Addressing the Challenges of International Bribery and Fair Competition 2004

The Sixth Annual Report Under Section 6 of the International Anti-Bribery and Fair Competition Act of 1998

U.S. Department of Commerce
International Trade Administration
July 2004

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THE SECRETARY OF COMMERCE
Washington, D.C. 20230

The Honorable Richard Cheney
President of the Senate
Washington, D.C. 20510

The Honorable J. Dennis Hastert
Speaker of the House of Representatives
Washington, D.C. 20515

Dear Mr. President and Mr. Speaker:

It is with the deepest conviction that we must carry forward the fight against global corruption that I provide to Congress the sixth and final annual report mandated by the International Anti-Bribery and Fair Competition Act of 1998 (IAFCA). Section 6 of the IAFCA directs the Secretary of Commerce to submit a report to the Senate and the House of Representatives assessing progress on the implementation of the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Antibribery Convention) and addressing other related matters.

Several important events have occurred since my last report. On September 22, 2003, Ireland deposited its instrument of ratification with the secretary general of the OECD; without exception, all 35 parties are bound by international treaty to criminalize bribery of foreign public officials by persons within their jurisdiction. In addition, in early 2004 the OECD implemented a set of reforms concerning the working group responsible for monitoring implementation and enforcement of the convention. Among other things, these reforms secured funding to permit enforcement reviews for each party to the convention, to be accomplished by 2007. This was an important objective of the U.S. government. To this end, enforcement reviews of Canada, France, Norway, and Luxembourg were completed over the past year, adding to the earlier reviews of Bulgaria, Finland, Germany, Iceland, and the United States. A number of parties still have important work to finish in remedying deficiencies identified in their implementing legislation. However, all should also respond proactively to the recommendations of the working group to make their enforcement regimes more effective.

The true test of the effectiveness of the Antibribery Convention will be measured by a sustained drop in the instances of bribery of foreign public officials or an increase in the number of investigations and convictions. In this regard, I reported last year that we had seen a noticeable drop in reports of alleged instances of bribery, from an average of 60 contracts a year to just 40 over the period April 2002-May 2003. While the numbers continue to be good relative to earlier years, unfortunately the reports of alleged bribes have crept up to 47 contracts worth approximately $18 billion for the same months in 2003-2004. At the same time, however, the

momentum of new investigations and prosecutions is building, and two parties have obtained convictions under their implementing legislation. The United States will continue to advocate for rigorous enforcement of parties' antibribery laws where it is appropriate to do so; the consequences of not demanding compliance with this important treaty obligation are much too grave.

The Bush Administration has over the last several years implemented a robust international transparency and anticorruption agenda, many components of which complement the objectives of the OECD Antibribery Convention. I have informed you of many of these efforts in prior reports; but the work continues. For example, in 2003, negotiations on the U.N. Convention Against Corruption were concluded. As of May 2004, 108 countries have signed the convention, including the United States, and two states have ratified. In June 2004 at Sea Island, Georgia, the Administration joined its Group of Eight (G8) partners in launching an anticorruption-transparency action plan. Building on G8 commitments undertaken in 2003, this plan, among other things, commits G8 countries to adhere to the expedited schedule for OECD enforcement reviews; to establish systems to deny safe haven to corrupt foreign officials; and to recover their illicit assets. Such a system, we believe, will provide opportunities to further dampen bribery of foreign officials by addressing the demand side of the bribery equation. The action plan also recognizes the importance of encouraging companies to establish corporate compliance programs to combat bribery. I have been a strong advocate of such programs. A notable recent example of an industry taking the lead in this regard is the move by 19 leading international engineering and construction companies at Davos, Switzerland, in January of this year to adopt business principles for countering bribery and establishing a "zero tolerance" policy toward bribery. All G8 and convention parties should encourage the development and implementation of such corporate compliance programs.

Mr. President and Mr. Speaker, in my letter to you last year, I quoted from President George W. Bush's televised remarks to Global Forum III attendees, in Seoul, South Korea, in which the President commended participants to the important cause of combating corruption. The President spoke of putting an end to "an ancient injustice that protects the undeserving and holds back the hopes of millions." I believe we are making strides to end this injustice, but we will continue to show leadership in every appropriate forum. The U.S. Government must maintain and expand its efforts.

Sincerely,

Donald L. Evans

Executive Summary

This sixth and final annual report under the International Anti-Bribery and Fair Competition Act of 1998 (IAFCA) 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 (Antibribery 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 such issues 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 enforce-

ment 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 US$18 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. U.S. firms are known to have lost at least eight of the contracts, worth $3 billion.

- We will continue to urge 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 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 the working group. Estonia's accession may occur before the end of 2004. The United States advocates a careful and deliberate approach to enlargement of the convention parties' group. 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 issues of bribes to political parties and candidates related to possible coverage by the convention continue to merit the attention of the working group and will seek to achieve consensus among convention parties to ensure such coverage.

■ The United States will continue to encourage other governments to increase public awareness within their countries. We will urge other governments to promote awareness of the convention and national laws in their business communities. In addition, fulfilling our commitment to 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

Over the past quarter century, the United States has made real progress in building international coalitions to fight bribery and corruption. Bribery and corruption are now being addressed in a number of forums. Some of these initiatives are now yielding positive results.

Corruption is an impediment to trade, a serious barrier to development, and a direct threat to our collective security. Corruption takes many forms and affects trade and development in different ways. In many countries, it affects customs practices, licensing decisions, and the awarding of government procurement contracts. If left unchecked, bribery and corruption can negate market access gained through trade negotiations, undermine the foundations of the international trading system, and frustrate broader reforms and economic stabilization programs. Corruption also hinders development and contributes to the cycle of poverty. This situation can have broader foreign policy and national security implications. In his remarks at the May 10, 2004, ceremony to celebrate countries selected for the Millennium Challenge Account (MCA), a program in which progress in addressing corruption is one of several grounds for qualifying as an MCA recipient country, President George W. Bush noted the effect of the chasm between rich and poor on the world's collective security:[1]

> 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.

One important element of the U.S. government's overall anticorruption focus involves international efforts to criminalize bribery of foreign public officials in the conduct of international trade. Bribery to corrupt those charged with the public trust but who lack a moral compass deprives countries of the resources needed to promote growth and development. This form of corruption also severely undercuts efforts to establish fundamental elements of accountability, rule of law, and market-based decision-making in developing economies. Long recog-

nizing the devastating consequences posed by bribery and corruption, the U.S. government has led the charge to confront and effectively address these behaviors on a global scale.

U.S. Leadership in Combating Corruption

The United States has been a leader in the international campaign to reduce corruption by rigorously promoting good governance and the rule of law. Transparency of government actions, explicit prohibitions on corrupt acts, the maintenance of effective ethical standards for government officials, and the promotion of strong law enforcement and judicial systems are important components of this campaign. The U.S. government led efforts to launch the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Antibribery Convention). Today, the Antibribery Convention is one of a number of initiatives and instruments in regional and international forums aimed at fighting corruption. It is considered one of the strongest anticorruption 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 a half years since the convention entered into force.

However, the U.S. government has recognized that other tools for fighting corruption must be used to complement the objectives of the Antibribery Convention. Programs to promote good governance and address corruption more broadly contribute to the goal of improving national welfare within individual countries, and support peace and prosperity for all nations. Accountability and transparency in governance are necessary foundations of economic progress and successful development, and therefore constitute a primary objective of U.S. foreign policy.

One example of an administration effort to increase accountability and transparency of governments is reflected in the 2004 Group of Eight (G-8) Statement on Fighting Corruption and Improving Transparency. At the June 2004 G-8 Summit in Sea Island, Georgia, President Bush and his G-8 colleagues renewed and expanded on their pledge to combat corruption and improve transparency. The 2003 G-8 Évian 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. The 2003 declaration proposed a partnership between donor and recipient countries to change incentives in order 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 2004 G-8 statement builds on this initiative to cooperate with developing countries in the fight to eradicate corruption. The United States and the United Kingdom co-sponsored the 2003 and 2004 G-8 action plans.

At Sea Island, the G-8 launched pilot projects with four partner countries committed to implementing transparency in their budgets, as well as in their government procurement and concession-letting procedures: Georgia, Nicaragua, Nigeria, and Peru. Each volunteer pilot country signed a political compact with the G-8 outlining its respective commitments to reduce corruption. Furthermore, the Sea Island documents feature a comprehensive set of measures to help developing countries improve public financial management and transparency in government procurement and the awarding of concessions. Importantly, there is a strong parallel emphasis on actions pledged by G-8 governments to fight corruption, including a new set of measures to deny safe haven to public officials guilty of corruption by denying them entry to the G-8 countries, and to recover the proceeds of corruption.

At Sea Island, the G-8 also announced actions to strengthen peer review and enforcement of the Antibribery Convention, including completing a full round of important peer reviews of enforcement regimes by 2007; honoring a pledge to serve as lead examiners and examinees in peer reviews and sending prosecutors and other law enforcement officials to participate in these reviews; and encouraging efforts by our private sectors to develop and implement corporate compliance programs to promote adherence to laws against foreign bribery. The G-8 Declaration sends a strong signal that developed-country parties recognize their responsibility to prevent their companies and citizens from exporting bribery and corruption to other countries. Documents for the 2004 G-8 Summit can be found at *www.g8usa.gov/documents.htm*.

Another administration effort to increase accountability and transparency of governments is the Millennium Challenge Account (MCA) announced by President Bush in March 2002, in Monterrey, Mexico. The president called for a "new compact for global development," which links greater contributions from developed nations

to greater responsibility from developing nations. The president proposed a concrete mechanism to implement this compact—the Millennium Challenge Account—in which development assistance would be provided to those countries that rule justly, invest in their people, and encourage economic freedom. Progress in addressing corruption is one of several grounds for qualifying as an MCA recipient country. With strong bipartisan support, Congress authorized the Millennium Challenge Corporation (MCC) to administer the MCA and provided $1 billion in initial funding for fiscal year 2004. President Bush has pledged to increase funding for the MCA to $5 billion a year starting in fiscal year 2006, roughly a 50 percent increase over current U.S. core development assistance. The MCA will provide billions of dollars of extra development assistance to countries that, among other things, are engaged in promoting good governance and the fight against corruption. Information on the MCA can be found on its Web site at *www.mca.gov/*.

In addition, in January 2004 President Bush urged leaders at the Special Summit of the Americas in Monterrey, Mexico, to strengthen the foundations of democracy and economic growth in the Western Hemisphere. Specifically, he urged them to join the United States in taking action to promote democracy and good governance, to spur private sector–led growth and reduce poverty, and to improve health and education. Leaders agreed to intensify the fight against corruption by: strengthening a "culture of transparency" in the Americas; denying safe haven to corrupt officials, those who corrupt them, and their assets; and promoting transparency in public financial management, in government transactions, and in procurement processes and contracts. In a significant step, Summit leaders agreed to hold consultations if adherence to their shared transparency and anticorruption objectives, as articulated in the Inter-American Convention Against Corruption, is "compromised to a serious degree" in any of the Summit countries. These commitments advance President Bush's work in the G-8 and elsewhere to implement a strong international transparency and anticorruption agenda.

To reinforce the message of government responsibility to combat corruption, the U.S. government is playing a leadership role in promoting the enforcement and monitoring of not only the OECD Antibribery Convention, but also the Inter-American Convention Against Corruption, the Council of Europe Criminal Law Convention on Corruption, the Stability Pact Anti-Corruption Compact for Southeast Europe, and the Financial Action Task Force. The U.S. government was a key player in the successful conclusion of negotiations that produced the United Nations Convention Against Corruption, the first global anticorruption convention. In 2003 and 2004, the United States played the leading role in developing substantial new regional anticorruption initiatives in Asia-Pacific Economic Cooperation, and as noted above, for the Special Summit of the Americas. 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. The United States also furnishes assistance for the countries involved in the Asian Development Bank–OECD Anticorruption Initiative to the Asia-Pacific region, and emerging governance efforts in Africa and the Middle East.

