United States Department of State
Bureau of Economic and Business Affairs

BATTLING INTERNATIONAL BRIBERY

2004

The Sixth 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

Executive Summary

This sixth and annual report required under the Senate Resolution of Advice and Consent of July 31, 1998, examines the progress that parties have made in implementing and enforcing the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Antribribery Convention).

Major Findings

- The OECD Antibribery Convention has been ratified by all 35 signatories and each party has also adopted implementing legislation that is currently in force. These are notable achievements in the short time since the Antibribery Convention entered into force on February 15, 1999.
  - Since our last report, Ireland deposited its instrument of ratification with the secretary general of the OECD on September 22, 2003.
- The U.S. Government reviews of the implementing legislation of Brazil, Chile, and Turkey are included in this report. The implementing legislation of all parties except Slovenia has now undergone an assessment by the OECD Working Group on Bribery and the U.S. Government. As summarized in the reviews, Brazil, Chile, and Turkey have taken some significant steps toward meeting their obligations under the convention, but there are some remaining issues of concern.
  - In Brazil, for example, there is no concept of criminal liability for legal persons. In addition, it is unclear whether applicable administrative remedies will be sufficiently effective, proportionate, and dissuasive.
  - In Chile, issues of concern include the liability of legal persons, the level of sanctions, limited jurisdictional coverage, and mutual legal assistance.
  - Finally, in Turkey concerns remain in the areas of corporate liability, an effective regret exception, the definition of a foreign public official, and some of the Turkish sanctions provisions.
- We are generally encouraged by the efforts of the parties to implement the Antibribery Convention. However, for a number of countries, we still have the same concerns that were identified in prior years' reports about the absence of specific legislative provisions to fulfill obligations under the convention.
  - The U.S. Government and the OECD Working Group on Bribery are continuing to follow up on these problems with the countries concerned during the enforcement review process. In addition, the U.S. Government may, if circumstances warrant, continue to engage countries bilaterally to encourage progress to implement their commitments under the convention.
- With regard to the enforcement of the Antibribery Convention, performance remains uneven.
  - Other than the United States, we are aware of only two parties (South Korea and Sweden) whose authorities have obtained convictions under their respective implementing laws for bribery of a foreign public official.

- Several other parties have initiated investigations or legal proceedings that are now in the public eye (Canada, France, Italy, and Norway), and other cases are in the investigative stage.
- Unfortunately, some parties, particularly those whose firms are very active in export markets, have been slow to apply enforcement resources to address transnational bribery.
- Based on information available from a variety of sources, we estimate that between May 1, 2003, and April 30, 2004, the competition for 47 contracts worth U.S. $15 billion may have been affected by bribery by foreign firms of foreign officials. Although this represents an increase over last year's report of 40 contracts, the value of the contracts dropped, from $23 billion to $18 billion. US. firms are known to have lost at least eight of the contracts, worth $3 billion.
- We will continue to press parties to address credible allegations of bribery of foreign public officials. 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 U.S. Government continues to believe that raising public awareness of antibribery laws is a very important element in making the convention a success. This includes informing the relevant prosecutorial authorities of the new tools they have to prosecute corruption, as well as counseling businesses and the general public about, antibribery laws. However, based on reports from U.S. embassies and public sources of information, such efforts continue to vary widely among the parties.

- Some parties continue to rely on historical perceptions of low levels of corruption within their communities and direct few if any resources to the effort.
- Others, faced with limited resources, assign greater importance to other initiatives and neglect to address this important component of implementation and enforcement.
- Nonetheless, some parties have recognized the need to raise awareness of the convention among their public and private sectors.

■ The U.S. Government believes that a rigorous peer review mechanism will encourage parties to take the necessary steps to investigate and to prosecute unlawful conduct by persons subject to their jurisdiction. To this end, the U.S. Government worked to persuade other OECD countries to join the consensus to increase funding for convention peer monitoring.

- In 2003, the OECD Working Group on Bribery negotiated a compromise package of institutional, structural, and financial reforms that will provide for stable funding of peer reviews through 2007. The OECD Council approved the reform package in February 2004.

■ Phase II enforcement reviews, begun in late 2001 with a review of Finland, have been accomplished for eight other parties: Bulgaria, Canada, France, Germany, Iceland, Luxembourg, Norway, and the United States. The United States assessed the initial pace of the enforcement peer review cycle to be too slow. Additional budget resources will enable the OECD Working Group on Bribery to review the rest of the parties by the end of 2007.

- The goal of Phase II of the monitoring process is to study the structures that parties have in place to enforce the laws and rules implementing the convention and the Revised Recommendation and to assess their application in practice. Summaries for Bulgaria, Canada, France, Luxembourg, and Norway are included in this report.

■ Each of the 35 signatories to the Antibribery Convention has affirmed that bribes paid to foreign public officials are not tax deductible. Despite important positive steps taken by the parties to disallow the deductibility of bribes, we remain concerned that the practice of tax deductibility still continues. Careful monitoring is needed to ensure that the rules are actually enforced; the United States will continue to play an active role in this effort.

■ In April 2004, the Working Group recommended that Estonia be invited to join and accede to the Convention. Estonia's accession may occur before the end of 2004. The United States advocates a careful and deliberate approach to enlargement of the parties to the convention. The primary focus should be to attract countries whose accession to the convention would bring significant mutual benefit, and whose companies are important global market participants.

- The financial resources of the Working Group are not sufficient to permit the rapid expansion of membership without reducing OECD staff support for priority activities such as peer review of convention enforcement. Therefore, the United States will continue to advocate a careful and incremental enlargement strategy.

■ The U.S. Government believes that the question of expanding the convention's coverage to include bribes to political parties and candidates merits the attention of the Working Group. We will seek to achieve consensus among convention parties to ensure such coverage.

■ The United States will continue to urge other governments to promote awareness of the convention and national laws in their business communities. In addition, fulfilling a commitment made with our G-8 partners at Sea Island, Georgia in June 2004, we will encourage efforts of our private sectors to develop and implement corporate compliance programs to promote adherence to laws against foreign bribery.

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Introduction

Corruption poses a serious threat to collective security, democracy and sustainable development. It imposes enormous costs on countries and destabilizes critical rule of law institutions and market-based systems that underpin democracy throughout the world. Corruption distorts public policy, leads to the misallocation of resources, increases budgetary costs to governments, undermines the rule of law and particularly hurts the poor. It robs nations of their human and natural resources and is a tax on development. Corruption often facilitates criminal activities, such as drug trafficking and money laundering, and can fuel transnational crimes and social/political conflict that threaten regional as well as global security.

Reducing corruption and enhancing transparency are top United States Government priorities because they are central to advancing our national security interests, supporting sustainable development and developing stable democracies. Transparency is a key component of domestic good governance and transparent systems are essential to build the trust of citizens, to create the necessary business climate, to stem corruption and to ensure that government revenues go to their intended purpose.

Creating New Commitments and Enforcing Them

The United States is a strong leader in the international campaign to reduce corruption by promoting transparency and strengthening judicial systems and rule of law. For that reason, we led efforts to launch the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Transactions ("the Antibribery Convention"). The convention was signed in December 1997 after more than a decade of U.S.-led effort to create a new multilateral agreement to criminalize the bribery of foreign public officials. Today, the convention is one of many initiatives and instruments in regional and international fora aimed at fighting corruption. It is considered one of the most rigorous anti-corruption conventions, and continues to serve as a model for new initiatives.

The United States can be proud of the progress achieved in the five and half years since the convention entered into force on February 15, 1999. Members of the Organization for Economic Cooperation and Development (OECD) and five non-member countries put "peer pressure" into action by reviewing each signatory's laws to implement the convention. Peer review proved to be a successful method to identify shortcomings in the implementing laws, and propose corrective measures. Most convention parties acted to remedy deficiencies in their new laws, although several are still working on changes to bring their legislation into full conformity with the convention.

Convention parties applied valuable lessons from the early days of peer review when they began to examine each other's enforcement practices. The first cycle of peer monitoring of enforcement was designed to assess each party's capacity to investigate allegations of bribery, build cases based on evidence, and prosecute. The work began slowly. Initially, the OECD did not have sufficient budget resources to conduct reviews at a fast enough pace. The U.S. was concerned about the slow progress of peer review. An accelerated effort was needed to keep the pressure on other countries to improve enforcement capacity. More money was required to hire addi-

tional expert staff to ensure a monitoring schedule of at least seven country examinations per year. After a concerted reform effort led by Italy and the U.S., additional financial resources were dedicated to convention peer monitoring starting in 2003. It was the first time in over a decade that member countries reached consensus to set aside a significant slice of the OECD budget for antibribery work. The new infusion of funds enabled the OECD Working Group on Bribery to step up the pace of peer pressure on its member countries to implement the convention.

Beyond its obvious significance to ensure transparency and public scrutiny of convention enforcement, the OECD peer review mechanism is an important learning tool. A typical peer review of enforcement is broad in coverage, and extends beyond assessment of a country's investigative and prosecutorial practices. Examined countries are asked to explain how they publicize their antibribery laws through outreach to the business and legal communities and civil society. Each examination is an opportunity to highlight the self-regulatory function of corporate compliance programs. U.S. companies use compliance programs to train company employees, up to the highest levels, to comply with the Foreign Corrupt Practices Act and other U.S. laws and regulations. However, corporate compliance remains a relatively new phenomenon outside the U.S. and is not yet widely implemented by European and Japanese companies. Peer review provides the context to remind other countries to encourage companies to strengthen internal compliance procedures. The peer review of U.S. enforcement in June of 2002 provided an opportunity to explain how the internal compliance phenomenon evolved in the U.S. Finally, because the peer review reports are made public on the OECD website, countries have a strong incentive to improve their own procedures to enforce the convention.

To date, the peer review procedures of the OECD Antibribery Convention are the most rigorous — and the most stringently applied — of any international anti-corruption instrument. Because of persistent U.S. pressure, the Working Group on Bribery adopted an accelerated peer review calendar in 2004, and new internal guidelines to ensure that country examinations are consistent over time. U.S. agencies continue to provide strong oversight and consistent participation by our federal prosecutors to raise the quality of peer monitoring and promote enhanced professional contacts between convention country prosecutors and law enforcement experts. The U.S. is encouraging other convention parties to send their prosecutors and law enforcement experts to participate in all peer review examinations. Through stronger cross-border law enforcement ties, the U.S. believes convention countries will help to improve each other's capacity to implement antibribery laws.

The U.S. is encouraged by signs of greater support among convention parties for the peer review mechanism. Agreement was reached in 2003-2004 to update internal procedures and protect the budget of the Working Group on Bribery. In addition, through the peer monitoring process, U.S. agencies are learning about bribery investigations in progress. Some may lead eventually to prosecutions. It is significant that parties are applying new investigative techniques to the challenge of gathering evidence to build antibribery cases. Progress is not as rapid as the U.S. might have wished but civil society and business organizations are likely to increase pressure on their national authorities to enforce the convention more aggressively in the future. Some national governments increasingly cite "level playing field" considerations when they point out that certain parties (their competitors for large international contracts) could be more vigilant to investigate credible allegations of foreign bribery by corporations based in their territories.

Fighting Corruption and Promoting Transparency

Recent high-profile U.S. Government development initiatives, such as the Millennium Challenge Account and Group of Eight (G8) action plans, incorporated important anti-corruption principles and gave new expression to the global fight against corruption. At the June 2004 G8 Summit in Sea Island, Georgia, G8 leaders renewed and expanded their pledge to combat corruption and improve transparency. The 2004 G8 statement on Fighting Corruption and Improving Transparency builds on a 2003 initiative to cooperate with developing countries in the fight to eradicate corruption. The United States and the United Kingdom were champions of both the 2003 and 2004 G8 action plans. The 2003 G8 Evian Declaration on Fighting Corruption and Improving Transparency proposed actions to reduce corruption and enhance transparency as part of a strategy to ensure that development assistance resources and budget revenues achieve their intended purpose. It proposed a partnership between donor and recipient countries to change the incentives to make corruption less attractive to public officials, expose the economic and political costs of corruption and institutionalize effective checks and balances on corrupt regimes.

The G8 Evian Declaration called for action to:

- Improve public financial management and accountability to ensure that public and donor resources are used effectively.
- Strengthen enforcement of the OECD Antibribery Convention and accelerate peer reviews of implementation.
- Deny safe haven to corrupt public officials and their assets.
- Negotiate a UN anticorruption convention.
- Fight financial abuses.
- Promote Transparency in Government Procurement; and
- Encourage governments and companies to develop and implement action plans to establish high standards of transparency with respect to all budget flows (revenues and expenditures) and with respect to the awarding of government contracts and concessions.

A year later, at the Sea Island Summit, having already helped to get the UN Corruption Convention successfully launched, the G8 announced new measures to implement the Evian Declaration, and reported on progress since June 2003 (www.g8usa.gov/documents). At Sea Island, the G8 launched four new pilot projects with partner countries committed to implement transparency in their budgets, government procure-

ment and concession-letting procedures: Georgia, Nicaragua, Nigeria and Peru. Each volunteer pilot country entered into a political compact with the G8, outlining their respective commitments to reduce corruption. The first group of four pilot countries demonstrated determination by providing detailed roadmaps of recent and planned efforts to promote economic openness through transparency and to root out corruption. The U.S. looks forward to working with them to achieve lasting economic reforms. We also will continue to engage with G8 partners and members of the international community to support the ambitious goals of these four countries. We believe their efforts will bring significant development benefits to their people, and hope these initial compacts encourage others to take similar steps.

The Sea Island documents feature a comprehensive set of commitments to help developing countries improve public financial management and transparency in government procurement and the awarding of concessions. There is a strong parallel emphasis on actions pledged by G8 governments to fight corruption, including a new set of measures to recover the proceeds of corruption. The United States hopes the International Financial Institutions will work with G8 countries to implement the action plan. The IFIs' country assistance strategies and surveillance programs share the G8 goal of achieving greater transparency in public finance and government operations. Other G8 governments may choose to assist by providing technical assistance to help developing countries build the capacity to follow through on their commitments. We welcome the strong interest shown by civil society, including the private sector, and look forward to their direct participation in the pilot projects with compact countries.

At Sea Island, the G8 announced the following specific actions to strengthen peer review and enforcement of the Antibribery Convention; they are summarized in each pilot compact document as well:

> "We made good progress to fulfill the G8's Evian pledge to strengthen OECD monitoring of the Antibribery Convention. The OECD Council approved a reform package in February 2004, including a mechanism to fund the Working Group on Bribery (WGB). It achieves stable funding through 2007 to complete a full round of important peer reviews that examine each member country's enforcement track record."

- We will adhere rigorously to our updated 2004-2007 enforcement review schedule, honour our pledges to serve as lead examiners or examinees, and send our prosecutors and other law enforcement officials to participate in peer reviews.

- We will encourage efforts of our private sectors to develop and implement corporate compliance programs to promote adherence to laws against foreign bribery, and welcome the positive steps already taken by certain industries to develop specific principles relevant to their specific activities to promote such compliance."

