ADDRESSING THE CHALLENGES OF INTERNATIONAL BRIBERY AND FAIR COMPETITION:

JULY 1999

(First Annual Report to Congress on the OECD Antibribery Convention)

Contents

Letter from the Secretary of Commerce William M. Daley

Executive Summary
Introduction

Chapter 1: Ratification Status

Chapter 2: Review of National Implementing Legislation

Summary of Amendments to the Foreign Corrupt Practices Act
Bulgaria
Canada
Finland
Germany
Greece
Hungary
Iceland
Japan
Korea
Norway
United Kingdom
Chapter 3: Review of Enforcement Measures
Enforcement of National Implementing Legislation
Efforts to Promote Public Awareness
Monitoring Process for the Convention
Chapter 4: Laws Prohibiting Tax Deduction of Bribes
Addressing the Challenges of International Bribery and Fair Competition
Chapter 5: Adding New Signatories to the Convention

Chapter 6: Subsequent Efforts to Strengthen the Convention
Outstanding Issues Relating to the Convention
Other Issues Relating to Coverage
Chapter 7: Antibribery Programs and Transparency in International Organizations
INTELSAT
International Telecommunication Union
International Monetary Fund
World Bank
African Development Bank
Asian Development Bank
European Bank for Reconstruction and Development
Inter-American Development Bank
Organization of American States
Organization for Economic Cooperation and Development
Organization for Security and Cooperation in Europe

United Nations
World Trade Organization
Chapter 8: Private Sector Involvement in Monitoring and Implementation

Chapter 9: Additional Information on Enlarging the Scope of the Convention

Chapter 10: Advantages to International Satellite Organizations

APPENDIXES

Appendix A: International Anti-Bribery and Fair Competition Act of 1998

Appendix B: OECD Documents
OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Adopted November 21, 1997, Signed December 17, 1997)

OECD Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Adopted by the Negotiating Conference on November 21, 1997)

Revised Recommendation of the OECD Council on Combating Bribery in International Business Transactions (Adopted by the OECD Council May 23, 1997)

Recommendation of the OECD Council on the Tax Deductibility of Bribes to Foreign Public Officials (Adopted by the OECD Council April 11, 1996)

Appendix C: U.S. Responses to the OECD Phase I Questionnaire and Supplemental Questionnaire on U.S. Implementing Legislation (Submitted to the OECD Working Group on Bribery)

Appendix D: OECD Questionnaire and U.S. Responses to the OECD Questionnaire Concerning Four Issues Related to Corruption (Submitted to the OECD Working Group on Bribery)

Appendix E: U.S. Note: Bribery of Foreign Political Parties, Party Officials and Candidates for Political Office in International Business Transactions (DAFFE/IME/BR(98)12: Contributed by U.S. Delegation for November 3-5, 1998 Working Group Meeting)

Appendix F: Websites Relevant to the Convention and Antibribery Issues

July 1, 1999

The Honorable Albert Gore
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 my pleasure to present to Congress the first of six annual reports under the International Anti-Bribery and Fair Competition Act of 1998 (IAFCA). The report was prepared by the Department of CommerceInternational Trade Administration working closely with the Office of General Counsel; the National Telecommunications and Information Administration; the Departments of State, Justice and the Treasury; the Securities and Exchange Commission; and the Office of the U.S. Trade Representative. Section 6 of the IAFCA directed that a report be given to the Senate and House of Representatives assessing progress in implementing the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and addressing other related matters. It also directed that the report address Congressional concerns noted in Section 5 of the IAFCA regarding advantages that may accrue to international satellite organizations as a result of privileges and immunities granted by treaty and U.S. law.

Reaching agreement on the OECD Convention was an historic achievement. Bribery of foreign public officials is one of the most pernicious practices that our companies face from foreign competitors. But its damaging effects go beyond U.S. business and trade interests. Bribery of public officials undermines good governance and democratic practices. It impedes economic development by raising costs and encouraging purchases of inferior products and services. Citizens of developing countries that can least afford these burdens are often the victims. The Asian Development Bank recently estimated that corruption costs many governments as much as 50 percent of their tax revenues.

The Foreign Corrupt Practices Act of 1977 (FCPA) set high standards of integrity for U.S. companies operating overseas and substantial penalties for those who violate the law. Yet without similar prohibitions by our trading partners, international bribery continued on a large scale. Foreign companies were free to bribe foreign public officials without fear of penalty. The OECD Convention, when fully implemented, promises to change that. Companies from the leading exporting nations will all have to adhere to similar ethical standards in their dealings with foreign public officials and compete on a more level playing field.

As of June 10, 1999, the United States and 14 other signatories had deposited instruments of ratification with the OECD. Most of the remaining 19 signatories are well on their way to completing the ratification process. I am encouraged by the progress made in bringing this important international agreement into effect. The prompt action of Congress in passing U.S. implementing legislation influenced other countries to move forward in changing their laws. But much remains to be done. I have directed my staff and asked other U.S. agencies to give a high priority to monitoring progress on implementation of the Convention. I have also asked that they maintain close contacts with the business community and nongovernmental organizations on issues relevant to the Convention and international bribery.

In the IAFCA, Congress also requested that actions be taken regarding certain privileges and immunities available to public international satellite organizations. Our report assesses the advantages these organizations have in countries where they operate and the progress made in achieving the policy objectives of the IAFCA. The advantages available to the organizations are

diminishing with privatization and the growth of global telecommunications competition. Earlier this year, Inmarsat was privatized and is thus no longer shielded by its former privileges and immunities. There has also been progress on the privatization of INTELSAT. As that privatization progresses, we can expect to see a more competitive global market in telecommunication services. The Department of Commerce remains fully committed to that goal.

American jobs and business growth depend increasingly on our ability to export. As Secretary of Commerce, I want to do all that I can to help our companies and workers compete in the international marketplace. Effective implementation of the OECD Convention and other initiatives to promote fair business practices support this endeavor. I look forward to working with Congress in our continuing effort to fight bribery and establish fair rules for international competition.

Sincerely,

William M. Daley

Executive Summary

The Department of Commerce's International Trade Administration, working closely with the Office of General Counsel, produced this report in accordance with the requirements of Section 6 of the International AntiBribery and Fair Competition Act of 1998 (IAFCA). The report was completed with the assistance and cooperation of a number of U. S. agencies, including the State Department, the Justice Department, the Treasury Department, the Securities and Exchange Commission, and the Office of the U. S. Trade Representative.

The report reviews the progress that is being made in implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention, which has been signed by all twenty-nine OECD members and Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic, entered into force on February 15, 1999, for the twelve signatories that had deposited instruments of ratification with the OECD. In addition, the report examines steps taken by signatories to implement the OECD recommendation to disallow the tax deduction of bribes. It also assesses antibribery programs and transparency in several major international organzations. Finally, the report addresses progress made on advancing other goals in the IAFCA relating to fair competition in global satellite communication services.

In the initial phase of monitoring the Convention, these reports will focus on analyzing national implementing legislation. The legal framework is critical for governments to fulfill their commitment to criminalize the bribery of foreign public officials and disallow the tax deductibility of bribe payments. As signatories begin confronting cases involving the bribery of foreign public officials, attention will shift to examining enforcement of the prohibitions on bribery and the tax deductibility of bribes.

Major Findings

The first priority is to ensure that all signatories deposit their instruments of ratification with the OECD at the earliest possible date. As of June 10, 1999, fifteen of the thirty-four signatories, representing approximately 66 percent of OECD exports, had completed their internal approval process and deposited instruments of ratification with the OECD secretariat. Twelve of these countries are now parties to the Convention and the others will be sixty days after their deposit of an instrument of ratification. Nevertheless, a number of key exporting countries, including France, Italy, Switzerland, and the Netherlands, have not yet completed the necessary steps to bring the Convention into effect.

As the Convention enters into force for the remaining signatories, there will be more attention given to encouraging new participants. The most appropriate candidates for accession are likely to be significant exporters whose governments are well equipped to take on the responsibilities of implementing the Convention.

Overall, the United States is encouraged by the seriousness with which signatories are approaching implementation of the Convention. Eleven foreign signatories presented implementing legislation in time for the Commerce Department to make a preliminary review for this report. Generally the eleven countries examined have sought to address the requirements of the Convention. In some implementing legislation, however, a number of issues require further examination.

The OECD has established comprehensive procedures to examine the adequacy of the laws that each signatory enacts to carry out the goals of the Convention. The review process is still at an early stage. The United States is confident that each country's legislation will be subjected to a

rigorous and comprehensive review that will identify any shortcomings. The OECD is scheduled to complete its review of implementing legislation by the spring of 2000 in time to report to OECD ministers at their annual meeting.

The United States has established its own monitoring process to track implementation and enforcement of the Convention. Preparation of this annual report is part of that process. Information developed through U. S. internal monitoring supports active participation in OECD meetings on the Convention and bilateral discussions with other signatory governments on implementation issues.

The signatories to the Convention have made great strides towards eliminating any remaining tax deductibility for bribes to foreign public officials. Some countries have not yet acted to disallow such deductions, and in others questions remain about the implementation of the laws ending tax deductibility. Because of the importance of this issue, the United States will be giving increased attention over the coming year to assessing the signatories' legislation on tax deductibility and encouraging effective implementation of this commitment.

Since the Convention has been in force for only a few months, it is too early to make definitive judgements regarding the effectiveness of enforcement measures by almost all signatories. In future reports, as the United States and OECD develop more information on enforcement activity in each of the signatory countries, each party's enforcement of the Convention will be analyzed. Several countries are taking significant steps to raise public awareness of international bribery and to promote implementation of the Convention. The Swedish government is appointing a special ambassador for this purpose. The United States will encourage other governments to increase public awareness. Nongovernmental organizations are active in educating their business communities about the Convention and antibribery issues, particularly in Australia, Bulgaria, Canada, and Poland.

At the urging of the United States, the OECD Working Group on Bribery has been examining issues relevant to strengthening the Convention. Two issues are of particular importance: bribery acts in relation to foreign political parties, and advantages promised or given to any person in anticipation of that person becoming a foreign public official. Other issues being examined include bribery of foreign public officials as a predicate offense for money laundering legislation, the role of foreign subsidiaries in bribery transactions, and the role of offshore financial centers in bribery transactions. While there is no consensus within the Working Group on the need to expand the scope of the Convention at this time, the OECD has agreed to continue to examine these issues.

Major international organizations have been making greater efforts to address international bribery and transparency issues. The OECD, the Organization of American States (OAS), the World Trade Organization, and the United Nations have launched a variety of anticorruption initiatives. The antibribery conventions negotiated in the OECD and OAS represent important progress in building international coalitions to combat corruption. Due in part to strong U. S. advocacy, international financial institutions, such as the World Bank, the International Monetary Fund, and regional development banks, are devoting more resources to help client countries eliminate corrupt practices. INTELSAT, the major public international satellite organization, is addressing transparency and antibribery issues in its policies and programs.

For more than a decade, the U. S. government has worked cooperatively with the private sector on antibribery initiatives. U. S. business associations and nongovernmental organizations, such as Transparency International, played a key advisory role in the negotiation of the Convention and the passage of implementing legislation. The U. S. government will continue to involve the private sector in its efforts to monitor the Convention.

International satellite organizations have, in the past, enjoyed advantages through the use of privileges and immunities that have limited direct regulatory oversight and insulated them from competition laws. Such advantages appear to be diminishing as international satellite organizations face increased competition and move toward privatization and as the global trend toward open markets accelerates. Other advantages in tax treatment, regulatory treatment, government ownership, or government contacts are not apparent based on available information. In a step toward procompetitive privatization, INTELSAT transferred one-quarter of its satellite fleet to the private Dutch corporation New Skies Satellites, N. V., on November 30, 1998. Inmarsat completed its privatization on April 15, 1999. Accordingly, the U. S. government ceased its oversight of Inmarsat acting through Comsat.

Eliminating the pernicious effects of bribery in international trade has been a priority of Congress and successive administrations for over two decades. With the entry into force of the Convention, a good start has been made in addressing this problem at the global level, even though progress has not been even among all signatories. In the coming year, the Clinton Administration intends to redouble its efforts to ensure that the remaining signatories that have not done so enact appropriate implementing legislation, ratify the Convention, and deposit instruments of ratification with the OECD.

However, fully achieving the goal of eliminating bribery in international business transactions will be a longterm process. The Commerce Department's International Trade Administration and Office of General Counsel will work closely with other U. S. agencies to ensure effective monitoring of the Convention with broad input from the private sector and nongovernmental organizations.