Consistent with Trade Promotion Authority (TPA), the U.S. government is seeking and obtaining binding commitments in trade agreements that promote transparency and that specifically address corruption of public officials. Also consistent with TPA, the U.S. government is seeking to secure a meaningful agreement on trade facilitation in the World Trade Organization.

Additional U.S. government efforts to support other international initiatives to combat bribery and corruption and to promote good governance and business integrity are included in our prior reports to Congress available at *www.export.gov/tcc*.

U.S. Leadership on the Antibribery Convention

The United States launched its own campaign against international corrupt business practices over 27 years ago with passage of the Foreign Corrupt Practices Act of 1977 (FCPA). 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 legislation reflected deep concern across a broad spectrum of 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 gained unfair advantages in competing for major commercial contracts.

The FCPA has had a major effect 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 disadvan-

tage in international commerce. Their foreign competitors continued to pay bribes without fear of penalties, resulting 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, calling on the executive branch to negotiate an agreement in the OECD on the prohibition of overseas bribes. After nearly 10 years, the effort succeeded. On November 21, 1997, the United States and 33 other nations adopted the Antibribery Convention within the OECD. It was signed on December 17, 1997. The following year, Congress enacted the International Anti-Bribery and Fair Competition Act (IAFCA), which amended certain provisions of the Securities Exchange Act of 1934 and the FCPA that relate to the bribery of foreign public officials. These changes were made to implement the Antibribery Convention. The United States ratified the convention on November 20, 1998, and deposited its instrument of ratification with the secretary general of the OECD on December 8, 1998. The Antibribery Convention entered into force February 15, 1999, for 12 of the then 34 signatories.[2] All signatories to the convention also agreed to implement the 1996 Recommendation of the OECD Council on the Tax Deductibility of Bribes to Foreign Public Officials and the 1997 Revised Recommendation of the OECD Council on Combating Bribery in International Business Transactions. These documents and the commentaries on the convention are reproduced in Appendix A of this report.

Major Provisions of the Antibribery Convention

The Antibribery Convention obligates the parties to criminalize bribery of foreign public officials in the conduct of international business. It is aimed at proscribing the activities of those who offer, promise, or pay a bribe. For this reason, the convention is often characterized as a "supply side" agreement, as it seeks to affect the conduct of companies in exporting nations.

The definition of "foreign public official" in the convention covers many individuals exercising public functions, including officials of public international organizations. It also covers business-related bribes to such officials made through intermediaries and bribes that corrupt officials direct to third parties. The convention requires that the parties, among other things:

- Apply "effective, proportionate, and dissuasive criminal penalties" to those who bribe, and provide for the ability to seize or confiscate the bribe and bribe proceeds (e.g., net profit) or property of similar value, or to apply monetary sanctions of comparable effect.

- Establish criminal liability of legal persons (e.g., corporations) for bribery, where consistent with a country's legal system, or alternatively, ensure that legal persons are subject to effective, proportionate, and dissuasive noncriminal sanctions, including monetary penalties.

- Make bribery of a foreign public official a predicate offense for purposes of money-laundering legislation on the same terms as bribery of domestic public officials.

- Take necessary measures regarding accounting practices to prohibit the establishment of off-the-books accounts and similar practices for the purpose of bribing or hiding the bribery of foreign public officials.

- Provide mutual legal assistance to the fullest extent possible under their respective laws for the purpose of criminal investigations and proceedings under the convention and make bribery of foreign public officials an extraditable offense.

The convention tracks the FCPA closely in many important respects. Unlike the FCPA, however, it does not cover bribes to political parties, party officials, or candidates for public office. The United States has urged that the convention be strengthened by including these individuals and organizations in the definition of "foreign public official." To date, we have not persuaded other convention parties to support the inclusion of this broader coverage of bribery in the convention. However, most countries agree that a bribe paid in anticipation of an act done after a person becomes a foreign public official would be covered under their legislation implementing the convention.

Reporting and Monitoring Requirements

Section 6 of the IAFCA provided that not later than July 1, 1999, and July 1 of each of the five succeeding

years, the Secretary of Commerce shall submit to the House of Representatives and the Senate a report on implementation of the convention by other signatories and on certain matters relating to international satellite organizations addressed in the IAFCA.[3] The IAFCA requested information in the following areas related to the convention and antibribery issues:

- The status of ratification and entry into force for signatory countries.
- A description of domestic implementing legislation and an assessment of the compatibility of those laws with the convention.
- An assessment of the measures taken by each party to fulfill its obligations under the convention, including an assessment of: the enforcement of the legislation implementing the convention; efforts to promote public awareness of those laws; and the effectiveness, transparency, and viability of the monitoring process for the convention, including input from the private sector and nongovernmental organizations.
- An explanation of the laws enacted by each signatory to prohibit the tax deduction of bribes.
- A description of efforts to add new signatories and to ensure that all countries that become members of the OECD are also parties to the convention.
- An assessment of efforts to strengthen the convention by extending its prohibitions to cover bribes to political parties, party officials, and candidates for political office.
- An assessment of antibribery programs and transparency with respect to certain international organizations.
- A description of the steps taken to ensure full involvement of U.S. private-sector participants and representatives of nongovernmental organizations in the monitoring and implementation of the convention.
- A list of additional means for enlarging the scope of the convention and otherwise increasing its effectiveness.

In addition, the IAFCA requested that the report address certain advantages available to the international satellite organizations International Telecommunications Satellite Organization (INTELSAT) and International Mobile Satellite Organization (Inmarsat). Since passage of the IAFCA, both Inmarsat and INTELSAT have been privatized and, as a result, there is no intergovernmental participation, including the U.S. executive branch, in these private companies. Therefore, reporting on these organizations terminated in 2002. This report addresses all of the other areas specified in Section 6 of the IAFCA. In particular, it provides assessments of the implementing legislation of three parties (see Chapter 2) and of the enforcement regimes of five others (see Chapter 3).

The Monitoring Effort

The U.S. government has established a program to monitor implementation of the convention and encourage effective action against bribery and corruption by its global trading partners. This effort includes regular contact with the business community and nongovernmental organizations, dissemination of information about the convention and antibribery legislation on the Internet, and other initiatives to promote international cooperation in combating these illicit and harmful practices.

In addition, U.S. officials participate in the OECD process for monitoring implementation of the Antibribery Convention. The OECD Working Group on Bribery is conducting a systematic review of measures taken by parties to fulfill their obligations under the convention. In the first phase, the working group examined the national implementing legislation to assess whether it conforms to the requirements of the convention. The working group has examined the implementing legislation of 34 parties; only the legislation of Slovenia remains to be reviewed, which is expected in 2005. The second phase of the OECD monitoring process is to assess steps that parties are taking to enforce their antibribery legislation and fulfill other obligations under the convention. Nine parties have been reviewed to date, with all reviews scheduled to be completed by the end of 2007. (Additional information on monitoring is provided in Chapter 3.)

Conclusion

The U.S. government continues to recognize the importance of vigorously promoting good governance and rule of law. The international coalitions to fight bribery and corruption in which the U.S. government participates are

important components of these efforts and are providing real benefits.

Compared to the year 1999, when the Department of Commerce first began this report on implementation of the OECD Antibribery Convention, the United States has made great strides in our fight against international bribery. The convention is now ratified by all 35 signatories. We are aware of investigations underway and several convictions obtained. As businesses recognize that all parties are committed to serious enforcement of their antibribery laws, conduct will change to conform to these new laws.

The United States is committed to the success of the OECD Antibribery Convention as a key anticorruption instrument. The U.S. government will continue to play an active role in promoting the effectiveness of the convention in combating bribery of foreign public officials in international trade. We will continue to insist that parties have laws that conform to the requirements of the convention and that those laws be effectively enforced. We will focus our efforts to ensure that bribes to political parties and candidates are covered and to advocate a careful and deliberate approach to inviting new participants to accede to the convention. Our approach should be to attract countries both whose accession to the convention would bring significant mutual benefit and whose companies are important global market participants. Finally, we will continue to encourage companies to establish meaningful antibribery corporate compliance programs.

The U.S. government will continue to maintain a strong leadership role in the coalitions to fight bribery and corruption in which it participates and support appropriate efforts by others to join the fight.

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

2. The 30 current member states of the OECD are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, South Korea, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. In addition to these OECD member countries, among the original signatories are nonmembers Argentina, Brazil, Bulgaria, and Chile. Slovenia, also not a member, acceded to the convention in 2001, and Estonia is expected to become a participant of the Working Group on Bribery through accession, which could occur before the end of 2004.

3. The Senate, in its July 31, 1998, resolution giving advice and consent to ratification of the Antibribery Convention, requested that the President submit a similar report on enforcement and monitoring of the convention to the Senate Committee on Foreign Relations and the Speaker of the House of Representatives. The President delegated responsibility for this report to the Secretary of State. In light of the similarity of the reporting requirements, the Commerce and State departments have worked together, in close coordination with the Justice and Treasury departments and the staff of the United States Securities and Exchange Commission, to prepare the two reports.

Ratification Status

In this final report to Congress, the U.S. Department of Commerce can favorably 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 on page 10). These are notable achievements in the short time since the Antibribery Convention entered into force on February 15, 1999,[1] for 12 of the then 34 signatories.[2]

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.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 through a Web link on the U.S. Commerce Department's Trade Compliance Center Web site 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 published 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. 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 an important tool to combat corruption and promote good governance and the 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 Évian, France, committed to joint efforts to fight corruption and increase transparency. Among their commitments was to "encourage efforts of our private sectors to develop and implement corporate compliance programs to promote adherence to laws against foreign bribery."

Furthermore, Commerce Secretary Donald L. Evans continues to maintain that to participate in global trade as responsible corporate stewards, businesses must establish anticorruption programs, which provide benefits by supporting an increase in free and fair global trade. Although such programs have been 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 the rule of law. An example of recent efforts is an initiative 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, these companies, which represent annual revenues in excess of US$70 billion, signed and adopted a set of business principles counter-

ing bribery. Expansion of such initiatives to other sectors with broader representation of countries should be encouraged. In the coming years, the U.S. government, and the Commerce Department in particular, will continue to encourage U.S. and foreign private sectors to support the Antibribery Convention through such awareness and corporate compliance programs.

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1. Article 15 of the Antibribery Convention states that the Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries, which have the ten largest shares of OECD exports and which represent by themselves at least 60 percent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification with the secretary general of the OECD. 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. On November 5, 2001, Slovenia became the 35th signatory to the Antibribery Convention, 60 days after it deposited its instrument of accession with the secretary general of the OECD.

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, 2000	October 23, 2000
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 2002[2]	April 18, 2001	June 17, 2001
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
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	January 8, 2001	September 6, 2001[5]	November 5, 2001
South Korea	December 17, 1998	December 17, 1998	January 4, 1999	February 15, 1999
Spain	December 1, 1998	January 11, 2000	January 14, 2000	March 14, 2000
Sweden	May 6, 1999	March 25, 1999	June 8, 1999	August 7, 1999
Switzerland	December 22, 1999	December 22, 1999	May 31, 2000	July 30, 2000
Turkey	February 1, 2000	January 11, 2003[2]	July 26, 2000	September 24, 2000
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 Accession.

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 through the U.S. Commerce Department's Web site 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 where available under the country's jurisdictional principles, 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, including the results of the formal "Phase I *bis*" process (which was established to monitor the implementation of the working group's recommendations), 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.

As part of the procedure for providing new information in the context of the working group's periodic *Tour 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 recommendations, 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 noted above.