Including OECD Antibribery Convention enforcement in the G8 Declaration sends a strong signal that developed country signatories recognize their responsibility to prevent their companies and citizens from exporting bribery and corruption to other countries. The convention is an important part of the G8 initiative because it demonstrates that all governments have a crucial role to play in establishing and reinforcing the rule of law and holding companies accountable for their actions when operating abroad. Developing country representatives have expressed support for the long-standing U.S. position to urge other signatory countries to implement and enforce the OECD Convention.

Transparency, accountability and domestic good governance provide the foundation for many U.S. Government technical assistance programs, including the Millennium Challenge Account (MCA) announced in Monterey in 2002, and the Africa Growth and Opportunity Act. President Bush has stated that the "MCA will reward nations that root out corruption, respect human rights, and adhere to the rule of law." Progress in addressing corruption is one of several criteria for qualifying as an MCA recipient country. In his May 10, 2004, remarks at the ceremony announcing the first group of countries eligible to submit proposals for Millennium Challenge Account (MCA) assistance, the President noted:

> "In many nations, poverty remains chronic and desperate. Half the world's people still live on less than $2 a day. This divide between wealth and poverty, between opportunity and misery, is far more than a challenge to our compassion. Persistent poverty and oppression can spread despair across an entire nation, and they can turn nations of great potential into the recruiting grounds of terrorists. The powerful combination of trade and open markets and good government is history's proven method to defeat poverty on a large scale, to vastly improve health and education, to build a modern infrastructure while safeguarding the environment, and to spread the habits of liberty and enterprise."

To reinforce the message of government responsibility to combat corruption, the U.S. leads multilateral efforts to promote the enforcement and monitoring not only of the OECD Antibribery Convention, but also: the Inter-American Convention Against Corruption, the Council of Europe Criminal Law Convention Against Corruption, the Stability Pact Anti-Corruption Compact for Southeast Europe, and the Financial Action Task Force. We were key players in the successful conclusion of negotiations that produced the United Nations Convention Against Corruption, the first global anti-corruption convention. In 2003 and 2004, the United States played the leading role to develop important new regional anti-corruption initiatives for the Special Summit of the Americas and in Asia-Pacific Economic Cooperation. Finally, the United States provides technical assistance and financial support for countries that are implementing their commitments under the conventions and regional instruments listed above. We furnish assistance for the countries involved in the Asian

Development Bank-OECD Anticorruption Initiative for the Asia-Pacific region, and emerging governance efforts in Africa and the Middle East.

Background

The U.S. launched a campaign against international corrupt practices more than twenty-five years ago with the passage of the Foreign Corrupt Practices Act (FCPA) of 1977. The law established substantial penalties for persons making payments to foreign officials, political parties, party officials and candidates for political office, to obtain or retain business. Enactment of the FCPA reflected deep concern by the American public about the involvement of U.S. companies in unethical business practices. Disclosures in the mid-1970s indicated that U.S. companies spent millions of dollars to bribe foreign public officials and thereby gain unfair advantages in competing for major commercial contracts.

The FCPA has had a major impact on how U.S. companies conduct international business. However, in the absence of similar legal prohibitions by key trading partners, U.S. businesses were put at a significant disadvantage in international commerce. Their foreign competitors continued to pay bribes without fear of penalties, which resulted in billions of dollars in lost sales to U.S. exporters.

Recognizing that bribery and corruption in foreign commerce could be effectively addressed only through strong international cooperation, the United States undertook a long-term effort to convince the leading industrial nations to join it in passing laws to criminalize the bribery of foreign public officials. The Omnibus Trade and Competitiveness Act of 1988 reaffirmed this goal and called on the U.S. Government to negotiate an agreement at the OECD on the prohibition of overseas bribes. After nearly ten years, the effort succeeded. The United States and thirty-three[1] other nations adopted the Antibribery Convention in 1997. It entered into force for twelve of the signatories on February 15, 1999. All signatories to the convention also agreed to implement the OECD's 1996 recommendation on eliminating the tax deductibility of bribes and by now have adopted laws to that effect.

Enlisting the active support of the private sector and civil society is a key element in promoting the objectives of the Antibribery Convention. Because of the influence of the FCPA, U.S. businesses developed corporate compliance programs and ethical guidelines to fight bribery and corruption. In addition, the OECD Guidelines for Multinational Enterprises were expanded in June 2000 to include, inter alia, a major section on combating bribery. Awareness by business of these instruments and the incorporation of these objectives in the private sector's approach to doing business are essential components to the convention's full implementation. We are working with other OECD Convention signatories to reinforce the message that companies must not export bribery and corruption into the markets where they do business and to encourage the private sector in other countries to adopt a more active and pragmatic approach to corporate compliance. We also welcome the important contributions of organizations like Transparency International, in support of the OECD Antibribery Convention.

The Commerce, State, Justice, and Treasury Departments work as a team to monitor implementation and enforcement of the convention. U.S. agencies established a comprehensive monitoring process that includes active participation in the OECD meetings on the convention, bilateral discussions with other governments on implementation and enforcement issues and careful tracking of bribery-related developments overseas. Preparation of the annual reports to Congress on the implementation and enforcement of the Antibribery Convention is part of the process of making it an effective multilateral, anticorruption instrument.

Conclusion

Five years into implementation of the OECD Convention, the U.S. Government's principal goal is to encourage other signatories to enforce their antibribery laws. There are encouraging signs that some countries are taking steps to investigate allegations of foreign bribery. However, more needs to be done, and — to be effective — it must involve serious efforts by the international community. The U.S. Government continues to receive reports that bribery of foreign public officials influences the awarding of contracts in many countries. There are few foreign bribery prosecutions, to date, outside the U.S. The governments of OECD Convention parties need to be more proactive to raise public awareness of antibribery laws and the consequences of non-compliance. Fortunately, the U.S. approach is beginning to attract more support within the OECD Working Group on Bribery, especially from G8 governments who would like to see consistent enforcement by other parties. The U.S. was encouraged by the cooperative effort to reform and re-finance the Working Group on Bribery during 2003-2004.

To address the serious challenge of achieving more robust enforcement, the U.S. Government is working with other convention countries at the OECD and bilaterally, to encourage discussion of the mechanics of investigating and prosecuting transnational bribery cases. To this end, we are exploring ways to engage them on a practical level, including technical assistance (capacity building) exchanges to reach out to those countries whose prosecutors have not yet had much experience in developing bribery cases and taking them to court. Some governments have approached us bilaterally for information and assistance. Our outreach efforts also will be aimed at encouraging prosecutors to participate in OECD peer review meetings and other convention-related work.

[1] In November 2001, Slovenia became the thirty-fifth signatory to the convention.

The U.S. Government remains firm in its commitment to reduce and eliminate the bribery of foreign public officials. We will encourage our OECD partners to renew their own commitment under the convention to fight this global problem by investigating allegations of bribery and prosecuting cases, when appropriate. Our collective efforts to secure effective enforcement of the convention are essential to the promotion of good governance, rule of law and sustainable development throughout the world.

1. In early May 2004, the first group of Millenium Challenge Account nations was selected: Armenia, Benin, Bolivia, Cape Verde, Georgia, Ghana, Honduras, Lesotho, Madagascar, mali, Mongolia, Mozambique, Nicaragua, Senegal, Sri Langka, and Vanuatu.

Ratification Status

In this final report to Congress, the U.S. Department of State is pleased to report that the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Antibribery Convention) has been ratified by all 35 signatories and that each party has adopted implementing legislation that is currently in force (see Table 1). These are notable achievements in the short time since the Antibribery Convention entered into force on February 15, 1999.

Since our July 2003 report to Congress, Ireland deposited its instrument of ratification with the Secretary General of the OECD on September 22, 2003, and became the 35th party to the Antibribery Convention. In addition, the legislation of three parties to the Antibribery Convention, adopted by the respective countries but not reviewed as of the publication date of our last report, was reviewed by the OECD Working Group on Bribery: Brazil in June 2003, Chile in October 2003, and Turkey in January 2004. U.S. Government assessments of the legislation of these three parties are included in Chapter 2 of this report, and assessments for other parties in prior reports are available at *www.state.gov/e/eb/rls/rpts/bib* and at *www.export.gov/tcc.* The legislation of each of the original 34 signatories has undergone an assessment by the OECD Working Group on Bribery and by the U.S. Government. Although the laws of Slovenia were reviewed as part of its accession process, a full review is expected to be undertaken in 2005. The OECD Working Group on Bribery's assessments for all parties can be viewed at *www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.html* and at *www.export.gov/tcc.*

The following information is an update on the internal legislative processes completed by Ireland to enact implementing legislation since our 2003 report to Congress. In addition, supplemental legislative information on Slovenia, the 35th signatory and the first country to accede to the Antibribery Convention, is included. The information that follows is based on data obtained from the U.S. embassy and on reports from the Irish and Slovenian Governments to the OECD, the latter of which are publicly available at the OECD Web site referred to above.

Ireland

Ireland enacted the Prevention of Corruption (Amendment) Act 2001 in mid-2001 to implement the Antibribery Convention. The government subsequently approved ratification of the Antibribery Convention in December 2001, and Parliament (Dáil Éireann) completed the necessary parliamentary procedures when it passed a resolution approving the terms of the Antibribery Convention on December 17, 2002. The intervention of a general election in the summer of 2002 had slowed this process. Thereafter, further administrative procedures were required that called for formal government decisions. Ireland subsequently deposited its instrument of ratification with the Secretary General of the OECD on September 22, 2003. The Antibribery Convention entered into force for Ireland on November 21, 2003.

Slovenia

Slovenia enacted the law authorizing accession to the Antibribery Convention in December 2000. The law was pub-

lished in the official gazette, volume 1/2001, on January 8, 2001. Slovenia deposited its instrument of accession with the Secretary General of the OECD on September 6, 2001. The Antibribery Convention entered into force for Slovenia on November 5, 2001. Recognizing that further amendments to domestic laws were required for Slovenia to conform to the requirements of the Antibribery Convention, the Slovenian Parliament adopted several pieces of legislation, the last of which was sent to Parliament in 2003 and entered into force in April 2004. The OECD Working Group on Bribery is expected to review Slovenia's laws in 2005.

Efforts to Encourage Implementation and Enforcement

The U.S. Government recognized that the Antibribery Convention's effectiveness for reducing bribery would be constrained until all signatories had become parties. Therefore, since the convention's entry into force, the United States has expended significant efforts to encourage signatories to adopt implementing legislation and complete their ratification procedures for the Antibribery Convention. In 2002, with 33 of the 35 signatories in a position to prosecute cases of bribery under their jurisdiction, the U.S. Government shifted its energies to encouraging parties' enforcement of their implementing laws. Coupled with the peer pressure applied in the OECD Working Group on Bribery and with encouragement by other governments, an international treaty has entered fully into force among all of its signatories in just under five years, a notable achievement. We continue to see indications that enforcement is being taken seriously by some parties. (The issue of enforcement is discussed in detail in Chapter 3 of this report.)

U.S. efforts to encourage other signatories to ratify, adopt implementing legislation, and enforce the Antibribery Convention have been concerted and consistent and have included the personal involvement of the Secretaries of the Departments of Commerce, State, and Treasury, and the Attorney General of the U.S. Department of Justice. Public statements by senior U.S. officials to direct senior and staff-level contacts with foreign governments, including editorial pieces in major publications and participation in international conferences, were important facets of those efforts. The level and intensity of U.S. efforts have remained high across administrations. This commitment clearly conveys to the world the importance the U.S. Government places on the Antibribery Convention as a potentially effective tool in combating corruption and promoting good governance and rule of law. The U.S. Government is committed to the success of the Antibribery Convention, and our efforts to secure enforcement of the laws implementing the convention will continue.

The fight against global corruption is a shared responsibility of governments, the private sector, and civil society. Therefore, we will continue to encourage businesses to implement and adhere to antibribery awareness and compliance programs. For example, in its June 2004 declaration from Sea Island, Georgia, the Group of Eight, building on its 2003 declaration at Evian, France, committed to joint efforts to fight corruption and increase transparency. Among their commitments was "to continue to encourage our private sectors to develop, implement and enforce corporate compliance programs relating to our domestic laws criminalizing foreign bribery of public officials."

Furthermore, U.S. officials and organizations like Transparency International maintain that businesses should establish anticorruption programs. Although such programs are present in most of the larger U.S. companies, further expansion to small and medium enterprises, both domestically and internationally, will help promote the objectives of the Antibribery Convention, good governance, and rule of law. An example of recent efforts is a move by 19 leading international engineering and construction companies to combat global corruption within their own industry. On January 25, 2004, as part of the World Economic Forum's Annual Meeting at Davos, Switzerland, 19 companies, which represent annual revenues in excess of US$70 billion, signed and adopted a set of business principles countering bribery. Expansion of such initiatives to other sectors with broader representation of countries should be encouraged. In the coming years, the U.S. Government will continue to encourage U.S. and foreign private sectors to support the Antibribery Convention through such awareness and corporate compliance programs.

Table 1: Ratification Status of Signatory Countries to the OECD Antibribery Convention (As of June 7, 2004)

Signatory Country	Ratified	Legislation Approved	Instrument of Ratification Deposited with OECD[1]	Convention Entered into Force
Totals: 35	35	35	35	35
Argentina	October 18, 2000	November 1, 1999[4]	February 8, 2001	April 9, 2001
Australia	October 18, 1999	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	August 6, 2000	June 11, 2002[2]	August 24, 20005	October 23, 20005
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	March 8, 2001	October 20022	April 18, 20015	June 17, 20015
Czech Republic	December 20, 1999	April 29, 1999	January 21, 2000	March 21, 2000
Denmark	March 30, 2000	March 30, 2000	September 5, 2000	November 4, 2000
Finland	October 9, 1998	October 9, 1998	December 10, 1998	February 15, 1999
France	May 25, 1999	June 30, 2000	July 31, 2000	September 29, 2000
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	September 22, 2003	July 9, 2001	September 22, 2003	November 21, 2003
Italy	September 29, 2000	September 29, 2000	December 15, 2000	February 13, 2001
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	January 15, 2001	January 15, 2001	March 21, 2001	May 20, 2001
Mexico	April 21, 1999	April 30, 1999	May 27, 1999	July 26, 1999
The Netherlands	December 13, 2000	December 13, 2000	January 12, 2001	March 13, 2001
New Zealand	May 2, 2001	May 2, 2001	June 25, 2001	August 24, 2001
Norway	December 18, 1998	October 27, 1998	December 18, 1998	February 15, 1999
Poland	June 11, 2000	September 9, 2000	September 8, 2000	November 7, 2000
Portugal	March 31, 2000	June 4, 2001	November 23, 2000	January 22, 2001
Slovak Republic	February 11, 1999	September 1, 1999[3]	September 24, 1999	November 23, 1999
Slovenia	December 2000	N/A	September 6, 2001[5]	November 5, 2001
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	January 11, 2003[2]	July 26, 20005	September 24, 20005
United Kingdom	November 25, 1998	1889, 1906, 1916[4] February 14, 2002	December 14, 1998	February 15, 1999
United States	November 20, 1998	November 10, 1998	December 8, 1998	February 15, 1999

1 The convention entered into force on February 15, 1999, for each signatory that had deposited its instrument of ratification on or before that date. For all other signatories, the convention entered into force on the sixtieth day after each signatory deposited its instrument of ratification or accession with the secretary general of the OECD.