Introduction

American business thrives on competition. U. S. companies and workers can compete with the best in the global marketplace because of their drive, innovation, and superior products and services. But their success depends heavily on their ability to compete on a level playing field. Bribery and corruption tilt the playing field and create unfair advantages for those willing to engage in unethical and illegal practices. These practices penalize companies that play fair and seek to win contracts through the quality and price of their products and services. Bribery and corruption have other damaging effects as well: undermining good governance, impeding economic development, and distorting world trade. It was because of these concerns and a shared desire to promote fair competition in the global marketplace that the Clinton Administration and Congress worked together to enact the International Anti-Bribery and Fair Competition Act of 1998 (IAFCA) and bring into effect the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. (See Appendixes A and B.) The Convention was negotiated by the major industrial nations, working within the Organization for Economic Cooperation and Development (OECD).

The IAFCA amended the Securities Exchange Act of 1934 and the Foreign Corrupt Practices Act of 1977 (FCPA), bringing U. S. law into conformity with the obligations of the United States under the Convention. Passage of the IAFCA enabled the United States to ratify the Convention on November 20, 1998, and deposit its instrument of ratification with the OECD on December 8, 1998. (The Convention entered into force on February 15, 1999, for the twelve countries that had deposited instruments of ratification with the OECD.) The IAFCA also addressed Congressional concerns regarding privileges and immunities for international organizations providing satellite communications services that may affect fair competition in the satellite industry.

U.S. Leadership on the Convention

The successful negotiation of the Convention is a major step forward in developing an international consensus on fighting bribery and corruption. The United States launched its own campaign against international corrupt practices more than twenty years ago with passage of the FCPA. The law established substantial penalties for persons making payments to foreign government officials, political parties, and candidates for public office to obtain or retain business. Enactment of the legislation reflected deep concern among a broad spectrum of the American public about the involvement of U. S. companies in unethical business practices. Disclosures in the 1970s indicated that U. S. companies spent millions of dollars to bribe foreign public officials and thereby gain unfair advantage in competing for major commercial contracts overseas. These practices not only damaged the reputation of American companies throughout the world but also undermined efforts to promote good governance and sound business practices in the countries where foreign public officials were bribed.

The FCPA has had a major impact on how U. S. companies conduct business overseas. However, in the absence of similar legal prohibitions by key trading partners, U. S. businesses were put at a significant disadvantage in international commerce. Their foreign competitors continued to pay bribes without fear of penalties, resulting in billions of dollars in lost sales to U. S. exporters and the continuation of a pernicious practice that harmed governments and societies, most often in developing countries that could least afford the costs.

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 U. S. government to negotiate an agreement in the OECD on the prohibition of overseas bribes. After nearly ten years, the effort succeeded. On November 21, 1997, the United States and thirty-three other nations adopted the Convention. It was signed on December 17, 1997. All signatories to the Convention also agreed to implement the OECD's recommendation on eliminating the tax deductibility of bribes. (See the Recommendation of the OECD Council on the Tax Deductibility of Bribes to Foreign Public Officials, in Appendix B.)

The Convention entered into force on February 15, 1999, following the deposit of instruments of ratification with the OECD by the United States and eleven other signatory countries. Austria, Mexico, and Sweden deposited their instruments of ratification with the OECD on May 20, May 27, and June 8, 1999, respectively. The Convention enters into force for Austria, Mexico, and Sweden sixty days after their respective dates of deposit. As of June 10, 1999, no other signatories had deposited instruments with the OECD. In most of the remaining signatory countries, legislative bodies are now reviewing proposals to ratify and implement the Convention. For many, this process should be completed by the end of 1999.

Major Provisions of the Convention

The 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 effect changes in the conduct of companies in exporting nations and not to penalize the bribe recipient.

The definition of "foreign public official" covers many individuals exercising public functions, including officials of public international organizations. It also captures business-related bribes to such officials made through intermediaries and bribes that corrupt officials direct to third parties. The Convention further 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 (i. e., net profit) or property of similar value.
- Establish liability of legal persons (e. g., corporations) for bribery and impose effective, proportionate, and dissuasive 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, and candidates for public office. The United States is urging signatories to strengthen the Convention by including these individuals and organizations in the definition of foreign public official.

Reporting and Monitoring Requirements

Section 6 of the IAFCA provides 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. The IAFCA requests information in the following areas related to the Convention and antibribery issues:

- The status of ratification and/ or 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 its inclusion of 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 the status 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 requests the following information with regard to international satellite organizations:

- A list of advantages, in terms of immunities, market access, or otherwise, in the countries or regions served by certain international satellite organizations; the reason for such advantages; and an assessment of progress toward fulfilling the policy described in Section 5 of the IAFCA.

The Senate, in its July 31, 1998, resolution giving advice and consent to ratification of the 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, the Securities and Exchange Commission, and the Office of the U. S. Trade Representative, to prepare the two reports.

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 trading partners around the world. This effort includes regular contacts with the business community and nongovernmental organizations, dissemination of information about the Convention and antibribery legislation over the Internet, and other initiatives to promote international cooperation in combating these harmful practices. The IAFCA's Congressional mandate to prepare annual reports has helped to strengthen the United States' internal monitoring process. It has encouraged U. S. agencies to focus on issues of specific interest to Congress and promoted a more intensive team approach to monitoring. More detailed information on monitoring is provided in Chapter 3.

In addition to the internal U. S. government monitoring, U. S. officials are also taking part in the OECD process for monitoring implementation of the Convention. The OECD Working Group on Bribery in International Business Transactions is conducting a systematic review of measures taken by signatory countries to carry out their obligations under the Convention. In the first phase of this review, the Working Group is examining national implementing legislation to assess whether it conforms to the requirements of the Convention. In the second phase, the Working Group will conduct on-site visits and meet with government, private sector, and nongovernmental organizations to assess steps that parties are taking to enforce their antibribery legislation and fulfill other obligations under the Convention.

U. S. officials are participating actively in this Working Group and other forums in which the Convention is discussed. The United States is encouraged by the seriousness with which other signatories are approaching the tasks associated the first phase of the OECD review and by the concrete steps many have taken to make bribery of foreign public officials illegal under their domestic laws. All signatories to the Convention have an interest in assuring that its provisions are enforced vigorously by all parties. The active engagement of other signatories, the private sector, and nongovernmental organizations will be essential to the success of the Convention.

The Secretary of Commerce's report to Congress addresses all of the areas specified in Section 6 of the IAFCA. Even though the Convention has been in effect less than five months, the United States has been able to assess the national legislation of eleven other parties and obtain useful information on their implementation of the Convention. Future reports are expected to provide more extensive information as additional signatory countries enact implementing legislation, ratify the Convention, and begin enforcing their antibribery laws. Assessing implementation is a complex undertaking that requires a good understanding of a foreign government's body of laws, enforcement regimes, and policies. To the extent that resources permit, the United States will seek to expand contacts with key countries in the coming year to obtain more detailed information on relevant laws and gain a better understanding of them through discussions with country experts.

Long-Term Commitment to Fighting Bribery and Achieving Fair Competition

After more than twenty years of effort, the United States is finally making real progress in building an international coalition to fight bribery and level the playing field for businesses to compete in the global marketplace. There is now greater recognition of the pernicious effects of bribery in international business transactions and a broader consensus on the need to take corrective action. Adoption of the Convention by thirty-four industrial countries represents an important and historic achievement.

However, much work remains to be done in order to ensure that the Convention becomes an effective instrument for eliminating bribery in international commerce. The majority of signatories have yet to bring their laws into conformity with the Convention. Most countries have had little experience with enforcing international bribery laws. Many foreign companies are only beginning to adjust their internal policies to the new legal standards on bribery. Achieving the goals of the Convention will take time.

To facilitate and expedite this process, the United States has established a solid framework within the federal government and, in cooperation with other signatories, within the OECD for monitoring progress on implementation and enforcement of the Convention. The Clinton Administration is committed to make these efforts produce results and looks forward to keeping in close contact with Congress, the business community, and interested nongovernmental organizations.

Ratification Status

On February 15, 1999, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions entered into force for twelve of the thirty-four signatories: Bulgaria, Canada, Finland, Germany, Greece, Hungary, Iceland, Japan, Korea, Norway, the United Kingdom, and the United States. These countries have all enacted implementing legislation (with one exception), ratified the Convention, and deposited an instrument of ratification with the OECD. The United Kingdom has deposited its instrument of ratification with the OECD but is still considering whether it will utilize its existing legislation to implement the Convention or seek to enact new legislation.

On May 20, 1999, Austria deposited its instrument of ratification with the OECD, followed by Mexico on May 27, 1999, and Sweden on June 8, 1999. Others have both ratified the Convention and passed implementing legislation, but as of June 10, 1999, no other signatories had deposited instruments of ratification with the OECD. According to Article 15 of the Convention, the Convention will enter into force for a signatory sixty days after it deposits its instrument of ratification with the OECD. Many other signatories are well advanced in their internal legislative and ratification process. The table on page 7 provides information, as of June 10, 1999, on all signatories with regard to ratification, enactment of implementing legislation, deposit of instrument of ratification, and entry into force of the Convention.

The Convention's effectiveness for reducing bribery will be constrained until all signatories—particularly the major exporting countries— have become parties and have implemented the Convention's provisions. The United States has therefore given a high priority to encouraging signatories to complete their ratification procedures and begin enforcing the Convention. U. S. efforts to encourage other signatories to ratify and implement the Convention have ranged from public statements by senior U. S. officials to direct senior-level contacts with foreign governments.

For example, in February 1999, Vice President Albert Gore stressed the importance of prompt ratification at a major international conference on fighting corruption that he hosted in Washington. Representatives of many signatory countries were in attendance. The U. S. Secretaries of Commerce, State, and Treasury, and senior officials of these agencies, have also used a variety of opportunities to remark on the importance of the Convention and to underscore U. S. concern that it enter into force for all signatories as soon as possible.

Secretary of Commerce William Daley has publicly called for signatories to move forward and ratify the Convention. He has focused special attention on France, Belgium, the Netherlands, and Italy because they repre sent almost a quarter of OECD exports. In the first half of 1999, he urged prompt action by all signatories in speeches to a major OECD conference on corruption, an executive session of the Transatlantic Business Dialogue forum, and a meeting of the U. S. chapter of Transparency International, a key nongovernmental organization that supports international antibribery and anticorruption initiatives. Daley also made personal appeals on ratification of the Convention at bilateral meetings with his counterparts and has sent letters to the trade ministers of France, the Netherlands, and Italy, calling for prompt ratification by these governments.

Commerce Under Secretary for International Trade David Aaron has repeatedly raised the issue in his bilateral meetings with signatory governments and at multilateral forums. Before becoming Under Secretary of International Trade, Aaron was the U. S. Permanent Representative to the OECD, where he was instrumental in concluding negotiations that brought the Convention to fruition.

In a May 3, 1999, speech to Latin American business executives and government officials at the Carter Center in Atlanta, Treasury Secretary Robert Rubin called on all signatories that had not ratified and implemented the Convention (noting in particular Latin American signatories) to act promptly to complete their internal process. He said that it was inexcusable that a number of OECD countries still had not eliminated the tax deductibility of bribes.

Secretary of State Madeleine Albright has been deeply involved in the campaign to persuade other countries to make bribery of foreign public officials a criminal offense. She has long felt that the fight against commercial bribery will not only level the playing field for U. S. business, but will also foster stronger democratic institutions and developing economies.

Under Secretary of State Stuart Eizenstat has also been a strong advocate of the Convention. At an OECDsponsored conference on corruption in February 1999, Eizenstat noted that many of the signatories had not yet ratified the Convention and advised participants that he would be pressing the issue of ratification vigorously with his diplomatic counterparts. Also, as Chairman of the OECD Executive Committee in Special Session, he has made this a top item on the agenda of the November 1998 and May 1999 meetings.

The Clinton Administration will continue to raise the issue of ratification until all signatories have taken the necessary steps to carry out their obligations under the Convention to make the bribery of foreign public officials illegal under their national laws.

Ratification Status of Signatory Countries to the OECD Anti-Bribery Convention (As of June 10, 1999)*

Signatory Country	Ratified	Legislation Approved	Instrument of Ratification Deposited With OECD Secretariat **	Convention Enters Into Force
Totals: 34	16	16	15	
Argentina				
Australia				
Austria	April 1, 1999 (final approval by Parliament)	August 20, 1998 (publication date)	May 20, 1999	July 19, 1999
Belgium	April 29, 1999 (approved by Parliament; awaiting signature)	March 23, 1999 (publication date)		
Brazil				
Bulgaria	June 3, 1998	January 15, 1999	December 22, 1998	February 15, 1999
Canada	December 17, 1998	December 10, 1998	December 17, 1998	February 15, 1999
Chile				
Czech Republic				
Denmark				
Finland	October 9, 1998	October 9, 1998	December 10, 1998	February 15, 1999
France	May 19, 1999			
Germany	November 10, 1998	September 10, 1998	November 10, 1998	February 15, 1999
Greece	November 5, 1998	November 5, 1998 (December 1, 1998 publication date)	February 5, 1999	February 15, 1999
Hungary	December 4, 1998	December 22, 1998	December 4, 1998	February 15, 1999
Iceland	August 17, 1998	December 22, 1998	August 17, 1998	February 15, 1999
Ireland				

Italy				
Japan	May 22, 1998	September 18, 1998	October 13, 1998	February 15, 1999
Korea	December 17, 1998	December 17, 1998	January 4, 1999	February 15, 1999
Luxembourg				
Mexico	April 26, 1999	April 22, 1999	May 27, 1999	July 26, 1999
Netherlands				
New Zealand				
Norway	December 18, 1998	October 27, 1998	December 18, 1998	February 15, 1999
Poland				
Portugal				
Slovak Republic	February 11, 1999 (approved by Parliament; awaiting signature)			
Spain	December 1, 1998			
Sweden	May 6, 1999	March 25, 1999	June 8, 1999	August 7, 1999
Switzerland				
Turkey				
United Kingdom	December 14, 1998	(Need for implmenting legislation still under review)	December 14, 1998	February 15, 1999
United States	November 20, 1998	November 10, 1998	December 8, 1998	February 15, 1999

*Based on information available to the U.S. government as of June 10, 1999.