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

On 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 5 million Swiss francs (approximately US$3.9 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)[2] 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 law assumes felonious intent in the absence of a specified mental element. The article is intended to cover 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." Apparently, 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 debate in Brazil. 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." 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. 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 pre-tax 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 apparently 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. The measures do not contain an express prohibition of off-the-books accounts. However, it is our understanding 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. It is our understanding 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. 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. 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. 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, although we understand that 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.

Jurisdictional Principles

Chile exercises territorial jurisdiction for foreign bribery offenses in cases where the offense was initiated in Chile. 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. It is our understanding 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.

Articles 24 and 251 of the Criminal Code permit confiscation for acts of bribery. These provisions provide for confiscation of bribe proceeds upon conviction and the seizure of property received by a domestic or foreign public official. It is unclear 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. Apparently, 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. 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. Apparently, there are no constitutional or legal provisions barring the extradition of its nationals, though Chile would 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).[3] 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. In the absence of a treaty with another party to the convention, Chile would consider the convention to be the basis for providing mutual legal assistance.

Complicity, Attempt, Conspiracy

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. Due to a lack of information, it is unclear whether and how Chilean law covers incitement, aiding and abetting, and authorization of foreign bribery.

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 July 26, 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 pro-

visions 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." Bribery apparently 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. Apparently, 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. In accordance with the principle of territoriality under Turkish law, 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. It is 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. 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." Article 220 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.

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, is apparently 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." "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. The "directly or indirectly" language of 211/3 is intended to cover 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. The article apparently 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 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 object, it may be seized. 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. The scope of the article is intended to be very wide and covers not only the confiscation of the bribe, but also any benefit deriving from the bribe. Confiscation under Articles 86 and 217 applies 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. A conviction regarding the predicate offense is apparently not required to proceed against the money launderer.

Extradition and Mutual Legal Assistance

Turkey has no specific law governing extradition. However, Article 90 of the Turkish constitution provides that "international agreements duly put into effect carry the force of law." The multilateral and bilateral agreements relating to extradition to which Turkey is a party carry the weight of domestic law. 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. However, 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 domestic authorities in Turkey.

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. In the absence of an applicable treaty, Turkey will 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. 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. 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*.

2. 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, directly or through agents, while in the United States; (3) 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.

3. 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 nongovernmental 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.

Commerce Secretary Donald L. Evans has stated publicly that, to give life to commitments embodied in multilateral anticorruption instruments like the Anti-

bribery 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 (South 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.

South Korea

South 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 (approximately 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 (approximately US$20,600) 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 had 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 to cover the matter of bribery which emerged during a letters rogatory procedure, the Public Prosecutor presented the examining magistrate with 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 (approximately US$1.2 billion) 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 has been formally charged with violation of the Norwegian penal code's provision criminalizing bribery of foreign public officials.

The investigation relates to a US$15 million contract that the company entered into with a consulting firm.

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 10 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, South 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 (approximately US$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 cease-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 B of this report for a 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 opin-

ions 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, 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.*

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 Anti-Bribery 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 Chapter 8 for more information on U.S. government outreach initiatives on bribery and corruption.)

Efforts of Other Parties

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 government of **Finland** established a body composed of officials from different ministries whose purpose is fighting corruption, and the government of **South 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. It 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. Secretary of Commerce Donald L. Evans has said that corporations, working in free markets, can spread the essential values of honest competition and the rule of law. Full participation in implementation and enforcement by governments, business, and civil society is critical to making the Antibribery Convention an effective deterrent to corruption. As Secretary Evans stated to Congress in his 2003 report, "Governments must adopt and enforce effective anticorruption laws. Corporations must establish awareness and compliance programs and their officers must be responsible corporate stewards. . . . [And] finally, civil society and the media can act through vigilance in exposing corruption to the sunshine of public scrutiny."

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 on-site 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 Con-

gress 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 for 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.

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 list of topics. Nor is it necessary or desirable to devote time and resources to issues already being examined and addressed in other forums. 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 flexible, 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.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.html.*

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 common-law 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 to 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, and potential impediments to the exercise of extraterritorial jurisdiction. Some recent court cases also 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 2004. 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 convention 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. At the U.S. Department of Commerce, monitoring compliance with the convention, and with international agreements generally, remains a high priority. Other U.S. government agencies are also actively involved and make important contributions. 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 party. Our process is transparent and open to input from the private sector and non-governmental 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 II	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 Luxembourg	Argentina Switzerland	Mid-January 2005
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 still continue 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 stated 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.

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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

Adding New 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 enlargement strategy. However, the United States continues to advocate a careful and deliberate approach to enlargement. 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 addition, 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.

6

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:

(1) bribery acts in relation to foreign political parties;

(2) advantages promised or given to any person in anticipation of that person becoming a foreign public official;

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

(4) the role of foreign subsidiaries in bribery transactions; and

(5) 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 convention countries 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; however, after repeated reminders, 25 out of 35 parties had responded by October of 2003.

In early 2003, Chairman Mark Pieth of the OECD Working Group on Bribery 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 (as of 2003, 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 offshore 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

Antibribery Programs and Transparency in International Organizations

Congress directed that the annual report should include an assessment of antibribery programs and transparency regarding international organizations covered by the International Anti-Bribery and Fair Competition Act (IAFCA) of 1998. More than 80 organizations fall within IAFCA purview. They include large institutions, such as the World Bank, the International Monetary Fund (IMF), and the World Trade Organization (WTO), as well as smaller and less well-known technical bodies.

Under the Antibribery Convention, any official or agent of a public international organization is considered a "foreign public official" and thus must be covered by a prohibition against bribery. Since the Foreign Corrupt Practices Act of 1977 (FCPA) did not include officials of public international organizations in its definition of a "foreign official," the United States needed to amend the FCPA to bring it into conformity with the convention. The amendment, embodied in the IAFCA, applies this provision to all public international organizations designated by executive order under Section 1 of the International Organizations Immunities Act (22 U.S.C. 288) and to any other international organization designated by the president by executive order for the purposes of the FCPA.

U.S. agencies have selected for review several major international organizations that have the potential to affect international bribery on a large scale through their policies and activities. International financial institutions —including the IMF, the World Bank, and regional development banks—are particularly important because they extend financial or development assistance amounting to billions of dollars annually to countries around the world. These institutions have an important role to play in promoting good governance and in helping borrower countries combat corruption. We have included the Organization of American States (OAS), the Organization for Economic Cooperation and Development (OECD), the Organization for Security and Cooperation in Europe (OSCE), the United Nations (U.N.), and the World Trade Organization (WTO) in the review because of their active work in promoting transparency and international anticorruption initiatives and in encouraging national governments to strengthen relevant domestic laws.

As a matter of policy, the United States seeks to encourage all public international organizations to maintain high standards of ethics, transparency, and good business practices in their operations. The greater attention

given to international bribery issues over the past several years, in the OECD and other forums, has helped to promote positive reform in many organizations.

International Financial Institutions

Recognizing the importance of corruption as an international development and financial issue, the United States, in cooperation with other shareholder countries, has strongly pressed the international financial institutions (IFIs) to implement anticorruption strategies, policies, and programs. As a result, major financial institutions—the International Monetary Fund (IMF) and the multilateral development banks (MDBs—the World Bank, the European Bank for Reconstruction and Development, the African Development Bank, the Asian Development Bank, and the Inter-American Development Bank)—are playing a growing role in promoting good governance, transparency, and accountability.

An overview assessment of IMF and MDB antibribery and good governance activities is provided in this section. A more detailed discussion of significant steps taken by the IMF and the MDBs can be found in the reports submitted to Congress in 1999, 2000, 2001, and 2002 pursuant to the IAFCA.[1] Relevant information can also be found in the Department of Treasury report to Congress in October 2001, titled "MDB Monitoring/ Supervision and Anti-Corruption Programs," and annual reports thereafter on MDB corruption programs.[2] In addition, all of the IFIs place materials related to their good governance, transparency, and antibribery activities on their respective Web sites.[3]

All the IFIs are actively engaged in providing financial and technical assistance to borrowing countries to assist in combating corruption, including efforts to promote the rule of law, judicial reform, civil service reform, independent central banks, stronger procurement systems, independent audits of government programs, and efforts to counter financial abuse such as money laundering and terrorist financing.

International Monetary Fund

As the IMF has worked to improve transparency and governance at the IMF itself, it also has strongly encouraged member countries to enhance transparency, strengthen governance, and take other steps to combat corruption.

1997 IMF staff guidelines call for IMF staff members to place a high priority on promoting good governance and outline ways this might be accomplished. IMF work reflects its attention to good governance, including promoting codes and standards that embody good practices, such as the provision of high-quality and reliable data, openness in fiscal policy, and openness in monetary and financial policies. Attention to good governance is also reflected in policies that have expanded the public availability of IMF documents, including through the IMF's Web site, regarding both the institution and its relations with member countries. In addition, the IMF uses conditions in its lending programs that further objectives of good governance in specific countries.

Multilateral Development Banks

Since 1996, the boards of all of the MDBs have approved anticorruption policies, and all of the MDBs now have anticorruption or good governance policies in place. Those policies are designed with both an internal focus, to eliminate opportunities for corruption in institutional operations, and an external focus, to link lending to borrower progress in combating corruption and to help governments put in place strong governance systems. Although more remains to be done to engage the institutions fully in the fight against corruption, progress has been made in recent years.

All MDBs have an investigative unit or mechanism to combat fraud. Most of the MDBs have established hotlines for reporting allegations and have protections for whistle-blowers. All the MDBs have added specific fraud and corruption language to their rules for the procurement of goods and services and for the selection of consultants. The strengthened rules include provisions for sanctions. Firms and individuals have been debarred from participating in contracts financed by MDBs, either for a specified period or indefinitely. In January 2004, a district court in Sweden convicted two individuals of bribery in connection with the misuse of World Bank trust funds. The World Bank cooperated with the Swedish authorities. The World Bank publishes its lists of firms and individuals that have been debarred. The Inter-American Development Bank (IADB) and the Asian Development Bank (AsDB) post reports of their fraud and corruption investigations on their Web sites. All of the institutions have staff codes of conduct that prohibit unethical or fraudulent practices.

The World Bank has become the focal point for developing innovative methods for analyzing and quantifying corruption in individual countries. The World Bank Institute, which is a research and training arm of the World Bank Group, has created "diagnostic" approaches to measure and better understand the nature and scope of

corruption. Information on the World Bank's anticorruption work may be found on its Web site at:

- *www.worldbank.org/wbi/governance* and
- *www.worldbank.org/publicsector/anticorrupt/.*

All MDBs routinely discuss governance and corruption in their country strategies, although the treatment of those issues varies. The U.S. government is seeking to increase candor and improve the quality and timeliness of underlying diagnostic work.

The World Bank's support for efforts by countries to strengthen governance and fight corruption has become mainstream and is more than double what it was in fiscal year 1996. A World Bank assessment, titled "Mainstreaming Anti-Corruption Activities in World Bank Assistance: A Review of Progress Since 1997" (prepared by the World Bank Operations Evaluation Department, April 2003), contains a comprehensive review of World Bank initiatives. The assessment, which is available on the Bank's home page, also examines in depth the relevance and early outcomes of World Bank support for anticorruption activities in six countries.

The World Bank continues to emphasize fiduciary assessments, such as Country Procurement Assessment Reports (CPARs), Country Financial Accountability Assessments (CFAAs), and Public Expenditure Reviews (PERs). Some of these assessments are jointly produced by the World Bank and one of the regional MDBs, and all assessments are shared among the MDBs. The World Bank has committed to working with its borrowers to produce a comprehensive set of these core fiduciary assessments by mid-2004. Moreover, the International Development Association replenishment agreement (IDA-13) of July 2002 set a timetable for the completion of core diagnostic studies for active recipient countries, with half of those studies planned for Africa. Reflecting the U.S. belief that more direct links between the findings of these diagnostic efforts and lending decisions is critical, meeting the timetable is one of the conditions for receiving the United States' additional $100 million contribution in the second year of the IDA-13 replenishment, and the additional $200 million in the third (final) year.