2 Date legislation came into effect.

3 Date partial implementing legislation came into effect.

4 The U.K. initially relied exclusively on existing legislation to implement the Convention but adopted the Anti-terrorism, Crime and Security Act of 2002 on February 14, 2002 to address some of the concerns of the OECD Working Group on Bribery.

5 Instrument of Accessibility

2

Review of National Implementing Legislation

Introduction

This chapter contains the U.S. Government reviews of the implementing legislation of Brazil, Chile, and Turkey.[1] The legislation of these three parties to the Antibribery Convention was adopted by the respective countries but not reviewed by the OECD Working Group on Bribery until after the publication date of our last report. These U.S. Government reviews were prepared following the same procedures and using the same sources as described in prior reports. This chapter also contains brief descriptions of actions undertaken by some parties to amend their legislation to conform to recommendations of the OECD Working Group on Bribery.

The views contained in this chapter are those of U.S. Government agencies and staff and not necessarily those of the OECD Working Group on Bribery. The Working Group country reports on the implementing legislation reviewed to date are made public on the OECD Web site at *www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.html* and are linked at *www.export.gov/tcc.*

The U.S. Government continues to monitor parties' implementation and enforcement of the convention, both independently and within the OECD Working Group on Bribery. In the ongoing Phase II of the Working Group's monitoring process, the focus is on how countries apply and enforce their implementing legislation (See Chapter 3). We note that parties' performance in implementing the convention through the adoption of legislation must be distinguished from the enforcement of those laws. As discussed in Chapter 3, performance by parties in regard to enforcement remains uneven.

Concerns about Implementing Legislation

On the basis of information that is currently available, we are generally encouraged by the efforts of the parties to implement the Antibribery Convention. However, for a number of countries, we still have the same concerns that were identified in prior years' reports: about how requirements were addressed and, in some cases, about the absence of specific legislative provisions to fulfill obligations under the convention, including the following:

- ***Basic elements of the offense:*** laws that do not specifically cover certain basic elements of the offense of bribery of foreign public officials contained in Article 1 of the convention: e.g., laws that do not specifically cover offering, promising, or giving a bribe; bribes to third parties or through intermediaries; laws that do not use the convention's autonomous definition of foreign official or require dual criminality.
- ***Liability of legal persons:*** a lack of corporate liability, or the addition of inappropriate requirements for the conviction of a natural person holding a management or other position within the corporation in order to trigger corporate liability.
- ***Sanctions:*** fines and prison terms that either do not rise to the level of being effective, dissuasive, and proportionate or are not at least equal to penalties for domestic bribery.
- ***Enforcement:*** statutes of limitation that are too short, require dual criminality to bring an action or require a complaint from the "victim" (e.g., the government of the corrupt official) to commence an investigation.

- ***Jurisdiction:*** limitations on jurisdiction; in particular, a lack of nationality jurisdiction or extremely limited territoriality jurisdiction.
- ***Extradition/mutual legal assistance:*** laws that do not provide for adequate extradition or mutual legal assistance as required by the convention or are contingent on dual criminality requirements.
- ***Inappropriate defenses and exceptions:*** for example, if the bribe was solicited by the foreign public official instead of being initiated by the bribe payor, or if the bribe agreement was cancelled and reported to authorities before its completion (e.g., "effective regret" and "effective repentance").
- ***Potential conflict with other instruments:*** differences between laws implementing European Union (EU) or other anticorruption conventions and the OECD Antibribery Convention.

The U.S. Government and the OECD Working Group on Bribery are continuing to follow up on these problems with the countries concerned during the Phase II review process (see Chapter 3). In addition, the U.S. Government may, if circumstances warrant, continue to engage countries bilaterally to encourage progress to implement fully their commitments under the convention.

Amendments to Implementing Legislation Described in Prior Reports

This section contains summaries of actions undertaken by some parties to amend their legislation over the past several years to conform to recommendations of the OECD Working Group on Bribery. These summaries are based on reports to the Working Group, reports from U.S. embassies, and public sources. Using this information and the U.S. Government review produced in the prior reports to Congress, the reader should get a general appreciation of what the particular party has done, or must still do to effectively implement the convention. However, this information is based on a variety of sources and may not be complete. In addition, although we note action by a party to correct a deficiency, additional recommendations may still remain unfulfilled.

Therefore, we caution the reader and recommend additional research. The amendments of some of the parties identified below have been formally reviewed by the Working Group, either through the process known in the Working Group as the Tours de Table, or through the more formal "Phase I *bis"* process, which was established to monitor the implementation of the Working Group's recommendations. Actions by the other parties, who claim to have taken action to correct deficiencies in their implementing legislation but who have not undergone such a review, are also included. When parties have indicated that draft legislation is before their parliament or is subject to other internal governmental review, we did not include that information given the uncertain fate of such processes, which has been quite prolonged for some countries.

As part of the procedure for providing new information in the context of the Working Group's periodic *Tours de Table*, parties are now required to provide updated written information to the OECD Secretariat staff that briefly describes the status of its implementing legislation. In particular, parties must describe measures that are under consideration or have been adopted to take account of Phase I recommendation, as well as to provide information on other legislation relevant to the effectiveness of the convention. As of June 2004, the Secretariat has received updated information from only 13 countries: Austria, the Czech Republic, Denmark, France, Germany, Japan, Mexico, Netherlands, Slovenia, Sweden, Switzerland, Turkey, and the United States. That information is available to the public and published on the OECD Web site at *www.oecd.org.*

Formal Review: Phase I *Bis*

Bulgaria:
On June 8, 2000, Bulgaria adopted amendments to its Penal Code relating to the criminalization of "offering" and "promising" of a bribe as well as the abolition of the concept of "provocation" as a defense. Furthermore, on September 13, 2002, Bulgaria adopted legislation to introduce non-material (non-valuable) advantages into the scope of the definition of bribery, revoked the defense of "informing the authorities", applicable to bribery of foreign public officials, and introduced fines as an additional sanction to imprisonment. An amendment also addressed the definition of a foreign public official under its implementing legislation.

Iceland:
On April 27, 2000, Iceland's parliament passed legislation amending the Penal Code. The amendment removed the ceiling on the level of fines applicable to legal persons and the statute of limitations for legal persons was increased to five years.

Japan:
Japan adopted changes to its Unfair Competition Prevention Law on June 22, 2001, which entered into force on December 25, 2001. The amendments eliminate the "main office exception" and expand the definition of foreign public official as it relates to public enterprises. We understand that two bills were submitted to the Diet early in 2004 that address nationality jurisdiction and seizure of the proceeds of bribery. Nonetheless, a number of other weaknesses in Japan's implementing legislation were identified in a prior report and will require further corrective action.

Slovak Republic:
In June 2001, legislation was adopted to extend the foreign bribery offense to third-party beneficiaries and to make its sanctions equal to those imposed for bribery of domestic public officials. The statute of limitations for this offense was extended to five years. This legislation entered into force on August 1, 2001.

United Kingdom:
December 14, 2001, the United Kingdom approved amendments to the Corruption Acts under the Anti- Terrorism, Crime and Security Act 2001 (Anti-Terrorism Act). The amendments are located in Part 12 of the Anti-Terrorism Act, sections 108–110. The amended legislation entered into effect on February 14, 2002. Although the recent amendments to the Corruption Acts appear to address the more serious concerns identified by the U.S. Government, that is, that the Corruption Acts apply to foreign public officials and acts committed by U.K. nationals and corporations outside the United Kingdom, several concerns still do not appear to have been addressed. In addition, on June 27, 2003, provisions on corruption were brought into force in Scotland and are similar to those for the rest of the United Kingdom. The convention was extended to the Isle of Man in June 2001.

Hungary:
In December 2001, Hungary enacted amendments providing for criminal liability for managers for bribery acts by their employees, deleting the "unlawful disadvantage" defense, increasing prison sentences for natural persons, extending the statute of limitations for certain offenses, changing the definition of foreign public officials, and reworking its laws on confiscation of assets and bribe proceeds. This legislation entered into force on April 1, 2002. In December 2001, Hungary also enacted legislation establishing the criminal liability of legal persons for any intentional breach of the Criminal Code, including antibribery provisions.

Although in most instances the Working Group concluded that the relevant amendments adequately implemented the recommendations arising from Phase I reviews, outstanding issues remained for some parties. Those matters will be addressed in Phase II.

Other Reporting:

On December 11, 2003, **Argentine** Law No. 25825 entered into force, which amended Article 258 *bis*, the description of the offense of bribery of a foreign official. Argentine officials indicate that the provision is now in conformity with the recommendations of the OECD Working Group on Bribery. **Australia** reported that the domestic offenses of bribery have been updated and the penalties raised to those imposed on bribery of foreign public officials. In **Canada**, on November 7, 2003, Royal Assent was granted to Bill C-45 which codifies and modernizes the Canadian criminal law in relation to corporate criminal liability. For example, it established rules for attributing to organizations, including corporations, criminal liability for the acts of their representatives. In 2003, the **Finnish** parliament reviewed the Criminal Code to eliminate the dual criminality provision and extended the active and passive bribery offense to members of parliament. On December 24, 2002, the Government of **Greece** published in the official gazette amendments to its implementing legislation. Those amendments include a definition of "foreign public official" by reference to Article 1 of the convention and address the responsibility of legal persons in reference to "enterprises and legal persons." In June 2003, the **Norwegian** parliament passed legislation that raises the level of penalties for natural persons up to 10 years imprisonment, which will have consequences on the investigative techniques as well as on the statute of limitations applicable to the offense. In November 2001, **Portugal** adopted Law No. 108/2001 which provides for the criminal liability of legal persons and establishes bribery as a predicate offense for money laundering purposes. On November 26, 2003, **Spain** published in its Official Gazette Law No.15/2003. The law amends Article 31 of the Penal Code, which introduces criminal liability of legal persons and provides for accessory sanctions for legal persons. In addition, Law 15/2003 amended the Criminal Code by making the penalty for corrupting a foreign official equal to the penalty for corrupting a Spanish official. Legislation submitted to the **Swedish** parliament on February 26, 2004, will enter into force on July 1, 2004, which will extend the maximum penalty to six years imprisonment for serious cases of active bribery. A bill on the criminal responsibility of legal persons was approved by the Swiss parliament on March 21, 2003, which entered into force on October 1, 2003. Fines up to SwF5 million can now be imposed on **Swiss** companies guilty of bribery of foreign public officials, irrespective of whether a natural person has been incriminated or whether an organ of the enterprise acted negligently.

U.S. Implementing Legislation: FCPA

In addition to the 1998 amendments to the Foreign Corrupt Practices Act of 1977 (FCPA),[3] which are fully described in the 2001 report to Congress, the United States has taken the following actions to implement the Antibribery Convention:

- On November 1, 2002, to conform to the Working Group's Phase I recommendation, Congress approved amendments to the U.S. sentencing guidelines. The amendments adjust the sanctions for the bribery of foreign public officials to those applicable to bribery of domestic public officials.
- In March 2002, the President signed an executive order to define the European Union's organizations and Europol as public international organizations, thereby extending the application of the FCPA to bribery of officials from those organizations.
- Effective August 23, 2000, the Civil Asset Forfeiture Reform Act expanded the grounds for civil and criminal forfeiture, making the proceeds of violations of the FCPA forfeitable.

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

Brazil

Brazil signed the convention on December 17, 1997, and deposited its instrument of ratification on August 24, 2000. Brazil enacted the implementing legislation through Law No. 10,467, which amended the Penal Code to include bribery of a foreign official as an offense.

There are a few issues of concern with Brazil's implementing legislation. For example, Brazilian law essentially has no concept of criminal liability for legal persons. Because of the absence of case law applying the administrative remedies, it is difficult to determine whether these measures are effective, proportionate and dissuasive.

Basic Statement of the Offense

The basic statement of the offense of bribery is found in the 2002 act, which adds a new chapter to the Brazilian Penal Code, Crimes Committed by Individuals Against a Foreign Public Administration. Article 337–B in that chapter defines the offense as:

> promising, offering or giving, directly or indirectly, an improper advantage to a foreign public official or to a third person, in order for him or her to put into practice, to omit, or to delay any official act relating to an international business transaction.

The article does not set forth an express intent requirement, but Brazilian authorities explained that Brazilian law assumes felonious intent in the absence of a specified mental element. Brazilian authorities stated that the article covers bribery through an intermediary.

Jurisdictional Principles

The Brazilian Penal Code adopts the principle of territoriality. Article 6 of the Penal Code provides that "the criminal offense is deemed to have occurred in the place where the act or omission, in whole or in part, occurred, as well as where the result was produced or planned to be produced." Brazil explained that for jurisdiction to be exercised it is enough for the crime to have "touched" Brazilian territory. Although Brazil did not provide any examples to demonstrate how substantial a connection to Brazil must be, Brazilian authorities stated that a telephone call, fax or email originating in Brazil would be sufficient to trigger jurisdiction.

Brazil's Penal Code provides for extraterritorial jurisdiction, including nationality jurisdiction, in a wide range of cases that include foreign bribery abroad. It should be noted that Brazil does not have nationality jurisdiction over permanent residents of Brazil who commit offenses abroad. Unlike naturalized Brazilians, however, permanent residents of Brazil are subject to extradition.

Coverage of Payor/Offeror

Article 337–B covers only natural persons. Brazil does not have a law imposing criminal liability on legal persons for the offense of bribery of a foreign public official. Under Brazilian law a corporation or enterprise exists only as an artificial entity within the limits the law imposes. The Brazilian constitution does provide for criminal liability for legal entities "in respect of acts committed against the economic and financial order and against the popular economy." Whether legislation creating criminal liability for a corporation can be created under this exception is the subject of intense debate in Brazil and Brazilian authorities stated that there is no likelihood that the issue will be resolved in the near future. Likewise, there is no non-criminal liability for legal persons for criminal offenses. However, a legal entity is subject to administrative liability.

Coverage of Payee/Offeree

Article 337–D provides that persons promising, offering, or giving an improper advantage to a foreign public official or to a third person will be guilty of an offense. Public officials are covered in Article 337–D, which defines a foreign public official as "anyone, even though temporarily or in an unpaid capacity, who holds a position, a job or a public function in state bodies or in diplomatic representations of a foreign country." The article also deems "anyone who holds a position, a job or function in an organization or enterprise directly or indirectly controlled by the Public authorities of the foreign country or in international public organizations" to be "equivalent to a foreign public official." Brazilian authorities stated that the definition of "foreign public official" is based on the domestic definition of "public official" which has been broadly interpreted in Brazilian law. However, differences do exist in the two definitions and it is not clear whether the definition of foreign public official found in Article 337–D is more restrictive than its domestic counterpart.

