phase II activities before the end of 2000 as originally scheduled. We are concerned that implementation of the Convention may lose momentum if Phase II does not begin soon. To help start the process and provide a benchmark for subsequent reviews, the United States has offered to be the first country to have its enforcement regime examined.

Review of enforcement is an important part of U.S. government monitoring of the Convention. Future reports should provide more detailed information on enforcement activities as governments begin to confront cases involving bribery of foreign public officials and a record of enforcement action develops. In addition, the U.S. government will also, where appropriate, apprise other governments of information relating to the bribery of foreign public officials by persons falling within their jurisdiction.

Monitoring of the Convention by the U.S. Government

The U.S. government is devoting considerable resources to monitoring implementation of the Convention. At the Commerce Department, monitoring compliance with the Convention—and international commercial agreements generally—has a high priority because, as Secretary Daley has repeatedly emphasized, "Compliance is the true litmus test for what we achieve in our negotiations and trade practices." Other U.S. agencies are also actively involved and making important contributions. The Commerce, State, Justice, and Treasury departments and the staff of the SEC are working as an interagency team to monitor implementation and enforcement of the Convention. Each agency brings its own expertise and has a valuable role to play.

Participation in the OECD Working Group on Bribery is an important part of the U.S. government monitoring process. As part of that process, attorneys in the Commerce Department's Office of General Counsel, the State Department Legal Adviser's Office, and the Justice Department's Criminal Division make an in-depth review of each party's implementing legislation.

Preparation of these annual reports to Congress also helps to strengthen the monitoring process within the U.S. government. To fulfill the IAFCA's reporting requirement, the Commerce Department organizes an interagency task force early in the year to coordinate work on the Congressional report and review ongoing initiatives to monitor the Convention over the longer term. U.S. embassies in signatory countries assist in this process by obtaining information on host government laws and making assessments of progress in implementing the Convention, taking into account the views of both government officials and private sector representatives. These diplomatic reports provide valuable information for our analysis.

The U.S. government has welcomed private sector input in monitoring the Convention. U.S. officials have had numerous contacts with the business community and nongovernmental organizations on the Convention. We have highly valued their assessments and the expertise that they can bring to bear on implementation issues in specific countries.

In the year ahead, the Department of Commerce, in close collaboration with the State and Justice departments and other responsible agencies, plans to continue its vigorous monitoring of the Convention. The following specific actions will be taken.

- The Department of Commerce will continue to ensure that there is an integrated approach to monitoring that includes legal assessments of implementing legislation, outreach to the private sector, appropriate diplomatic initiatives, and timely analysis of the latest developments on international bribery and corruption.
- The Trade Compliance Center, which has responsibility in the Commerce Department for monitor-

ing compliance with international trade agreements with the United States, and the Office of General Counsel will continue to give heightened attention to bribery in international business transactions and implementation of the Convention. This effort will include strong outreach to the U.S. business community and nongovernmental organizations. The Trade Compliance Center will, in close cooperation with the Office of General Counsel and interested U.S. agencies, also continue to oversee preparation of the annual reports to Congress required by the IAFCA.

- Enforcement of implementing legislation is critical to ensuring that the Convention is effective in deterring the bribery of foreign public officials in international transactions. When information is received relating to acts of bribery that may fall within the jurisdiction of other parties to the Convention, the information will be forwarded, as appropriate, to national authorities for action.
- The Department of State will continue to use its Advisory Committee on International Economic Policy (ACIEP) to obtain private sector views concerning the Convention and to keep nongovernmental organizations abreast of progress in the fight against corruption. Over the past year, the ACIEP discussed implementation of the Convention at three of its meetings.
- The Departments of Commerce and State, working with other U.S. agencies, will support active diplomatic and public affairs efforts to promote the goals of the Convention. Senior officials will continue to include points on the Convention in their meetings with foreign government officials and speeches to U.S. and foreign audiences. U.S. diplomatic missions will be kept informed of current developments on the Convention so they can effectively participate in the monitoring process and engage foreign governments in a dialogue on key bribery-related issues.

The United States has the most intensive monitoring program of any of the signatory countries. It is transparent and open to input from the private sector and nongovernmental organizations. The U.S. government will continue giving a high priority to monitoring implementation of the Convention so that U.S. businesses can fully realize the benefits of this important international agreement.

4

Laws Prohibiting Tax Deduction of Bribes

The OECD Council made an important contribution to the fight against bribery in 1996 by recommending that member countries that had not yet disallowed the tax deductibility of bribes to foreign public officials should reexamine such treatment with the intention of denying deductibility. This recommendation was reinforced in the OECD Council's 1997 Revised Recommendation on Combating Bribery in International Business Transactions, which laid the foundation for negotiation of the OECD Antibribery Convention. All thirty-four signatories to the Convention have agreed to implement the OECD Council's recommendation on denying the tax deductibility of bribes.

As part of the monitoring process on the Convention and the OECD Council's recommendation, the OECD gathers information on signatories' laws implementing the recommendation on tax deductibility. Information on current and pending tax legislation regarding the tax deductibility of bribes is available on the OECD website (http:www.oecd.org/daf/nocorruption/instruments.htm). Since 1998, the OECD has posted country-by-country descriptions of the treatment of the tax deductibility of bribes in signatory countries and a summary of pending changes to their laws. The information on the website is based entirely on reports that the signatories themselves provide to the OECD secretariat.

The Treasury Department relied heavily on these reports from signatories to prepare the report in Chapter 4 on laws prohibiting the tax deductibility of bribes. Treasury also drew on information obtained from U.S. embassies on this issue. The 2000 report to Congress provides the latest available information on signatories' tax laws that was available from these sources.

We continue to seek more detailed information on the entire body of signatories' tax and bribery laws so that we will have a better understanding of how the disallowance of tax deductibility will be applied in practice. As part of that effort, the Treasury Department is working to ensure that the Committee of Fiscal Affairs, the OECD body responsible for tax issues, takes a more active role in monitoring the progress of countries in implementing the OECD Council's recommendation. In 2000, the Treasury Department made arrangements to provide U.S. technical expertise to the Committee on Fiscal Affairs in order to assist members in their monitoring work. We believe that our information will continue to improve as the OECD's monitoring process creates a more complete record of each signatory's legal, regulatory, and administrative framework for disallowing the tax deductibility of bribes and makes that record publicly available.

Overall Status of Signatories' Laws Regarding the Tax Deductibility of Bribes

Signatories to the Convention have made substantial progress on implementing the OECD Council's recommendation to disallow the tax deductibility of bribes, and further progress is expected in the year ahead. Only

three OECD member countries (Luxembourg, New Zealand, and Switzerland) have reported that they have not yet completed action necessary to disallow these deductions. Luxembourg has drafted legislation to disallow the tax deductibility of bribes, and New Zealand is in the process of doing so. Switzerland's Parliament approved legislation denying the deductibility of bribes in December 1999. The Swiss cantons have until December 2000 to integrate the federal law into their own tax legislation. If they fail to do so, the federal law will become effective. In addition, the French Parliament recently approved a draft amendment that, when the legislation is enacted, will remove "grandfather" provisions from its laws that might have allowed tax deductibility to continue even after the Convention comes into force for France.