The MDB Heads of Procurement Group, which initially focused on harmonizing procurement documents across MDBs, has produced some concrete results. Several "master" standard documents have been agreed on—a bidding document for the procurement of goods was completed in October 1999 and revised in July 2002, and prequalification documents for procurement of works were completed in October 2002. A draft master bidding document for the Procurement of Works has been prepared. A draft master Request for Proposal for Consulting Services has been agreed to, and work has advanced on the harmonized master time-based contract for consulting services. Work on a master lump-sum contract document for consulting services is also under way. Recently, the master document for the Procurement of Goods was revised for consistency with the master document for Procurement for Works. The group also has facilitated discussions among its members on addressing fraud and corruption.

Over the past year, the regional MDBs have continued to undertake additional activities to improve governance and anticorruption efforts. For example, the IADB in 2003 created an Office of Institutional Integrity, which is responsible for pursuing allegations of impropriety. Allegations may be reported anonymously, with full "whistle-blower protections" afforded. The AsDB's Office of the Auditor General has conducted audit training programs and fraud investigation workshops in a number of the Asian Development Bank's borrowing countries. The AsDB is performing government assessments for all borrowers, and their findings will be reflected in their country strategies. The African Development Bank (AfDB) explicitly requires that its Country Strategy Papers include an assessment of governance concerns, including the impact of corruption on the effectiveness of the AfDB's interventions. In 2004, the AfDB adopted anticorruption guidelines that provide whistleblower protection and call for increased project oversight. The European Bank for Reconstruction and Development (EBRD) is continuing its legal transition program, which aims to improve the legal environment of the bank's countries of operation. The EBRD also is undertaking a regional assessment project, which is designed to assess the status of laws and regulations related to corporate governance in all 27 of the EBRD's countries of operation.

All of the MDBs have established, or are in the process of establishing, performance-based allocation mechanisms in their concessional loan windows, with a heavy emphasis on governance criteria, which provide more resources to countries that are successful in combating corruption and promoting good governance. The United States has taken the position that these allocation mechanisms should be made transparent to the public.

Major International Organizations

Organization of American States

The Organization of American States (OAS) continues to play an active role in the fight against bribery and corruption in the Western Hemisphere. In public statements and joint resolutions, the OAS has emphasized its concern about the negative impact of corrupt practices on good governance, economic development, and other national interests. OAS member states are aware that corrupt practices thwart the process of economic and social development, undermine good governance, and pose an obstacle to the observance of human rights.

Debate in the 1994 OAS General Assembly sparked a long-term commitment to address the problems of bribery and corruption in the hemisphere. The Plan of Action of the first Summit of the Americas, held in Miami in 1994, mandated, among other things, negotiation of the Inter-American Convention Against Corruption (Inter-American Convention). The Inter-American Convention was successfully negotiated and signed by 21 countries on March 29, 1996. Seven additional countries later signed the convention, including the United States, which signed on June 2, 1996. The Inter-American Convention entered into force on March 6, 1997. Thirty countries had deposited instruments of ratification or accession with the OAS as of June 2004. The United States ratified the Inter-American Convention on September 15, 2000, and deposited its instrument of ratification on September 29, 2000.

The Inter-American Convention addresses a broad range of corrupt acts, including domestic corruption and transnational bribery. Signatories agree to enact legislation making it a crime for individuals to offer bribes to public officials and for public officials to solicit and accept bribes. It is, therefore, considerably broader in scope than the OECD Antibribery Convention, which covers only the offering, promising, or giving of bribes to foreign public officials.

Reflecting continued member interest in unethical practices, the OAS also adopted in 1997 the Inter-American Program for Cooperation in the Fight Against Corruption, which is ongoing. The program includes a strategy to secure prompt ratification of the Inter-American Convention, and it has contributed greatly to the recent ratifications and accessions. Under the auspices of the program, the OAS has conducted comparative studies of legal provisions in member states and drafted codes of conduct for public officials. The program also mandates implementing a system of consultations with international organizations, conducting media campaigns, and formulating educational programs.

The states parties to the Inter-American Convention formally established a follow-up mechanism on June 4, 2001, on the margins of the OAS General Assembly meeting in San Jose, Costa Rica. The mechanism consists of two bodies: a Conference of States Parties to the Mechanism, of which there are now 28, which is the political arm of the mechanism, and a Committee of Experts, which is the technical arm. The Committee of Experts is responsible for assessing progress that states parties to the convention have made in meeting their commitments under the Inter-American Convention. The committee's members consist of an expert selected by each of the states parties to the mechanism. Under the rules and procedures of the committee, the Technical Secretariat of the OAS is responsible for supporting the committee's work.

The Conference of States Parties to the Mechanism met for the first time in April 2004. In response to a mandate from the January 2004 Special Summit of the Americas, the conference issued a series of declarations and recommendations to strengthen the mechanism. Those included a recommendation to the OAS General Assembly that the OAS Technical Secretariat have as its primary mission to provide permanent services to the mechanism and that it be given the necessary resources to continue to serve the mechanism in an efficient and uninterrupted manner.

The Special Summit of the Americas also called for a meeting of the states parties to the Inter-American Convention in mid-2004, to be held in Managua, Nicaragua, to consider the recommendations made by the conference and to make additional concrete proposals to enhance transparency and to combat corruption.

The conference also recommended to the Committee of Experts that it increase the number of the evaluations conducted each year from 8 to 12. In its meetings of July 2003 and February 2004, the committee completed its first-round evaluations of eight countries: Argentina, Chile, Colombia, Ecuador, Nicaragua, Panama, Paraguay, and Uruguay. It expected to complete its evaluations of Bolivia, Costa Rica, Peru, and Venezuela at its meeting of July 26–30, 2004. The committee would also have to respond to the conference recommendation on accelerating report production. The OAS Technical Secretariat prepares the first draft of each evaluation report, convenes the meetings of the subgroup of states parties that reviews the drafts before they are submitted to the countries being evaluated, and then convenes the meeting of the plenary of the committee to review and approve the final reports.

With respect to its efforts to prevent corruption in its own activities, the OAS has had an Office of the Inspector General since 1995. The office is responsible for ensuring compliance with the norms and regulations of the General Secretariat in terms of financial, operational, and administrative activities, both at OAS headquarters and in OAS offices in the member states. The Office of the Inspector General primarily performs audits of the expenditures of OAS funds. It is also responsible for conducting special reviews on possible or alleged violations of the OAS policies by OAS staff, particularly with respect to ethics of conduct and conflicts of interest. It publishes annual reports of its programs and activities. The Web site for the Office of the Inspector General can be reached through the OAS Web link at *www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/structure.asp.*

Organization for Economic Cooperation and Development

The OECD is a leader in the global fight against bribery and corruption and serves as a key forum for industrial countries in developing multilateral approaches to combat bribery and corruption. Through its activities, the OECD addresses corruption from the perspective of both the recipients of illicit payments, for example by promoting public ethics and good governance, and the providers of illicit payments, by promoting initiatives to stop the flow of such payments at their source. The OECD currently has 30 member countries, including most of the major trading partners of the United States. OECD members share a commitment to market-oriented policies, good governance, and democratic practices. Because of these common interests, consensus for joint action has often been more practical to achieve within the OECD than within larger, more diverse international organizations.

OECD support for international anticorruption initiatives goes beyond monitoring implementation and enforcement of the Antibribery Convention. The OECD Anti-Corruption Division, the Directorate for Financial and Enterprise Affairs (DAFFE), and the OECD Development Center are among the OECD bodies that also address the issue of corruption.

The Anti-Corruption Division is the main body within the OECD Secretariat that supports the fight against bribery and corruption in international business transactions. The division supports the OECD Working Group on Bribery and is responsible for helping to implement a program of peer review and surveillance, which monitors and promotes full implementation of the convention and related instruments. The division also engages in outreach activities with non-member countries not directly related to the Antibribery Convention.

The division's Anti-Corruption Ring Online (AnCorR Web) offers access to more than 3,000 selected references to books, journals, papers, reports, and other documents related to corruption and bribery. It also has a wide range of downloadable electronic or on-line anticorruption documentation, such as laws, international conventions, anticorruption strategies, best practices, and other information. AnCorR Web can be reached at *www.oecd.org/daf/nocorruptionweb/.*

The purpose of the division's outreach activities is to expand the range of countries that incorporate the standards of the convention and other anticorruption instruments, to raise awareness of the problems of corruption, and to strengthen cooperation between the various stakeholders involved in the fight against corruption. Initiatives included among the outreach programs are the Stability Pact Anti-Corruption Initiative for Southeast Europe, the Anti-Corruption Network for Transition Economies, the joint AsDB/OECD Forum on Combating Corruption in the Asia-Pacific Region, and the Governance Outreach Initiative for Latin America.

Other important anticorruption work also has been undertaken outside the OECD Anti-Corruption Division. DAFFE has provided leadership on raising awareness of the OECD *Principles of Corporate Governance* and of the importance of transparency and financial disclosures and reporting by companies. The OECD *Principles of Corporate Governance*, first published in 1999, have been widely adopted as a benchmark, both in OECD countries and elsewhere. They are used by the Financial Stability Forum as one of 12 key standards for ensuring international financial stability and by the World Bank in its work to improve corporate governance in emerging markets. Since September 2003, the Center for Cooperation with Non-Members (CCNM) and DAFFE have, in partnership with a core of Middle East and North Africa (MENA) countries and the United Nations Development Program (UNDP), held several consultations to develop a formal policy dialogue and cooperation network between the OECD and the region. The OECD initiative with MENA countries is exploring two principal areas of engagement: improving the investment policies in MENA countries, and modernizing the governance structures and processes in the region. Finally, the OECD has also provided technical expertise and input into the negotiations of the U.N. Convention Against Corruption, which were completed in December 2003.

To deter bribery in officially supported export credits, the OECD Working Party on Export Credits and Credit Guarantees (ECG) agreed in November 2000 on an action statement on bribery and officially supported export credits. Among other things, actions may include informing applicants who request credit support about the legal consequences of bribery in international business transactions, having an applicant provide an antibribery undertaking or declaration, and refusing to approve credit, cover, or other support if there is sufficient evidence that bribery was involved in the award of an export contract. In 2002, the ECG considered the results of its mapping survey on antibribery measures adopted in export credit systems maintained by ECG members, which showed that a significant number of concrete new measures had been put in place since the adoption of the action statement. ECG members also agreed on a revised in-depth survey, which better reflects the specific undertakings set forth in the action statement, and which should contribute positively to the ongoing review of the implementation of the OECD Antibribery Convention. The action statement can be viewed on the OECD Web site at *www.oecd.org/ech/docs/bribery-en.pdf*. In November 2002, the ECG further agreed that their responses, and all subsequent updates of the survey results, should be publicly disseminated. Accordingly, this document is available on the OECD's Web site at *www.olis.oecd.org/olis/2004doc.nsf/LinkTo/td-ecg(2004)9* and includes responses through May 14, 2004.

Given the deep-seated relationship of bribery and corruption to the entire global trading system, and seeking to build on the experience in the OECD, the U.S. government has supported work in the OECD Trade Committee on corruption as it relates to trade. One objective of that support was to identify the practices or characteristics of a trade regime that may make it susceptible to bribery and corruption. In response, the committee undertook an inspection of the available data sources regarding corruption in customs processing, import licensing, preshipment inspection, and government procurement.