Penalties

Article 337–B of the Brazilian Penal Code provides for the offense of bribery of a foreign official a term of imprisonment from one to eight years. The article also provides for a fine in addition to the prison term. The fine cannot be substituted for the prison term. The penalties for bribing a foreign official are the same as those for bribing a domestic official. Both the prison term and fine assessed will be raised by one-third if the advantage or promise causes the official to breach his or her functional duty.

Article 49 of the Penal Code states that fines under Brazilian law will consist of a number of daily fines. Article 49 states that "the amount of the daily fine will be set by the judge but may not be less than one-thirtieth of the highest monthly minimum wage ruling at the time of commission of the crime, nor be more than 5 (five) times this wage." Brazilian law also requires that the fine consist of not less than 10 days of the fine and not more than 360 days of the fine. Article 68 of the Penal Code governs the calculation of fines,

which takes into account the basic penalty, any aggravating or mitigating circumstances, subjective factors such as the degree of guilt of the perpetrators or previous record, and the convicted person's salary, income, and assets.

Administrative liability can be imposed on legal or natural persons under Brazilian law resulting in a suspension or exclusion from all public tenders or contracts with the public administration. Brazilian authorities have also stated that bribery of a foreign official falls within a group of crimes that affect international competition and is consequently subject to a fine ranging from 1 to 30 percent of a company's gross pretax earnings for the previous financial year. The amount will not be less than the amount of the advantage and can be doubled for repeat offenders. In addition, if a situation is considered severe, the penalty can include a disqualification from public financing or bids for five years. Brazilian law provides for the payment of damages to a successful claimant based on civil liability. An offender may also lose his or her "position, public function or term of office."

Confiscation of proceeds is provided under Article 91 of the Brazilian Penal Code upon conviction. The law does not expressly provide that confiscation can be imposed on a third party, but Brazilian authorities have explained that it can be imposed on a third-party accomplice who possesses the instrumentality or proceeds from an offense. Confiscation under Brazilian law can be applied only to someone who has taken part in the offense and cannot be levied against a third party who did not participate in the crime. Likewise, assets in the hands of an injured party cannot be confiscated or seized.

Books and Records Provisions

The Brazilian books and records provisions are contained in the Companies Law (Law No. 6,404, which requires corporations to maintain permanent bookkeeping records in conformity with commercial legislation and generally accepted accounting principles. Businesses and companies are required to maintain a uniform system of bookkeeping and keep a daily journal. Brazil confirmed that the measures do not contain an express prohibition of off-the-books accounts. Brazilian authorities, however, clarified that several other provisions of the Companies Law as well as the tax law address off-the-books accounts and can be used to enforce a prohibition.

Law No. 6,385 of 1976, which governs the securities market, requires that accounts of listed companies as well as other companies regulated by the Brazilian Securities and Exchange Commission, that are involved in the distribution and intermediation of securities must be audited by registered independent audit firms or independent accounting auditors.

Money Laundering

The provisions on money laundering are contained in Law No. 9,613 of 1998 as amended by Law No. 10,467 of 2002. The law includes bribery of both domestic and foreign public officials as predicate offenses for purposes of Brazilian money laundering legislation. Brazilian authorities have confirmed that judicial proceedings or sentencing of money laundering offenses are not dependent on either judicial proceedings or sentencing for the predicate offenses. However, the charges must contain sufficient evidence of the existence of the predicate offense.

Extradition and Mutual Legal Assistance

The legal basis for extradition in Brazil is found in Law No. 6,815 of 1980. Extradition may be granted when a state bases its request on a treaty or when it promises reciprocity to Brazil. Brazil has stated that the convention would be considered a legal basis to extradite someone for the offense of bribery of a foreign public official, subject to the condition of reciprocity. Brazil's Federal Constitution expressly forbids the extradition of Brazilian nationals, both native and naturalized citizens. An exception exists for naturalized citizens who committed the extraditable offense prior to his or her date of naturalization. Brazilian authorities stated that a legal duty exists to investigate or prosecute a case in Brazil in which an extradition request has been denied solely on the grounds of nationality.

Under Brazilian law, mutual legal assistance depends upon the existence of either bilateral or multilateral agreements. Brazil is a party to a number of multilateral mutual legal assistance agreements and has concluded or will conclude 27 bilateral accords. Brazil has noted that Article 9 of the convention is self-executing in Brazil and is itself a sufficient basis for granting mutual legal assistance. Whether Brazil requires dual criminality depends on the language of the specific agreement in question.

Complicity, Attempt, Conspiracy

Article 29 of Brazil's Penal Code establishes liability for complicity relating to a foreign bribery offense. The article states that "the penalties prescribed for the criminal offense also apply to whomever, in any way, conspires in the criminal offense, insofar as the person concerned is found guilty." Punishment under the article may be reduced by one sixth to one third "if the participation was of a lesser degree." Article 14 of the Penal Code governs the crime of attempt. The article provides that a crime is attempted "when the performance is begun, but it is not carried out through circumstances foreign to the wishes of the offender." The penalty applicable to the crime of attempt is the penalty applicable to the crime the offender tried to commit reduced by one-third to two-thirds.

Chile

Chile signed the Antibribery Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on April 18, 2001. The implementing legislation, Law No. 19,829, entered into force on October 8, 2002. Law No. 19,829 amended the Chilean Criminal Code by adding Article 250 *bis* A, which criminalizes the bribery of a foreign public official in international business transactions. The law also added Article 250 *bis* B, which closely follows the definition of foreign public official set forth in the convention.

The most significant concerns with the Chilean legislation include: the absence of liability for legal persons, the difference in sanctions for persons who offer bribes and those who pay bribes as a result of solicitations, as well as differences in penalties for domestic and foreign bribery offenses, and limited jurisdictional coverage.

Basic Statement of the Offense

Article 250 *bis* A of Chile's Criminal Code provides:

> He who offers a foreign public official an economic advantage, for that official or a third person, to act or refrain from acting in order to obtain or retain—for him or a third party—any business or advantage in the field of international commercial transactions shall be punished with imprisonment, fine and disqualification, as referred to in Article 248 *bis*, first paragraph. The same punishment shall be imposed on he who offers the said advantage to a foreign public official for his having acted or refrained from acting.
>
> He who, under the circumstances described in the foregoing paragraph, has consented to the offering of said advantage shall be punished with short term imprisonment, minimum degree, as well as the fine and disqualification referred to above.

The text of Article 250 *bis* A covers the offering of a bribe, but does not expressly refer to the act of giving a bribe. In the absence of case law, it is unclear whether the offense covers the act of giving a bribe. Furthermore, the text does not stipulate that the bribery of a foreign public official may be committed through intermediaries, though according to Chilean officials, the act of an intermediary is punishable under the general rules on participation contained in the Criminal Code. The text draws a distinction between a person who offers a bribe to a foreign public official and a person who bribes as a result of a bribe solicitation by a foreign public official, which is a lesser offense under Chilean law (see penalties below). It is unclear whether "economic advantage" includes more than monetary bribes, although Chile states that it does.

Jurisdictional Principles

Chile exercises territorial jurisdiction for foreign bribery offenses in cases where the offense was initiated in Chile. Chile has also indicated that Chilean courts may extend jurisdiction to cover offenses that produce consequences in Chile, though it is not clear if the courts will do so. Chile's law does not provide for nationality jurisdiction and it is unclear whether assertion of nationality jurisdiction is possible under Chile's system.

Coverage of Payor/Offeror

Article 250 *bis* A covers natural persons, but not legal persons. Chilean law does not provide for criminal liability for legal persons or for the possibility of imposing fines on a corporate or other legal entity. Further, there is no civil liability for legal persons for the foreign bribery offense, though there is a general sanction available for the dissolution of the corporation or foundation if the entity has an "unlawful" purpose. Chilean authorities have indicated that the executive branch has pledged to consider criminal liability for legal persons.

Coverage of Payee/Offeree

The basic statement of the offense covers bribery acts made to a foreign public official. Article 250 *bis* B defines "foreign public official" as:

> any person holding a legislative, administrative, or judicial office of a foreign country, whether appointed or elected, and any person exercising a public function for a foreign country, including for a public agency or public enterprise. It shall also mean any official or agent of a public international organization. The definition of foreign public official closely follows the definition set forth in the convention. Article 250 *bis* A also stipulates that the advantage can be for that official or a third person. It is unclear whether third person includes legal persons as well as natural persons.

Penalties

The level of sanctions applicable for the offense of bribery depends on whether the briber (1) offers a bribe to a public official ("offers") or (2) consents to a bribe solicitation ("consents"). The level of monetary sanctions for offering and consenting in giving a bribe are similar in that they both are punishable with a fine amounting to twice the economic advantage and provisional partial or absolute disqualification. Article 250 *bis* A, however, provides that consenting in giving a bribe is a lesser offense punished with short-term imprisonment in its minimum degree (range not given), whereas offering a bribe is punishable with "short-term imprisonment" in its minimum to medium degree (61 days to 3 years).

There are discrepancies in the range of penalties for domestic and foreign bribery even though domestic and foreign bribery are similar in scope. A comparison of the sanctions shows that the range of sanctions for domestic bribery is higher than the range of sanctions for foreign offenses. A similar discrepancy exists between the accessory sanctions for domestic bribery and foreign bribery.

According to Chilean authorities, Articles 24 and 251 of the Criminal Code permit confiscation for acts of bribery. Chilean officials stated that these provisions provide for confiscation of bribe proceeds upon conviction and the seizure of property received by a domestic or foreign public official. Chilean authorities have not provided any information as to

whether the possibility exists under Chilean criminal law of provisional seizure of a bribe or its proceeds either for the purpose of securing evidence or the imposition of a fine or confiscation.

Article 119 of the Administrative Statute provides for the dismissal of a public official who has been convicted of foreign bribery. Chilean authorities also stated that if a subsidy, award or economic advantage has been obtained through bribery, the granting authority shall render the illegal act null and void.

The statute of limitations for foreign bribery is five years and is "suspended" once a criminal action is filed against the alleged offender. Furthermore, Article 100 of the Criminal Code provides that for any period the offender spends abroad during the running of the statute of limitations, such period extends the initial five-year limitations period one day for every day spent abroad. It appears from this provision that the limitations period could be extended up to 10 years maximum.

Books and Records Provisions

The Chilean Corporations Law and the Commercial Code set forth accounting rules. In addition, regulatory bodies have the authority to issue accounting regulations for entities under their control, which have the force of law in the absence of specific laws. Chile applies international accounting regulations absent specific guidance under Chilean regulations pursuant to Law No. 13,011.

Article 25 of the Commercial Code sets forth the general obligation for natural or legal persons to keep books for accounting purposes and Article 27 requires the maintenance of a general journal detailing all business transactions. Article 4 of the Decree—Law No. 3,538 of 1980—requires corporations listed in the Securities Register to maintain books and records. Law No. 18,045 on the Securities Market sets forth obligations for "open" corporations and "partnerships limited by shares" on the maintenance of books and records provisions. Finally, the General Banking Law applies to financial institutions regulated by the Commission of Banks and requires that all transactions must be recorded, clearly identifying their origin or purpose. It is not clear, however, whether Chile's accounting rules directly address the prohibition of, and penalties for, off-the-books accounts or inadequately identified transactions.

Money Laundering

In Chile, neither domestic nor foreign bribery of a public official is a predicate offense for money laundering, although the Chilean Government is currently conducting a study to change this.

Extradition and Mutual Legal Assistance

Chile may provide extradition on the basis of multilateral and bilateral treaties. Chilean authorities state that in the absence of a treaty, Articles 637, 647 and 651 of the Old Procedure Code and the convention may serve as a legal basis for extradition. According to Chile, there are no constitutional or legal provisions barring the extradition of its nationals, though they state that they prefer to prosecute Chilean nationals in a Chilean court of law.

The Criminal Procedure Code governs the conditions that need to be satisfied to request or provide extradition. Chile may request extradition in a criminal proceeding for any offense whose maximum length of imprisonment exceeds one year under the Old Procedure Code (Article 635) and for any offense whose minimum length of imprisonment exceeds one year or where the imprisonment imposed exceeds one year under the New Procedure Code (Article 431).[4] Under the Old Procedure Code, there is no length of imprisonment requirement where another party requests extradition (Article 644). Under the New Procedure Code, however, there is a requirement that a person has been accused or sentenced for an offense of more than one year imprisonment (Article 440). According to Chile, dual criminality is satisfied by virtue of Article 10.4 of the convention.

Chile is restricted in its ability to provide mutual legal assistance in criminal and non-criminal matters and can only provide assistance to countries with which it has concluded legal assistance treaties. Chile has stated that in the absence of a treaty with another party to the convention, it would consider the convention to be the basis for providing mutual legal assistance.

Complicity, Attempt, Conspiracy

Chilean authorities stated that complicity is a form of criminal participation that is punishable under the general rules on participation in the Criminal Code. Because complicity is generally a less serious offense, the sanctions are less stringent than those imposed on the perpetrator. It is unclear whether and how Chilean law covers incitement, aiding and abetting and authorization of foreign bribery due to a lack of information.

Article 7 of the Criminal Code governs the offense of attempt generally and provides for a penalty that is two "degrees" less than the penalty applied to the completed offense. Chile has no law punishing conspiracy to bribe a domestic public official or a foreign public official.

Turkey

Turkey signed the convention on December 17, 1997, and deposited its instrument of ratification with the OECD on January 1, 2000. The Turkish implementing legislation, Amendment to the Law Regarding Prevention of Bribery of Foreign Public Officials in International Business Transactions No. 4782 of January 2, 2003 (the 2003 law), entered into force on January 11, 2003. The legislation establishes criminal liability for the active bribery of a foreign public official through amendments to Articles 4, 211 and 220 of the Turkish Criminal Code.

Although Turkey has taken some significant steps toward meeting its obligations under the convention, some issues of concern remain. For example, to impose corporate liability, the law requires:

(1) that the act of bribery was committed by an authorized representative,
(2) that the bribe was given for the benefit of a legal person, and
(3) that the authorized representative will be punished in order to proceed against the corporate body.

Turkey's law provides for an "effective regret" exception, which is inconsistent with the convention. The definition of foreign public official does not make expressly clear whether it covers officials or agents of a public agency, public enterprise or public international organization. It is also not clear whether the Turkish provisions for sanctions will be sufficient to meet the "effective, proportionate, and dissuasive" standard in the convention.

Basic Statement of the Offense

The basic statement of the offense is found in Article 211/3, Active Bribery of Foreign Public Officials, of the Turkish Criminal Code, which provides that:

The offering or the promising or the giving of the benefits directly or indirectly specified in the first paragraph to the officials whether appointed or elected and carrying out a legislative, administrative or judicial function in a foreign country or exercising a public function in the international business transactions for [either] obtaining or retaining the business or taking improper advantage or keeping them shall be regarded as bribery.

The first paragraph of Article 211 defines the term benefits as "any money, gift or any other benefits," which includes "any exorbitant difference between the market value of any movable or immovable property they have sold, purchased, or transferred for such purposes and the amount actually received or paid." According to Turkey, bribery requires the element of intent and the offender must be aware of the causal link between the benefit provided and the end attained.