Despite important positive steps taken by signatories to the Convention, we remain concerned that tax deductibility is still continuing. France and the Netherlands have changed their tax laws to disallow the tax deductibility of bribes, but these changes become effective for payments to foreign public officials only when each country brings the Convention into force. Even with the Convention in force, deductibility in the Netherlands as well as several other countries that have laws currently in effect (such as Austria, Belgium, and Japan) may continue for one or more of the following reasons. The legal framework may disallow the deductibility of only certain types of bribes or bribes by companies above a certain size. The standard of proof for denying a tax deduction (e.g., the requirement of a conviction for a criminal violation) may make effective administration of such laws difficult. The relevant laws may not be specific enough to deny deductibility of bribes effectively in all circumstances. The United States has noted its concerns about the effectiveness of measures disallowing tax deductibility in diplomatic exchanges with other Convention signatories and at meetings of the OECD Working Group on Bribery and the Committee on Fiscal Affairs.

Because we believe it is vital that the OECD play an active role in critically evaluating the information provided by member countries, we are working within the Committee on Fiscal Affairs to ensure that adequate resources are devoted to ongoing monitoring of the OECD Council's recommendation on tax deductibility. Committee members support our position. Several members are joining the United States in helping the committee prepare a manual that will assist countries in enforcing the nondeductibility rules and will also enable the committee to better perform its monitoring function. With this and other U.S. assistance, we are confident that the committee will continue to develop more reliable methodologies for monitoring implementation of the OECD Council's recommendation.

The purpose of describing the limitations of country laws in the tax deductibility of bribes is to ensure continued focus on improving the situation. Whatever the nature of the legal or administrative loophole that makes it possible to deduct a bribe to a foreign public official, the practice must be eliminated. Further, it must be recognized that enactment of rules denying deductibility is only the first step. Careful monitoring is needed to ensure that the rules are actually enforced.

Report on Country Laws Relating to the Tax Deductibility of Bribes

Argentina

Tax deductibility of bribes paid to foreign public officials is not allowed.

Australia

On May 31, 2000, Australia enacted a new law (Taxation Laws Amendment (No. 2) 2000) that amends the Australian Income Tax Assessment Act of 1997 to explicitly disallow the tax deductibility of losses or payments that are bribes to foreign public officials. The disallowance of such losses and payments became effective on the date of enactment of the new law.

Austria

According to legislation passed in late October 1998, bribes paid to foreign public officials are generally no longer deductible for income tax purposes. The Tax Amendment Law of 1998, published in *Bundesgesetzblatt* (Federal Law Gazette) number I/28 of January 12, 1998, amended Section 20, paragraph 1, subparagraph 5 of the Income Tax Act. Under the new legislation, any cash or in-kind remuneration whose granting or receipt is subject to criminal punishment is not deductible from taxable income. The disallowance applies to bribes that are subject to criminal punishment under the Criminal Code, which was amended in August 1998 to extend criminal liability to bribery of foreign public officials. A deduction may be disallowed before a finding of a criminal violation. However, if no criminal violation is found in a court proceeding, the tax administration may have to allow the tax deduction.

Belgium

A bill aimed at criminalizing bribes to foreign public officials and denying the deductibility of so-called

"secret commissions" paid in order to obtain or maintain public contracts or administrative authorizations was adopted by the Senate on July 9, 1998, and by the House of Representatives on February 4, 1999. It was published in the Official Journal on March 23, 1999, and entered into force on April 3, 1999. However, the new law does not disallow the deductibility of all bribes to foreign public officials.

Other types of commissions paid to foreign public officials will remain deductible if such commissions do not exceed reasonable limits, are necessary to compete against foreign competition, and are recognized as a normal customary practice in the relevant country or business sector (i.e., necessary, usual, and normal in the given sector). A tax equal to at least 20.6 percent of the commission must be paid whether or not the commission is deductible. The taxpayer must present a request and disclose to the tax administration the amount and the purpose of the commissions for the tax administration to decide whether the commission is deductible. If all these conditions are not fulfilled, the deductibility of the commissions is denied, and they are added back to the taxable income of the payer. If the payer is a company, it is liable to a special tax equal to 309 percent of the amount of the bribe.

Brazil

Brazil does not allow tax deductibility of bribes to foreign public officials.

Bulgaria

Bulgarian tax legislation does not allow tax deductibility of bribes to foreign public officials. Bribery is a criminal activity under Bulgaria's criminal code. The deduction of bribes in the computation of domestic taxes is not permitted. This disallowance, however, is not explicit in Bulgaria's tax legislation.

Canada

Since 1991, the Income Tax Act has disallowed the deduction as a business expense of payments in connection with a bribe in Canada of a foreign public official or a conspiracy to do so. Specifically, effective for outlays or expenses after July 13, 1990, Section 67.5 of the Income Tax Act states that any payment that would be an offense identified in several provisions of the criminal code (including bribes and conspiracy to pay bribes to foreign public officials, or persons or companies connected to foreign public officials) is not deductible for income tax purposes. This provision also waives the normal statute of limitations so that an amount may be disallowed any time it is identified no matter how long after it has been paid.

Chile

Chilean tax legislation does not contain specific provisions or rules concerning bribes paid to foreign public officials. Because bribe payments are not considered to be compulsory payments, they are not deductible.

Czech Republic

Czech taxation law and regulations do not allow deductions of bribes paid to foreign public officials. Deductibility is not possible even in cases where the bribe could be treated as a gift. Gifts are deductible only in exceptional cases under two specific conditions. The gift must be made for one of the following specific purposes: science, education, culture, fire protection, or some other social, charitable, or humanitarian purposes. The gift must not be above a strictly determined percentage of the tax basis. Only if both conditions are fulfilled can the gift be treated as deductible for tax purposes. Although Czech law has never permitted the deduction of bribes, this prohibition has never been made explicit in legislation. The Czech Republic has indicated, however, that it intends to amend its tax law with an explicit statement that bribes cannot be deducted. Such legislation is expected to enter into force on January 1, 2001.

Denmark

The Danish Parliament adopted the bill proposed by the government to deny the deductibility of bribes to foreign public officials. The legislation came into force on January 1, 1998.

Finland

Finland does not have statutory tax rules concerning bribes to foreign public officials. Similar payments to domestic public officials are nondeductible on the basis of case law and the practice of the tax administration. It is expected that this case law would also apply to disallow deductions for bribes paid to foreign public officials. On this basis, the tax administration in practice currently denies deductions for bribes to foreign public officials.

France

The French Parliament passed legislation denying the tax deductibility of bribes to foreign public officials on December 29, 1997, as part of the Corrective Finance Bill for 1997. The law does not allow the deduction of amounts paid or advantages granted directly or through intermediaries to foreign public officials within the mean-

ing of Article 1.4 of the Convention. As originally enacted, the legislation was "grandfathered," in that it did not disallow deductions for bribes tied to pre-existing contracts. Responding to criticism by other OECD members, including the United States, the French Parliament voted in February 2000 to remove the grandfather provision in the tax legislation. This amendment, which is included in the draft implementing legislation on the Convention, will take effect when the legislation is passed and the Convention comes into force for France (i.e., sixty days after France deposits an instrument of ratification with the OECD).

Germany

Under previous German tax law, deductions or bribes were disallowed only if either the briber or the recipient had been subject to criminal penalties or criminal proceedings which were discontinued on the basis of a discretionary decision by the prosecution. Legislation adopted on March 24, 1999, eliminated these conditions and denied the tax deductibility of bribes. The revised legislation is paragraph 4, Section 5, sentence 1, number 10 of the *Einkommensteuergesetz* in the *Steuerentlastungsgesetz* of March 24, 1999, as published in the *Bundesgesetzblatt* dated March 31, 1999 (BGBl I S. 402).