The OECD *Guidelines for Multinational Enterprises* help to reinforce the Antibribery Convention. Originally adopted in 1976, the guidelines are nonbinding recommendations to enterprises made by the 37 governments that adhere to them. The aim of the guidelines is to help multinational enterprises operate in harmony with government policies and with the expectations of civil society. In the most recent revision adopted by the OECD ministers on June 27, 2000, a new chapter on combating bribery closely tracks the key provisions of the convention. Although the guidelines are voluntary and not legally enforceable, they draw attention to the destructive effects of bribery and corruption and encourage companies to take a proactive approach to addressing the problem.

On January 1, 2003, pursuant to the Financial Regulations and Rules of the OECD, the Office of the Auditor General was established to monitor the proper application of the provisions of the internal financial and budgetary control system of the OECD. To that end, the office is required to, among other things, verify the reliability and integrity of financial data; ensure that assets exist, are preserved and protected, and are used in the interests of the organization; ensure that systems are implemented to guarantee compliance with the financial regulations and rules, and with other rules and directives concerning the financial management of the organization; assess the economy and efficiency with which resources are used; and examine activities and programs in order to ascertain whether their outcomes are consistent with established objectives. The financial regulations also require the Office of the Auditor General to provide an annual report to the OECD Council, the first of which was issued May 12, 2004.

Organization for Security and Cooperation in Europe

The Organization for Security and Cooperation in Europe is a regional security organization whose 55 participating states are in Europe, the former Soviet Union, and North America. The OSCE addresses issues in three primary areas: security, human rights, and economic security (which recently has been focused on corruption).

The United States is a founding member of the OSCE and participates in the process through a U.S. agency: the Commission for Security and Cooperation in Europe. The commission includes nine members each from the House and Senate, as well as three administration officials from the State, Defense, and Commerce departments. Assistant Secretary of Commerce William H. Lash III, in his role as commissioner, has addressed the underlying problems that threaten the economies of Europe, particularly rule of law, judicial insecurity, and corruption.

Over the past several years, the United States has sought to focus attention on the threats posed by organized crime and corruption in the region during several OSCE forums. Assistant Secretary Lash has addressed the pernicious effects of corruption in his speeches at universities in the region, during press conferences, and

with his ministerial counterparts. In addition, the U.S. Department of Commerce is cooperating with OSCE missions in implementing bilateral programs to promote business ethics in the public and private sectors.

United Nations

Over the past several years, the United States has been successful in bringing together a coalition of developed and developing countries in the United Nations to bring attention to the international fight against corruption and bribery. Those efforts culminated in December 2003 with the finalization and opening for signature of the U.N. Convention Against Corruption (U.N. Convention). The U.N. Convention is the first truly globally negotiated and most comprehensive international anticorruption agreement to date. It is the product of two years of negotiations involving 130 countries under the auspices of the U.N. Office of Drugs and Crime (UNODC), in Vienna, Austria. As of May 2004, 108 countries have signed the U.N. Convention, including the United States, and two states have ratified it, Kenya and Sri Lanka.

The new U.N. Convention incorporated a number of useful concepts from the OECD Antibribery Convention. For example, Article 16 requires parties to adopt legislative and other measures to criminalize the bribery of foreign public officials. Article 12 imposes a "books and records" requirement that is similar to the OECD Antibribery Convention's, and also requires parties to disallow the tax deductibility of bribes. It also contains an innovative chapter designed to facilitate international cooperation in the recovery of illicitly acquired assets that are sent abroad.

Both the U.N. General Assembly and the Economic and Social Council often debate corruption issues at length and regularly endorse resolutions in support of corrective action. Corruption and bribery have also been the subjects of specialized meetings, such as the annual U.N. Commission on Crime Prevention and Criminal Justice.

Beginning in 1996, the U.N. General Assembly has adopted a series of resolutions pledging specific actions to fight corruption and bribery. They include a resolution establishing an international code of conduct for public officials (U.N. Resolution 51/59) and others that pledge to criminalize bribery of foreign public officials, to deny the tax deductibility of bribes paid to any public official or elected representative of another country, to encourage international cooperation in the fight against corruption, and to strengthen national and international capacities to combat corrupt practices and bribery in international transactions.

The UNODC has also developed a global program against corruption that is now being implemented in several countries. This program conducts studies of the extent of the corruption problem in participating countries, and UNODC experts then help governments create detailed plans for addressing the problems identified. UNODC has issued a "tool kit" for fighting corruption, which is available on-line and is updated periodically.

The U.N. also has a global program within the UNODC to combat money laundering. Its goal is to increase the effectiveness of international action against money laundering by offering comprehensive technical expertise to member states that request help. It focuses on three main areas of activity: promoting cooperation through training, institution building, and awareness raising; gaining understanding of the money-laundering phenomenon through research and analysis; and increasing the effectiveness of law enforcement.

The U.N. Commission on International Trade Law (UNCITRAL) continues to provide valuable legal assistance to countries interested in improving their procurement laws and regulations, thus limiting the opportunities for bribery and corruption. In 1994, UNCITRAL approved a model law on procurement of goods, construction, and services, which was aimed at preventing bribery and corruption. Several countries have based their procurement laws or standards on provisions of the UNCITRAL model law. Many of the new democracies in Central and Eastern Europe and the former Soviet Union have benefited from UNCITRAL projects. Albania and Poland, for example, have enacted legislation using the UNCITRAL model.

The U.N. Development Program (UNDP) has tackled corruption as a problem of poor governance. It recognizes that minimizing corruption is critical to reducing poverty and achieving sustainable development. UNDP country initiatives include supporting capacity-building of independent anticorruption commissions, strengthening journalism as a tool for deterring and exposing corruption, and helping to improve civic education to fight corruption.

The U.N. Conference on Trade and Development (UNCTAD), as part of its investment climate reviews of developing countries, has done work on the effects of bribery on foreign direct investment. In 2001, UNCTAD published a paper on this issue (UNCTAD/ITE/IIT/25), which examines how international investment agreements have addressed the issue of combating transnational bribery through international obligations by states to criminalize such transactions.

The U.N. Office of Internal Oversight Services (OIOS) was created by the General Assembly in 1994. As an independent office reporting to the secretary general, OIOS provides worldwide audit, investigation, inspection, program monitoring, evaluation, and consulting services to the U.N. Secretariat and a wide range of U.N. operational funds, programs, and tribunals. According to OIOS, such efforts have exposed waste, misconduct, fraud, and mismanagement and have identified potential savings totaling approximately $290 million, of which nearly $130 million was actually recovered and saved since 1994.

OIOS has three primary operating divisions: the Internal Audit Division determines if there are adequate and effective systems of internal controls in the organization as a whole; the Monitoring, Evaluation, and Consulting Division, which compares the implementation of programs against commitments in plans and budgets; and the Investigations Division, which investigates allegations of employee misconduct, abuse of authority, payment of kickbacks, embezzlement of funds, and waste and mismanagement of the organization's resources. The Investigations Division operates a 24-hour hotline that is confidential and can be reached at (212) 963-1111.

In 2003, OIOS launched an Organizational Integrity Initiative, a three-year program to strengthen integrity and professional ethics in the organization and to prevent fraud and waste. OIOS annual reports and related material can be found on the OIOS Web site at *www.un.org/Depts/oios/*.

World Trade Organization

Bribery and corruption can affect international trade in many different ways. If left unchecked, they can negate market access gained through trade negotiations, undermine the foundations of the rules-based international trading system, and frustrate broader economic reforms and stabilization programs. U.S. firms report a variety of problems, but two key issues involve customs and government procurement. Bribes or fees required by foreign customs officials can slow shipments and increase the costs of customs importation in many countries. Corruption is also a significant barrier faced by U.S. firms bidding for foreign government procurement contracts.

The World Trade Organization (WTO) continues to be a critical forum for developing transparency measures that will combat corruption and bribery in international trade transactions. Transparency is one of the core commitments of all WTO members through the specific obligations outlined in General Agreement on Tariffs and Trade Article X.

Transparent, predictable customs procedures are the goal of ongoing WTO efforts in the area of trade facilitation. Since the start of 2004, there is growing support for new WTO negotiations on trade facilitation. The United States continues to work toward a launch of negotiations during the Doha Development Round.

Transparency in government procurement remains on the agenda for future work in the WTO, but negotiation of an agreement is not expected in the near term. The United States remains committed to working with willing partners in the WTO and other forums such as bilateral and regional free trade agreements, and with Asia-Pacific Economic Cooperation to increase transparency in government procurement in markets around the world.

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1. See sections on the IFIs in the First Annual Report, 1999 (pp. 52–59); the Second Annual Report, 2000 (pp. 72–81); the Third Annual Report, 2001 (pp. 97–107); the Fourth Annual Report, 2002 (pp. 36–37); and the Fifth Annual Report, 2003 (pp. 27–28).

2. In accordance with the Foreign Operations, Export Financing and Related Programs Appropriations Act, 2001, Sections 802(b) and 803(b) (1).

3. The Web sites are: *www.imf.org*, *www.worldbank.org*, *www.ebrd.com*, *www.afdb.org*, *www.adb.org* and *www.iadb.org*.

8

Private-Sector Involvement in Monitoring and Implementation

Since the enactment of the Omnibus Trade and Competitiveness Act of 1988, the U.S. government has worked to build and maintain a strong cooperative relationship with the U.S. private sector to combat international bribery and corruption more effectively and to raise awareness of preventive measures. This relationship helped to achieve international agreement on the Antibribery Convention and enactment of implementing legislation by the signatories. The U.S. government is committed to maintaining this valuable relationship. The Bush administration values input from the private sector and makes every effort to inform the private sector of the government's anticorruption policies and programs.

Private-sector organizations and the U.S. government continue to co-sponsor and participate in international anticorruption conferences. The private-sector organizations publicize the convention, call the public's attention to the problem of corruption and bribery in international business, provide useful information on progress made by parties and their companies to combat corrupt practices, and suggest possible additional means of dealing with the issue of international corruption.

To help ensure the success of Phase II peer reviews of parties' enforcement efforts, the U.S. government encourages the private sector and non-governmental organizations to play an active role in monitoring the implementation of the convention. Private-sector participation in Phase II of the monitoring process is crucial. The U.S. government will continue to advocate openness and transparency in the process. The active participation of the private sector and non-governmental organizations is vital to the effective implementation and enforcement of the Antibribery Convention.

The United States solicits the views of private-sector organizations and companies about international anticorruption strategies in the Organization for Economic Cooperation and Development (OECD) and other international forums, including the United Nations, the Council of Europe, the World Trade Organization, the Organization of American States, and Asia-Pacific Economic Cooperation.

Senior officials of the Commerce, State, and Justice departments frequently engage private-sector representatives in discussions about the convention and the need for strong enforcement of antibribery legislation by its parties.

In addition, officials of the Commerce, Justice, State, and Treasury departments communicate with the private sector on convention-related issues through a variety of other channels. For example, officials participate in a wide range of meetings on the convention held by corporations, bar associations, and business associations.

In addition, U.S. officials attend meetings and informal consultations with groups that have a strong interest in combating international corruption, including Transparency International, the American Bar Association Task Force on International Standards for Corrupt Practices, the U.S. Council for International Business, and the International Bar Association.

When discussions go beyond the exchange of information and into the solicitation of recommendations on specific matters of policy, U.S. agencies make use of the existing advisory committee structure as a forum for dialogue with the private sector. For example, the U.S. Department of Commerce maintains an ongoing dialogue with the private sector through its regularly scheduled meetings of industry technical advisory committees and the President's Export Council. Commerce officials have raised the issue of international bribery before the Transatlantic Business Dialogue (TABD), a public-private partnership in which U.S. and European Union businesses meet to discuss trans-Atlantic trade barriers and relay their findings to governments. TABD members have stressed the importance of fighting corruption and bribery at their annual conferences. The U.S. State Department receives input on bribery and transparency issues through its Advisory Committee on International Economic Policy. In addition, senior State Department economic policy officials frequently discuss U.S. policy for combating corruption on a less formal basis with business organizations and companies.