**The Convention entered into force on February 15, 1999, for the following twelve signatories: Bulgaria, Canada, Finland, Germany, Greece, Huntary, Iceland, Japan, Korea, Norway, the United Kingdom, and the United States. The Convention will enter into force for all other signatories sixty days after each submits its instrument of ratification to the OECD.

Review of National Implementing Legislation

The Departments of Commerce, State, and Justice and the United States Securities and Exchange Commission have conducted a review of implementing legislation of the eleven foreign countries for which the Convention was in force as of July 1, 1999. These countries are Bulgaria, Canada, Finland, Germany, Greece, Hungary, Japan, Korea, Iceland, Norway, and the United Kingdom. We have also included a brief summary of the amendments to the Foreign Corrupt Practices Act (FCPA). In next year's report, we will review the implementing legislation of additional countries that have enacted national implementing legislation and ratified the Convention.

We are generally encouraged by the seriousness with which signatories have approached their commitments under the Convention. In addition to the eleven signatories noted above, four others— Austria, Belgium, Mexico, and Sweden— have enacted implementing legislation. In all the remaining countries, governments have either introduced implementing legislation or are expected to do so soon. By the time of next year's report, most signatories should have enacted implementing legislation, ratified the Convention and deposited instruments of ratification with the OECD.

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

We have paid special attention to the penalties imposed for the criminal offense of bribery of foreign public officials, which Article 3 of the Convention states must be "effective, proportionate, and dissuasive." Where possible, we have examined other issues, such as bribery as a predicate offense to money laundering (Convention Article 7), provisions on books and records (Convention Article 8), mutual legal assistance and extradition (Convention Articles 9 and 10), and conspiracy, attempt and authorization (Convention Article 1.2).

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

- Basic statement of the offense.
- Jurisdictional principles.
- Coverage of payor/ offeror.
- Coverage of payee/ offeree.
- Penalties.
- Books and records provisions.
- Money laundering.
- Extradition/ mutual legal assistance.

- Complicity (including incitement, aiding and abetting, or authorization), attempt, conspiracy.

We used a variety of sources in our analyses, including texts of laws, diplomatic reporting and exchanges, private sector comments, publications, and other materials. Analyzing a signatory's implementation of the Convention, however, is a complex undertaking. It requires an in-depth understanding of not only the new laws that bring the Convention into effect but the entire body of legislation relevant to bribery and corruption. How these laws are interpreted and enforced differs markedly among the signatories.

A particular analytical difficulty is that several countries did not enact comprehensive, selfcontained legislation criminalizing bribery. Rather, they passed amendments to existing antibribery legislative provisions or selected provisions necessary to implement the basic offense of bribery (Article 1 of the Convention). For other countries, a complete understanding of the adequacy of implementation requires an indepth analysis of relevant laws and regulations on accounting, books and records, money laundering and complicity. As several countries had not yet deposited their official translations of their legislation in the OECD working languages (i. e., English or French), we took the initiative to obtain informal translations so that U. S. agencies could begin their review. Despite these limitations, we were able to complete an initial analysis of all eleven foreign signatories' implementing legislation.

We are continuing to review information on relevant legislation and to monitor the signatories' implementation of the Convention, independently and within the OECD Working Group on Bribery. Much more analysis of implementing legislation and related laws is required before a definitive assessment can be made of their compatibility with the Convention. To the extent that resources permit, we will seek to expand our contacts with key countries in the coming year to obtain more detailed information on relevant laws and gain a better understanding of them through discussions with country experts.

This preliminary analysis, though limited in scope, developed an initial understanding of signatories' efforts to date and highlighted issues for more indepth study. Generally the eleven countries examined have all sought to address the requirements of the Convention in explaining their implementing legislation. Based on the text of legislation, many of the requirements appear to have been met. Questions, however, emerged from our analyses that require further examination.

- In Bulgaria, it is not clear whether the law provides for noncriminal sanctions against legal persons or confiscation of proceeds of bribery, as required by the Convention.
- Japan's implementing legislation raises several issues. Maximum fines for natural and legal persons are limited to approximately $25,000 and $2.5 million, raising concerns about whether they meet the Convention's requirement to be "effective, proportionate and dissuasive." There is also a concern that Japan will not subject the proceeds of bribery to confiscation or will not impose monetary sanctions of comparable effect in lieu of such confiscation, as required by the Convention.
- In Germany's implementing legislation, there are questions about the extent to which fines will be "effective, proportionate and dissuasive." It is not clear whether Germany will implement its law by imposing fines on corporations in amounts limited to approximately $531,300 (dollar equivalent of the statutory fine for corporations embodied in its Administrative Offenses Act) or whether Germany will seek to impose fines up to the amount of the commercial advantage gained from the bribery.
- Norway's implementing legislation raises two concerns. The maximum penalty for bribery of a public official is imprisonment for only up to one year, and the relevant statute of limitations is only two years.

- For the United Kingdom, existing legislation on corrupt practices does not explicitly address bribery of foreign public officials and questions remain about whether it is adequate for implementing the Convention.
- Also, none of the eleven countries' implementing legislation explicitly addresses bribery of foreign political parties, party officials, and candidates. However, such provisions, while desirable from the U. S. perspective, are not specifically mandated by the Convention. (This subject is discussed in greater detail in Chapter 6, Subsequent Efforts to Strengthen the Convention.)

As we continue our analysis of implementing legislation and more information becomes available, we will be in a better position to assess the overall conformity of signatories' laws with the Convention. In the meantime, preliminary analysis of the eleven signatories' legislation has helped to identify strengths and potential weaknesses in implementation and establish a useful framework for more in-depth legal analysis. The analysis will be useful for our participation in the Working Group and our dialogue with signatories on promoting effective implementation of the Convention.

Summary of Amendments to the FCPA

Through the FCPA, the United States declared its policy that American companies should act ethically in bidding for foreign contracts and should act in accordance with the U. S. policy of encouraging the development of democratic institutions and honest, transparent business practices. The FCPA requires both issuers and all other U. S. nationals and companies (defined as "domestic concerns") to refrain from making any unlawful payments to public officials, political parties, party officials, or candidates for public office, directly or through others, for the purpose of causing that person to make a decision or take an action, or refrain from taking an action, or to use his influence, for the purpose of obtaining or retaining business.

The International Anti-Bribery and Fair Competition Act of 1998 (IAFCA) amended the FCPA to conform it to the requirements of and to implement the OECD Convention. First, the FCPA formerly criminalized payments made to influence any decision of a foreign public official or to induce him to do or omit to do any act in order to obtain or to retain business. The IAFCA amended the FCPA to include payments made to secure "any improper advantage," the language used in Article 1(1) of the OECD Convention.

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

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

Fourth, the OECD Convention calls on parties to assert nationality jurisdiction when consistent with national legal and constitutional principles. Accordingly, the IAFCA amended the FCPA to provide for jurisdiction over the acts of U. S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States.

Fifth and finally, the IAFCA amended the FCPA to eliminate the current disparity in penalties applicable to U. S. nationals and foreign nationals employed by or acting as agents of U. S. companies. Prior to passage of the IAFCA, foreign nationals employed by or acting as agents of

U. S. companies were subject only to civil penalties. The IAFCA eliminated this restriction and subjected all employees or agents of U. S. businesses to both civil and criminal penalties.

Bulgaria

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

Bulgaria has enacted implementing legislation through amendments to Articles 93 and 304 of the Bulgarian Penal Code to cover bribery of foreign public officials in the course of international business activities. The following analysis is based upon the amended provisions of the Bulgarian Penal Code.

We understand that the Bulgarian legal system does not provide for the criminal liability of legal persons. In such cases, the Convention requires that a legal person be subject to commensurate noncriminal sanctions, including monetary penalties. It is not clear whether Bulgarian law provides for such noncriminal sanctions. In addition, it is not clear whether the confiscation provision in the Bulgarian Penal Code applies to the confiscation of the proceeds of bribery in addition to the bribe itself.

Basic Statement of the Offense

Under Article 304 of the Penal Code, it is unlawful to give a gift or any other material benefit to an official in order that the official perform or not perform an act within the framework of his or her service. As amended, this applies to persons who bribe a foreign public official while the person is carrying out international business activities.

Article 304 does not address the element of intent, bribes made through intermediaries, or bribes paid on behalf of an official to a third party. (Article 305(a) imposes criminal liability on persons who "mediate" in the giving or receiving of a bribe.)

Jurisdictional Principles

We understand that the Penal Code applies to all crimes committed in Bulgarian territory. It is not clear what acts in furtherance of the bribe would be required to trigger the exercise of such territorial jurisdiction. Under Article 4 of the Penal Code, Bulgaria also exercises jurisdiction over crimes committed abroad by Bulgarian nationals. It is also our understanding that this applies to the bribery of foreign public officials.

Under Article 80 of the Penal Code, the statute of limitations for offenses carrying a penalty of imprisonment for three years or less is two years.

Coverage of Payor/Offeror

Article 304 applies to any person, without reference to nationality.

Coverage of Payee/Offeree

Article 93(15) of the Penal Code, as amended, defines "foreign official" as any person

- Performing duties in a foreign country's office or agency.

- Performing functions assigned by a foreign country, including state-owned enterprises or organizations.
- Performing duties, assignments, or tasks delegated by an international organization.

Penalties

Under Article 304 of the Penal Code, the penalty for bribery of domestic or foreign public officials is imprisonment for a term of up to three years, unless the official has violated his official duties in connection with the bribe, in which case the penalty is imprisonment for a term of up to five years.

We understand that legal persons cannot be held criminally liable under the Bulgarian legal system. It is not clear whether legal persons who bribe foreign public officials would be subject to effective, proportionate and dissuasive noncriminal sanctions, as is required by Article 3(2) of the Convention.

Under Article 307(a), the "object of the crime" is subject to confiscation and, if it is missing, a monetary sanction of equal value shall be assessed. It is not clear whether, in the context of bribery, the object of the crime refers only to the bribe itself, or whether it would also cover the proceeds of bribery, as provided in Article 3(3) of the Convention.

Books and Records Provisions

Article 308 of the Penal Code provides that persons who forge an official document are subject to punishment by imprisonment for a term of up to three years (except in minor cases). Under Article 309, persons who forge a private document are subject to punishment by imprisonment for a term of up to two years. (It is not clear whether company records would be considered official or private documents for purposes of these provisions.) It is uncertain whether and to what extent other provisions in the Penal Code would apply to accounting offenses.

Money Laundering

It is our understanding that bribery of a domestic or foreign public official is a predicate offense for purposes of the application of Bulgarian money laundering legislation. Under Article 253 of the Penal Code, persons who conclude transactions with funds or property known or believed to have been acquired through criminal activity are subject to imprisonment for a period of up to three years and a fine of from 3 million to 5 million levs (approximately $1,600 to $2,700).

Extradition/Mutual Legal Assistance

Bribery is not listed as an extraditable offense under the 1924 U. S.-Bulgaria extradition treaty. However, Article 10(1) of the Convention provides that bribery of a foreign public official shall be deemed to be an extraditable offense under extradition treaties between the parties. Dual criminality is required under the treaty and under Article 439(a)(2) of the Penal Code. The Bulgarian Constitution (Article 25(4)) and the Penal Code (Article 4(2)) prohibit the extradition of Bulgarian nationals. The United States and Bulgaria do not have a mutual legal assistance treaty. It is our understanding that Bulgaria has authority to provide mutual legal assistance, on the basis of reciprocity.

Complicity, Attempt, Conspiracy

Under Article 21 of the Penal Code, complicity is punishable by the penalty provided for the substantive crime, with due consideration for the nature and degree of the participation. Attempt is covered under Article 17-19. Article 18 provides that the penalty for attempt is that of the

substantive crime, with due consideration for the degree of implementation and the reasons why the crime was not completed.

Canada

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

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

Basic Statement of the Offense

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

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

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

Jurisdictional Principles

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

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

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

Coverage of Payor/Offeror

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

Coverage of Payee/Offeree

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

(a) a person who holds a legislative, administrative, or judicial position of a foreign state;
(b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and
(c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.
The act further defines a foreign state to include national government of a foreign government and its political subdivisions, and their departments, branches, and agencies.