Article 215 of the Turkish Criminal Code, Effective Regret and Non-Violation, provides specific provisions for situations where either the person offering the bribe or the public official declines to complete the illegal transaction and reports it to the relevant authorities. The Turkish authorities stated that the purpose of the provision is not only to prevent bribery, but also to reward contrition and disclose information about the persons involved in an act of bribery.

Jurisdictional Principles

Article 3 of the Turkish Criminal Code establishes territorial jurisdiction, but it does not expressly establish such jurisdiction where an offense is committed in part in Turkey. Turkish officials explained that in accordance with the principle of territoriality, if bribery of a foreign public official is committed either completely or partially in Turkey, the suspect or suspects are tried in Turkey and will be punished under Turkish law, even if they are sentenced abroad. The Turkish authorities have not provided case law to support this assertion, however. It is also not clear how an offense is deemed to have been committed in Turkey.

The Turkish Criminal Code generally does not address nationality jurisdiction. Article 4/3 of the code does provide that "whoever commits a felony during and in connection with performance of an office or mission on behalf of Turkey in foreign countries shall be prosecuted in Turkey." Article 4/3 covers the scope of extraterritorial jurisdiction over offenses occurring abroad, but only in connection with the performance of an office or mission on behalf of Turkey. Consequently, nationality jurisdiction can only be applied in a narrow set of circumstances because there does not appear to be any authority for the application of jurisdiction to offenses committed abroad by Turkish nationals.

Coverage of Payor/Offeror

The bribery offenses in Article 213 apply to "any person" and Turkish officials have explained that on the basis of this language it is understood that anyone can be an offender, including a public official. Turkish officials stated that the 2003 law amended Article 220 of the Turkish Criminal Code to establish corporate liability for bribery offenses. Specifically, Article 220 provides that "if the bribery offenses in this section are committed by authorized representatives of corporate bodies" who are punished, then "the corporate body shall also be punished." Turkish authorities did not provide a list of the types of entities covered by Article 220, although they stated that it applies to both private law and public legal persons. The standard of liability for a corporate body requires:

(1) that the act of bribery was committed by an authorized representative,
(2) that the bribe was given for the benefit of a legal person, and
(3) that the authorized representative will be punished in order to proceed against the corporate body.

Turkey explained that an authorized representative is a person who is legally bound to the corporate body, which requires a legal link between the representative and the legal personality. The "legal link" between the authorized representative and the corporate body, which is necessary to trigger corporate liability according to Turkish officials, is a mere formality. No actual proof of complicity between the natural person and the corporate body needs to exist to punish the corporate body. There are several concerns about Turkey's definition of authorized representative, which include who within the corporate body constitutes an authorized representative and how it can be proved that a particular representative was "authorized." Another point of concern is whether the law would cover a situation in which a regular employee has bribed a foreign public official with the authorization of the corporate body.

Coverage of Payee/Offeree

Article 211/3 refers to the bribery of "officials whether appointed or elected and carrying out a legislative, administrative or judicial function in a foreign country or exercising a

public function in international business transactions." Turkish officials stated that "exercising a public function in international business transactions" includes persons other than officials or agents as well as officials or agents of a public international organization. However, no express coverage of persons "exercising a public function for a foreign country, including for a public agency or public enterprise" exists. Turkish authorities also explained that the "directly or indirectly" language of 211/3 covers a situation where the benefit of a bribe flows to a third party and a case in which the bribe is made through an intermediary. Turkish officials qualified the explanation by saying that the article applies only in cases where there is a relationship between the official and the third party. "Relationship" is not defined and, as a result, it is not clear whether this creates a gap in coverage.

Penalties

The penalties for bribery are found in Articles 213 and 220 of the Turkish Criminal Code for natural and legal persons respectively. Article 213 carries a maximum jail term of 12 years depending on the degree of the breach of law or regulations or whether the action was taken in whole or in part. Article 213 does not establish a pecuniary penalty. Aggravating factors may be applied to a violation of Article 213 under Article 214, which provides that "punishment shall be increased from one-third to half according to the degree of breach of the law and regulation." Article 219 provides both aggravating and mitigating factors to the crime of bribery. Based on the type of offender (that is, commanding or judicial authority) and the value of the bribe or benefit, the penalties can be aggravated ("increased by half") or mitigated ("reduced by two-thirds").

Article 220 provides for "a heavy fine from two to three times the benefit derived from the crime" for legal persons guilty of bribery. It is not clear whether the aggravating and mitigating factors in Articles 214 and 219 apply to violations by legal persons. It is also not clear whether Turkish law imposes a sanction in situations where the benefit cannot be quantified.

Article 36 of the Criminal Courts Procedure Law provides that objects that can be used as evidence in an investigation or objects whose confiscation may be ordered may be kept under protection. If the holder of the object does not voluntarily surrender the objects, they may be seized. Turkish officials explained that Article 86 includes both the bribe and the proceeds of bribery. Article 217 of the Turkish Criminal Code specifically provides for the confiscation of property and benefits involved in bribery. Turkish officials described the scope of the article as very wide and covering not only the confiscation of the bribe, but also any benefit deriving from the bribe. Confiscation under Articles 86 and 217 apply to natural persons, legal persons, and third parties.

The Turkish Criminal Code also provides for a number of civil penalties and administrative sanctions for persons convicted of bribery. Article 219/4 states that persons convicted of bribery shall be permanently prohibited from accepting government employment. Likewise, the Turkish Public Procurement Law prevents persons, whether legal or natural, "established to be involved in acts such as to conduct or attempt to conduct procurement fraud by means of fraudulent and corrupt acts, promises, threats, unlawful influence, undue interest, agreement, corruption, bribery or other actions," from participating in a public tender. The Public Sector Procurement Contracts Law subjects bidders, either foreign or domestic, who engage in "fraud, intrigue, promises, threats, using influence, or arranging for (personal) gain or other means or attempting the same" to a temporary or permanent ban on participation in any bidding processes carried out by any public institution or organization. The length of the ban depends on the seriousness of the relevant acts.

Books and Records Provisions

Turkey's basic bookkeeping requirement is found in the Turkish Commercial Code. Turkey also has a Uniform Chart of Accounts designed to regulate the basic concepts and principles of accounting and to guide the preparation of financial statements. The Uniform Chart of Accounts is intended to provide an accurate reflection of company operations and results. The Turkish Tax Procedures Code also provides extensive rules requiring businesses to record financial information and provides sanctions for failing to properly record information.

All Turkish companies must comply with the accounting principles found in the Uniform Chart of Accounts and the accounting laws found in the tax code. Sole proprietors are required to comply only with the basic component of the Uniform Chart of Accounts. Registered and listed companies must comply with the rules and regulations of the capital markets board. Joint stock companies with 250 or more shareholders are considered public and therefore subject to the capital markets law. Banks, insurance companies, private financial institutions, financial leasing companies, stocks and bonds investment funds, and intermediary institution and investment partnerships must use different accounting techniques.

Money Laundering

Money laundering provisions are contained in Law No. 4208 on the Prevention of Money Laundering. Article 5 of Law No. 4782/03 added both domestic and foreign bribery of a public official to the list of predicate offenses. The Turkish authorities stated that a conviction regarding the predicate offense is not required to proceed against the money launderer.

Extradition/Mutual Legal Assistance

Turkey has no specific law governing extradition. However, Article 90 of the Turkish constitution provides, however, that "international agreements duly put into effect carry the force of law." According to Turkish officials, the multilateral and bilateral agreements relating to extradition to which Turkey is a party carry the weight of domestic law. Turkish officials also stated that in the absence of a relevant treaty the convention will serve as a legal basis for extradition. The Turkish Counsel of Ministers has the final authority to grant extradition

requests; it is not clear whether a denial of extradition may be appealed. Article 9 of the Turkish Criminal Code states that a Turkish national cannot be extradited to a foreign country. Turkish officials stated, however, that where nationality is the only reason for denying an extradition request for bribery of a foreign official, the case will be submitted to the relevant authorities.

Turkey also has no specific law regulating mutual legal assistance, but it provides mutual legal assistance in criminal matters pursuant to treaties. Where there is no applicable treaty, Turkey may provide mutual legal assistance in criminal matters based upon the principle of reciprocity. Turkish authorities said that in the absence of an applicable treaty, they consider the convention to be a sufficient legal basis for providing mutual legal assistance for foreign bribery offenses.

Complicity, Attempt, Conspiracy

The Sixth Chapter of the Turkish Criminal Code, Participation in Felonies and Misdemeanors, governs complicity by providing for the crimes of abetting in Article 64 and participation in a crime in Article 65. Turkish officials said that both provisions apply to bribery of foreign officials. Under Turkish law, anyone abetting another person to commit an offense is subject to the same punishment as the perpetrator. Participation in a crime includes inciting, giving instructions, and facilitating the commission of a crime. The punishment for someone guilty of participation is a reduced version of the base crime. Should it be the case, however, that the crime could not have been accomplished without the assistance of the person who participated in the crime, no reduction in penalty is provided. An intermediary involved in an act of bribery of a foreign official is covered under the crime of complicity.

Articles 61 and 62 of the Turkish Criminal Code govern the crime of attempt, which occurs when anyone commences the execution of an intended felony and due to reasons beyond his or her control cannot complete the felony. The punishment for attempt under Turkish law is a reduced version of the punishment for the relevant felony. Turkey distinguishes between failure to complete a crime due to circumstances under the control of the agent, and the failure to complete a crime due to circumstances beyond the control of the agent. In the former case, the agent will not be punished. In the latter case, punishment will be applied.

It is not clear if the Turkish Criminal Code provides for the crime of conspiracy to bribe a foreign official.

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1. U.S. Government assessments of the implementing legislation of the following 27 countries appear in the 2001 report: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Japan, Luxembourg, Mexico, Poland, the Netherlands, Norway, the Slovak Republic, South Korea, Spain, Sweden, Switzerland, and the United Kingdom.

2 Assessments of New Zealand and Portugal appear in the 2002 report, and for Ireland in the 2003 report. All of the reports are available at www.export.gov/tcc.

3 The IAFCA amended the FCPA to: (1) include payments made to secure "any improper advantage"; (2) include all foreign persons who commit acts in furtherance of the bribery act while in the United States; (3) to include officials of public international organizations within its definition of public official; (4) provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States; and (5) eliminate the disparity in penalties applicable to U.S. nationals and foreign nationals employed by or acting as agents of U.S. companies.

4 The New Procedure Code will gradually replace the Old Procedure Code on a region by region basis by December 2004.

3

Review of Enforcement Measures

Enforcement of National Implementing Legislation

As of July 2004, all parties have laws in place that substantially conform to the requirements of the Antibribery Convention. Some parties are making greater efforts than others to increase awareness of the convention and their domestic implementing laws. Other parties are responding to credible allegations of bribery of foreign officials with investigations, and, in several cases, convictions. However, performance remains uneven. In 2004, after strong encouragement by the U.S. Government, the monitoring cycle for convention enforcement was accelerated, with a total of seven country examinations scheduled per annum. As more parties prepare for and experience their peer reviews, they are becoming aware of the power of public scrutiny. Reports summarizing parties' efforts to implement the convention appear on the OECD Web site at *www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.html.* Civil society, including non-governmental organizations, is using those reports to raise pointed questions about the quality of each party's measures and efforts to enforce the convention. Progress is incremental, but U.S. agencies are confident that peer monitoring is beginning to achieve its intended effect: to put pressure on convention parties to improve their actions to investigate credible allegations of foreign bribery and to prosecute when a solid case can be made.

Unfortunately, some parties, particularly those whose firms are very active in export markets, have been slow to apply enforcement resources to address transnational bribery. The U.S. Government recognizes that achieving the convention's goals will take time. As the peer monitoring program progresses, all parties to the convention should apply resources to the task of building capacity to launch investigations, bring prosecutions, and obtain convictions under their laws. It also is important to expand public awareness campaigns and ensure that business groups and legal communities, as well as law enforcement experts and prosecutors, are fully aware of the legal and institutional framework that makes foreign bribery a criminal offense for companies based in a party's territory. Technical cooperation between law enforcement authorities and prosecutors in the OECD Antibribery Convention countries will strengthen enforcement practices and improve cross-border cooperation. U.S. enforcement authorities have offered assistance to their counterparts in other convention countries and have encouraged the OECD Working Group on Bribery to promote joint meetings with prosecutors.

To give life to commitments embodied in multilateral anticorruption instruments like the Antibribery Convention, countries must back them with concrete actions. Such actions include following up on all credible allegations of bribery, initiating prosecutions when evidence supports the allegations, and imposing sanctions that are effective, proportionate, and dissuasive. It is the responsibility of each party to implement and enforce its national laws as well as to be proactive and not await Phase II review or other public scrutiny of its enforcement regimes before taking action.

Enforcement by Other Parties to the Antibribery Convention

Other than the United States, we are aware of only two parties (Korea and Sweden) whose authorities have obtained convictions under their respective implementing laws for bribery of a foreign public official. A number of other parties have initiated investigations or legal proceedings that are now in the public eye, and other cases are in the investigative stage. We continue to follow allegations in the press, which we believe should, in some instances, prompt the relevant law enforcement authorities to proceed with an inquiry. We continue to call on all parties to enforce the convention rigorously.

Korea

Korea has launched two investigations under its implementing legislation. One of those cases has resulted in a conviction. Both cases concern the alleged involvement of Korean nationals in bribing U.S. military procurement officers at U.S. military facilities in Korea. In 2002, the Seoul prosecutor's office indicted and subsequently obtained the conviction of the president of a construction company on bribery charges involving a U.S. Army colonel who was the commander of the contracting command in Korea. A second bribery case related to U.S. Army procurement was initiated in November 2003. Prosecutors indicted eight Korean businessmen, who were owners or directors of delivery companies, and on February 3, 2004, referred four U.S. Army officers to the Army's criminal investigation command.

Sweden

In November 2002, the prosecutor general's office pressed charges against two Swedish consultants who were accused of bribing World Bank officials. The two men were suspected of paying 3 million Swedish krona (US$390,000) in bribes to win World Bank consulting contracts. The case was tried in December 2003, and on January 12, 2004, one defendant was sentenced to one year and the other to one-and-a-half years' imprisonment. Both cases are being appealed.

Canada

Canada is prosecuting a Canadian oil field services company for allegedly bribing a U.S. Immigration and Naturalization Service (INS) official to facilitate entry of its employees into the United States and thwart the entry of its competitors. The INS official pleaded guilty in July 2002 to accepting $28,300 Canadian in bribes from the oil company, served a six-month sentence, and was deported to the United States, where he faced further prosecution. We understand that the case against the Canadian firm will be tried this fall in Alberta.