In addition, the U.S. private sector participates in monitoring the implementation of the convention through international business groups, such as the OECD Business and Industry Advisory Committee, a group composed of private-sector representatives from OECD member countries. The group strongly supports the convention and speaks out frequently on the need to fight corruption and bribery. The OECD Trade Union Advisory Committee also has endorsed the convention and its effective implementation.

The International Trade Administration's Trade Compliance Center uses its Compliance Liaison Program and other initiatives to enlist the cooperation of the private sector in monitoring bribery of foreign public officials and implementation of the Antibribery Convention. The business community and non-governmental organizations can help our anticorruption efforts by reporting instances of alleged bribery and possible violations of convention obligations directly to the Trade Compliance Center at *www.export.gov/tcc*. Only through enhanced reporting of credible allegations of bribery will the proper authorities become aware of and able to pursue many cases of bribery.

The Commerce Department also offers several services that may help U.S. businesses that are seeking to address transnational business-related corruption issues. For example, the U.S. Commercial Service of the Commerce Department can undertake limited background checks to assist U.S. companies in choosing business partners or agents overseas. The U.S. Commercial Service can be reached directly through its offices in every major U.S. and foreign city, or through its Web site at *www.export.gov/comm_svc/*. Also, the Departments of Commerce and State provide worldwide support for qualified U.S. companies bidding on foreign government contracts. Problems encountered by U.S. companies seeking such foreign business opportunities, including corruption by foreign governments or competitors, may be brought to the attention of the appropriate U.S. government officials. The Commerce Department's Advocacy Center can be reached through the Department of Commerce's International Trade Administration in Washington or through its Web site at *www.export.gov/advocacy/*. Advice on business advocacy is also available from the Department of State through the Office of Commercial and Business Affairs and on the business page of the department's Web site at *www.state.gov.*

The U.S. government also publishes information to help keep the private sector informed about anticorruption and good business practices. For example, in May 2004, the U.S. Department of Commerce published a manual that provides guidance on how to operate in accordance with modern standards of corporate accountability and ethics. Titled *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies (Business Ethics)*, the manual is designed as a training tool for enterprises operating in countries that have just recently made the transition to a market economy. *Business Ethics* will also be useful to decision-makers in any organization that is seeking to design and implement a business ethics program that conforms to global standards.

The State Department, in cooperation with the Commerce and Justice departments, published a brochure for businesses titled *Fighting Global Corruption: Business Risk Management*, which contains information about the benefits of good governance and strong corporate antibribery programs and policies. The brochure also summarizes the basic requirements of the Foreign Corrupt Practices Act of 1977 (FCPA) and the Antibribery Convention, and various international initiatives underway to combat business bribery and official public corruption.

The brochure is online at *www.state.gov/g/inl/rls/rpt/fgcrpt/*. In addition, a joint Commerce Department–Justice Department brochure summarizes the antibribery provisions of the FCPA. This joint FCPA brochure was updated after the 1998 amendments to the FCPA implementing the OECD Antibribery Convention. Many companies have found the joint brochure useful, especially small firms and those that are new to exporting. The brochure is available on the Web site of the Office of the Chief Counsel for International Commerce at the Department of Commerce, at *www.ogc.doc.gov/intl_comm_main.html* and on the Department of Justice Web site at *www.usdoj.gov/criminal/fraud/fcpa.html*.

U.S. officials continually respond to public inquiries on the convention and the status of its implementation. The convention and related commentaries, as well as the full text of the International Anti-Bribery and Fair Competition Act of 1998 and other background materials, are posted on the Web sites of the Commerce, Justice, and State departments. The Justice Department has posted on its Web site the responses of the United States to the OECD Working Group on Bribery's Phase I and Phase II questionnaires, as well as the working group's Phase I and Phase II final reports relating to the United States. The Commerce Department provides detailed information on the status of the implementation and enforcement of the convention by U.S. trading partners. The Web site of the Commerce Department's Trade Compliance Center has a guide to help businesses understand key provisions of the convention. In addition, the U.S. Office of Government Ethics has information on anticorruption issues which can be accessed through its main Web site at *www.usoge.gov*.

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Additional Information on Enlarging the Scope of the Convention

The International Anti-Bribery and Fair Competition Act (IAFCA) of 1998 directs the U.S. Department of Commerce to review additional means to enlarge the scope of the OECD Antibribery Convention, or otherwise increase its effectiveness, while taking into account the views of private-sector participants and representatives of non-governmental organizations. Such additional means are to include, but not be limited to, improved record-keeping provisions and the possible expansion of the applicability of the convention to additional individuals and organizations. The IAFCA also asks that this annual report assess the impact on U.S. business of Section 30A of the Securities Exchange Act of 1934 and Sections 104 and 104A of the Foreign Corrupt Practices Act (FCPA).

Additional Individuals and Organizations

The five issues identified by the OECD Council in December 1997 for additional examination have been the major focus of the OECD Working Group on Bribery's activities outside the realm of peer monitoring and are addressed in Chapter 6 of this report. As discussed in Chapter 6, over the years the results of that examination have been mixed. Although parties have concluded that the convention adequately addressed bribes paid through foreign subsidiaries, the problem of bribes paid to political parties and candidates remained unresolved. The FCPA has explicitly prohibited such bribery since 1977, and no loophole exists in U.S. law; however, our experience has shown that such bribery may be effective. Therefore, the U.S. government will continue to monitor this issue closely as parties implement and enforce their laws.

As parties to the convention are confronted with allegations of bribery of foreign public officials, an analysis of whether or not the parties succeed in obtaining convictions under their laws will provide guidance on whether the outcome was due to deficiencies in their implementing laws or perhaps the inadequate scope of the convention. In time we will be in a better position to assess the convention's effectiveness in combating bribery of foreign public officials and to identify additional means of enlarging its scope to increase its effectiveness. The results of the Phase II reviews will provide valuable input to the U.S. government regarding the scope of any expansion of the convention. In making its assessment, the U.S. government will continue to obtain the views of representatives of the private sector and non-governmental organizations.

Improved Record Keeping

The provisions of Article 8 of the Antibribery Convention, which concern accounting practices, are not as comprehensive as those in Section V of the 1997 Revised Recommendation of the OECD Council on Combating Bribery in International Business Transactions (Revised Recommendation). Article 8 directs signatories to take certain measures regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards in order to prohibit certain practices that might facilitate the bribing of foreign public officials or of hiding such bribery. The Revised Recommendation, however, addressed a wider range of safeguards against corruption, including accounting requirements, independent external audits, and internal company controls. The United States would like to see the parties to the convention implement all elements of Section V of the Revised Recommendation. The United States will continue to encourage parties to institute the entire recommendation.

Section 404 of the Sarbanes-Oxley Act of 2002 directed the Securities and Exchange Commission (SEC) to adopt rules requiring each annual report of a company, other than a registered investment company, to contain a statement of management's responsibility for establishing and maintaining an adequate internal control structure and procedures for financial reporting, and a statement of management's assessment, as of the end of the company's most recent fiscal year, of the effectiveness of the company's internal control structure and procedures for financial reporting. Section 404 also requires the company's independent auditor to attest to and report on management's assessment of the effectiveness of the company's internal controls and procedures for financial reporting in accordance with standards established by the Public Company Accounting Oversight Board. To implement Section 404, the SEC voted to adopt rules concerning management's report on its assessment of internal control over financial reporting, the independent auditor's report concerning management's assessment, and management certifications of disclosures in periodic Exchange Act reports. The SEC press release regarding those rules is available at *www.sec.gov/news/press/2003-66.htm*.

Impact on U.S. Business

The U.S. government has long been aware of the problems that bribery of foreign public officials poses for international business and good governance. In the 1970s, widely publicized incidents of bribery by U.S. companies damaged the reputation of U.S. business. Because of such problems, Congress enacted the FCPA to end bribery of foreign officials and to restore public confidence in the integrity of the American business system. Through the FCPA, the United States declared that American companies must act ethically in obtaining foreign contracts and in carrying out business in foreign countries.

The impact of the FCPA was widespread. The law contributed to the perception that U.S. firms operate with greater integrity in the international market. In addition, U.S. businesses were induced to compete on the strength and quality of their goods and services, which helped them to be more competitive around the world. Over time, many companies recognized the importance and value of establishing awareness and corporate compliance programs specifically related to the FCPA as vehicles to prevent such bribery. But the FCPA also left U.S. firms at a disadvantage relative to their foreign competitors, who were able to bribe foreign officials without fear of penalty. Some foreign companies were even able to deduct bribes paid to foreign public officials from their taxes. The disparity between U.S. law and the laws of other OECD countries was one of the reasons the U.S. government sought to persuade other countries to enact criminal prohibitions against bribery of foreign public officials. The negative consequences suffered by U.S. businesses occurred not because of the FCPA, but because foreign competitors were not subject to comparable laws. Today, all parties to the Antibribery Convention have enacted criminal laws against foreign bribery. Therefore, the impact on U.S. businesses will be a function of the commitment parties maintain with regard to enforcement of those laws. The U.S. government continues to assert that aggressive enforcement of these important antibribery laws must be a priority for each party to the convention.

Over the years, the U.S. government has received reports indicating that the bribery of foreign public officials influenced the awarding of billions of dollars in contracts around the world. While it is not possible to verify the accuracy or completeness of all of these reports, we believe that they are indicative of how widespread the bribery of foreign public officials has been in recent years. However, the U.S. government is nonetheless encouraged that a number of parties to the convention are investigating or prosecuting cases of bribery of foreign public officials under their implementing laws, and that in several instances they have obtained convictions.

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 US$18 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. Firms alleged to have offered bribes won approximately 90 percent of the contracts in the deals for which we have information on the outcome; U.S. firms are known to have lost at least eight of the contracts worth $3 billion. The numbers for each of the last two years represents a sharp drop from the previous five years, which averaged very close to 60 contracts each year. Although the overall bribery activity by OECD firms dropped substantially from the reporting years prior to 2002, firms from a few OECD countries continue to be involved in a disproportionate share of those allegations. This is a matter of great concern to the U.S. government and will be followed closely to see what actions are taken by these governments to detect bribery and prosecute it.

Meaningful prosecutions by other parties will send the powerful message to companies engaged in international commerce that competition on the strength and quality of goods and services is the way to conduct business, and that bribery will no longer be tolerated. To ensure that businesses can compete on a level playing field, the U.S. government will continue to urge the relevant authorities in each party to investigate all credible allegations of bribery of foreign public officials.

The U.S. government continues to urge other governments to promote awareness in their business communities about the Antibribery Convention and national laws implementing the convention. Parties to the convention should encourage businesses involved in international trade to develop and adopt corporate compliance programs. In June 2004, at Sea Island, Georgia, the Group of Eight announced a transparency and anticorruption action plan which includes among its commitments an obligation to encourage corporate compliance programs among their respective business communities. The positive results of such actions will benefit all participants in trade, both at home and abroad.

OECD Documents

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

(Signed December 17, 1997)

Preamble

The Parties,

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

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

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

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

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

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

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

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

Have agreed as follows:

Article 1 – The Offense of Bribery of Foreign Public Officials

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

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

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

4. For the purpose of this Convention:

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

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

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

Article 2 – Responsibility of Legal Persons

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

Article 3 - Sanctions

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

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

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

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

Article 4 – Jurisdiction

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

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

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

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

Article 5 – Enforcement

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

Article 6 – Statute of Limitations

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

Article 7 – Money Laundering

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

Article 8 – Accounting

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

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

Article 9 – Mutual Legal Assistance

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

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

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

Article 10 – Extradition

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

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

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

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

Article 11 – Responsible Authorities

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

Article 12 – Monitoring and Follow-up

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

Article 13 – Signature and Accession

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

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

Article 14 – Ratification and Depositary

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

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

Article 15 – Entry into Force

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

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

Article 16 – Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine

by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17 – Withdrawal

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

ANNEX
STATISTICS ON OECD EXPORTS

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

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

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

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

Adopted by the Negotiating Conference on November 21, 1997

General:

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

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

4. It is an offense within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or 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 offense whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

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

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

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 offense. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programs of good governance. However, criminalization by other countries does not seem a practical or effective complementary action.