Greece

Greece does not allow the deductibility of bribes to foreign public officials.

Hungary

Hungary does not allow the deductibility of bribes to foreign public officials, since only expenses covered in the tax laws are deductible, and the tax laws do not include a specific reference to bribes.

Iceland

Since June 1998, Iceland has not allowed the deductibility of bribes to foreign as well as domestic public officials and officials of international organizations on the basis of law (Section 52 of the Act No. 75/1981 on Tax on Income and Capital as amended by Act No. 95/1998).

Ireland

It is the view of the Irish Revenue Commissioners, on the basis of legal advice received, that bribes paid to foreign public officials are not deductible in principle. These authorities doubt that the conditions for deductibility could ever be met in practice in Ireland. Therefore, Ireland has not considered it necessary to introduce specific legislation to deny a deduction.

Italy

Italy does not allow deductions for bribes paid to foreign public officials. Legislation enacted in 1994 made gains from illicit sources taxable. The nondeductibility of bribes was unaffected by this 1994 legislation.

Japan

Bribes to domestic public officials as well as foreign public officials are treated as "entertainment expenses" under Japanese law. Such expenses are generally not deductible. However, small companies (with capital not exceeing approximately $500,000) can get a deduction for entertainment expenses. If a bribe is not recorded as an entertainment expense, a penalty tax is imposed.

Korea

Korea does not allow deductions for bribes paid to foreign public officials since they are not considered to be business-related expenses.

Luxembourg

The Minister of Justice and Budget has prepared draft legislation that would criminalize bribes to foreign public officials as well as deny their tax deductibility. At present, Luxembourg allows deductions for bribes paid to foreign public officials as any business expense.

Mexico

Mexico does not allow the deductibility of bribes to foreign public officials since they would not meet the general requirements to qualify as deductible expenses. Such expenses must be strictly essential for the purposes of the taxpayer's activities and must be formally documented. Considering that bribes are treated as illicit activities, such payments cannot meet the requirements set forth in the Mexican Commerce Code. Therefore, the payment of a bribe is not a business activity and is not a deductible item.

The Netherlands

A law that entered into force as of January 1, 1997, denies the deductibility of expenses in connection with illicit activities if a criminal court has ruled that a criminal offense has been committed. This law will apply to bribes of foreign public officials only when Dutch criminal law is amended to ensure that bribery of foreign public officials is a criminal offense.

Until the criminal law incorporating the provisions of the Convention into Dutch law is brought into effect, bribes of foreign government officials will remain deductible unless certain conditions are met. Although there is no jurisprudence on the question, the Netherlands has

indicated that, according to well-established opinion, bribery of a foreign public official committed outside the territorial jurisdiction of the Netherlands constitutes, if certain conditions are met, the criminal offense of falsification of documents or fraud or imposture.

Under the1997 law, an income tax deduction is denied for costs connected with a criminal offense for which the taxpayer has been irrevocably convicted by a Dutch criminal judge or has met the conditions of a settlement in lieu of conviction. The period between the deduction of costs connected with a criminal offense on the one hand and the conviction for a criminal offense or a settlement in lieu of conviction on the other hand normally takes several years. The law provides that these deductions will be disallowed and added back to income only if the bribe payment took place within the five years preceding the year of the conviction or of meeting the conditions of the settlement. The bribe payment is added back to income in the year in which the conviction becomes irrevocable or the year in which the conditions of the settlement are met.

New Zealand

Legislation is being prepared to disallow deductions for bribery. At present, deductions are allowed for bribes paid to foreign officials, provided the recipient is identified.

Norway

Under Section 44, paragraph 1, litra a, subparagraph 5 of the Norwegian Tax Law, which was passed on December 10, 1996, Norway does not allow deductions for bribes paid to foreign private persons or public officials.

Poland

Poland does not allow the deductibility of bribes to foreign public officials. According to Polish law, bribery is illegal and an offense for both the briber and the recipient of the bribe, and both are punishable. The provisions of the Corporate Tax Act and Personal Income Tax Act are not applicable to illegal activities. Therefore, gains and expenses connected with the offense of bribery cannot be taken into account by the tax authorities. As a result, the taxpayer is not allowed to deduct them from his income expenses concerning bribes to foreign officials.

Portugal

Portugal does not allow the deductibility of bribes to foreign public officials. On December 20, 1997, Parliament adopted new legislation, effective January 1, 1998, to disallow any deduction referring to illegal payments, such as bribes, to foreign public officials.

Slovak Republic

The Slovak Republic does not allow deductions of bribes to foreign public officials or private persons. Bribes are not considered business-related expenses. Recipients of bribes are liable to criminal prosecution. Expenses related to any bribes are not deductible for taxation purposes.

Spain

Spain does not allow deductions for bribes paid to foreign public officials.

Sweden

A bill explicitly denying the deductibility of bribes and other illicit payments to foreign public officials was adopted by the Swedish Parliament on March 25, 1999, and became effective on July 1, 1999.

Switzerland

A draft bill on the denial of tax deductibility of bribes to foreign public officials was submitted in spring 1998 to the cantons and other interested parties for consultation. (Matters of direct taxation are mostly within the competence of the cantons.) The bill was then submitted to the national parliament and passed in December 1999. The legislation is an outline law, and the cantonal parliaments are to integrate its provisions into cantonal tax law by December 2000. Should they fail to do so, the provisions of the federal law on direct taxes become directly applicable at the canton level.

Until such legislation becomes effective, under longstanding administrative practice in Switzerland, bribe and commission payments to non-Swiss recipients are considered business expenses, provided that their effective payment and their relationship to the business of the corporate taxpayer is proven.

Turkey

Turkey does not allow deductions for bribes paid to foreign public officials because there is no explicit rule allowing the deductibility of bribes. Although a possible loophole could allow Turkish corporations operating overseas to deduct bribes in certain circumstances, legislation to implement the Convention, which is currently being reviewed, would eliminate this loophole.

United Kingdom

Under Section 577A of the Income and Corporations Tax Act 1988, enacted under the U.K. Finance Act of 1993, the U.K. does not allow deductions for any bribe if that bribe is a criminal offense, contrary to the Preven-

tion of Corruption Acts. The U.K. has declared that the Prevention of Corruption Acts apply to bribes to foreign public officials. If any part of the offense is committed in the U.K.—for example the offer, agreement to pay, the soliciting, the acceptance, or the payment itself—it would violate the Prevention of Corruption Acts and would then not qualify for tax relief. In addition, U.K. tax laws also deny relief for all gifts and hospitality given, whether or not for corrupt purposes.

United States

The United States does not allow deductions for bribes paid to foreign government officials if that bribe is a criminal offense. Both before and after the United States criminalized bribery of foreign government officials, it denied tax deductions for such payments. Before the enactment of the Foreign Corrupt Practices Act of 1977, tax deductions were disallowed for payments that were made to an official or employee of a foreign government and that were either unlawful under U.S. law or would be unlawful if U.S. laws were applicable to such official or employee. The denial of the tax deduction did not depend on a conviction in a criminal bribery case.

After the United States criminalized bribery of foreign government officials, U.S. tax laws were changed to disallow tax deductions for payments that are unlawful under the Foreign Corrupt Practices Act of 1977 (FCPA). With respect to U.S. tax provisions for Controlled Foreign Corporations, any payment of a bribe by a foreign subsidiary is treated as taxable income to the U.S. parent. Also, to the extent relevant for U.S. tax purposes, bribes of foreign officials are not permitted to reduce a foreign corporation's earnings and profits. U.S. denial of tax deductibility or reduction of earnings and profits does not depend on whether the person making the payment has been convicted of a criminal offense. On tax deductibility, the Treasury Department has the burden of proving by clear and convincing evidence that a payment is unlawful under the FCPA.