France

In late 2003, a French magistrate confirmed that he has opened an investigation into suspicious payments made by a consortium that included a French company to an agent in connection with an oil and gas project in Nigeria. In addition, at the end of April 2002, a judicial investigation was opened by a tribunal in the Paris suburbs to look into charges of misuse of corporate assets and receiving of misuse of corporate assets. This followed a notification by the French Financial Intelligence Unit (TRACFIN) of suspicious large-scale transfers involving the French bank accounts of a minister from a non- EU foreign country. In order to extend the judicial investigation, initially limited to the alleged misuse of corporate assets and receiving of misuse of corporate assets, to cover the matter of bribery which emerged during a letters rogatory procedure, the Public Prosecutor laid before the examining magistrate a "supplementary brief " on the active bribery of a person entrusted with public authority in a foreign state, an offence defined and punished under Articles 435–3 and 435–5 of the Penal Code.

Italy

Italian authorities are investigating a major Italian energy company for allegedly bribing foreign public officials in several countries in the Middle East. Several company executives reportedly inflated invoices from consulting firms for work related to contracts worth approximately 1 billion euros in three Middle Eastern countries from 1999 to 2001. The excess funds reportedly were used to bribe foreign officials in those Middle Eastern countries. The trial is expected to start within a year.

Norway

In September 2003, Norwegian investigative authorities opened a bribery investigation of a large Norwegian oil and gas company. This company was formally charged with violation of the Norwegian penal code's provision criminalizing bribery of foreign public officials.

A number of other investigations have been initiated by parties, but the details are not available in the public domain. The U.S. Government will watch developments in those cases closely. We note that some potential cases may be dismissed at an early stage because the initial evidence indicates that a bribe offer or payment was made before implementing legislation was in force for a country. In such cases investigative authorities should ensure that bribery transactions are fully scrutinized to guarantee that any ongoing or promised future payments under pre-Antibribery Convention contracts are fully investigated and prosecuted as appropriate. Because of the significant amounts of money involved, bribery transactions often are structured over many years.

Further, although we recognize that reports in the general media of alleged bribery of foreign public officials are not always sufficiently credible to result in an official inquiry, in some cases such reports should at least prompt prosecutors to make preliminary inquiries. Furthermore, prosecutors in party states should develop information on potential violations from successful prosecutions by governments whose public officials were bribed. The U.S. Government expects and encourages each party to follow such cases and to bring its own prosecutions if warranted. U.S. agencies are concerned about the apparent inaction of some parties and their failure to initiate investigations where a conviction has been obtained in the bribed official's country and where the facts appear to support

such an investigation (e.g., bribe payor of a party or an actionable time period). A rigorous approach to prosecuting credible cases is essential both to fulfill a party's obligations under the convention as well as to help support the rule of law. We recognize that many countries, like ours, preserve the confidentiality of criminal investigations until and unless they result in public enforcement action. Therefore we may not have a full picture of foreign enforcement efforts. Nonetheless, all parties should take concrete steps in response to credible reports of bribery of foreign public officials.

Enforcement in the United States

In the United States, under the Foreign Corrupt Practices Act (FCPA), investigation of bribery of foreign public officials and prosecution are subject to the same rules and principles that govern any other federal criminal or civil investigation. To ensure that uniform and consistent prosecutorial decisions are made in this area, all criminal investigations, and some civil actions, under the FCPA are supervised by the Criminal Division of the U.S. Department of Justice. The Securities and Exchange Commission (SEC) has civil enforcement authority over issues under the FCPA, parts of which are incorporated into the Securities Exchange Act of 1934.

In the 27 years since the passage of the FCPA, the U.S. Department of Justice has brought 39 criminal prosecutions, seven civil enforcement actions under the antibribery provisions of the FCPA, and 19 foreign bribery criminal cases under federal criminal statutes other than the FCPA. In addition, the SEC has brought nine civil enforcement actions since 1997 under the antibribery provisions and the books and records provisions of the Securities Exchange Act of 1934. Since July 1, 2003, the following enforcement actions have been instituted, advanced procedurally, or concluded:

- ***United States v. Hans Bodmer:*** In 2003, a grand jury in New York returned an indictment charging Hans Bodmer, a Swiss lawyer, with conspiring to violate the FCPA in connection with alleged bribery of senior officials of the government of Azerbaijan. At the United States' request, Korea extradited Mr. Bodmer to the United States in 2004.

- ***United States v. James H. Giffen:*** In April 2003, a grand jury in New York returned an indictment charging James Giffen, a U.S. citizen, who acts as a counselor to the government of Kazakhstan on oil transactions, with, among other things, violations of the FCPA, money laundering, and fraud associated with the diversion of fees paid by oil companies and the deposit of funds into Swiss bank accounts held for the benefit of Kazakh officials. The trial is scheduled for October 2004.

- ***United States v. David Kay:*** In December 2001, a grand jury sitting in Houston, Texas, returned an indictment charging David Kay, an officer of American Rice Inc., with violating the FCPA by allegedly authorizing bribes of Haitian customs officials. In March 2002, the grand jury returned a superseding indictment adding a second defendant, Douglas Murphy, a former officer of American Rice Inc. In April 2002, the district court dismissed the indictment, finding that the alleged conduct did not fall within the FCPA's requirement that the bribes be paid to obtain or retain business. The United States appealed this decision, and in February 2004, the Court of Appeals for the Fifth Circuit reinstated the indictment. The trial is now scheduled for August 2004.

- In a related administrative proceeding, ***In the Matter of American Rice, Inc.,*** the SEC entered a settled cease-and-desist order against American Rice, two former American Rice employees involved in rice shipments to Haiti, Joel R. Malebranche and Allen W. Sturdivant, and a former American Rice controller in Haiti, Joseph A. Schwartz, Jr. The SEC found that American Rice paid bribes with regard to at least 12 shipments of rice into Haiti. In general, Malebranche negotiated each bribe, Schwartz issued checks drawn on American Rice's bank account and falsely recorded the amounts as routine business expenditures on American Rice's books and records, and Sturdivant falsified the shipping records with respect to each shipment. In each case, the respondents' actions were allegedly authorized by the respondents' superiors. The SEC further found that American Rice lacked internal controls that were reasonably designed to prevent or detect FCPA violations. Each of the respondents consented to cease and desist from further violations. (Note: This case was concluded in January 2003, but was not noted in our 2003 report).

- ***In the Matter of BJ Services Company:*** In March 2004, the SEC entered a settled cease-and-desist order against BJ Services Company for violations of the FCPA's antibribery, books-and-records, and internal control provisions stemming, in part, from illicit payments made through the company's Argentinean subsidiary to customs officials. In one instance, an Argentinean customs official demanded a bribe for the release of equipment that had been imported into the country in violation of Argentinean customs law. Payment of the bribe ensured that the company could avoid fines and charges relating to reimportation of the equipment and also avoid any disruption to its business. On a subsequent occasion, bribes were paid to an Argentinean customs official to overlook a prior customs violation and not fine the company. Those payments were improperly characterized on the company's books and records. BJ Services Company consented to cease and desist from further violations.

- ***SEC v. Schering-Plough Corporation:*** In June 2004, Schering-Plough consented to pay a $500,000 civil penalty without admitting or denying allegations that it violated the books and records and internal control provisions of the FCPA. These violations resulted from payments made by Schering-Plough's Polish subsidiary to the Chudow Castle Foundation, a charitable organization based in Poland, from February 1999 through March

2002. During the period in which these illicit payments were made, the individual who headed the Chudow Castle Foundation also served as the Director of the Silesian Health Fund. The Silesian Health Fund was a Polish governmental body that, among other things, provided money for the purchase of pharmaceutical products and influenced the purchase of those products by other entities, such as hospitals, through the allocation of health fund resources. According to the complaint, Schering-Plough Poland paid 315,800 Zlotys (approx. U.S.$76,000) to the Chudow Castle Foundation to induce the Director to influence the health fund's purchase of Schering-Plough's pharmaceutical products. The complaint alleges that none of the payments made by Schering-Plough Poland were accurately reflected on the subsidiary's books and records and that the company's internal controls were inadequate to detect the improper payments.

- Additionally, in a parallel enforcement proceeding, the SEC entered a settled case-and-desist order requiring Schering-Plough to cease and desist from committing or causing violations of the FCPA's books and records and internal control provisions. As part of the settled cease-and-desist order, Schering-Plough was ordered to retain an independent consultant to review the company's policies and procedures regarding compliance with the FCPA and to implement any changes recommended by the consultant.

The Antibribery Convention requires parties to take measures necessary to ensure either that the party can extradite its nationals or that it can prosecute its nationals for bribery of foreign public officials, and if it denies a request to extradite its nationals solely on that basis, it shall submit the case to its authorities for prosecution. In the case of *United States v. Frerik Pluimers,* the United States made such a request to the Netherlands and has been waiting for appropriate action since 2000. [Please refer to appendix C of this report for a comprehensive list of FCPA prosecutions and civil enforcement actions by the DOJ and independent civil enforcement actions by the SEC.]

Department of Justice Opinion Procedure

The U.S. Department of Justice has also provided guidance to American businesses engaged in international business transactions. Since 1980, in response to requests from U.S. businesses, the department has issued 40 opinions stating whether it would take enforcement action if the requestors proceeded with actual proposed transactions. In 2004, the department issued one opinion:

> In Opinion Release 04–01 the U.S. Attorney General opined that a U.S. law firm that proposed to sponsor and present, in conjunction with a ministry of the People's Republic of China ("PRC"), a comparative law seminar in Beijing, China, which would entail among other things, paying the costs of the seminar for certain foreign public officials, could proceed with the seminar without fear of FCPA prosecution based on the facts and circumstances described in the request.

The opinion procedure is set forth at 28 C.F.R. Part 80. The opinion procedures and the opinions issued to date are available on the Department of Justice Fraud Section's Web site at www.usdoj.gov/criminal/fraud/fcpa.html. Please see Appendix 2C of this report for a copy of the opinion procedures.

Efforts to Promote Public Awareness

U.S. Efforts

Of any party to the convention, the United States has the most extensive public outreach program to promote awareness of the Antibribery Convention and its implementing legislation. The United States recognizes the importance of awareness-raising activities. For many years, prior to the adoption of the Antibribery 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 that are engaged in international trade generally are aware of the requirements of U.S. law. Since U.S. ratification of the Antibribery Convention and the passage of the International Antibribery and Fair Competition Act of 1998 (IAFCA), the U.S. Government has increased efforts to raise public awareness of U.S. policy on bribery and of initiatives to eliminate bribery in the international marketplace.

Officials of the Commerce, State, and Justice Departments continue to be in regular contact with business representatives to brief them on new developments in antibribery issues and to discuss problems they encounter in their operations. As part of a vigorous outreach program, the three departments' Web sites provide detailed information on the convention, relevant U.S. laws, and the wide range of U.S. international activities to combat corruption. (See Appendix D for websites.)

Efforts of Other Signatories

Efforts to raise public awareness about the Antibribery Convention and domestic laws implementing the convention continue to vary widely among the parties. Some parties continue to rely on historical perceptions of low levels of corruption within their communities and direct few if any resources to the effort. Others, faced in some cases with limited resources, assign greater importance to other initiatives and also fail to address this important component of implementation and enforcement. Nonetheless, some parties have recognized the need to raise awareness of the convention among their public and private sectors. For example, in **Australia**, the attorney general's department is developing guidelines on bribery for Australian government employees operating overseas. The government is also developing information on the convention to be inserted into a passport pack that Australians receive when traveling overseas.

As host of the 2005 Global Forum on Fighting Corruption, **Brazil** is organizing national, regional, and global antibribery events to raise awareness of the Antibribery

Convention, including in the private sector and civil society. The Government of **Chile** recently created a National Corruption Expert Group, which is composed of public officials from entities of the Chilean administration that specialize in the prevention, detection, and prosecution of acts of corruption. The group will include support for the activities of the OECD Working Group on Bribery in Chile. The Government of **Finland** established a body composed of officials from different ministries whose purpose is fighting corruption, and the Government of **Korea** established a task force to promote implementation of the convention. In July 2003, **Italy** enacted a law that established a high commissioner for the prevention and the fight against corruption and other forms of illicit practices in public administration. In **Mexico** the Secretariat of Public Administration partnered with several private-sector entities to promote greater awareness of the convention among the business, academic, and legal communities, and held seminars, including one in September 2003 that was directed at the accountancy profession and titled "International Instruments Related to the Fight Against Corruption." The Government of **Norway** started collecting information from its diplomatic missions on whether Norwegian enterprises have reported about bribery in the countries in which they operate. In addition, Norway's Phase II review revealed an extensive program of outreach related to the convention. In **Sweden** the prosecutor general created a special anticorruption unit within the city court of Stockholm, which will operate at the national level. In **Switzerland** the State Secretariat for the Economy, in collaboration with the other departments and with Transparency International (Switzerland), published a brochure aimed at Swiss enterprises that are active abroad, which provides them with information on bribery laws and related anticorruption resources. In addition, a number of the parties to the convention have posted their national implementing legislation on their government Web sites or the OECD Anti-Corruption Division Web site at *www.oecd. org/document/30/0,2340, en_2649_34859_2027102_1_1 _1_1,00.html.*

These, and similar efforts by other parties, contribute to securing the objectives of the Antibribery Convention. Although businesses are responsible for understanding and complying with the laws in the environments in which they operate, each party to the convention bears the responsibility of publicizing the fact that bribery is no longer an acceptable way to obtain an international contract and that serious criminal and civil penalties can be imposed on those who bribe or attempt to bribe foreign public officials. Each enforcement review to date has emphasized the importance of raising awareness of the convention among public officials and the private sector. The U.S. Government will continue to urge other parties to the convention to undertake active public awareness programs. In addition, such initiatives should include a component that encourages businesses to develop and adopt effective corporate compliance programs to ensure compliance with national laws implementing the convention. Full participation in implementation and enforcement by governments, business, and civil society is critical to making the Antibribery Convention an effective deterrent to corruption.

Monitoring Process for the Convention

Monitoring is crucial for promoting the effective implementation and enforcement of the Antibribery Convention. The OECD has developed a comprehensive monitoring process that provides for input from the private sector and non-governmental organizations. In addition to the OECD process, the U.S. Government undertakes its own monitoring. The United States continues to encourage all parties to participate fully in the OECD monitoring process and to establish their own internal mechanisms for ensuring follow-through on the convention by governments and the private sector.

OECD Monitoring

The OECD Working Group on Bribery recognizes that a rigorous process of multilateral surveillance of implementation and enforcement is necessary. Therefore, to ensure the effectiveness of the Antibribery Convention and related anticorruption instruments, the OECD Working Group on Bribery has established a rigorous process to monitor implementation and enforcement of the convention and the 1997 Revised Recommendation of the OECD Council on Combating Bribery in International Business Transactions (Revised Recommendation).

The monitoring process has two phases: 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. Both phases entail:

(1) the issuance of questionnaires to the reviewed country,

(2) the subsequent analysis of its replies by an examination team composed of staff from the OECD Working Group on Bribery secretariat and lead examiners from two party states, and

(3) the drafting of an interim report by the examination team.