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, falls within the scope of the offenses described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offenses covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

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

if authorization, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

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

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

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

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

Article 5. Enforcement:

27. Article 5 recognizes the fundamental nature of national regimes of prosecutorial discretion. It recognizes as well that, in order to protect the independence of prosecution, such

discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD Recommendation"), which recommends, inter alia, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

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

Article 8. Accounting:

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 offenses referred to in Article 8 will generally occur in the company's home country, when the bribery offense itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

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

Re paragraph 2:

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 cooperate fully regarding cases whose facts fall within the scope of the offenses 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 be based on the following complementary systems:

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

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

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

. . .

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

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

Article 13. Signature and Accession:

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 non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organization, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

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

Adopted by the Council on May 23, 1997

The Council

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

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

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

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

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

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

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

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

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

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

General

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

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

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

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

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

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

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

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

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

III. RECOMMENDS that Member countries should criminalize the bribery of foreign public officials in an effective and coordinated manner by submitting proposals to their legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

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

Tax Deductibility

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

Accounting Requirements, External Audit and Internal Company Controls

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

A. Adequate accounting requirements

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

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

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

B. Independent External Audit

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

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

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

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

C. Internal company controls

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

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

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

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

Public Procurement

VI. RECOMMENDS:

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

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

iii) In accordance with the Recommendation of the Development Assistance Committee, Member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts.[2]

International Cooperation

VII. RECOMMENDS that Member countries, in order to combat bribery in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

i) consult and otherwise cooperate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;

ii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

iii) ensure that their national laws afford an adequate basis for this cooperation and, in particular, in accordance with paragraph 8 of the Annex.

Follow-up and Institutional Arrangements

VIII. INSTRUCTS the Committee on International Investment and Multinational Enterprises, through its Working Group on Bribery in International Business Transactions, to carry out a program of systematic follow-up to monitor and promote the full implementation of this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

i) receipt of notifications and other information submitted to it by the Member countries;

ii) regular reviews of steps taken by Member countries to implement the Recommendation and to make proposals, as appropriate, to assist Member countries in its implementation; these reviews will be based on the following complementary systems: a system of self-evaluation, where Member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation; a system of mutual evaluation, where each Member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the Member country in implementing the Recommendation.

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

iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;

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

IX. NOTES the obligation of Member countries to cooperate closely in this follow-up program, pursuant to Article 3 of the OECD Convention.

X. INSTRUCTS the Committee on International Investment and Multinational Enterprises to review the implementation of Sections III and, in co-operation with the Committee on Fiscal Affairs, Section IV of this Recommendation and report to Ministers in Spring 1998, to report to the Council after the first regular review and as appropriate there after, and to review this Revised Recommendation within three years after its adoption.

Cooperation with Nonmembers

XI. APPEALS to non-member countries to adhere to the Recommendation and participate in any institutional follow-up or implementation mechanism.

XII. INSTRUCTS the Committee on International Investment and Multinational Enterprises through its Working Group on Bribery, to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the Recommendation and its follow-up.

Relations with International Governmental and Nongovernmental Organizations

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

Notes

1. Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.

2. This paragraph summarizes the DAC recommendation which is addressed to DAC members only, and addresses it to all OECD Members and eventually nonmember countries which adhere to the Recommendation.

Recommendation of the OECD Council on the Tax Deductibility of Bribes to Foreign Public Officials

Adopted by the Council on April 11, 1996

The Council

Having regard to Article 5 b) of the Convention on the Organization for Economic Cooperation and Development of 14th December 1960;

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

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

Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favor bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal.

II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with nonmember countries and to report to the Council as appropriate.

FCPA Prosecutions and Civil Enforcement Actions by the Department of Justice and the Securities and Exchange Commission

I. Pre-Act Criminal Prosecutions

1. *U.S. v. J. Ray McDermott & Co., Inc.*, E.D. Louisiana, 1978.

2. *U.S. v. Bethlehem Steel Corporation* (Cr. No. 80-0431), S.D.N.Y., 1980.

3. *U.S. v. The Williams Companies* (Cr. No. 78-00144), D.D.C., 1978 [Currency and Foreign Transactions Reporting Act].

   The company paid a fine and civil penalty of $187,000.

4. *U.S. v. Control Data Corporation* (Cr. No. 78-00210), D.D.C., 1978 [Mail Fraud and Currency and Foreign Transactions Reporting Act].

   The corporation paid a fine and civil penalty of $1,381,000.

5. *U.S. v. Westinghouse Electric Company* (Cr. No. 78-00566), D.D.C., 1978 [False statements to Export-Import Bank and Agency for International Development].

   The company paid a fine of $300,000.

6. *U.S. v. United Brands Company* (Cr. No. 78-538), S.D.N.Y., 1978 [Mail Fraud].

   The company paid a fine of $15,000.

7. *U.S. v. United States Lines, Inc.* (Cr. No.), D.D.C.,1978 [Conspiracy to defraud the Federal Maritime Administration].

   The company paid a fine of $5,000.

8. *U.S. v. Sea-Land Services, Inc.* (Cr. No. 78-103), D.D.C., 1978 [Conspiracy to defraud the Federal Maritime Administration].

   The company paid a fine of $5,000.

9. *U.S. v. Seatrain Lines, Inc.* (Cr. No. 78-49) [Conspiracy to defraud the Federal Maritime Administration and Currency Transactions Reporting Act].

   The company and a subsidiary each paid fines of $260,000.

10. *U.S. v. Lockheed Corporation* (Cr. No. 79-00270), D.D.C., 1979 [Currency and Foreign Transactions Reporting Act, Wire Fraud, false statements to Export-Import Bank].

    The company paid a fine and civil penalties of $647,000.

11. *U.S. v. Gulfstream American Corporation* (Cr. No. 79-00007), D.D.C., 1979 [False Statements to Export-Import Bank and Commerce Department].

    The company paid a fine of $120,000.

12. *U.S. v. Page Airways, Inc.* (Cr. No. 79-00273), D.D.C., 1978 [Currency and Foreign Transactions Report Act].

    The company paid a fine and civil penalty of $52,647.

13. *U.S. v. Textron, Inc.* (Cr. No. 79-00330), D.D.C., 1979 [Currency and Foreign Transactions Report Act].

    The company paid a fine and civil penalty of $131,670.

14. *U.S. v. McDonnell Douglas Corporation, et al.* (Cr. No. 79-516), D.D.C., 1981 [Mail Fraud, Wire Fraud, conspiracy, false statements to Export-Import Bank].

II. FCPA Criminal Prosecutions

1. *U.S. v. Kenny International Corp.* (Cr. No. 79-372), D.D.C., 1979.

   The company pled guilty to one count of violating the FCPA and consented to an injunction against further FCPA violations. The corporation was fined $50,000 and required to pay restitution to the Cook Islands government in the amount of NZ $337,000.

   The chairman of Kenny International consented to a civil injunction and agreed to enter a plea of guilty to criminal charges pending in the Cook Islands.

2. *U.S. v. Crawford Enterprises, Inc., Donald G. Crawford, William E. Hall, Mario S. Gonzalez, Ricardo G. Beltran, Andres I. Garcia, George S. McLean, Luis A. Uriarte, Al L. Eyster and James R. Smith* (Cr. No. H-82-224), S.D.Tx, Houston Division, 1982.

Crawford Ent.	Pled no contest	Fined	$3,450,000
D. Crawford	Pled no contest	Fined	$309,000
W. Hall	Pled no contest	Fined	$150,000
A. Garcia	Pled no contest	Fined	$75,000
A. Eyster	Pled no contest	Fined	$5,000
J. Smith	Pled no contest	Fined	$5,000
G. McLean	Acquitted		

3. *U.S. v. C.E. Miller Corporation and Charles E. Miller* (Cr. No. 82-788), C.D. Cal., 1982.

   The corporation pled guilty and was fined $20,000. The individual defendant pled guilty and was sentenced to three years' probation and 500 hours of community service.

4. *U.S. v. Marquis King* (Cr. No. 83-00020), D.D.C., 1983.

   The defendant pled guilty to violations of the Currency and Foreign Transactions Reporting Act and was sentenced to 14 months' incarceration and required to pay prosecution costs.

5. *U.S. v. Ruston Gas Turbines, Inc.* (Cr. No. H-82-207), S.D. Tex., 1982.

   The corporation pled guilty to an FCPA violation and was fined $750,000.

6. *U.S. v. International Harvester Company* (Cr. No. 82-244), S.D. Tex., 1982.

   The corporation pled guilty to one count of conspiracy to violate the FCPA and was fined $10,000 plus costs of $40,000.

   An individual defendant also pled guilty to one count and was sentenced to one year incarceration (suspended).

7. *U.S. v. Applied Process Products Overseas, Inc.* (Cr. No. 83-00004), D.D.C., 1983.

   The company pled guilty to an FCPA violation and was fined $5,000. In addition, it consented to a permanent civil injunction.

8. *U.S. v. Gary Bateman* (Cr. No. 83-00005), D.D.C., 1983.

   The defendant pled guilty to five CFTR misdemeanors and was sentenced to three years' probation. In addition, he agreed to pay a civil penalty of $229,512, a civil tax payment of $300,000, and costs of prosecution of $5,000.

9. *U.S. v. Sam P. Wallace Company, Inc.* (Cr. No. 83-0034) (PG), D.P.R., 1983.

   The corporation pled guilty to three counts of FCPA accounting violations and was fined $30,000. In addition, it also pled guilty to a CFTR violation and was fined $500,000.

10. *U.S. v. Alfonso A. Rodriguez* (Cr. No. 83-0044 (JP)), D.P.R., 1983.

    The defendant pled guilty to one count of FCPA bribery and was sentenced to three years' probation and fined $10,000.

11. *U.S. v. Harry G. Carpenter and W.S. Kirkpatrick, Inc.* (Cr. No. 85-353), D.N.J., 1985.

    The corporation pled guilty to an FCPA violation and was fined $75,000.

    The individual defendant pled guilty to one count of FCPA bribery and was sentenced to three years' probation, community service, and a fine of $10,000.

12. *U.S. v. Silicon Contractors, Inc., Diversified Group, Inc., Herbert D. Hughes, Ronald R. Richardson, Richard L. Noble and John Sherman* (Cr. No. 85-251), E.D. La., 1985.

    The corporation pled guilty to an FCPA violation, agreed to a permanent civil injunction, and was fined $150,000.

    Hughes, Richardson, Noble and Sherman agreed to permanent injunctions in a civil case.

13. *U.S. v. NAPCO International, Inc. and Venturian Corporation* (Cr. No. 4-89-65), D. Minn., 1989.

    The defendants pled guilty to three counts of FCPA bribery and were fined $785,000. In addition, they paid $140,000 in a civil settlement and $75,000 to settle tax charges.

14. *U.S. v. Richard H. Liebo* (Cr. No. 4-89-76), D. Minn., 1989.

    The defendant was convicted of FCPA bribery and false statements and was sentenced to 18 months' incarceration (suspended) with three years' probation.

15. *U.S. v. Goodyear International Corp.* (Cr. No. 89-0156), D.D.C., 1989.

    The corporation pled guilty to one count of FCPA bribery and was fined $250,000.

16. *United States v. Joaquin Pou, Alfredo G. Duran, and Jose Guasch* (S.D. Fla., 1989); *U.S. v. Robert Neil Gurin* (S.D. Fla., 1989).