5

Future Negotiations to Strengthen the Convention

During the negotiation of the Convention, the United States sought to include coverage of bribes paid to political parties, party officials, and candidates for public office. These important channels of bribery and corruption are covered in the FCPA. They are not, however, specifically covered in the Convention.

The United States has repeatedly expressed its concern that failure to prohibit the bribery of political parties, party officials, and candidates for office may create a loophole through which bribes may be directed in the future. Although since 1977 the FCPA has prohibited the bribery of these persons and organizations and no such loophole in U.S. law has existed, our experience has shown that such bribery may be effective. In fact, the very first case brought under the FCPA involved a payment to a political party and party officials. In the fight against corruption, bribes to political parties, party officials, and candidates are no less pernicious than bribes to government officials.

The United States was not able to convince other signatories to include this broader coverage of bribery in the Convention. We did succeed, however, in getting signatories to keep this issue and certain other issues under study. In all, five issues were identified by the OECD Council in December 1997 for additional examination:

- Bribery acts in relation to foreign political parties.
- Advantages promised or given to any person in anticipation of that person becoming a foreign public official.
- Bribery of foreign public officials as a predicate offense for money laundering legislation.
- The role of foreign subsidiaries in bribery transactions.
- The role of offshore centers in bribery transactions.

Although not addressed by the OECD Council, private sector bribery and the question of whether the obligations of the Convention should be extended to include an explicit prohibition of payments to immediate family members of foreign public officials are also of interest to the United States. These issues remain under review within the U.S. government.

The United States has continued to raise its concerns about broadened coverage at OECD meetings and also with signatory governments on a bilateral basis, and has insisted that this subject remain on the OECD agenda for further discussion. However, given the lack of consensus on expanding coverage, the United States has made its highest priority encouraging all signatories to complete ratification and implementation of the existing Convention as soon as possible.

Outstanding Issues Relating to the Convention

Political Parties, Party Officials, and Candidates

Over the past year, the United States has sought to keep the issue of bribes to foreign political parties, party officials, and candidates for office on the OECD's agenda. We have, however, faced indifference and even strong resistance from many signatories. Most countries are of the view that signatories should implement the Convention as it is and monitor implementation over time to see whether changes are necessary.

Nonetheless, at the May 1999 OECD ministerial meeting, ministers did endorse further consideration of all five issues as part of the OECD's work to strengthen the fight against corruption. Since then, the U.S. delegation has regularly raised the issue of further coverage at Working Group meetings and pressed to keep this issue on the agenda. The delegation made particularly strong statements on the importance of addressing coverage of political parties, party officials, and candidates at the Working Group meetings in December 1999 and March 2000. While Working Group members have been reluctant to engage in further discussion of revising the Convention, they did accept the U.S. recommendation to include an update on issues related to bribery coverage and the other outstanding issues in the June 2000 report to the OECD ministerial meeting. Clearly, however, developing support for strengthening the Convention, particularly regarding the bribery of political parties, party officials, and candidates for public office, will require a longer-term effort as most signatories have yet to accept the need for any changes to the Convention.

Bribery as a Predicate Offense to Money Laundering

With regard to the relationship between bribery and money laundering legislation, Article 7 of the Convention requires a party that has made bribery of its own public officials a predicate offense for applying its money laundering legislation do so on the same terms for the bribery of a foreign public official. A potential problem arises in that there could be uneven application of the Convention between parties that make bribery of domestic officials a predicate offense for purposes of money laundering legislation and those that do not.

Many signatory countries, particularly the European and civil law countries, define money laundering as the concealment of proceeds from all "serious crimes," as that term is defined under their domestic legislation. Others, like the United States, define predicate crimes in domestic legislation by cross-referencing a list of other specific offenses or statutory provisions.

How jurisdictions define "serious" cannot be generalized. Definitions are based on individual domestic legal systems in each country (i.e., punishable by imprisonment of a certain period of time or roughly the distinction between a misdemeanor and a felony).

Thus, if all parties to the Convention would make bribery a serious offense for the purposes of domestic money laundering legislation, there would seem to be no need for going beyond the requirements in Article 7 of the Convention. Language endorsing the application of bribery as a predicate offense for money laundering was included in the G-8 conclusions at Moscow in October 1999. Since then, a consensus appears to have emerged within the entire Working Group on Bribery, including the G-8 countries, on the need to make bribery a predicate offense for money laundering legislation.

In November 1999, the Administration sent to Congress the Money Laundering Act of 2000. The proposed legislation expands the list of foreign crimes that may serve as a predicate offense for a money laundering prosecution when the proceeds of the crime are laundered in the United States. Among the crimes included in this expanded list is fraud against a foreign government. If enacted, this provision would permit the United States to prosecute, as a violation of American anti-money laundering laws, the laundering of the proceeds of the bribery of a foreign government official.

The Role of Foreign Subsidiaries

Foreign-incorporated subsidiaries are potentially subject to the law of the country in which they are incorporated and the law of any country in which they operate or in which they take any action in furtherance of an unlawful payment. Thus, as an example, a foreign-incorporated subsidiary of an American company, just like any foreign company, is subject to the FCPA if it takes any act in furtherance of the offer, promise to pay, payment, or authorization of an offer, promise, or payment of a bribe within U.S. territory. We understand that other parties to the Convention may assert a similar form of territorial jurisdiction although there are some gaps in the coverage of extraterritorial acts by corporations.

No OECD member country holds parent corporations absolutely liable for the criminal acts of their subsidiaries. In the United States and other Convention signatories that impose liability on legal persons, parent cor-

porations may be held liable only for the acts of their subsidiaries that are authorized, directed, or controlled by the parent corporation. The United States has, therefore, urged further examination of strong standards of corporate governance, business ethics, and international accounting standards to ensure that foreign subsidiaries do not use their independence to obtain business through means prohibited to their parents.

The Role of Offshore Financial Centers

On the role of offshore financial centers, there appears to be broad agreement on the need to encourage adherence to internationally accepted minimum standards in the areas of anti–money laundering, financial regulation, company law, and mutual legal assistance. These issues are not exclusive to offshore centers, nor are they restricted to the fight against bribery and corruption. The Working Group has dedicated two sessions to the issue of offshore centers to determine the significance of the problem as it relates to bribery of foreign public officials and whether there are aspects of the problem not being dealt with in other forums that might benefit from Working Group activity. This work continues.

Compliance with international norms is a focal point of the Financial Stability Forum's Working Group on Offshore Financial Centers, while the Financial Action Task Force's Ad Hoc Group on Noncooperative Countries and Territories is concentrating on the ability and willingness of jurisdictions to cooperate in the fight against money laundering. Other international forums with initiatives on related issues are the United Nations, the European Union, the Council of Europe, and the G-8. Bribery transactions frequently are carried out, at least in part, in jurisdictions that do not participate in arrangements for international cooperation. This greatly complicates multilateral efforts to promote transparency in financial and commercial transactions and greater mutual legal assistance.