The report is discussed and further evaluated at a Working Group meeting, which results in a final report. The shortcomings are identified, and effective approaches to implementation and enforcement are provided to the reviewed country. Phase II examinations also include onsite visits by the examination team. An important objective of both phases is to improve the capacity of parties to fight bribery of foreign public officials in international business transactions through parties' mutual critical evaluation of compliance with the requirements of the Antibribery Convention and Revised Recommendation. For a detailed description of the framework for monitoring the convention and Revised Recommendation, which includes a summary of the modalities for the process, please refer to this chapter in the 2001 report to Congress at www.export.gov/tcc. The

modalities are also available on the OECD's public Web site at:

- *www.oecd.org/document/21/0,2340,en_2649_34859_2022613_1_1_1_1,00.html* for Phase I and

- www.oecd.org/document/27/0,2340,en_2649_34859_2022939_1_1_1_1,00.html for Phase II.

Financial support for the monitoring of the Antibribery Convention remained uncertain through 2002; however, the OECD Council agreed to reallocate budget funds for the 2003–2004 budget cycle to support an accelerated cycle of peer reviews. The U.S. Government worked to persuade other OECD countries to join the consensus to increase funding for convention peer monitoring. In 2003 the OECD Working Group on Bribery succeeded in negotiating a compromise package of institutional, structural, and financial reforms that will provide for stable funding of peer reviews through 2007. The OECD Council approved the reform package in February 2004. The U.S. Government firmly believes that a rigorous Phase II enforcement process is needed to encourage parties to take the necessary steps to investigate and to prosecute unlawful conduct by persons subject to their jurisdiction.

Phase I Reviews

As of July 2004, the OECD Working Group on Bribery completed Phase I reviews of the implementing legislation of 34 parties. Only the implementing legislation of Slovenia remains to be reviewed. That review is expected to take place sometime in 2005. The individual country reviews by the Working Group are available on the OECD's public Web site at www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.html.

The Commerce Department's Trade Compliance Center also maintains a link to those materials through its site at www.export.gov/tcc. U.S. Government assessments of the implementation of parties reviewed since our last report (Brazil, Chile, and Turkey), and brief descriptions of actions undertaken by some parties to amend their legislation over the past several years to conform to recommendations of the Working Group, are included in Chapter 2 of this report. For all other U.S. Government assessments, please refer to the earlier annual reports to Congress available at the same Web address. A copy of the Phase I Review of the U.S. is contained in Appendix B of this report.

Phase II Reviews

The goal of Phase II of the monitoring process is to study the structures that parties have in place to enforce the laws and rules implementing the convention and the Revised Recommendation and to assess their application in practice. Phase II began in late 2001 with a review of Finland. Since then, the enforcement regimes of Bulgaria, Canada, France, Germany, Iceland, Luxembourg, Norway, and the United States have undergone review. The dates, countries of lead examiners, and related information for these and all Phase II reviews can be found in Table 2 at the end of this chapter.

In early 2004, after a little over two years of experience in conducting Phase II examinations, the OECD Working Group on Bribery developed new review guidelines to supplement the existing procedures and to provide guidance and best practices for lead examiners, countries to be reviewed, the OECD Secretariat, and the Working Group as a whole. The guidelines recognize that it is not necessary for every Phase II review to cover the same laundry list of topics. Nor is it necessary or desirable to devote time and resources to issues already being examined and addressed in other fora. Instead, the review should focus on the particular issues raised by the examined country's implementation of the convention and its governmental, economic, and geographic organization. Furthermore, the facts and circumstances presented by a particular country may require that issues not addressed in previous Phase II reviews be included in the review of that country. The Working Group believes that, to be effective, the Phase II process must be transparent, rigorous, and credible.

Following are brief summaries highlighting various issues raised in enforcement reviews of Bulgaria, Canada, France, Luxembourg, and Norway. Summaries for Finland and the United States and for Germany and Iceland can be found in the 2002 and 2003 reports to Congress, respectively. For more detailed analyses and recommendations of the Working Group, see www.oecd. 28 Addressing the Challenges of International Bribery and Fair Competition, 2004 org/document/24/0,2340,en_2649_34859_1933144_1_ 1_1_1,00.html. Phase II reports and recommendations of the OECD Working Group on Bribery go to www.oecd.org/document/24/0,2340,en_2649_37447_1933144_1_1_1_3744 7,00.html. A copy of the Phase II Review of the U.S. is contained in Appendix B of this report.

Bulgaria

The OECD Working Group on Bribery conducted the Phase II review of Bulgaria during the group's February 2003 meeting. Corruption is a nationally debated issue in Bulgaria, and although the Working Group examiners were impressed with the amount of resources and energy the Bulgarian government is focusing on the issue generally, bribery of foreign public officials is not as high on the agenda as domestic corruption. There have been no prosecutions under Bulgaria's law implementing the convention.

Bulgaria has made several amendments to its foreign bribery law to meet the convention's requirements following its Phase I examination. For example, some of the amendments addressed offers and promises to bribe, deleted certain defenses, and expanded the definition of a foreign public official. However, one of the main problems with Bulgaria's implementation and enforcement of the Antibribery Convention is that it still does not provide for liability of legal persons for bribery of foreign public officials or sanctions for corporate liability. The Working Group recommended that Bulgaria proceed diligently with procedures addressing those remaining problems. It also recommended excluding from government contracts any entities whose officers and directors engaged in foreign bribery.

In addition, the Working Group recommended that Bulgaria provide more training of government officials to make them aware of the new antibribery laws, particularly those officials responsible for the detection, reporting, and enforcement regarding the offense of bribery of foreign public officials, as well as training of tax authorities. Furthermore, the Working Group recommended that the relevant Bulgarian agencies in charge of investigating and prosecuting foreign bribery simplify and streamline their procedures, enhance their cooperation and coordination, increase resources, and, to the extent possible, consider centralizing expertise among those responsible for investigating the offense. The Working Group also noted that the Bulgarian private sector, businesses and, particularly, professionals in the legal, auditing, and accounting professions, could use more education on the foreign bribery laws, and recommended that Bulgaria increase public awareness by educating and advising the private sector on the offense. A key recommendation was that Bulgaria encourage more widespread development and use of corporate codes of conduct and compliance policies in the Bulgarian private sector. Apparently the private sector has begun these efforts on its own initiative, with certain business groups having already created corporate codes of compliance.

Canada

The Working Group conducted Canada's Phase II review at its June 2003 meeting. Although there have been no completed prosecutions involving bribery of foreign public officials in Canada (there was one ongoing matter at the time of the Phase II review), the Working Group made several general recommendations regarding effective measures for preventing and detecting foreign bribery as well as for effectively prosecuting and sanctioning foreign bribery offenses.

The Working Group recommended that Canada consider giving a coordinating role to one of the principal agencies responsible for implementing the Canadian antibribery law. Better coordination will help to avoid the duplication of resources and to maintain specialized knowledge and expertise, at both the federal and the provincial level, in the enforcement of the offense. The Working Group also recommended that Canada establish a more systematic and coordinated approach to promoting awareness of its antibribery laws in all the relevant government agencies, at both the federal and provincial level, in order to prevent and detect foreign bribery. Although both the Department of Justice and the Department of Foreign Affairs and International Trade, as well as Canada's export credit agency, have publicized the Canadian law implementing the convention within the private sector and have provided training to key government officials, the Working Group encouraged Canada to do more. The Working Group suggested more training for the relevant agencies involved, police and prosecutors, customs, and those most likely to come into contact with companies abroad. Also, as in many countries, the larger multinational companies were more aware of the foreign bribery offense than small and medium-sized businesses were; therefore, the Working Group recommended that more information be targeted to those companies.

The Working Group also made several recommendations concerning accounting requirements, external audits, and internal company controls to clarify the prohibition of off-the-books accounts and transactions and the use of false documentation, to encourage more effective external audits and auditor independence, and to spur the development and adoption of adequate internal company controls and standards of conduct. Another important recommendation was to review the prohibition under the federal Income Tax Act against reporting to law enforcement agencies any non-tax-related criminal offenses detected in the course of tax audits. In addition, the Working Group recommended that Canada reconsider its decision not to establish nationality jurisdiction over the offense of foreign bribery (as most other commonlaw countries did, including the United States and the United Kingdom, when they enacted laws implementing the OECD Antibribery Convention).

France

The OECD Working Group on Bribery conducted the Phase II review of France during its October 2003 meeting. Although the French Phase II review revealed some problems, the Working Group and the United States were encouraged to learn that France had brought one prosecution for foreign bribery, in which it charged a French national and a foreign official. The Working Group also learned that France was conducting several other investigations into allegations of foreign bribery, had referred one investigation to another country, and was executing mutual legal assistance requests from other countries investigating foreign bribery.

In addition, the Working Group made a number of recommendations that it felt would improve France's efforts to raise awareness of the Antibribery Convention and make its enforcement efforts more effective. For instance, the group recommended that French officials send regular reminders to diplomatic missions concerning their responsibility to report allegations of bribery by French enterprises to the public prosecutor. The Working Group also suggested that France step up its efforts to publicize the law implementing the convention with the private sector, and encourage its companies to develop and adopt corporate compliance programs that address the issue of transnational bribery. Furthermore, the Working Group noted that the French permit victims of bribery of domestic and European Union officials to initiate prosecutions but did not extend the same rights to victims of bribery in other foreign countries. The Working Group called on France to accord equal treatment in the prosecution of all cases of bribery of foreign officials.

The Working Group expressed concern over reports that France has a general legal culture that has resisted prosecuting corporations. Despite the creation of corporate criminal liability in 1994, certain legal impediments to prosecuting corporations, potential impediments to the exercise of extraterritorial jurisdiction, and some recent court cases suggest prosecutors might encounter difficulties in establishing the elements of the crime.

Luxembourg

The Working Group conducted the Phase II review of Luxembourg at its April 2004 meeting. The Phase II report on the Luxembourg review indicated that Luxembourg authorities are concerned not only about transnational bribery by their companies, but also by foreign companies and nationals using Luxembourg banks or companies to further international bribery schemes. Accordingly, Luxembourg officials stated that they would provide assistance to the home country of such companies and nationals, enabling those countries to bring enforcement actions. In fact, Luxembourg has instructed its prosecutors to give mutual legal assistance requests priority over the government's own investigations.

The most serious flaw in Luxembourg's enforcement regime is its continued failure to implement liability for corporations. Luxembourg has repeatedly assured the Working Group that a law creating such liability is being prepared, and it stated that it expects to introduce a bill after its national elections in June. The Working Group made a series of recommendations concerning improving awareness of Luxembourg's antibribery law among its public and private sectors, improving the enforcement of reporting requirements by public servants, and implementing whistle-blower protection in the private sector. In addition, the group recommended empowering police to conduct preliminary investigations of bribery allegations and, of course, encouraged the introduction and passage of a law on corporate criminal liability. Finally, the Working Group indicated that it would consider an unprecedented follow-up on-site examination after Luxembourg reported on its efforts to implement the Working Group's recommendations.

Norway

The Working Group conducted Norway's Phase II review at its December 2003 meeting. Norway received a generally favorable Phase II review. Although no cases of the new offense of bribery of foreign public officials have been tried in Norway, Norway has had one conviction for bribery of a foreign public official. That case, which was brought under an alternative aggravated breach of trust offense, predated the implementation of the convention. Several investigations apparently were under way at the time of the Phase II review.

Norway has made numerous amendments to its law implementing the convention since its Phase I review. For example, Norway added a definition of a "foreign public official," clarified what constitutes an aggravated bribery offense, increased the prison terms for the offense of foreign bribery, broadened the coverage regarding reporting of suspicious transactions under its money laundering legislation, and significantly increased the statute of limitations from 2 years to 5 and 10 years, respectively, for natural and legal persons. In addition, compared with many OECD countries, Norway conducted a widespread public campaign to address international corruption, both within the government and within the private sector. The private sector has adopted corporate codes of compliance and generally seems aware of the foreign bribery issue, particularly the larger companies. Nonetheless, the Working Group recommended that this publicity continue, so that all relevant actors, including small and medium-sized businesses, accountants, auditors, and government employees, particularly in diplomatic posts, are aware of the Antibribery Convention. The Working Group also recommended that Norway consider allocating more resources to agencies responsible for investigating foreign bribery.

Monitoring of the Convention by the U.S. Government

Since the Antibribery Convention entered into force, monitoring the implementation and enforcement of the convention has been a priority for the U.S. Government. The U.S. Government is committed to ensuring full compliance with agreements with its trading partners. The Commerce, State, and Justice Departments continue to cooperate 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.

The United States continues to have the most intensive monitoring program of any signatory country. Our process is transparent and open to input from the private sector and nongovernmental organizations. We encourage other parties to undertake similar programs and expect them to find it in their interest to ensure that all parties are complying with the obligations of the convention. In this way, we all make it an effective multilateral anticorruption instrument.

Table 2: OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Phase II Country Examinations through 2007)

Date of Examination under Phase II	Country Examined	Phase I Examiners	Phase II Examiners	On-site Visit for the Phase II Examination
November 2001	Finland	Czech Republic Sweden	Czech Republic South Korea	September 12–14, 2001
June 2002	United States	Japan United Kingdom	France United Kingdom	March 11–15, 2002
October 2002	Iceland	Denmark Slovak Republic	Denmark Slovak Republic	May 27–30, 2002
December 2002	Germany	Canada South Korea	Austria Japan	June 3–6, 2002
February 2003	Bulgaria	Norway Poland	Norway Poland	November 26–29, 2002
June 2003	Canada	Brazil United States	United States Switzerland	February 16–21, 2003
October 2003	France	Italy Luxembourg	Canada Italy	June 23–27, 2003
December 2003	Norway	Finland Hungary	Finland Czech Republic	September 8–12, 2003
April 6–8, 2004	Luxembourg	Greece Switzerland	Belgium France	November 17–21, 2003
June 22–24, 2004	Mexico	Netherlands Spain	Netherlands Spain	February 2–6, 2004
	South Korea	Germany Italy	Australia Finland	2004
October 12–13, 2004	Italy	Mexico United Kingdom	Germany United Kingdom	April 19–23,2004
	Switzerland	Austria Canada	Belgium Hungary	May 10–14, 2004
December 7–9, 2004	Japan	South Korea United States	Italy United States	June 28–July 2, 2004
	United Kingdom	France Netherlands	France Canada	July 19–23, 2004

1. As exigencies in the Working Group arise, this schedule may be subject to change.
2. The Phase II review of the United Kingdom will be carried out as scheduled on the basis of its existing foreign bribery provisions in the Anti-Terrorism Act.