    Guasch and Gurin pled guilty to conspiracy to violate the FCPA. Duran was acquitted at trial. Pou jumped bail.

17. *U.S. v. Young Rubicam Inc., Arthur R. Klein, Thomas Spangenberg, Arnold Foote Jr., Eric Anthony Abrahams, and Steven M. McKenna* (Cr. No. N-89-68 (PCD)), D. Conn., 1990.

    The company pled guilty to one count of conspiracy to violate the FCPA and was fined $500,000.

18. *U.S. v. George V. Morton* (Cr. No. 3-90-061-H), N.D. Tex. (Dallas Div.), 1990.

    The defendant pled guilty to one count of conspiracy to violate the FCPA and was sentenced to three years' probation.

19. *U.S. v. John Blondek, Vernon R. Tull, Donald Castle and Darrell W.T. Lowry* (Cr. No. 741), N.D. Tex., 1990.

    Two of the defendants were acquitted at trial. The charges were dismissed against the two remaining defendants. In separate cases, the Canadian agent, Morton, pled guilty to conspiracy to violate the FCPA and the company agreed to a civil injunction enjoining it from future violations of the FCPA.

20. *U.S. v. F.G. Mason Engineering and Francis G. Mason* (Case No. B-90-29), JAC, D. Conn., 1990.

    The corporation pled guilty to one count of conspiracy to violate the FCPA, was fined $75,000, and was required to pay restitution of $160,000.

    The individual defendant also pled guilty to one count of conspiracy to violate the FCPA, was sentenced to five years' probation, and was fined $75,000 (joint with company).

21. *U.S. v. Harris Corporation, John D. Iacobucci and Ronald L. Schultz* (Cr. No. 90-0456), N.D. Cal., 1990.

    The court granted a motion for judgment of acquittal at the close of the government's case.

22. *U.S. v. Herbert Steindler, Rami Dotan, and Harold Katz* (Cr. No. 194-29), S.D. Ohio, 1994.

    One defendant pled guilty to three counts of conspiracy, wire fraud, and money laundering and was sentenced to 84 months' incarceration and required to forfeit $1,741,453. The remaining defendants are fugitives.

23. *U.S. v. Vitusa Corporation* (Cr. No. 94-253)(MTB), D.N.J., 1994.

    The corporation pled guilty to an FCPA violation and was fined $20,000.

24. *U.S. v. Denny Herzberg* (Cr. No. 94-254)(MTB), D.N.J., 1994.

    The defendant pled guilty to an FCPA violation and was sentenced to two years' probation and fined $5,000.

25. *U.S. v. Lockheed Corporation, Suleiman A. Nassar and Allen R. Love* (Cr. No. 1:94-Cr-22-016), N.D. Ga., Atlanta Div., 1994.

    The corporation pled guilty to conspiracy to violate the FCPA and was fined $21.8 million. In addition, it had to pay a $3 million civil settlement. Defendant Nassar pled guilty to two counts and was sentenced to 18 months' imprisonment. Defendant Love pled guilty to one count in a related case and was fined $20,000.

26. *U.S. v. David H. Mead and Frerik Pluimers* (Cr. 98-240-01), D.N.J., Trenton Div., 1998.

    Defendant Mead was convicted following a jury trial of conspiracy to violate the FCPA and the Travel Act (incorporating New Jersey's commercial bribery statute) and two counts each of substantive violations of the FCPA and the Travel Act. Defendant Mead was sentenced, after a departure from the guidelines, to four months' imprisonment, four months' home detention, three years' supervised release, and a $20,000 fine. Defendant Pluimers remains at large.

27. *U.S. v. Herbert K. Tannenbaum* (98 Cr. 784), S.D.N.Y., 1998.

    Defendant pled guilty to conspiracy to violate the FCPA. The defendant was sentenced to one year and a day imprisonment and a $15,000 fine.

28. *U.S. v. Saybolt, Inc. & Saybolt North America Inc.* (98 Cr. 10266 WGY), D. Mass., 1998.

    Defendant companies pled guilty to one count of conspiracy to violate the FCPA and one substantive violation of the FCPA and were sentenced to pay a $1,500,000 fine and five years' probation.

29. *United States v. Control System Specialist, Inc., and Darrold Richard Crites* (Cr. 3-98-073), S.D. Ohio, Dayton Division, 1998.

    Defendants pled guilty to conspiracy to violate the FCPA and to pay an illegal gratuity to a federal employee and substantive violations of the FCPA and 18 U.S.C. § 201(c)(1)(A). Crites was sentenced to three years' probation and 150 hours of community service; the company was sentenced to a fine of $1,500 and one year of probation.

30. *United States v. IMS and Donald Qualey* (Cr. 3-99-008), S.D. Ohio, Dayton Division, 1999.

    Defendants pled guilty to conspiracy to violate the FCPA and to a substantive count. IMS was defunct at sentencing and was sentenced to a fine of $1,000. Defendant Qualey, after a departure from the guidelines, was sentenced to a fine of $5,000, home confinement for four months, and 150 hours of community service.

31. *United States v. Robert Richard King and Pablo Barquero Hernandez* (01-00190-01/02-CR-W), W.D. Mo., 2001; *United States v. Richard Halford* (01-00221-01-Cr-W-1); *United States v. Albert Reitz* (01-00222-01-Cr-W-1).

    Two defendants pled guilty to FCPA conspiracy and were sentenced, after a 5K1.1 motion, to 1,000 hours of community service. Two defendants were indicted for conspiracy, FCPA, and Travel Act violations in connection with an agreement to bribe officials and political parties to obtain a land concession. King was convicted at trial and was sentenced to 30 months' incarceration, two years' supervised release, and a payment of a $60,000 fine. Barquero remains a fugitive.

32. *United States v. Joshua Cantor* (No. 01 Cr. 687), S.D.N.Y., 2001.

    Defendant pled guilty to conspiracy to violate the FCPA and various securities fraud charges. Sentencing is pending. Related SEC complaints and orders were filed against American Banknote Holographics Inc., Cantor, and Morris Weissman (*see* SEC Litigation Release 17068A).

33. *United States v. David Kay and Douglas Murphy* (No. 4-01-914), S.D. Tex., 2001.

    Indictment reinstated in February 2004. Trial scheduled for August 2004.

34. *United States v. Gautam Sengupta*, D.D.C., 2002.

    Defendant pled guilty to mail fraud conspiracy and FCPA violations. Sentencing is pending.

35. *United States v. Richard G. Pitchford* (No. 02-365), D.D.C., 2002.

    Defendant pled guilty to conspiracy, government program fraud, and FCPA violations and was sentenced to twelve months and one day of incarceration, three years' supervised release, and a fine of $400,000.

36. *United States v. Ramendra Basu* (No. 02-475-RWR), D.D.C., 2002.

    Defendant pled guilty to conspiracy to commit wire fraud and a substantive violation of the FCPA. Sentencing is pending.

37. *United States v. Syncor Taiwan, Inc.* (No. 02-1244-SVW), C.D. Cal., 2002.

    Defendant pled guilty to a substantive violation of the FCPA and was sentenced to a $2 million fine.

38. *United States v. James H. Giffen* (No. 03 Cr. 404 (WHP)), S.D.N.Y., 2003.

    Defendant charged with conspiracy, FCPA violations, mail and wire fraud, money laundering, tax evasion, and subscribing to false tax returns. Trial scheduled for October 2004.

39. *United States v. Hans Bodmer,* S.D.N.Y., 2003.

    Trial pending.

III. FCPA Civil Injunctive Actions

1. *U.S. v. Roy J. Carver and E. Eugene Holley* (Civ. No. 79-1768), S.D. Fla., 1979.

   Carver and Holley consented to permanent injunctions from future violations of the FCPA.

2. *U.S. v. Finbar B. Kenny, et al.* (Civ. 79-2038), 1979.

3. *U.S. v. Dornier GmbH,* D. Minn., 1990.

4. *U.S. v. Eagle Manufacturing, Inc.* (Civil Action No. B-91-171), S.D. Tex., 1991.

5. *U.S. v. American Totalisator Company Inc.,* 1993.

   The corporation consented to a permanent injunction from future violations of the FCPA.

6. *U.S. v. Metcalf & Eddy, Inc.* (No. 99CV12566-NG), D. Mass., 1999.

   The corporation consented to a permanent injunction from future violations of the FCPA; agreed to make specific improvements to its compliance program and to submit to periodic audits; and agreed to pay a $400,000 civil penalty and $50,000 costs of investigation.

7. *U.S. & SEC v. KPMG Siddharta Siddharta & Harsono and Sonny Harsono* (Civ. Action No. H-01-3105), S.D. Tex., 2001.

   In a joint complaint, the SEC and the Department of Justice charged the defendants with violations of the FCPA. Without admitting or denying the allegations, the defendants consented to the entry of a final judgment that enjoined them from violating the antibribery and books-and-records provisions of the FCPA. *See* SEC Litigation Release 17127. For related SEC actions against Baker Hughes and two of its executives, see SEC Litigation Release 17126 and Administrative Action No. 3-10572.

IV. FCPA Accounting Cases (since January 2000)

1. *U.S. v. UNC/Lear Service*s (No. 3 CR-31-J), W.D. Ky., 2000.

   In connection with falsely stating to the Defense Department that it had paid no foreign agents in an FMIS contract, the corporation pled guilty to violations of the mail fraud, false statement, and FCPA accounting statutes and agreed to pay a $75,000 fine, $768,000 in restitution, and $132,000 in civil penalties.

2. *U.S. v. Daniel Ray Rothrock* (No. SA01CR343OG), W.D. Tex., 2001.

   In connection with authorizing the payment and entry on Allied Product's books of a false invoice to cover payments in Russia, the defendant agreed to plead guilty to a violation of the FCPA's books-and-records provision. Sentencing is pending.

V. Independent SEC Enforcement Actions (since January 2000)

1. *SEC v. International Business Machines* (Litigation Release 16839), Dec. 2000.

2. *SEC v. Morris Weissman, Joshua Cantor, et al.; In re American Banknote Holographics* (Litigation Release 17068), July 2001.

3. *In re Baker Hughes* (Litigation Release 44784); *SEC v. Eric L. Mattson and James W. Harris* (Litigation Release 17126); *U.S. & SEC v. KMPG Siddharta Siddharta & Harsono and Sonny Harsono* (Litigation Release 17127), Sep. 2001.

4. *SEC v. Chiquita Brands International* (Litigation Release 17169), Oct. 2001.

5. *In re BellSouth Corporation* (Litigation Release 17310), Jan. 2002.

6. *SEC v. Douglas Murphy, David Kay, and Lawrence Theriot* (Litigation Release 17651), Aug. 2002 (*see* U.S. v. Kay, *supra*).

7. *SEC v. Syncor International Inc.* (Litigation Release 17887), Dec. 2002 (*see* U.S. v. Syncor Taiwan, Inc., *supra*).

8. *In re American Rice, Inc., Joseph A. Schwartz, Jr., Joel R. Malebranche and Allen W. Sturdivant* (Litigation Release 47286), Jan. 2003.

9. *In re BJ Services Company* (Litigation Release 49390), March 2004.

10. *SEC v. Schering-Plough Corporation* (Litigation Release 18740), June 2004.

VI. Other Cases

1. *U.S. v. General Electric Company* (Cr. No. 1-92-87), S.D. Ohio, 1992.

2. *U.S. v. Benjamin Sonnenschein* (Cr. No. 92-680), E.D.N.Y., 1992.

3. *U.S. v. Gary S. Klein* (Cr. No. 1-93-52), S.D. Ohio, 1993.

4. *U.S. v. National Airmotive Corporation,* (Dkt. No. CD93-377-CAL), N.D. Cal., 1993.