Other Issues Relating to Coverage

Immediate Family Members of Foreign Public Officials

In the Working Group on Bribery, the United States has informally raised the question of whether the Convention provides adequate coverage of bribes paid to immediate family members of foreign public officials. There is general agreement that bribes paid to a government official through a family member—either at the direction of a corrupt foreign official or where there is an understanding that the family member will pay some or all of the bribe to the official or the official will otherwise benefit—is adequately covered by the Convention. Since all bribes paid to officials through intermediaries are already covered, we thus far have found no support for expanding the Convention to provide for an explicit prohibition against bribes paid to immediate family members in the absence of the direction of a government official or absent the intent or expectation of the bribe payor that all or a part of the bribe will be paid to a government official or the official will otherwise benefit. Indeed, we do not provide in our FCPA for coverage of payments to family members apart from such cases.

In the ongoing process within the OECD of reviewing the implementation of the Convention by each party, we will continue to examine whether bribes paid to immediate family members may provide a loophole of sufficient magnitude so as to undermine effective implementation of the Convention.

Private Sector Corruption and Other Issues

The issue of private sector corruption, which goes beyond the scope of the Convention, has been addressed in two sessions of the Working Group and in informal consultations with representatives of civil society, notably the OECD Trade Union Advisory Committee (TUAC) and the Business and Industry Advisory Committee (BIAC). The Working Group concluded in July 1999 that the question of bribery within the private sector was largely undefined and unexplored, but nevertheless important. The Working Group is awaiting an International Chamber of Commerce study of bribery within the private sector that should be completed within two years. The Working Group has not addressed the question of corruption of officials for purposes other than to obtain or retain business.

The Working Group sessions with TUAC and BIAC have also dealt with the solicitation of bribes and the protection of whistle-blowers (either within government or business) who come forward to expose corruption. Discussion to date has not produced a suitable means for addressing the solicitation of bribes by government or corporate officials. Solicitation remains on the agenda of the Working Group as an area of concern and possible follow-up in the context of the 1997 OECD Council Recommendation on Combating Bribery in International Business Transactions. Whistle-blowing, however, is a subject that goes beyond the scope of bribery of foreign public officials, and thus the Working Group has deferred immediate follow-up action. The issue could be revisited in connection with the Phase II monitoring of the implementa-

tion of the Convention and in a future review of the 1997 OECD Council Recommendation.

In addition, the Working Group has been examining private sector corruption in terms of the relationship between the Convention and related OECD anticorruption initiatives and the OECD Guidelines for Multinational Enterprises. The OECD guidelines, initially adopted in 1976, are nonbinding recommendations addressed by OECD member countries to multinational enterprises operating in their territories. The guidelines are currently undergoing review in the Committee on International Investment and Multinational Enterprises. CIME is considering the best means of reflecting in the guidelines the OECD's intensified anticorruption activities.

In April 2000, Transparency International presented to the Working Group a major new study on accounting issues. Transparency International directed a private sector task force which collected and analyzed data to assist the Working Group in developing expertise with regard to: books and records; internal controls; and auditing practices. The study documented current practices in sixteen countries, including the ten largest exporters, and developed both general and country-specific findings. Requirements in the areas of financial transparency and accountability are important in the fight against bribery since they deter use of slush funds and help guard against coverups.

Conclusion

During the monitoring of the implementation and enforcement of the Convention, we will continue to raise the above issues with other Working Group members. We will also work closely with the private sector and nongovernmental organizations to convince the other parties to the Convention that additional prohibitions on bribe offers and payments will strengthen the Convention and advance our common goal of eliminating bribery in international business transactions. We expect that other parties will show more interest in private sector issues, such as whistle-blowing and books and records provisions, as they begin enforcing their antibribery laws under the Convention. At that point, these issues will become a more practical and less theoretical concern.

6

Expanding the Membership of the Convention

In mid-1999 the OECD secretariat sought guidance from signatories about how to deal with the increasing number of requests for accession to the Convention. The primary focus of the United States and the Working Group on Bribery was then, and continues to be, the completion of ratification and implementation of the Convention by all thirty-four signatory states. It has become clear, however, that a targeted expansion of Convention membership to appropriate states could make a significant contribution to the general elimination of bribery of foreign public officials in international business transactions.

Despite this general agreement and existing guidance in the Convention and its Commentaries on the subject of expansion, the Working Group initially was unable to agree on a selection mechanism or precise criteria for new signatory states. That signatories anticipated further expansion is clear enough. Article 13.2 of the Convention provides that it shall be open to accession by nonsignatories that have become full participants in the OECD Working Group on Bribery or any successor to its functions. In the OECD Commentaries on the Convention, nonsignatories are encouraged to participate in the Working Group provided that they accept the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions and the 1996 OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials. These conditions, in effect, put in place some selection principles.

Faced with a lack of consensus on how to put general encouragement and basic selection principles into practice, the Working Group asked the United States to lead an ad hoc group to define criteria and entrance procedures for Working Group membership and Convention accession. Over the course of several months in the latter half of 1999, the ad hoc group produced an approach that should permit a selective increase in signatory states. It should also eliminate inappropriate motivations for membership or accession (e.g., use of accession as a prestige symbol or as a stepping stone to participation in other OECD bodies). In presupposing a slow expansion and limiting it to carefully chosen states, the policy proposals also were intended to preserve the critically important ability of the Working Group to continue its effective evaluation of Convention implementation and, equally significant, to not hinder the near-term start of enforcement reviews or broadening of Working Group attention to new issues.

Accession and membership proposals developed by the U.S.-led group were approved by the full Working Group in October 1999. They were put in final form and derestricted for public distribution later in the year. Subsequent discussion in both the ad hoc accession group and the full Working Group sessions then produced a practical application of the original proposals. Essential

elements of the accession criteria include application of an OECD Council resolution that emphasized that signatory states be "major players" and that "mutual benefit" be demonstrated.

The Working Group also agreed that other factors could be taken into account in order to provide some flexibility. For example, it was agreed the term "major player" should apply to states with regional importance or significant market shares in particularly sensitive export sectors where commercial bribery is prevalent. Defense, aviation, construction, and telecommunications were cited as examples. In addition, "mutual benefit" not only was seen as encompassing a readiness to participate constructively in Working Group deliberations, but also was regarded as dependent on the existing legal framework of a prospective signatory, including legislation for the criminalization of bribery. Without such a legal infrastructure, serious doubts were raised by many regarding the ability of a state to participate in the Working Group in a meaningful way.

A first step toward the enlargement of Convention membership was taken at an outreach session on June 5, 2000. Fourteen states and Hong Kong[1] responded to invitations issued by the OECD secretariat. At this information session, accession criteria, Convention obligations, and Working Group activities and admission procedures were explained.

A proposal for a possible anticorruption declaration was also presented to invitees, and their comments were solicited. Such a declaration could be a useful instrument both for current parties to the Convention and for those nonsignatories interested in a closer association with anticorruption activities. It would signal to the OECD and the general business community a readiness to deal firmly with bribery and to cooperate with parties to the Convention. This is seen as a means of letting nonsignatories demonstrate their commitment to an improved investment climate and contribute to better governance standards worldwide.

Several invitees to the outreach session stressed their interest in acceding to the Convention in the near future. In anticipation of an initial review of applicants in October 2000, all participants in the session were asked to respond as soon as possible to a questionnaire seeking information on entrance qualifications. At present it is unclear how many attendees will continue their interest, be offered the opportunity to join the Working Group, and ultimately accede to the Convention. Nevertheless, it would be reasonable to conclude that a small number of qualified applicants could satisfy the conditions for Working Group observership or full membership in the coming year.