The definition of a public official includes persons employed by "a board, commission, corporation or other body of authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function." It is our understanding that the legislature intended that judges interpret the terms of the act by reference to the OECD Convention and Official Commentaries, which provide that a "public enterprise" is "any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence." The Act does not address whether state-owned enterprises acting in a commercial context are covered. The Official Commentaries affirmatively state that they are not so covered if the enterprise receives no subsidies or privileges. *See* OECD Commentary footnote 14.

Penalties

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

The penalties under the act are roughly congruent to the penalties for domestic bribery except that a person convicted of bribery of a foreign public official is not subject to debarment. Bribery of domestic public and municipal officials is punishable by imprisonment for up to five years and corporations are subject to a fine. *See* Criminal Code §§ 121, 123. Bribery of law enforcement officials and judges is subject to a sentence of fourteen years imprisonment. *See* Criminal Code §§ 119, 120.

In addition, a person convicted of bribery of a public official (but not a municipal official) is automatically debarred from government contracting or employment unless pardoned or specifically reinstated by the Governor in Council. *See* Criminal Code § 750(3). Bribery of a municipal official will not result in debarment because there is no direct link between the infraction and the Crown.

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

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

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

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

Books and Records Provisions

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

The Generally Accepted Auditing Standards in effect in Canada require the auditor to obtain a written certification from management that it is not aware of any illegal or possibly illegal acts.

Money Laundering

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

Extradition/Mutual Legal Assistance

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

Complicity, Attempt, Conspiracy

Canadian law permits prosecution for attempt and aiding and abetting. *See* Criminal Code §§ 21(1), 24.

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

Finland

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

Sources for this analysis include a translation of the new provisions to the Finnish Penal Code, Chapter 16, entitled "Offenses against Public Authorities," as well as information from our embassy in Helsinki.

Basic Statement of the Offense

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

(1) A person who to a public official, to an employee of public corporation, to a soldier, to a person in the service of the European Communities, to an official of another Member State of the European Union or to a foreign official of another Member State of the European Union or to a foreign official, in exchange for his/ her actions in service, promises, offers or gives a gift or other benefit, intended to the said person or to another, that affects or is intended to affect or is conductive to affecting the actions in services of the said person, shall be sentenced for bribery to a fine or to imprisonment for at most two years.
(2) A person who, in exchange for the actions in service of a public official or another person mentioned in paragraph (1) promises, offers or gives a gift or other benefit mentioned in the said paragraph to another person, shall also be sentenced for bribery.
Generally, Section 13 provides that persons who intentionally promise, offer, or give gifts or other benefits either directly or indirectly to a foreign public official to affect the behavior of such an official may be imprisoned for a maximum period of two years or fined. The provision is not limited to bribes in the context of international business. Although intermediaries are not specifically mentioned, the provision says that bribes "intended" for public officials are covered. Payments involving third parties are covered under Section 13(2).

Jurisdictional Principles

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

Coverage of Payor/Offeror

The Finnish legislation covers bribery by any person. It is our understanding that "any person" is to be broadly construed, applying to both natural and legal persons to the extent of Finland's jurisdiction.

The Finnish provisions on corporate criminal liability found in Chapter 16, Section 28 of the Finnish Penal Code also apply to bribery of foreign public officials. Under Chapter 9, Section 2 of the Penal Code, a Finnish corporation may be fined for the actions of its management representatives or employees, when acting within the scope of their employment on behalf or for the corporation or for its benefit, if they act as accomplices in committing an offense or allowed

the offense to happen. Section 2(2) states that even if a specific person cannot be identified as the offender, the corporation itself can still be fined.

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

Coverage of Payee/Offeree

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

a person who in a foreign State has been appointed or elected to a legislative, administrative or judicial office or duty, or who otherwise performs a public duty for a foreign State, or who is an official or representative/ agent of an international organization under public law.
Although the Finnish definition of foreign public official contains no reference to employees of a "public agency or public enterprise" as does Article 1(4)(a), Section 13 of the Finnish law, the provision containing the basic statement of the offense, does prohibit bribes to employees of public corporations.

Penalties

Under Chapter 16, Section 13, the Finnish law provides for a fine or a two-year maximum prison sentence for persons who have committed bribery of domestic public officials. No amount for the fine is specified. In addition, for "Aggravated Bribery," the offender shall be sentenced to a minimum of four months and a maximum of four years imprisonment. These provisions also apply to the bribery of foreign public officials, so the penalties for domestic and foreign bribery are the same. Corporations can also be fined pursuant to Chapter 9 of the Finnish Penal Code as set forth above. There does not appear to be a maximum or minimum fine for either persons or corporations under the Finland's implementing legislation.

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

Statutes of limitations are covered under the Finnish Penal Code Chapter 8, Section 1, which provides that charges must have been brought within five years after the offense for the imposition of a sentence. For Aggravated Bribery, the statute of limitations is ten years.

Books and Records Provisions

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

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

Our embassy reports that mutual legal assistance is provided for by the Finnish Act on International Legal Assistance in Criminal Matters. Under that act, Finland can provide assistance without the condition of dual criminality, except where coercive measures are requested, unless such measures would be available under Finnish law had the offense upon which the request is based occurred in Finland.

Complicity, Attempt, Conspiracy

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

Germany

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

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

Basic Statement of the Offense

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

bribery concerning a future judicial or official act which is committed in order to obtain or retain for the offender or a third party business or an unfair advantage in international business transactions.
ACIB § 2(1). Germany implemented the Convention by making judges, officials, and soldiers of foreign governments and international organizations "equal" to domestic judges, officials, and soldiers for purposes of Sections 334 (active bribery), 335 (severe cases of bribery), 336 (omission of public service), and 338 (fine and forfeiture). The basic offense, therefore is defined in Criminal Code Section 34 as follows:
Whoever offers, promises, or grants an advantage to any official, any person specifically engaged for public service, or any soldier of the Federal Armed Forces, on behalf of such person or for a third party, in return for the performance of a past or future public service and the past or future breach of his official duties, shall be punished.
Unlike the domestic bribery provisions, the implementing legislation applies to "future judicial or official acts." As Section 334 applies to "offers," the timing of the payment itself, whether before or after the corrupt act, is not determinative. In addition, the implementing legislation refers to "official act;" the domestic bribery laws use the term "performance of past or future public service and the past or future breach of his official duties."

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

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

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

Coverage of Payor/Offeror

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

German law provides that a corporation cannot be held administratively liable if the criminal offense itself cannot be prosecuted for "legal reasons." It is our understanding that this refers to

such legal impediments as the statute of limitations and not mere inability to assert jurisdiction over a culpable individual.

Coverage of Payee/Offeree

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

Penalties

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

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

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

As noted, corporations are not subject to criminal liability. However, they may be prosecuted administratively and subjected to fines under the Administrative Offenses Act. The statutory fines on corporations are up to DM 1 million (approximately $531,300) for intentional acts by a leading person and up to DM 500,000 (approximately $265,600) for negligent acts. *See* Administrative Offenses Act, § 30. However, it is our understanding that corporations can be subject to fines up to the amount of the commercial advantage. *See* Administrative Offenses Act, § 17(4). We have not yet received any information on how often this provision has been invoked against German corporations.

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

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

Greece

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

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

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

Basic Statement of the Offense

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

1. Any person who, in the conduct of international business and in order to obtain or retain business or other improper advantage, promises or gives, whether directly or though intermediaries, any undue gift or other advantage, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, is punished with imprisonment of at least one year.

Jurisdictional Principles

Although the statute itself does not contain any information about jurisdictional principles, Greek law provides for both territorial as well as nationality jurisdiction. Article 5 of the Greek Penal Code provides that Greece follows the principle of territoriality: Greek criminal laws apply to all acts committed in Greek territory, either by Greeks or other nationals. Article 16 generally defines the place where acts are committed as the place where the act or omission was carried out in

whole or in part. It is our understanding that if only part of the act in furtherance of the bribery took place in Greece, the crime would still fall within Greek jurisdiction. Article 6 of the Penal Code provides that Greek criminal laws apply to criminal acts committed abroad by a Greek national if the act is punishable under the laws of the country in which it occurs.

Coverage of Payor/Offeror

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

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

Coverage of Payee/Offeree

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

Penalties

Although Law 2656 states (in our English translation) that any person who bribes a foreign public official "is punished with imprisonment of at least one year," the penalty could be from one to five years imprisonment, in conformity with the penalties prescribed for bribery of domestic officials under Greek Civil Code Articles 235 and 236. There do not appear to be any fines for individuals for the bribery of domestic or foreign public officials, although this is unconfirmed.

As stated above, the Greek judicial system does not recognize criminal responsibility for legal entities. Article 5 provides three kinds of administrative penalties for a company whose managerial employees violate the law: fines of up to three times the value of any benefit that it has received; temporary or permanent prohibition from doing business; or provisional or permanent exclusion from state grants or incentives. Article 2(2) provides for the confiscation of the bribe or the value of the bribe. Article 76 of the Greek Code of Criminal Procedure provides for confiscation of the proceeds of a crime. Also, if an act violates the anticorruption laws as well as Article 2(1) of Law 2331/ 1995 concerning money laundering then paragraphs 6 to10 of that article on the confiscation of goods will also apply. Goods may also be seized during the criminal investigation/ inquiry under the Code of Criminal Procedure Articles 258, 259, 260, 261, 266, 288, and 495.

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

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

Hungary

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

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

Basic Statement of the Offense

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

(1) The person who gives or promises a favor to a foreign official person or with regard to him to another person, which may influence the functioning of the official person to the detriment of the

public interest commits a misdemeanor and shall be punishable with imprisonment of up to two years.

(2) The briber shall be punishable for a felony with imprisonment of up to three years, if he gives or promises the favor so that the foreign official person violate his official duty, exceed his competence, or otherwise abuse his official position.

(3) The perpetrator of the crime defined in subsection (1) shall not be punishable, if he gave or promised the favor upon the initiative of the official person because he could fear unlawful disadvantage in case of his reluctance.

Jurisdictional Principles

Hungary applies the principles of territoriality and nationality jurisdiction. *See* HCC § 3. In addition, our translation of Hungary's law states that Hungary will apply its law to non-Hungarian citizens abroad, if the acts are violative of Hungarian law and the law of the place of perpetration. *See* HCC § 4.

Coverage of Payor/Offeror

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

Coverage of Payee/Offeree

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

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

Penalties

The penalties for bribery of a foreign public official are up to two years for purchasing influence and up to three years where the bribe was intended to induce the official to violate his official duty, exceed his competence, or otherwise abuse his official position. These penalties are identical to those for domestic bribery. Compare HCC §§ 253, 258/ B. In addition, Hungary authorizes the confiscation of property "which was obtained by the perpetrator during or in connection with the commission of the crime." HCC § 62, 63. In addition, the law provides for the confiscation of instrumentalities of crime. *See* HCC §§ 77, 77/ A.

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

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

Hungary has both an extradition treaty and a mutual legal assistance treaty with the United States, both of which entered into force in 1997.

Hungary will provide mutual legal assistance provided that doing so will not "prejudice the sovereignty, security, or public order of the Republic of Hungary" (Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters, § 2).

Complicity, Attempt, Conspiracy

Hungarian law covers attempt and abetting. *See* HCC §§ 1621.

Iceland

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

Basic Statement of the Offense

Section 109 of the General Penal Code provides:

(1) Whoever gives, promises or offers a public official a gift or other advantage in order to induce him to take an action or to refrain from an action related to his official duty, shall be imprisoned for up to three years, or, in case of mitigating circumstances, fined.

(2) The same penalty shall be ordered if such a measure is resorted to with respect to a foreign public official or an official of a public international organization in order to obtain or retain business or other improper advantage in the conduct of international business.

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

Jurisdictional Principles

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

Section 5 of the General Penal Code allows Iceland to prosecute its nationals for crimes committed abroad if the acts were also punishable under the law of the nation where committed. However, under Section 8 of the General Penal Code, the penalties for such offenses are limited to those of the country where the crime is committed.

Coverage of Payor/Offeror

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

Coverage of Payee/Offeree

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

Penalties

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

Act No. 144/ 1998, on Criminal Responsibility of Legal Persons on Account of Bribery of Public Officials, provides that a legal person may be fined if its employees have committed acts of bribery of domestic or foreign public officials. Icelandic law provides for criminal responsibility of legal persons. Legal persons are subject to fines, but the statute gives no indication of the amount of the fines.

The Code of Criminal Procedure allows for the seizure of "objects" if obtained by criminal means under Section 78. "Objects" include documents, money, and proceeds.

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

Section 20 of the General Penal Code provides that any attempt to commit a crime is punishable. Under Section 22 of the General Penal Code all accomplices to an offense under the General Penal Code are criminally liable. Furthermore, Section 70 of the General Penal Code provides that when two people commit a crime, both may be prosecuted for the commission of the crime. In addition, under Section 70, acting together to commit a crime is regarded as an aggravating factor.