Table 2 (continued)

Date of Examination under Phase I	Country Examined	Phase I Examiners	Phase II Examiners	On-site Visit for the Phase II Examination
March 15–17, 2005	Hungary	Austria Italy	Denmark Austria	Mid-October 2004
	Greece	Portugal Switzerland	Portugal Ireland	Mid-October 2004
June 14–16, 2005	Sweden	Finland Poland	Poland Iceland	Mid-January 2005 Belgium
	France	Argentina Luxembourg	Mid-January 2005 Switzerland	
October 18–20, 2005	Slovak Republic	Czech Republic Greece	Hungary Turkey	May/June 2005
	Australia	New Zealand Norway	New Zealand Japan	May/June 2005
December 14–16, 2005	Austria	Belgium Denmark	Luxembourg Greece	June/July 2005
March 22–24, 2006	Czech Republic	Bulgaria Iceland	Iceland Slovenia	October 2005
	Spain	Japan Mexico	Mexico Chile	October 2005
June 13–16, 2006	Netherlands	Germany Iceland	Norway Ireland	Mid-January 2006
	Denmark	Australia Sweden	Slovak Republic Sweden	Mid-January 2006
October 24–26, 2006	Argentina	Slovak Republic Spain	Spain Brazil	May/June 2006
	New Zealand	Australia Argentina	Australia South Korea	May/June 2006
December 12–14, 2006	Poland	Belgium Hungary	Slovenia Turkey	July/September 2006
March 2007	Portugal	Chile Ireland	Netherlands Brazil	October 2006
	Ireland	Argentina United Kingdom Bulgaria	Sweden New Zealand	October 2006
June 2007	Slovenia	Chile Turkey	Greece Luxembourg	Mid-January 2007
	Chile	Argentina/ Spain	Argentina Mexico	Mid-January 2007
October 2007	Turkey	Slovenia Brazil	Germany Bulgaria	May/June 2007
	Brazil	Portugal Chile	Portugal Chile	May/June 2007

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 1997 Revised Recommendation of the OECD Council on Combating Bribery in International Business Transactions (Revised Recommendation), which laid the foundation for negotiation of the OECD Antibribery Convention. All 35 parties to the convention agreed to implement the OECD Council's recommendation on denying the tax deductibility of bribes.

Each of the 35 parties to the Antibribery Convention has affirmed that bribes paid to foreign public officials are not tax deductible.[1] Some parties deny tax deductibility of bribes explicitly in their laws, while others permit deductions only for expenses specified in their tax laws or related to proper business activity.

Despite the important positive steps taken by parties to the convention, the U.S. Government remains concerned that tax systems that permit tax deductibility of bribes to foreign public officials may be continuing for one or more of the following reasons:

(1) the legal framework may disallow the deductibility of only certain types of bribes or only bribes by companies above a certain size,
(2) 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,
(3) the relevant laws may not be specific enough to effectively deny deductibility of bribes in all circumstances,
(4) the prohibition is not currently applicable to a country's territories and dependencies, and
(5) overly broad categories for allowable deductions may permit disguised bribe payments.

As part of the monitoring process, the OECD Working Group on Bribery examines each party's implementation of the Revised Recommendation, including the prohibition of tax deductibility of bribes to foreign public officials. Phase II reviews by the OECD Working Group on Bribery have identified potential weaknesses in the application of rules denying deductibility. For example, tax examiners may not be sufficiently aware of the laws or policies that require them to deny tax deductions for bribes to foreign public officials, especially where such prohibitions are not explicitly disallowed under domestic laws. Also, tax examiners may not be sufficiently trained in detecting deductions related to the payment of bribes to foreign officials. In addition, because domestic laws may protect the confidentiality of taxpayer information and taxpayer rights against self-incrimination, tax officials may not be permitted to share with prosecutors certain information they obtain regarding the payment of bribes. To address those weaknesses, the Working Group proposed that countries expressly deny the deductibility of bribes in their relevant laws and increase tax authorities' and other public officials' awareness of the non-tax deductibility of bribes by issuing guidelines and providing special training to help them detect the payment of bribes to foreign officials. The Bribery Awareness Handbook, published by the OECD Committee on Fiscal

Affairs, is a useful manual for tax officials to assist in the detection of bribes. The Working Group also recommended that a party require its tax officials to report suspected foreign bribery to investigative authorities. As noted above, however, the sharing of information between tax officials and prosecutors may be subject to confidentiality restrictions on taxpayer information that are designed to promote sound tax administration, as well as restrictions to protect taxpayers from self-incrimination. Furthermore, the Working Group recommended that accountants or auditors responsible for a company's books also be required to report suspicious transactions to management or to investigative authorities pursuant to the Revised Recommendation.

Whatever the legal or administrative gaps that perpetuate the practice of tax deductibility of bribes to foreign public officials, signatories to the Antibribery Convention are obligated to stop the practice. Furthermore, all parties must recognize that enacting rules denying deductibility is only the first step; careful monitoring to ensure that the rules are actually enforced must continue. The Working Group on Bribery has indicated that as the monitoring process moves forward, it will follow up on the effectiveness of existing mechanisms to identify and disallow tax deductions for bribes to foreign public officials; the United States will continue to play an active role in that effort.

1 As part of the monitoring process on the Antibribery Convention and the Revised 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 Web site *www.oecd.org /topic/0,2686,en_2649_34551_1_1_1_1_ 37447,00.html*. The information on the Web site is based entirely on reports that the signatories themselves have provided to the OECD Secretariat.

5

Subsequent Efforts to Strengthen the Convention

Outstanding Issues Relating to the Convention

When the Antibribery Convention was negotiated in 1997, the United States sought to include coverage of bribes paid to political parties, party officials, and candidates for public office. Those channels of bribery and corruption are covered in the U.S. Foreign Corrupt Practices Act (FCPA); however, they are not specifically covered in the convention. The original signatories did agree that expansion of the convention's coverage should be studied further.

In all, five issues were identified at a December 1997 OECD Council meeting 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, and
- the role of offshore centers in bribery transactions.

Those issues have been discussed to varying degrees over the past several years in the OECD Working Group on Bribery. However, although several countries have stated that they would make bribery of foreign public officials a predicate offense for their respective money laundering legislation, no agreement has been reached to formally expand the scope of the convention to cover any of the five issues listed above. For a more detailed review of the history of those discussions, please refer to prior reports to Congress, which are available at *www.export.gov/tcc*.

Although the U.S. Government considers expanding the scope of the Antibribery Convention to include bribes to political parties and candidates to be particularly important, to date, we have not persuaded other convention parties to support the inclusion of this broader coverage of bribery in the convention. The United States remains concerned 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 now and in the future. Although no such loophole exists in the FCPA, our experience shows that firms nevertheless attempt to obtain or retain business with such bribes. In fact, the 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 damaging than bribes to government officials. Based in part on press reports, it appears that companies based in states who are party to the convention may still attempt to use this mode of bribery to obtain or retain business in foreign markets.

Recent Developments

Since 1997, the Working Group has held consultations with the private sector and non-governmental organizations on several of the five issues. In 2001, the OECD Working Group on Bribery distributed a questionnaire to determine whether parties' laws implementing the Antibribery Convention applied to bribes to political parties and candidates. The questionnaire also requested information concerning bribery transactions involving foreign subsidiaries. Most parties were slow to return their responses to the OECD Secretariat. After repeated reminders 25 out of 35 Parties had responded by October of 2003.

In early 2003, the chairman of the OECD Working Group on Bribery, Mark Pieth, urged the group to develop a new work program centered on substantive issues, including the five that were identified in 1997. In response to Mr. Pieth's interest, the United States proposed an ad hoc meeting in 2003 for Working Group experts to exchange views on foreign subsidiaries, a topic France had originally proposed in 1997. In October 2003, the Working Group experts met in Paris to discuss the topic of bribery by foreign subsidiaries of companies based in Antibribery Convention countries. In preparation for the meeting, parties were urged to update their responses to the 2001 questionnaire. Information submitted by the majority of parties indicated that most would assert jurisdiction over the acts of a foreign-incorporated company that attempted to bribe a foreign official within the parties' territory. No party, including the United States, holds parent corporations strictly liable for the criminal acts of their subsidiaries. However, in the United States and in other convention countries that impose liability on legal persons, parent corporations may be held liable for the acts of their subsidiaries that are authorized, directed, or controlled by the parent corporation. The Working Group concluded that the convention, as currently drafted, adequately addressed the issue of bribes paid through foreign subsidiaries and that most of the parties had in place the legal tools necessary to prosecute parent corporations or their officers for bribes paid through foreign subsidiaries.

The Working Group has heard presentations by academic experts on corporate supervision of subsidiaries under the countries' various domestic legal systems. Several parties to the convention have proposed topics for examination with the possible goal of amending the convention in the future to expand its coverage. From 2001 to 2003, the Working Group received new proposals to study international sports bribery and "private-to-private" bribery. The group reserved decisions on both matters while work on internal and budgetary reform was pending in 2003–2004, and while negotiations to conclude the new United Nations Convention Against Corruption were under way. Table 3 provides the status of the five issues as of May 2004.

Table 3: Status of the Five Issues as of May 2004

Issue	Status
Bribery acts in relation to political parties	2001 questionnaire: Responses are incomplete (about 25 of 35 parties have replied; some responses are incomplete).
Bribery of foreign public officials as a predicate offense for money laundering legislation	Addressed by WGB in peer reviews of each party's implementing legislation and enforcement.
Role of off shore centers in bribery transactions	Action shifted, de facto, to Financial Action Task Force (OECD).
Role of foreign subsidiaries in bribery transactions	WGB experts exchanged views in October 2003. WGB will monitor as enforcement issue in peer reviews. Most parties can prosecute if head office had knowledge or reason to know of bribery act.
Advantages promised or given to any person in anticipation of that person becoming a foreign public official	Most countries agree that a bribe paid in anticipation of an act done after a person becomes a foreign public official would be covered. Issue has not received further attention.

Note: WGB = Working Group on Bribery

6

Adding Signatories to the Convention

The United States and the OECD Working Group on Bribery believe that a targeted expansion of the Antibribery Convention membership could help to eliminate bribery of foreign public officials in international business transactions. The United States expects that a modest number of additional qualified applicants may satisfy the conditions for accession to the convention in the coming years. In December 2003, the Working Group agreed on language to update the criteria and procedures for accession. Revised accession criteria were approved by the OECD Council as part of a reform package for the Working Group in February 2004. That decision opens the door for renewed consideration of applications from non-OECD member countries interested in adhering to the convention.

Responding to countries' interest in being associated with the Antibribery Convention and the Working Group, the United States is working closely with other members of the OECD Working Group on Bribery to develop an outreach strategy. The primary focus should be to attract countries whose accession to the convention would bring significant mutual benefit, and whose companies are important global market participants. The financial resources of the Working Group are not sufficient to permit the rapid expansion of membership without reducing OECD staff support for priority activities such as peer review of convention enforcement. Therefore, the United States will continue to advocate a careful and incremental enlargement strategy.

In any event, each new Working Group member is expected to meaningfully participate in the group's work and to effectively implement and enforce the convention.

In April 2004, the Working Group agreed to send a recommendation forward to the OECD Council recommending that Estonia be invited to join the Working Group. Estonia's accession could occur before the end of 2004.

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) criminalize 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 the 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 explore other ways 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.

OECD Documents

CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

Adopted by the Negotiating Conference on 21 November 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 Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)l23/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 crlminalisation 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 co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

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

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

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

Recognising 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:

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Article 1

The Offence of Bribery of Foreign Public Officials

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

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

3. The offences 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 organisation;

   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 authorised 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 he 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 offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences 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 offence 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 persona 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 non-existent 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 biding 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 slams 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 Patty. 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 co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

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 nonsignatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14

Ratification and Depository

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 set out in DAFPE/IMEIBRiI97)18/FINAL (annexed), 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, co-operation 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

	1990-1996	1990-1996	1990-1996
	US$ million	%	%
		of total OECD	of 10 largest
United States	287,118	16.9%	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 largest	**1,459,148**	**81.0%**	**100%**
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%**	

Notes: * 1990-1995; ** 1991-1996; 1993-1996

Source: OECD, (1) IMP

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 ratificatin, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered tha 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 21 November 1997

General:

1. This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery', the offence committed by the official who receives the bribe. The Convention does not utilise 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.

2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.

Article I. The Offence of Bribery of Foreign Public Officials:

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would he required to be proved if the offence 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 offence 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 "antonomous" definition not requiring proof of the law of the particular official's country.

4. It is an offence 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 was otherwise a company which could properly have been awarded the business.

5. "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.

6. The conduct described in paragraph 1 is an offence 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.

7. It is also an offence 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.

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

9. 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 offence. 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 programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

10. 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, fails within the scope of the offences described in Article t, paragraph t or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, 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:

12. "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.

14. 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.

15. 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.

16. 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 persona, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

I7. "Public international organisation" includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.

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

19. 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:

20. 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:

21. 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.

22. 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.

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

Re paragraph 4:

24. 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:

25. 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:

26. 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 offences, the reference to "principles" includes the principles upon which such selection is based.

Article 5. Enforcement:

27. Article 5 recognises the fundamental nature of national regimes of prosecutnrial discretion. It recognises 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 he 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:

28. 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 offence 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 offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment he subject to money laundering legislation.

Article 8. Accounting:

29. 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 offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence 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:

30. 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:

31. Within the framework of paragraph I 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 he able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. 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 co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

Article 10. Extradition:

Re paragraph 2:

33. 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:

34. 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 he 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.

35. 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.

36. The follow-up of any aspect of the Convention which it not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants its 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:

37. 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 nonmembers 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 Organisation, 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 COUNCIL ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

Adopted by the Council on 23 May 1997

THE COUNCIL,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation 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 Anticorruption 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 Organisation of American States;

Having regard to the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated 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 criminalisation 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 criminalisation of bribery of foreign public officials; tax deductibility of bribes toforeign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

Recognising 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) lax 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.

Criminalisation of Bribery of Foreign Public Officials

III. RECOMMENDS that Member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated 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 criminalise 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, rates 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 10 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 10 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 Organisation 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.

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 so combat corruption in all development co-operation efforts.[2]

International Co-operation

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 co-operate 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 co-operation and, in particular, in accordance with paragraph 8 of the Annex.

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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 summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD Members and eventually non-member countries which adhere to the Recommendation.

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 programme of systematic follow-up to monitor and promote the full implementation of this Recommendation, in cooperation 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 co-operate closely in this follow-up programme, 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.

Co-operation with Non-members

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 Non-governmental Organisations

XIII. **INVITES** the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to consult and co-operate with the international organisations and international financial institutions active in the combat against bribery in international business transactions and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

ANNEX

Agreed Common Elements of Criminal Legislation and Related Action

1) Elements of the offence of active bribery

i) *Bribery* is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retails business.

ii) *Foreign public official* means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.

iii) *The offeror* is any person, on his own behalf or on the behalf of any other natural person or legal entity.

2) Ancillary elements or offences

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.

3) Excuses and defences

Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

4) Jurisdiction

Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.

States which do not prosecute on the basis of the nationality principle should he prepared to extradite their nationals in respect of the bribery of foreign public officials.

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

5) Sanctions

The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) Enforcement

In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offence.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) Connected provisions (criminal and non-criminal)

— Accounting, recordkeeping and disclosure requirements

In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud,

— Money laundering

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.

8) International co-operation

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality, requirements.

Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offeror; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.

RECOMMENDATION OF THE COUNCIL ON THE TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS

Adopted by the Council on 11 April 1996

THE COUNCIL,

Having regard to Article 5 (b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75/FINAL];

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 favour 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 public 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 non-Member countries and to report to the Council as appropriate.