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[1]Attendees were Benin, Columbia, Croatia, Estonia, Hong Kong, Latvia, Lithuania, Malaysia, Peru, Romania, Russia, Slovenia, South Africa, Thailand, and Venezuela.

A

Senate Resolution of Advice and Consent of July 31, 1998

Senate of the United States

IN EXECUTIVE SESSION

July 31, 1998

Resolved, *(two-thirds of the Senators present concurring therein),*

That the Senate advise and consent to the ratification of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted at Paris on November 21, 1997, by a conference held under the auspices of the Organization for Economic Cooperation and Development (OECD), signed in Paris on December 17, 1997, by the United States and 32 other nations (Treaty Doc. 105-43), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING. -- The advice and consent of the Senate is subject to the following understanding, which shall be included in the instrument of ratification and shall be binding on the President:

EXTRADITION. -- The United States shall not consider this Convention as the legal basis for extradition to any country with which the United States has no bilateral extradition treaty in force. In such cases where the United States does have a bilateral extradition treaty in force, that treaty shall serve as the legal basis for extradition for offenses covered under this Convention.

(b) DECLARATION. -- The advice and consent of the Senate is subject to the following declaration:

TREATY INTERPRETATION.--The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.-- The advice and consent of the Senate is subject to the following provisos:

(1) ENFORCEMENT AND MONITORING. -- On July 1, 1999, and annually thereafter for five years, unless extended by an Act of Congress, the President shall submit to the Committee on Foreign Relations of the Senate, and the Speaker of the House of Representatives, a report that sets out:

(A) RATIFICATION.-- a list of the countries that have ratified the Convention, the dates of ratification and entry into force for each country, and a detailed account of U.S. efforts to encourage other nations that are signatories to the Convention to ratify and implement it.

(B) DOMESTIC LEGISLATION IMPLEMENTING THE CONVENTION.-- a description of the domestic laws enacted by each Party to the Convention that implement commitments under the Convention, and an assessment of the compatibility of the laws of each country with the requirements of the Convention.

(C) ENFORCEMENT.-- an assessment of the measures taken by each Party to fulfill its obligations under this Convention, and to advance its object and purpose, during the previous year. This shall include:

(1) an assessment of the enforcement by each Party of its domestic laws implementing the obligations of the Convention, including its efforts to:

(i) investigate and prosecute cases of bribery of foreign public officials, including cases involving its own citizens;

(ii) provide sufficient resources to enforce its obligations under the Convention;

(iii) share information among the Parties to the Convention relating to natural and legal persons prosecuted or subjected to civil or administrative proceedings pursuant to enforcement of the Convention; and

(iv) respond to requests for mutual legal assistance or extradition relating to bribery of foreign public officials.

(2) an assessment of the efforts of each Party to:

(i) extradite its own nationals for bribery of foreign public officials;

(ii) make public the names of natural and legal persons that have been found to violate its domestic laws implementing this Convention; and

(iii) make public pronouncements, particularly to affected businesses, in support of obligations under this Convention.

(3) an assessment of the effectiveness, transparency, and viability of the OECD monitoring process, including its inclusion of input from the private sector and non-governmental organizations.

(D) LAWS PROHIBITING TAX DEDUCTION OF BRIBES.-- an explanation of the domestic laws enacted by each signatory to the Convention that would prohibit the deduction of bribes in the computation of domestic taxes. This shall include:

(i) the jurisdictional reach of the country's judicial system;

(ii) the definition of "bribery" in the tax code;

(iii) the definition of "foreign public official" in the tax code; and

(iv) the legal standard used to disallow such a deduction.

(E) FUTURE NEGOTIATIONS.-- a description of the future work of the Parties to the Convention to expand the definition of "foreign public official" and to assess other areas where the Convention could be amended to decrease bribery and other corrupt activities. This shall include:

(1) a description of efforts by the United States to amend the Convention to require countries to expand the definition of "foreign public official," so as to make illegal the bribery of:

(i) foreign political parties or party officials,

(ii) candidates for foreign political office, and

(iii) immediate family members of foreign public officials.

(2) an assessment of the likelihood of successfully negotiating the amendments set out in paragraph (1), including progress made by the Parties during the most recent annual meeting of the OECD Ministers; and

(3) an assessment of the potential for expanding the Convention in the following areas:

(i) bribery of foreign public officials as a predicate offense for money laundering legislation;

(ii) the role of foreign subsidiaries and offshore centers in bribery transactions; and

(iii) private sector corruption and corruption of officials for purposes other than to obtain or retain business.

(F) EXPANDED MEMBERSHIP.-- a description of U.S. efforts to encourage other non-OECD member to sign, ratify, implement, and enforce the Convention.

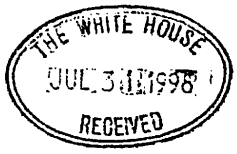
(G) CLASSIFIED ANNEX.-- a classified annex to the report, listing those foreign corporations or entities the President has credible national security information indicating they are engaging in activities prohibited by the Convention.

(2) MUTUAL LEGAL ASSISTANCE. -- When the United States receives a request for assistance under Article 9 from a country with which it has in force a bilateral treaty for mutual legal assistance in criminal matters, the bilateral treaty will provide the legal basis for responding to that request. In any case of assistance sought from the United States under Article 9, the United States shall, consistent with U.S. laws, relevant treaties and arrangements, deny assistance where granting the assistance sought would prejudice its essential public policy interests, including cases where the Responsible Authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior government official who will have access to information to be provided under this Convention is engaged in a felony, including the facilitation of the production or distribution of illegal drugs.

(3) SUPREMACY OF THE CONSTITUTION.--Nothing in the Convention requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.

Attest: Gary Sisco

Secretary.



B

OECD Documents

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

(Signed December 17, 1997)

Preamble

The Parties,

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

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organization for Economic Cooperation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalization of such bribery in an effective and coordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and cooperation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organization, the Organization of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, organizations and trade unions as well as other non-governmental organizations to combat bribery;

Recognizing the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognizing that achieving progress in this field requires not only efforts on a national level but also multilateral cooperation, monitoring and follow-up;

Recognizing that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows:

Article 1 - The Offense of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offense 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 authorization of an act of bribery of a foreign public official shall be a criminal offense. Attempt and conspiracy to bribe a foreign public official shall be criminal offenses to the same extent as attempt and conspiracy to bribe a public official of that Party.

3. The offenses set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official.”

4. For the purpose of this Convention:

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

b. “foreign country” includes all levels and subdivisions of government, from national to local;

c. “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorized competence.

Article 2 - Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3 - Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

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

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4 - Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offenses committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offense described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5 - Enforcement

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

Article 6 - Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7 - Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8 - Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of nonexistent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Article 9 - Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10 - Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

Article 11 - Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12 - Monitoring and Follow-up

The Parties shall cooperate in carrying out a program of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the program in accordance with the rules applicable to that body.

Article 13 - Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.

2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14 - Ratification and Depositary

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.

2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

Article 15 - Entry into Force

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares (see annex), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.