Japan

Japan signed the Convention on December 17, 1997, and submitted its instrument of ratification with the OECD on October 13, 1998. On April 10, 1998, the government of Japan formally submitted the Convention and its implementing legislation to the National Diet. The National Diet approved the Convention on May 22, 1998. The implementing legislation was adopted September 18, 1998. The implementing legislation provides that it shall enter into force as of the date on which the OECD Convention enters into force for Japan. That date was February 15, 1999.

Japan's legislation to implement the Convention is found in amendments to the Unfair Competition Prevention Law (Law No. 47 of May 19, 1993) (UCPL), rather than the Penal Code, where domestic bribery laws are found. The penalties are criminal, however. Provisions of the Penal Code apply generally to all crimes unless specified otherwise. Sources for this analysis include an official English translation, prepared by the government of Japan, of the Unfair Competition Prevention Law, as amended; information obtained from the government of Japan through diplomatic exchanges; and unofficial translations of various provisions of the Japanese Penal Code and other provisions of Japanese law.

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

Basic Statement of the Offense

Article 10 bis (1) of the Unfair Competition Prevention Law prohibits any person, for the purpose of obtaining an improper business advantage, from offering or promising any undue pecuniary or

other advantage to a foreign public official in order that such official act or refrain from acting in relation to the performance of his official duties, or in order to induce such official to use his position to make another official act or refrain from acting in relation to the performance of his official duties.

Article 10 bis (1) does not include the element of intent. We understand that intent is generally an element in all criminal offenses pursuant to Article 38 of the Penal Code. Also, Article 10 bis (1) does not address bribes offered, promised, or given through intermediaries, nor bribes paid, on behalf of a public official, to a third party.

Jurisdictional Principles

Article 10 bis of the UCPL does not address basic jurisdictional principles. Article 8 of the Penal Code states that its provisions apply to crimes defined under other Japanese laws unless such laws specifically provide otherwise. The UCPL contains no such provision and therefore is governed by the Penal Code. Article 1 of the Penal Code sets forth the principle of territoriality; We understand that in order to establish jurisdiction, at least one element of the offense must be committed in Japan. Under Article 3 of the Penal Code, nationality jurisdiction is applied only for specified crimes; bribery is not one of them.

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

Coverage of Payor/Offeror

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

Coverage of Payee/Offeree

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

- Persons engaged in public service for a national or local government in a foreign country.
- Persons engaged in service for an entity constituted under foreign special laws to carry out specific tasks in the public interest.
- Persons engaged in business operations (1) in which more than half of the stock or capital is held directly by a foreign government; (2) in which the majority of the executives are appointed by a foreign government; or (3) that have been granted special privileges by a foreign government.
- Persons engaged in public service for an international organization.
- Persons exercising a public function that falls under the competence of and is delegated by a foreign government or international organization.

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

Penalties

Under Article 14 of the Unfair Competition Prevention Law, as amended, legal persons can be held criminally liable. Article 14 further provides that the maximum fine for legal persons is 300 million yen (approximately $2.5 million). There is no comparable penalty for domestic bribery

because the Penal Code which covers domestic bribery does not provide for criminal liability of legal persons.

Under Article 13, the penalties for natural persons are imprisonment for up to three years or a maximum fine of only 3 million yen (approximately $25,000). The corresponding penalties for domestic bribery are imprisonment for up to three years or a maximum fine of 2.5 million yen (approximately $21,000) (Penal Code Article 198). It appears that a fine or imprisonment can be applied in the alternative, but not together.

Article 19 of the Penal Code provides for confiscation of the bribe or its monetary equivalent. It appears that Japan does not intend to subject the proceeds of bribery to confiscation (although Article 19 appears to provide for this), or to apply monetary sanctions of comparable effect.

Japanese law apparently does not provide for other civil or administrative sanctions for bribery such as debarment from government procurement or ineligibility for government assistance.

Books and Records Provisions

The implementing legislation does not include provisions on books and records. However, other provisions of Japanese law apply. Companies and partnerships are generally subject to the Japanese Commercial Code. Under Article 498 of the Commercial Code, persons who falsify records are subject to fines. Companies that issue securities listed on a stock exchange are covered by the Securities and Exchange Law (SEL). Article 193 of the SEL provides that balance sheets, profits and loss statements, and other documents relating to financial accounting are to be prepared in accordance with the requirements prescribed by the Ministry of Finance. Those requirements are set forth in the Ordinance of the Ministry of Finance concerning Financial Statements. Under Article 193 2 of the SEL, documents relating to financial accounting must be audited and certified by an independent auditor. Under Article 30 of the Certified Public Accountants Law, accountants who falsely certify the correctness of financial documents are subject to administrative sanctions. Article 197 of the SEL provides for criminal penalties for persons who submit false registration statements. Such persons may also, under Article 18 of the SEL, be held civilly liable to injured investors.

Money Laundering

Bribery, domestic or foreign, is currently not a predicate offense under Japan's money laundering laws. A proposed anti– organized crime law would appear to make acceptance of bribes by foreign public officials (passive bribery) a predicate offense.

Extradition/Mutual Legal Assistance

The implementing legislation does not include provisions on extradition or mutual legal assistance. Under the U. S.-Japan extradition treaty, bribery is an extraditable offense so long as it is punishable in both countries by imprisonment for a period of more than one year. The United States and Japan do not have a bilateral mutual legal assistance treaty. We understand that legal assistance may be provided to foreign countries under the Law for International Assistance in Investigation and the Law for Judicial Assistance to Foreign Courts.

Complicity, Attempt, Conspiracy

Japan's Penal Code covers instigation of (Article 61) and aiding and abetting (Article 62) criminal acts. Under Japanese law, attempt does not apply to the bribery of domestic officials. Accordingly,

the implementing legislation does not criminalize attempt with respect to bribery of foreign public officials.

Korea

Korea signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on December 4, 1998. The implementing legislation entered into force on February 15, 1999. Sources for this analysis include an unofficial translation of the Foreign Bribery Prevention Act in International Business Transactions of 1998 (FBPA) and diplomatic reporting from the U. S. embassy in Seoul.

Basic Statement of the Offense

Article 1 sets forth the purpose of the FBPA, which is to contribute to the establishment of sound practice in international business transactions by criminalizing bribery of foreign public officials and providing the details necessary for implementing the OECD Convention.

The basic statement of the offense of bribery is contained in the FBPA's penalty provisions for natural (Article 3) and legal (Article 4) persons. Article 3, entitled "Criminal Responsibility of Bribery," provides that

Any person, promising, giving or offering [a] bribe to a foreign public official in relation to his/ her official business in order to obtain [an] improper advantage in the conduct of international business transactions, shall be subject to [penalties].
We understand that under Korean law generally a bribe is "any undue advantage in relation to a public official's duty or business."

Article 4 covers such bribes on behalf of a legal person by a "representative, agent, employee or other individual working for [a] legal person in relation to its business."

There are two exceptions to the basic statement of the offense. Article 3(2) provides an exception for (1) bribes where they are "permitted or required by the law" in the country of the foreign public official and (2) facilitating payments.

Jurisdictional Principles

Article 2 of the Korean Criminal Code provides for territoriality jurisdiction. Jurisdiction will be established over any offense which has been committed in the territory of the Republic of Korea.

Article 3 of the Korean Criminal Code allows Korea to prosecute its nationals for offenses committed abroad (nationality jurisdiction). Article 6 of the Korean Criminal Code provides Korean jurisdiction over any offenses in which the Republic of Korea or a Korean national is a victim.

Coverage of Payor/Offeror

Article 3 covers bribes made by "any person," without reference to nationality.

Article 4 of the FBPA provides that a legal entity may be fined up to one billion won (approximately $840,000) when a representative, agent, or other employee of the legal entity, in the ordinary conduct of the business of the legal entity, commits the offense of bribery of a foreign public official. If the profit from the transaction exceeds 500 million won (approximately $420,000), the fine may be up to twice the profit. The fine is in addition to penalties that may be imposed on

the representative, agent, or employee. Fines will not be imposed if there have been significant supervisory efforts to prevent the violation.

Coverage of Payee/Offeree

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

Penalties

For individuals, Article 3(1) of the FBPA provides for a maximum prison sentence of five years or a fine of up to 20 million won (approximately $16,800), or twice the profit realized as a result of the bribe. Article 3(3) provides that where imprisonment is imposed, "the prescribed amount of fine shall be concurrently imposed." The stated intent of Article 3(3) of the FBPA is to effectively deprive the offeror/ payor of the profits obtained from the bribery. Under Article 132 of the Korean Criminal Code, the criminal penalty for bribery of domestic public officials is imprisonment for a maximum of five years and a maximum fine of 20 million won (approximately $16,800.)

In addition to the fines imposed on representatives, agents, employees, or other individuals working for legal persons under Article 3, the entity itself may be fined under Article 4. Article 4 of the FBPA provides for a maximum fine of the greater of one billion won (approximately $840,300) or twice the profits realized as a result of the bribe. As mentioned above, the same provision provides an exception from the sanctions for corporate liability where there has been "due attention" or "proper supervision" to prevent an offense under the FBPA.

Article 5 of the FBPA provides for confiscation of bribes in the possession of the briber or another person who has knowledge of the offense after it has been committed. However, the bribe proceeds are not subject to confiscation. Instead, the FBPA in Articles 3 and 4 provides for a fine up to twice the profits obtained through bribery of a foreign public official (see above).

Under Article 249 of the Criminal Procedures Act, the statute of limitations for the bribery of foreign public officials under the act is five years. Article 253 of the Criminal Procedures Act provides that when a prosecution is initiated against one of the offender's accomplices, or the offender remains overseas to circumvent punishment, the statute of limitations is suspended.

Books and Records Provisions

It is our understanding that under Korean law, firms must prepare financial statements in accordance with Korean accounting standards, which prohibit off-the-books transactions and accounts. The accounting standards require all financial transactions to be recorded on the basis of objective documents and evidence.

We understand in addition that Korea's External Audit Law obligates auditors to report fraud on the part of managers to shareholders and a statutory auditor. Korea's regulatory authorities can bring administrative measures against firms and auditors for material omissions, falsifications, and fraud. Firms and auditors may, in some circumstances, be subject to criminal sanctions.

Money Laundering

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

Extradition/Mutual Legal Assistance

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

Complicity, Attempt, Conspiracy

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

Norway

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

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

Sources for this analysis include the Norwegian Penal Code, the Extradition Act and information provided by our embassy in Oslo.

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

Basic Statement of the Offense

Section 128 prohibits any person from using threats or the granting or promising of a favor to induce a public official illegally to perform or omit to perform an official act. Pursuant to the recent amendment, the term "public official" includes foreign public officials and officials of public international organizations.

Section 128 does not refer to intent. However, section 40 of the Penal Code states that the provisions of the Penal Code apply only if a person acts intentionally. Section 128 also does not mention bribes paid through intermediaries, nor does it expressly cover payments that are made to third parties for the benefit of a public official. Under Section 128, the bribe must be intended to induce a public official "illegally to perform or omit to perform an official act."

Jurisdictional Principles

We understand that Norway exercises territorial jurisdiction over acts of bribery of foreign officials by any person so long as any part of the crime is committed in Norway. In addition to territorial jurisdiction, under section 12(3)(a) of the Penal Code, Norway applies nationality jurisdiction over crimes, including acts of bribery of foreign public officials, committed abroad by Norwegian nationals or persons domiciled in Norway.

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

Coverage of Payor/Offeror

Section 128 specifically covers acts by "any person."

Coverage of Payee/Offeree

Although Norway's law apparently does not define foreign public official, we understand that Norway will interpret "foreign public official" in accordance with the requirements of the Convention.

Penalties

Under Section 128, the penalty for natural persons (for bribery of domestic or foreign officials) is a fine or imprisonment for a term not exceeding one year. It is unclear whether penalties could be applied in the alternative or cumulatively. There is no stated limit on the amount of fines.

Under Section 48(a) of the Penal Code, enterprises may be held criminally liable when a penal provision is contravened by a person acting on behalf of the enterprise. (" Enterprise" is defined as a company, society or other association, one-person enterprise, foundation, estate or public activity.)

There is no stated limit to such fines; Section 48(b) lists factors that are to be considered in determining the size of a fine. Under Section 48(a), an enterprise may also "be deprived of the right to carry on business or may be prohibited from carrying it on [sic] in certain forms."

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

Norway apparently does not currently have civil or administrative sanctions that could be applied in cases of bribery of foreign officials.

Books and Records Provisions

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

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

Money Laundering

Section 317 of the Penal Code makes it a crime to receive or obtain the proceeds of any criminal act under Norwegian law, as well as to aid and abet the securing of such proceeds for another person. As a result, bribery of domestic or foreign officials is a predicate offense for the purpose of application of money laundering legislation.

Violations of Section 317 are punishable by fines or imprisonment for a term not exceeding three years. For "aggravated offenses", the penalty is imprisonment for a term not to exceed six years.

Extradition/Mutual Legal Assistance

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

The United States and Norway do not have a mutual legal assistance treaty. It is our understanding, however, that using the Convention as a legal basis, Norway will provide assistance to other parties.

Complicity, Attempt, Conspiracy

Section 128 of the Penal Code expressly applies to those who are accessories to acts of bribery. It is not clear to what extent participation as an "accessory" would cover incitement, aiding and abetting, or authorization of acts of bribery. Apparently, the Penal Code contains no specific provisions on conspiracy.

United Kingdom

The United Kingdom signed the Convention on December 17, 1997; it was approved by Parliament on November 25, 1998. The U. K. deposited its instrument of ratification with the OECD on December 14, 1998.

The following review is based on the texts of relevant U. K. laws, information from our embassy in London, and a March 1998 Report of the U. K. Law Commission that considered how the U. K. would meet the requirements of the Convention.

Under U. K. law, bribery of public officials is primarily covered under three statutes: the Public Bodies Corrupt Practices Act 1889 (" the 1889 Act"), the Prevention of Corruption Act 1906, and

the Prevention of Corruption Act 1916 , referred to collectively as the Prevention of Corruption Acts. These statutes do not specifically address the bribery of foreign public officials. The U. K. has stated, however, that these statutes address the offenses covered in the Convention and that it is in compliance with the OECD Convention under the 1906 act. Generally, the 1906 act criminalizes bribes corruptly offered or given by any person to an agent to induce him or her to act or not to act in relation to his or her principal's affairs or business.

Basic Statement of the Offense

Section 1(1) of the 1906 act states that If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business … he shall be guilty of a misdemeanor.
The 1906 act applies to all "agents," whether in the public or private sector, who act corruptly in relation to his or her "principal's" affairs or business. An "agent" is anyone who is employed by or acting for another, or any person serving under the Crown or under any corporation or any public body.

Jurisdictional Principles

With very few exceptions, the U. K. exercises only territoriality jurisdiction. It is our understanding that if any part of the offense, either the offer or acceptance or agreement to accept, takes place within the territory of the U. K. jurisdiction, it can be prosecuted in the U. K. The Criminal Justice Act of 1998 on Terrorism and Conspiracy provides that any conspiracy in the U. K. to commit crimes abroad is a criminal offense, and our embassy reports that the antiterrorism legislation would apply to a conspiracy in the U. K. to bribe a foreign public official.

Coverage of Payor/Offeror

The Prevention of Corruption Acts concern bribery by "any person" without distinction as to nationality. The 1906 act, which covers bribes by "any person," does not define "person."

The U. K. legal system provides criminal liability for corporations. Companies can be held criminally responsible, and fined, for the acts of those who control the company, including representatives of the company.

Coverage of Payee/Offeree

It is our understanding that under the U. K. 's anticorruption laws, an official is identified based upon his or her position as an officer, member or servant of a "public body."

The 1906 act uses agency law to forbid bribes that would encourage an agent in the private sector to contravene the principal/ agent relationship (subsequently amended in the 1916 act to apply equally to agents in the public sector).

Penalties

The penalty for corruption in a magistrate's court is a maximum of six months imprisonment and/ or a fine of £5,000 (approximately $8,000). For convictions in crown courts, the penalty is a maximum of seven years imprisonment and/ or an unlimited fine. There are no express provisions on corporate criminal liability, but we understand that companies can be fined for breaches of the

criminal law. Persons found guilty of bribery, may, at the discretion of the court, be ordered to pay the amount or value of any gift, loan, fee, or reward received by him or her.

There is no statute of limitations under U. K. laws for prosecution of bribery cases.

Books and Records Provisions

The Companies Act of 1985, Sections 221, 222, and 722 prohibit generally the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of nonexistent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents. These provisions govern private and public limited companies, companies limited by guarantee, and unlimited companies.

Money Laundering

It is our understanding that since offering and accepting bribes are indictable offenses, they automatically fall within the purview of U. K. moneylaundering legislation, both as to the bribe and the bribe proceeds.

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

Whosoever shall aid, abet, counsel, or procure the commission of [any indictable offense], whether the same be [an offense] at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.
Under U. K. law, conspiracy to commit a crime is also a crime, and subject to the same penalties as the primary offense.

Review of Enforcement Measures

Enforcement of National Implementing Legislation

With the Convention in effect for less than five months, it was not expected that there would be significant enforcement activities to report among the first group of eleven parties whose implementing legislation we have reviewed. We are not, at this time, aware of any prosecution by another party to the Convention for bribes to foreign public officials.

Enforcement of implementing legislation, however, is an important part of U. S. Government monitoring of the Convention and will be followed closely. Reviewing enforcement is also part of the mandate of the OECD Working Group on Bribery, which has responsibility for monitoring all signatories' implementation of the Convention. Future reports should provide more detailed information on enforcement activities as governments begin to confront cases involving bribery of foreign public officials and a record of enforcement action develops. In the meantime, we are focusing our attention and resources on analyzing the implementing legislation of those signatories that have ratified the Convention and encouraging other signatories to put the Convention into effect as soon as possible.

In the United States, FCPA investigations of the bribery of foreign public officials are subject to the same rules and principles as govern any federal criminal or SEC civil investigation. A prosecutor is required, as always, to make an initial assessment of the merits of the case, the likelihood of obtaining sufficient evidence to obtain a conviction, and the availability of sufficient investigative and prosecutorial resources. Political or economic interests are not relevant to this decision. To ensure that uniform and consistent prosecutorial decisions are made in this particular area, all FCPA investigations are supervised by the Criminal Division of the U. S. Department of Justice. Similarly, political or economic interests are not relevant to the SEC's decisions to investigate or bring cases to enforce the civil provisions of the FCPA against issuers.

In the twenty-two years since the passage of the FCPA, the Department of Justice has brought approximately thirty criminal prosecutions* and five civil injunctive actions. In addition, the SEC has brought several civil enforcement actions against issuers for violations of the antibribery provisions and numerous actions for violations of the books and records provisions of the FCPA. In 1998, the Department brought five FCPA prosecutions, resulting in a fine against one corporation of $1.4 million and individual fines against four individuals ranging from $1,500 to $20,000. In addition, two defendants were sentenced to terms of imprisonment.

*In addition, there have been several cases where the absence of dual criminality has made it difficult to obtain foreign evidence for use in an FCPA prosecution, and charges were therefore brought under other federal criminal statutes.

The Department of Justice has also provided assistance to American businesses who have been in the process of negotiating international business transactions. Since 1980, the Department has issued thirty-three opinions in response to requests from American businesses stating whether it would take enforcement action if the businesses proceeded with actual proposed transactions. In addition, since 1992 the Department of Justice and the Department of Commerce have made available to U. S. exporters a joint brochure that explains the antibribery provisions of the FCPA.

Efforts to Promote Public Awareness

Efforts to promote public awareness of the Convention and domestic laws on bribery of foreign public officials vary widely among the signatory countries. The United States, for its part, has undertaken an intensive campaign to educate the business community and the general public about international bribery and the requirements of U. S. law and the Convention. U. S.

companies engaged in international trade are generally aware of the FCPA. Since U. S. ratification of the Convention and the passage of the IAFCA, the Clinton Administration has sought to raise public awareness of U. S. policy on bribery and initiatives to expand cooperation on eliminating bribery in the international marketplace.

Secretary of Commerce William Daley has repeatedly spoken out against international bribery to business audiences and urged support for the Convention. Other senior government officials, including Commerce Under Secretary and former U. S. Ambassador to the OECD David Aaron and Commerce General Counsel Andrew J. Pincus, Treasury Secretary Robert Rubin, and Under Secretary of State Stuart Eizenstat, have also highlighted the importance of antibribery initiatives for both protecting U. S. business and promoting good governance in countries where bribery may occur. As part of this outreach program, the Commerce Department provides in several of its Internet websites detailed information on the Convention, relevant U. S. laws, and the wide range of U. S. international activities to combat bribery. Officials of the Commerce, State, and Justice Departments are also in regular contact with business representatives to brief them on new developments relating to antibribery issues and discuss problems they encounter in their operations (See Chapter 8, Private Sector Review for more information on U. S. government outreach initiatives on bribery.)

No other signatory to the Convention has undertaken as extensive a public affairs effort on combating bribery as the United States. Several countries, however, have taken initiatives to promote public awareness on the need to fight corruption and reduce bribery in business transactions at home and abroad. In Sweden, both the Trade and Justice Ministers have spoken out on corruption and highlighted the progress made under the Convention. To help promote public awareness of the government's anticorruption campaign, the government plans to appoint a senior official to serve as an anticorruption ambassador. Swedish trade officials also met with Commerce Department representatives recently to discuss the two countries' efforts to promote implementation of the Convention and anticorruption initiatives more broadly, including in the World Trade Organization.

In Poland, President Aleksandr Kwasniewski hosted an international conference on fighting corruption in March 1999, and Polish Deputy Prime Minister and Finance Minister Leszek Balcerowicz has actively supported the activities of nongovernmental organizations that are working for openness and integrity in government. The government of Korea has published extensive material on the Convention and its implementing legislation and held numerous seminars on these subjects. In France, Minister of Economy Dominique StraussKahn addressed a business conference on international corruption in Paris on April 13, 1999, noting France's determination to combat corruption in international trade and its support for the Convention.

Nongovernmental organizations are playing an important role in raising public awareness of corruption and the need for effective remedies. Transparency International, a nongovernmental organization committed to promoting good governance and fighting bribery and corruption, is active in more than 70 countries around the world, including most signatories of the Convention. In Canada, Transparency International and the International Center for Criminal Law Reform and Criminal Justice Policy organized a private sector seminar in Vancouver February 4– 5, 1999, to review the Convention and recent international developments on corruption and bribery. Other Canadian nongovernmental organizations are planning additional events for later in the year.

The Transparency International chapter in Poland will hold a conference on fighting corruption in the next several months. The Australian chapter is scheduling seminars this summer in Sydney, Melbourne, and Brisbane to brief the business representatives on anticorruption initiatives. In Bulgaria, fifteen nongovernmental organizations have joined together to form Coalition 2000, an advocacy group devoted to fighting corruption. Coalition 2000 is developing an anticorruption action plan and publicizing the Convention. It has its own Internet website with links to the OECD website and the text of the Convention.

In addition to the United States, the following fourteen signatories to the Convention have posted their national implementing legislation or draft legislation on their government's website and/ or the OECD Anticorruption Unit website: Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Korea, the Netherlands, New Zealand, Norway, and Switzerland. (See Appendix F.)

Monitoring Process for the Convention

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

OECD Monitoring

The OECD has established a rigorous process to monitor implementation and enforcement of the Convention. Our experience with the first stage of the process confirms that it is a serious undertaking that will encourage parties to fulfill their obligations under the Convention.

Evaluating implementation of the Convention is a challenging project given the diverse legal systems of signatory countries. The OECD review process seeks to accommodate these differences by focusing on the functional equivalence of measures and the identification of the strengths and weaknesses of the various approaches to implementation. The effectiveness of this process will be demonstrated by the willingness of signatories to correct weaknesses identified in their implementation and enforcement regimes after their legislation has undergone the review process.

Framework for Monitoring

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

The key elements of the monitoring program are as follows:

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

In addition to evaluating implementation by signatories, the Working Group also has responsibility for examining the five outstanding issues not fully covered by the Convention (See Chapter 6 on Subsequent Efforts to Strengthen the Convention).

Operation of the Working Group

To carry out this mandate, the Working Group agreed at its meeting on June 29– July 1, 1998, to certain modalities concerning the systems of self-evaluation and peer group evaluation provided for in the Convention and Revised Recommendation. These modalities are summarized below and are also available on the OECD's public web site at http:// oecd. org// daf/ nocorruption/ selfe. htm.

The monitoring process has been divided into two stages, an implementation phase (Phase I) and an enforcement phase (Phase II). The objective of Phase I is to evaluate whether a signatory'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 parties to enforce the application of those laws.

Phase I began in the latter part of 1998 with the issuance of a questionnaire to signatories soliciting information on how their respective laws and legal systems implement the Convention and the Revised Recommendation. Signatories recognized that it would take a considerable amount of time to conclude Phase I given the large number of signatories and the fact that some countries would need longer than others to ratify the Convention and enact implementing legislation. The Working Group was instructed to report on the results of the Phase I review to the OECD Ministers at their annual meeting in the spring of 2000. Phase II is not expected to begin until the second half of 2000, by which time at least some parties will have developed a record of enforcement actions.

The questionnaire contains a comprehensive list of questions on how signatories fulfill their obligations under the Convention and the Revised Recommendation. Signatories are asked, among other things, to

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

To encourage a candid and frank discussion among the Working Group members in evaluating each other's laws, the Working Group agreed that questionnaire responses would be considered "confidential" documents and would not be publicly distributed.