2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16 - Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17 - Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, cooperation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

ANNEX
STATISTICS ON OECD EXPORTS

	1990–96 US$ million	1990–96 % of total OECD	1990–96 % of total 10
United States	287,118	15.9	19.7
Germany	254,746	14.1	17.5
Japan	212,665	11.8	14.6
France	138,471	7.7	9.5
United Kingdom	121,258	6.7	8.3
Italy	112,449	6.2	7.7
Canada	91,215	5.1	6.3
Korea (1)	81,364	4.5	5.6
Netherlands	81,264	4.5	5.6
Belgium-Luxembourg	78,598	4.4	5.4
Total 10	**1,459,148**	**81.0**	**100.0**
Spain	42,469	2.4	
Switzerland	40,395	2.2	
Sweden	36,710	2.0	
Mexico (1)	34,233	1.9	
Australia	27,194	1.5	
Denmark	24,145	1.3	
Austria*	22,432	1.2	
Norway	21,666	1.2	
Ireland	19,217	1.1	
Finland	17,296	1.0	
Poland (1) **	12,652	0.7	
Portugal	10,801	0.6	
Turkey *	8,027	0.4	
Hungary **	6,795	0.4	
New Zealand	6,663	0.4	
Czech Republic ***	6,263	0.3	
Greece *	4,606	0.3	
Iceland	949	0.1	
Total OECD	**1,801,661**	**100.0**	

Notes: * 1990-1995; ** 1991-1996; *** 1993-1996
Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 percent of combined total exports of those ten countries, which is required for entry into force under this provision.

Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on November 21, 1997

General:

This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery," meaning the offense committed by the person who promises or gives the bribe, as contrasted with "passive bribery," the offense committed by the official who receives the bribe. The Convention does not utilize the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

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.

Article 1. The Offense of Bribery of Foreign Public Officials:

Re paragraph 1:

Article 1 establishes a standard to be met by Parties, but does not require them to utilize its precise terms in defining the offense under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offense does not require proof of elements beyond those which would be required to be proved if the offense were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offense in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.

It is an offense within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or wasotherwise a company which could properly have been awarded the business.

"Other improper advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

The conduct described in paragraph 1 is an offense whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

It is also an offense irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

It is not an offense, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offense. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programs of good governance. However, criminalization by other countries does not seem a practical or effective complementary action.

Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offenses described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offenses covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

The offenses set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorization, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

"Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.

A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their de facto performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

"Public international organization" includes any international organization formed by states, governments, or other public international organizations, whatever the form of organization and scope of competence, including, for example, a regional economic integration organization such as the European Communities.

"Foreign country" is not limited to states, but includes any organized foreign area or entity, such as an autonomous territory or a separate customs territory.

One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office—though acting outside his competence—to make another official award a contract to that company.

Article 2. Responsibility of Legal Persons:

In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3. Sanctions:

Re paragraph 3:

The "proceeds" of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

The term "confiscation" includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re paragraph 1:

The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2:

Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offenses, the reference to "principles" includes the principles upon which such selection is based.

Article 5. Enforcement:

Article 5 recognizes the fundamental nature of national regimes of prosecutorial discretion. It recognizes as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD Recommendation"), which recommends, inter alia,

that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

In Article 7, "bribery of its own public official" is intended broadly, so that bribery of a foreign public official is to be made a predicate offense for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offense. When a Party has made only passive bribery of its own public officials a predicate offense for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8. Accounting:

Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offenses referred to in Article 8 will generally occur in the company's home country, when the bribery offense itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to cooperate fully regarding cases whose facts fall within the scope of the offenses described in this Convention.

Article 10. Extradition

Re paragraph 2:

A Party may consider this Convention to be a legal basis for extradition if, for one or more

categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Article 12. Monitoring and Follow-up:

The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

i) receipt of notifications and other information submitted to it by the [participating] countries;

ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:

- a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;

- a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

...v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

Article 13. Signature and Accession:

The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organization, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

Revised Recommendation of the OECD Council on Combating Bribery in International Business Transactions

Adopted by the Council on May 23, 1997

THE COUNCIL,

Having regard to Articles 3), 5a) and 5 b) of the Convention on the Organization for Economic Cooperation and Development of 14 December 1960;

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Considering that enterprises should refrain from bribery of public servants and holders of public office, as stated in the OECD Guidelines for Multinational Enterprises;

Considering the progress which has been made in the implementation of the initial Recommendation of the Council on Bribery in International Business Transactions adopted on 27 May 1994, C(94)75/FINAL and the related Recommendation on the tax deductibility of bribes of foreign public officials adopted on 11 April 1996, C(96)27/FINAL; as well as the Recommendation concerning Anti-corruption Proposals for Bilateral Aid Procurement, endorsed by the High Level Meeting of the Development Assistance Committee on 7 May 1996;

Welcoming other recent developments which further advance international understanding and co-operation regarding bribery in business transactions, including actions of the United Nations, the Council of Europe, the European Union and the Organization of American States;

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalize the bribery of foreign public officials in an effective and coordinated manner;

Noting that an international convention in conformity with the agreed common elements set forth in the Annex, is an appropriate instrument to attain such criminalization rapidly.

Considering the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalization of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

Recognizing that achieving progress in this field requires not only efforts by individual countries but multilateral co-operation, monitoring and follow-up;

General

I. RECOMMENDS that Member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

II. RECOMMENDS that each Member country examine the following areas and, in conformity with its jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal:

i) criminal laws and their application, in accordance with section III and the Annex to this Recommendation;

ii) tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;

iii) company and business accounting, external audit and internal control requirements and practices, in accordance with section V;

iv) banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;

v) public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;

vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;

vii) international co-operation in investigations and other legal proceedings, in accordance with section VII, Criminalization of Bribery of Foreign Public Officials

III. RECOMMENDS that Member countries should criminalize the bribery of foreign public officials in an effective and coordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the

agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

DECIDES, to this end, to open negotiations promptly on an international convention to criminalize bribery in conformity with the agreed common elements, the treaty to be open for signature by the end of 1997, with a view to its entry into force twelve months thereafter.

Tax Deductibility

IV. URGES the prompt implementation by Member countries of the 1996 Recommendation which reads as follows: "that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal."

Accounting Requirements, External Audit and Internal Company Controls

V. RECOMMENDS that Member countries take the steps necessary so that laws, rules and practices with respect to accounting requirements, external audit and internal company controls are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business.

A. Adequate accounting requirements

i) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.

ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.

iii) Member countries should adequately sanction accounting omissions, falsifications and fraud.

B. Independent External Audit

i) Member countries should consider whether requirements to submit to external audit are adequate.

ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls.

iii) Member countries should require the auditor who discovers indications of a possible illegal act of bribery to report this discovery to management and, as appropriate, to corporate monitoring bodies.

iv) Member countries should consider requiring the auditor to report indications of a possible illegal act of bribery to competent authorities.

C. Internal company controls

i) Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.

ii) Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.

iii) Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.

iv) Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

Public procurement

VI. RECOMMENDS:

i) Member countries should support the efforts in the World Trade Organization to pursue an agreement on transparency in government procurement;

ii) Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.(1)

iii) In accordance with the Recommendation of the Development Assistance Committee, Member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.(2)

International Cooperation

VII. RECOMMENDS that Member countries, in order to combat bribery in international business transactions, in

conformity with their jurisdictional and other basic legal principles, take the following actions:

i) consult and otherwise cooperate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;

ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

iii) ensure that their national laws afford an adequate basis for this cooperation and, in particular, in accordance with paragraph 8 of the Annex.

Follow-up and Institutional Arrangements

VIII. INSTRUCTS the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a program of systematic follow-up to monitor and promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

i) receipt of notifications and other information submitted to it by the Member countries;

ii) regular reviews of steps taken by Member countries to implement the Recommendation and to make proposals, as appropriate, to assist Member countries in its implementation; these reviews will be based on the following complementary systems: a system of self-evaluation, where Member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation; a system of mutual evaluation, where each Member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the Member country in implementing the Recommendation.

iii) examination of specific issues relating to bribery in international business transactions;

iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;

v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

IX. NOTES the obligation of Member countries to cooperate closely in this follow-up program, pursuant to Article 3 of the OECD Convention.