The questionnaire responses are circulated to participants in the Working Group and serve as the primary basis of analysis for each country examined. At the onset of the monitoring process, each signatory provided the OECD secretariat with the names of two experts to serve as lead examiners in monitoring implementation. The secretariat thereafter developed a timetable for countries to be examined. A team of lead examiners drawn from two signatory states conducts the examination with the assistance of the secretariat. At the first monitoring session held on April 12– 14, 1999, the Working Group examined the implementing legislation of the United States, Norway and Germany. Additional sessions are scheduled for Finland, Bulgaria, Greece, Canada, and Korea July 7– 9, 1999, and for Japan, United Kingdom, Hungary, Belgium, Australia, Sweden, and Iceland in October 1999.

Several weeks before each Working Group meeting to examine implementing legislation, the secretariat prepares a draft analysis and questions based on the country's responses to the

Phase I Questionnaire. The designated lead examiners also prepare advance written questions. The examined country then provides written responses to the secretariat's analysis and to the questions posed. At the beginning of each segment of the monitoring meeting, the designated lead examiners and the examined country have the opportunity to make general opening remarks. The lead examiners begin the questioning and discussion by raising issues that were unresolved during the written exchange stage. A discussion and consultation within the Working Group follows. The lead examiners and the secretariat, in consultation with the examined country, then prepare a summary report and a set of recommendations that must be approved by the Working Group. Working Group members have agreed to keep the summaries and recommendations confidential until the process of self-evaluation and peer group review has been completed and a final report to Ministers produced.

Although Working Group proceedings are confidential, the monitoring process still provides ample opportunities for input by the private sector and nongovernmental organizations. For the April Working Group review, Transparency International (TI) submitted its own assessment of the implementing legislation of all three examined countries. In addition, the American Bar Association provided input with regard to the Foreign Corrupt Practices Act (FCPA) and on how the FCPA had affected the behavior of U. S. companies.

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

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

Monitoring of the Convention By the U.S. Government

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

Participation in the OECD Working Group on Bribery is an important part of the U. S. government monitoring process. Attorneys in the Commerce Department's Office of General Counsel, the State Department Legal Adviser's Office and the Justice Department's Criminal Division make an in-depth review of each signatory's implementing legislation and information contained in its questionnaire prior to Working Group meetings.

Preparation of this first annual report to Congress has also helped to strengthen the monitoring process within the U. S. government. It has encouraged U. S. agencies to focus on issues of specific interest to the Congress and provided a more intensive team approach to monitoring. In

response to the IAFCA's reporting requirement, the Commerce Department organized an interagency task force earlier in the year to coordinate work on this report and develop initiatives to intensify monitoring of the Convention over the longer term. U. S. embassies in signatory countries have also assisted this process by obtaining information on host government laws and making on-the-scene assessments of progress in implementing the Convention, taking into account the views of both government officials and private sector representatives. These diplomatic reports provided valuable information that we used in our analysis.

The U. S. government has welcomed private sector input in monitoring the Convention. As indicated in Chapter 8, U. S. officials have had numerous contacts with the business community and nongovernmental organizations on the Convention. We have highly valued their assessments and the expertise that they can bring to bear on implementation issues in specific countries.

In the year ahead, the Commerce Department plans to step up its monitoring of the Convention in several ways.

- Building on the collaborative approach to preparing this report, the Commerce Department will continue to support a vigorous monitoring of implementation. The Department will seek to ensure that we have an integrated strategy which includes expert legal assessments of implementing legislation, outreach to the business community and nongovernmental organizations, appropriate diplomatic initiatives and current analysis of the latest developments on international bribery and corruption. °

  The Trade Compliance Center, which serves as the Department of Commerce's focal point for monitoring compliance with international trade agreements, will give increased attention to bribery and implementation of the Convention. The Center is strengthening its outreach to business and improving its collection and analysis of information on briberyrelated commercial problems. The Center is adding bribery complaints to its Internet Trade Complaint Hotline so that U. S. business now has a direct channel to report bribery-related problems. The Center will also, in coordination with other U. S. agencies, prepare future annual reports to Congress on implementation of the Convention.

- The Department of Commerce will continue to seek input from the business community and nongovernmental organizations on the Convention. During the negotiation of the Convention and the period since its adoption, U. S. officials have made a concerted effort to consult with the private sector. In this next phase of implementation and enforcement of the Convention, it is all the more important that U. S. officials and private sector representatives be in close contact.
- The Department of State is also using its Advisory Committee on International Economic Policy to obtain private sector views concerning the Convention and to keep nongovernmental organizations abreast of progress in the fight against corruption.
- The Departments of Commerce and State, working with other U. S. agencies, will support increased diplomatic and public affairs activities on the Convention. Senior officials will include points on the Convention in their meetings with foreign government officials and speeches to U. S. and foreign audiences. U. S. diplomatic missions will be kept informed of current developments on the Convention so they can effectively participate in the monitoring process and engage foreign governments in a dialogue on key bribery-related issues.
- Improved research and analysis of current developments on international bribery will also be part of our monitoring plan. The Department of Commerce will track closely information on bribery and corruption revealed in the international press, business publications, and its contacts with private sector and nongovernmental organizations.

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

Laws Prohibiting Tax Deduction of Bribes

In 1996, the OECD Council recommended that those member countries that do not disallow the tax deductibility of bribes to foreign public officials reexamine such treatment with the intention of denying such deductibility (see Appendix B.) This recommendation was reinforced in the Council's 1997 Revised Recommendation on Combating Bribery in International Business Transactions, which laid the foundation for negotiation of the OECD Antibribery Convention. All thirty-four signatories to the Convention have agreed to implement the Council's recommendation on denying the tax deductibility of bribes.

As part of the monitoring process on the Convention and the OECD Council recommendation, the OECD also gathers information on the signatories' laws implementing the recommendation on tax deductibility. Over the past year, the OECD has taken important steps to further the transparency of national legal frameworks dealing with tax deductibility by providing information on current and pending tax legislation in its website (http:// www. oecd. org). Since 1998, the OECD has posted country-by-country descriptions of the treatment of the tax deductibility of bribes in signatory countries and an up-to-date summary of pending changes to their laws on the tax deductibility of bribes. The information on the website is based entirely on reports that the signatories themselves provide to the OECD secretariat.

The Treasury Department has relied heavily on these OECD sources to prepare the review in Chapter 4 of laws on the tax deductibility of bribes. For some countries, however, non-OECD sources, such as press reports and U. S. embassy reporting, were also used. Generally there was limited information available on how nonmember signatories' tax laws deal with bribery. Even for OECD member countries, information made public by the OECD is not yet comprehensive. We continue to seek additional information on the entire body of signatories' tax and bribery laws so that we will have a better understanding of how the disallowance of tax deductibility will be applied in practice. Our information should improve as the OECD's current monitoring process creates a more complete record of each signatory's legal, regulatory, and administrative framework for disallowing the tax deductibility of bribes and makes that record publicly available. In the meantime, our review of signatories' laws on the tax deduction of bribes must necessarily be of a preliminary nature.

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

Signatories to the Convention have made substantial progress on the implementation of the OECD Council Recommendation Against the Tax Deductibility of Bribes, and further progress is expected in the period ahead. According to information made available on the OECD website, only five OECD member countries (Australia, Luxembourg, New Zealand, Sweden, and Switzerland) have reported that they have not yet disallowed these deductions. One of the five, Sweden, enacted a new law on March 25, 1999, under which deductions for bribes to foreign public officials will be disallowed effective on July 1, 1999.

Despite important positive steps taken by signatories, however, such tax deductions are still continuing in some countries. There are several reasons for this. First, some countries have developed legislative proposals to deny the tax deductibility of bribes of foreign public officials, but these proposals either have not been introduced in their legislatures or have not yet received legislative approval. Second, some other countries have changed their tax laws but these laws will not become effective until the date that the Convention enters into force (i. e., sixty days after the deposit of an instrument of ratification with the OECD). Third, grandfather provisions in at

least one country's laws may allow tax deductibility to continue. Fourth, it appears that legal frameworks of some countries may only disallow the deductibility of certain types of bribes. Finally, the standard of proof for denying a tax deduction (i. e., the requirement of a conviction for a criminal violation) in some national laws complicates the administration of the tax rules disallowing deductibility.

The purpose of describing the limitations of country laws in the area of the tax deductibility of bribes is to ensure continued focus on improving the situation. Whatever the nature of the legal or administrative loophole that makes it possible to deduct a bribe to a foreign public official, the practice must be eliminated. In his remarks to the Carter Center Conference on May 3, 1999, Treasury Secretary Robert Rubin characterized the fact that some countries have not yet eliminated the tax deductibility of bribes as "simply inexcusable." Monitoring must continue to ensure the full implementation of the OECD Recommendation against the tax deductibility of bribes.

Review of Country Laws on the Tax Deductibility of Bribes

Argentina

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

Australia

The Australian law outlawing the bribery of foreign public officials was recently passed by both chambers of the legislature. Australia has drafted legislation that would deny deductions (other than minor facilitation payments) for bribery payments made to foreign public officials and also cover bribes paid to nongovernment enterprises associated with foreign governments. This legislation, which would end tax deductibility from July 1, 1999, should be introduced in parliament soon.

Austria

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

Belgium

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

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

Brazil

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

Bulgaria

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

Canada

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

Chile

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

Czech Republic

Czech taxation law and regulations do not allow deductions of bribes paid to foreign public officials. Deductibility is not possible even in cases where the bribe could be treated as a gift. Gifts are deductible only in exceptional cases under two specific conditions. The gift must be made for one of the following specific purposes: science, education, culture, fire protection or some other social, charitable or humanitarian purposes. The gift must not be over a strictly determined percentage of the tax basis. Only if both conditions are fulfilled can the gift be treated as deductible for tax purposes.

Denmark

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

Finland

Finland does not have statutory rules concerning bribes paid to foreign public officials. Similar payments to domestic public officials are nondeductible on the basis of case law and practice of the tax administration. The same rule is expected to apply to bribes paid to foreign public officials in case law. On this basis, the same rule is already being applied in practice by the tax administration regarding bribes to foreign public officials.

France

The French Parliament passed legislation denying the tax deductibility of bribes to foreign public officials on December 29, 1997, pursuant to Article 27 bis of the Corrective Finance Bill for 1997. The law does not allow the deduction of amounts paid or advantages granted directly or through intermediaries to foreign public officials within the meaning of Article 1.4 of the Convention. The tax provision will take effect on July 18, 1999, which is sixty days after the ratification of the Convention by the French National Assembly. The new law applies only to contracts concluded during tax years beginning on or after July 18, 1999.

Germany

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

Greece

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

Hungary

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

Iceland

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

Ireland

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

Italy

Italy does not allow deductions for bribes paid to foreign public officials. Legislation enacted in 1994 made gains from illicit sources taxable without affecting the nondeductibility of bribes.

Japan

Bribes are treated as an "entertainment expense" under Japanese law; such expenses are not deductible. Japan treats bribes of foreign public officials in the same way as bribes of domestic public officials. Neither is tax deductible.

Korea

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

Luxembourg

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

Mexico

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

The Netherlands

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

Under the 1997 law, an income tax deduction is denied for costs connected with a criminal offense for which the taxpayer has been irrevocably convicted by a Dutch criminal judge or has met the conditions of a settlement in lieu of conviction. The period between the deduction of costs connected with a criminal offense on the one hand and the conviction for a criminal offense or a settlement in lieu of conviction on the other hand normally takes several years. The law provides that these deductions will be disallowed and added back to income only if the bribe payment took place within the five years preceding the year of the conviction or of meeting the conditions of the settlement. The bribe payment is added back to income in the year in which the conviction becomes irrevocable or the year in which the conditions of the settlement are met.

New Zealand

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

Norway

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

Poland

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

Portugal

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

Slovak Republic

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

Spain

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

Sweden

A bill explicitly denying the deductibility of bribes and other illicit payments to foreign public officials was presented to the Swedish parliament on December 17, 1998, and was adopted by the Parliament on March 25, 1999. It will become effective on July 1, 1999.

Switzerland

A draft bill on the denial of tax deductibility of bribes to foreign public officials was submitted in spring 1998 to the cantons and other interested parties for consultation. (Matters of direct taxation are mostly within the competence of the cantons.) This process has been completed, and the revised draft is almost finished. The next step is the submission of the draft bill to Parliament.

There is a longstanding administrative practice under which bribe and commission payments to nonSwiss recipients are considered business expenses, provided that their effective payment and their relationship to the business of the corporate taxpayer is proven.

Turkey

Turkey does not allow deductions for bribes paid to foreign public officials because there is no explicit rule allowing the deductibility of bribes.