X. INSTRUCTS the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate there after, and to review this Revised Recommendation within three years after its adoption.

Cooperation with Nonmembers

XI. APPEALS to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.

XII. INSTRUCTS the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

Relations with International Governmental and Nongovernmental Organizations

XIII. INVITES the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organizations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the nongovernmental organizations and representatives of the business community active in this field.

Notes.

1. Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.

2. This paragraph summarizes the DAC recommendation which is addressed to DAC members only, and addresses it to all OECD Members and eventually nonmember countries which adhere to the Recommendation.

Recommendation of the OECD Council on the Tax Deductibility of Bribes to Foreign Public Officials

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organization for Economic Cooperation and Development of 14th December 1960;

Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75];

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favor bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal.

II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with nonmember countries and to report to the Council as appropriate.

C

Websites Relevant to the Convention and Antibribery Issues

United States Government

Department of Commerce

- Commerce Home Page: http://www.doc.gov
- Market Access and Compliance: http://www.mac.doc.gov
- Trade Compliance Center:
  http://www.mac.doc.gov/tcc/index.html

  Trade Agreements:
  http://www.mac.doc.gov/tcc/index.html
  (Select "Bribery Hotline")

  Exporter's Guide to the OECD Anti-Bribery Convention:
  http://www.mac.doc.gov/tcc/tcc2/guides/index.html

  Trade Complaint Hotline:
  http://www.mac.doc.gov/tcc/tcc2/hotline/index.html
- Office of the General Counsel:
  http://www.ita.doc.gov/legal

  Anti-Corruption Review:
  http://www.ita.doc.gov/legal/master.html

Department of State

- Home page: http://www.state.gov
  (Search "bribery")

Department of Justice

- Criminal Division, Fraud Section:
  http://www.usdoj.gov/criminal/fraud/fcpa/

United States Agency for International Development

- Home page: http://www.info.usaid.gov/
  (Search "bribery and corruption")

Notable Websites on Global Initiatives

International Chamber of Commerce

- Home page: http://www.iccwbo.org
- Standing Committee on Extortion and Bribery:
  http://www.iccwbo.org/home/menu_extortion_bribery.asp

Organization for Economic Cooperation and Development

- Home page: http://www.oecd.org/
- OECD Anti-Corruption Ring Online (AnCorr Web):
  http://www.OECD.org/daf/nocorruption/#Ancorr
- OECD Anti-Corruption Unit Combating Bribery and Corruption in International Business Transactions:
  http://www.oecd.org/daf/nocorruption/

  Downloaded documents and links to national legislation can be accessed at the above address or at
  http://www.oecd.org/daf/nocorruption/links1.htm

Organization of American States

- Anticorruption Network:
http://www.oas.org/juridico/english/FightCur.html

Transparency International

- Home page: http://www.transparency.de/

United Nations

- Home page: http://www.un.org
  (Search "bribery and corruption")

World Bank

- World Bank Anti-Corruption Website:
  http://www.worldbank.org/publicsector/anticorrupt/

Country Websites With Convention-Related Legislation

Implementing legislation of many signatories can be downloaded directly from the OECD website www.oecd.org/daf/nocorruption/links1.htm. A number of countries have also posted legislation on their government website. Legislation of the following countries is available from one or more of these sources.

Australia

The government response (tabled in the Senate on March 11, 1999) to the Treaties Committee Report on the OECD Convention and the Draft Implementing Legislation may be found at http://www.aph.gov.au/hansard/hanssen.htm (Select March 11, 1999 and go to p.2634).

The Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 is at http://www.aph.gov.au/parlinfo/billsnet/main.htm (Search "current bills")

The Bill's Explanatory Memorandum is also on that site.

Austria

The German text of the Austrian implementing legislation (Strafrechtsanderungsgesetz 1998 BGBI No. I 153) is available in pdf format on the OECD website. The government site (in German only) is http://www.ris.bka.gv.at/iausw2.html

Belgium

The text of the law passed on February 10, 1999, is available on the site of the Moniteur Belge at http://www.just.fgov.be/html/fd2_w3.htm

To find the text, choose the Moniteur published on March 23, 1999. The French text is available in pdf format on the OECD website.

Brazil

The English text of two relevant legal documents (Law no. 9.613, passed on March 3, 1998, and Decree 1171 of June 1994) is available in pdf format on the OECD website.

Canada

Access to the legislation can be obtained through the website for the Department of Justice / Ministère de la Justice (http://canada.justice.gc.ca/Loireg/index_en.html). Alternatively, the Act concerning the Corruption of Foreign Public Officials is located directly at

http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/government/S-21/S-21_4/S-21_cover-E.html

The English text is also available in pdf format on the OECD website.

Denmark

Implementing legislation can be found on the Department of Justice web site (in Danish only) at http://www.jm.dk/forslag/

Finland

Implementing legislation can be found on the government web site (in Finnish and Swedish) at http://www.vn.fi/vn/english/index.htm

Excerpts showing amendments to the Finnish Penal Code are also available in pdf format on the OECD website.

France

The draft law modifying the penal code and the penal procedure code relating to combating bribery and corruption can be found on the website of Legifrance (in French only) at http://www.legifrance.gouv.fr/citoyen/index.ow

The French text of the legislation is also available in pdf format on the OECD website.

Germany

The English and German texts of the implementing legislation dated September 10, 1998, the relevant criminal code, and the Administrative Offence Act are available in pdf format on the OECD website.

Greece

The French text of the implementing legislation dated November 11, 1998, and the English text of the Greek law No. 2331 on money laundering of August 1995 are both available in pdf format on the OECD website.

Hungary

The English text of the relevant implementing legislation is available in pdf format the the OECD website.

Iceland

The English text of the Icelandic Extradition and other Assistance in Criminal Proceedings Act (Law no. 3 of April 17, 1984, and relevant articles of the Icelandic Penal Code are available in pdf format on the OECD website.

Japan

An unofficial English translation of the Japanese implementing legislation (the amended Unfair Competition Act, adopted on September 18, 1998, is available in pdf format on the OECD website.

Korea

An English translation of the Korean implementing legislation (The Act on Preventing Bribery of Foreign Public Officials in International Business Transactions) is available in pdf format on the OECD website.

Norway

The implementing legislation (Amendments to the Norwegian Penal Code of May 22, 1902, chapter 2, para. 128) is available in pdf format at the OECD website and also on the Norwegian government website: www.lovdata.no/all/

Poland

The text of the implementing legislation (in Polish only) can be found at Poland's parliamentary website: http://ks.sejm.gov.pl:8009/proc3/opisy/1718.html.

Spain

The provisions to the Spanish Penal Code, implementing the Convention, is available in pdf format on the OECD website.

Sweden

The Swedish implementing legislation is available in pdf format on the OECD website.

Switzerland

Swiss laws can be found on Recueil Systématique du Droit Fédéral (available in French, German and Italian only) at http://www.admin.ch/ch/f/rs/rs.html

Search for the Swiss Penal Code of December 21, 1937, which will soon be amended to comply with the Convention.

The following legislation is available in French on the OECD website: modification of the Swiss Penal Code and the Amendments to the Swiss Penal Code; the law of April 19, 1999, authorizing the ratification of the Convention; and Recueil Systematique du Droit Federal.