United Kingdom

Under Section 577A of the Income and Corporations Tax Act 1988, enacted under the UK Finance Act of 1993, the United Kingdom does not allow deductions for any bribe if that bribe is a criminal offense, contrary to the Prevention of Corruption Acts. The UK has declared that the Prevention of Corruption Acts apply to bribes to foreign public officials. If any part of the offense is committed in the United Kingdom, for example the offer, agreement to pay, the soliciting, the acceptance, or the payment itself, it would be caught by the corruption laws and would then not qualify for tax relief. In addition, UK tax laws also deny relief for all gifts and hospitality given, whether or not for corrupt purposes.

United States

The United States does not allow deductions for bribes paid to foreign government officials if that bribe is a criminal offense. Both before and after the United States criminalized bribery of foreign government officials, it denied tax deductions for such payments. Before the enactment of the Foreign Corrupt Practices Act of 1977, tax deductions were disallowed for payments that were made to an official or employee of a foreign government and that were either unlawful under U. S. law or would be unlawful if U. S. laws were applicable to such official or employee. The denial of the tax deduction did not depend on a conviction in a criminal bribery case. After the United States criminalized bribery of foreign government officials, U. S. tax laws were changed to disallow tax deductions for payments if made to foreign government officials or employees and if unlawful under the Foreign Corrupt Practices Act of 1977 (FCPA). With respect to U. S. tax provisions for Controlled Foreign Corporations, any payment of a bribe by a foreign subsidiary is treated as taxable income to the U. S. parent. Also, to the extent relevant for U. S. tax purposes, bribes of foreign officials are not permitted to reduce a foreign corporation's earnings and profits. U. S. denial of tax deductibility or reduction of earnings and profits does not depend on whether the person making the payment has been convicted of a criminal offense. On tax deductibility, Treasury has the burden of proving by clear and convincing evidence that a payment is unlawful under the FCPA.

Adding New Signatories to the Convention

Thirty-four countries have signed the Convention: all twenty-nine OECD members and five nonmembers (Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic). Most of the signatories are major exporting countries. As of June 10, 1999, only fifteen of the thirty-four signatories had deposited instruments of ratification with the OECD. The focus of U. S. efforts to date has been to encourage the signatories that have not done so to enact necessary implementing legislation and to ratify the Convention as soon as possible. We expect most of the remaining signatories to take these steps and deposit their instruments of ratification with the OECD by the end of 1999.

Article 13.2 of the Convention provides that it shall be open to accession by nonsignatories that have become full participants in the OECD Working Group on Bribery or any successor to its functions. The OECD Commentaries on the Convention state that such full participation is encouraged. In order to participate in the Convention, governments must accept the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions and the 1996 OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials (see Appendix B).

As more of the original signatories ratify and implement the Convention, and as we gain experience with it in operation through the monitoring process, we will be in a better position to determine which additional parties would make significant contributions to eliminating the bribery of foreign public officials in international business transactions. Thus, in considering candidates for accession, we will focus on countries (1) whose companies are meaningful competitors in international business and (2) which are capable of undertaking the obligations of the Convention and participating constructively in the OECD Working Group. On the latter point, we will give particular attention to whether a prospective party has or is actively contemplating the necessary legislation, effective enforcement measures and other anticorruption measures required to implement the Convention faithfully.

Subsequent Efforts to Strengthen the Convention

The commitment of thirty-four countries to criminalize bribery of foreign public officials represents an important step forward in the fight against corruption in international business transactions. The Convention, however, does not explicitly address a number of other corrupt practices. Of particular concern to the United States are bribes to foreign political parties, party officials, and candidates for public office. These are not covered by the Convention although they are covered by the Foreign Corrupt Practices Act of 1977 (FCPA). The question of whether the obligations of the Convention should be extended to include an explicit prohibition of payments to immediate family members of foreign public officials and private sector bribery is also of interest to the United States.

During the negotiation of the Convention, the United States had sought to include a broader coverage of bribery in the agreement, similar to the coverage in the FCPA. Although the United States did not succeed in that effort, signatories to the Convention did agree that a number of issues related to coverage should be studied further. In all, five issues relating to corruption and the Convention were identified at the December 1997 OECD Council meeting for additional examination: bribery acts in relation to foreign political parties, advantages promised or given to any person in anticipation of that person becoming a foreign public official, bribery of foreign public officials as a predicate offense for money laundering legislation, the role of foreign subsidiaries in bribery transactions, and the role of offshore centers in bribery transactions.

Initial discussion of the five issues occurred at an informal experts meeting in Milan October 5– 6, 1998. Signatories had further discussions at meetings of the Working Group on Bribery in November 1998 and February and April 1999. At all of these sessions, the United States gave particular attention to coverage of foreign political parties, party officials, and candidates for political office because of concern that bribery of these individuals could lead to circumvention of the Convention and seriously undermine efforts to reduce corruption in international business transactions. The U. S. delegation encouraged Working Group members to examine these issues carefully and highlighted the importance of adequate coverage for making the Convention an effective tool to fight corruption.

At this point, no consensus has emerged on the need to expand coverage of the Convention. Rather, most countries are of the view that signatories should implement the Convention as it is and monitor implementation over time to see whether changes are necessary. At the May 1999 OECD ministerial meeting, ministers endorsed further consideration of the five issues as part of the OECD's work to strengthen the fight against corruption. In light of the lack of consensus on expanding coverage, the United States has concentrated its efforts on encouraging all signatories to complete ratification and implementation of the existing Convention, while insisting that the outstanding issues remain on the Working Group's agenda.

The Five Outstanding Issues

Political Parties, Party Officials, and Candidates

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

The United States has argued in the Working Group deliberations that the serious concerns that led the signatories to combat bribery of foreign public officials apply equally to bribes offered or paid to political parties, party officials, and candidates for office. (See Appendix D, U. S. Response to Questionnaire on Four Issues, and Appendix E, U. S. Delegation Submission on Bribery of Foreign Political Parties, Party Officials, and Candidates for Political Office in International Business Transactions.) In addition to efforts within the OECD, the United States has raised these issues in other forums in order to ensure that awareness of their importance remains high. For example, Commerce Secretary William Daley, Under Secretary for International Trade David Aaron, Treasury Secretary Robert Rubin, and Under Secretary of State Stuart Eizenstat have noted U. S. concerns in meetings with their foreign counterparts on numerous occasions since the conclusion of negotiations on the Convention in November 1997. Andrew J. Pincus, General Counsel of the Department of Commerce, addressed these issues in his remarks at the Vice President's Conference on Corruption on February 25, 1999.

Bribery as a Predicate Offense to Money Laundering Legislation

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

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

How jurisdictions define "serious" cannot be generalized. Instead, definitions are based on individual domestic legal systems in each country (i. e., punishable by imprisonment of X period of time or, roughly, the distinction between a misdemeanor and a felony.) Thus, if all parties to the Convention would make bribery a serious offense for the purposes of domestic money laundering legislation, there would seem to be no need for going beyond the requirements in Article 7 of the Convention. However, it is clear that some parties to the Convention are reluctant to take this step.

The Role of Foreign Subsidiaries

Concerning the role of foreign subsidiaries in bribery transactions, the Convention would cover cases in which a company headquarters in a party state authorized a bribe. Use of the nationality basis of jurisdiction would also allow the Convention to be applied to cases where a party's nationals were involved in a bribery transaction. The effective supervision of foreign subsidiaries with regard to bribery in international business transactions is an issue that merits continued attention. The United States has urged further examination of strong standards of corporate governance, business ethics, and international accounting standards.

The Role of Offshore Financial Centers

On the role of offshore financial centers, there appears to be broad agreement on the need to encourage adherence to internationally recognized minimum standards in the areas of anti–money laundering, financial regulation, company law, and mutual legal assistance. These issues are not exclusive to offshore centers, nor are they restricted to the fight against bribery and corruption. Compliance with international norms is a focal point of the Financial Stability Forum's Working Group on Offshore Financial Centers, while the Financial Action Task Force's Ad Hoc

Group on Noncooperative Countries and Jurisdictions is concentrating on compliance with international anti– money laundering practices. Other international forums with initiatives on related issues are the United Nations, the European Union, the Council of Europe, and the G-8. Bribery transactions frequently are carried out, at least in part, in jurisdictions that do not participate in arrangements for international cooperation. This greatly complicates multilateral efforts to promote transparency in financial and commercial transactions and greater mutual legal assistance.

Other Issues Relating to Coverage

Immediate Family Members of Foreign Public Officials

Another issue of interest to the United States is the extent to which the Convention applies— or may be amended to apply— to bribes paid to immediate family members of foreign public officials. The U. S. Delegation has informally raised the question of whether the Convention provides adequate coverage of this issue. There is general agreement that bribes paid to a government official through a family member— either at the direction of a corrupt foreign official or where there is an understanding that the family member will pay some or all of the bribe to the official— is adequately covered by the Convention. Since all bribes paid to officials through intermediaries are covered, we have found no support for expanding the Convention to provide for an explicit prohibition against bribes paid to family members in the absence of the direction of a government official or absent the intent or expectation of the bribe payor that all or a part of the bribe will be paid to a government official. Indeed, we do not provide in our FCPA for coverage of payments to family members in such cases.

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

Private Sector Corruption

The issues of private sector corruption and corruption of officials for purposes other than to obtain or retain business are broad questions which have been raised on occasion by the private sector and noted in OECD Council statements. However, these issues go beyond the scope of the Convention. As the United States gains experience with the Convention, we will consider how private sector corruption and corruption of officials for purposes other than to obtain or retain business can be best addressed. The OECD Working Group has placed the subject of private sector bribery on its agenda for a preliminary discussion at its session July 7– 9, 1999.

Conclusion

During the monitoring of the implementation and enforcement of the Convention, we will continue to raise these issues with other Working Group members. We also intend to work closely with the private sector and nongovernmental organizations to convince the other parties to the Convention that additional prohibitions on bribe offers and payments will strengthen the Convention and advance our common goal of eliminating bribery in international business transactions.

Antibribery Programs and Transparency in International Organizations

Section 6 (a) (8) of the IAFCA directs that the report to Congress contain an assessment of antibribery programs and transparency with respect to each of the international organizations covered by the IAFCA. Over eighty organizations fall within the IAFCA's purview. They include large institutions, such as the World Bank, International Monetary Fund (IMF) and the World Trade Organization (WTO), as well as smaller and less wellknown technical bodies.

Under the Convention, any official or agent of a public international organization is considered a "foreign public official" and thus must be covered by a legal prohibition against bribery. Since the 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) (IOIA) and to any other international organization designated by the President by executive order for the purposes of the FCPA.

This first report to Congress focuses on 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 assistance or fund commercial contracts amounting to billions of dollars annually in countries around the world. They need to take particular care to guard against bribery and corruption in the countries where they operate. We have included the WTO, the United Nations, the Organization of American States (OAS), and the OECD for special attention this year because of their work in promoting international antibribery initiatives and encouraging national governments to strengthen relevant domestic laws. In light of Section 5 of the IAFCA, we have also examined the policies on bribery and transparency of INTELSAT and the International Telecommunications Union (ITU) since their operations can have a significant impact on competition in satellite communication services.

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 change in many organizations. In future reports, we will include an assessment of additional international organizations. For those major international organizations for which our focus this year was on external activities to promote antibribery and anticorruption initiatives, we will also examine issues related to their internal policies and programs to promote transparency and prevent corruption.

International Telecommunications Organizations

INTELSAT

This section of the report addresses the request for information on antibribery programs and transparency with respect to the International Telecommunications Satellite Organization (INTELSAT) as an international organization covered by the IAFCA. Chapter 10 assesses the advantages in terms of immunities, market access, or otherwise of INTELSAT as an international

satellite organization described in Section 5 of the IAFCA. Overall, we find that INTELSAT has the requisite tools in place to address antibribery and transparency issues in its policies and programs.

INTELSAT is structured under the terms of the Agreement Relating to the International Telecommunications Satellite Organization (" INTELSAT agreement") to have four organs. These include the Assembly of Parties, the principal organ of INTELSAT composed of all INTELSAT parties (national member governments); the Meeting of Signatories, composed of all signatories (designated by each party to invest in and participate in the commercial operations of INTELSAT); the Board of Governors; and the INTELSAT Management, the executive organ which handles the day-to-day business operations of the organization and which is most closely supervised by the Board of Governors. The discussion below focuses on the Board of Governors and the INTELSAT Management, as these two organs have virtually all responsibility for the organization's business decisions and transactions (subject to ultimate oversight by the parties).

Decisionmaking in the Board of Governors

Most of INTELSAT's major business decisions are made within the INTELSAT Board of Governors. The Board is typically composed of just over twenty-five members representing signatories with relatively greater investment shares in the organization and groupings of a number of signatories with smaller investments. Mechanisms exist within the INTELSAT agreement also to promote representation of each of the geographic regions defined by the Plenipotentiary Conference of the International Telecommunication Union (Montreux, 1965). As of March 1999, the Board was composed of twenty-eight members representing in total approximately 110 INTELSAT signatories.[1]

Decisions by the Board are generally made on the basis of consensus, without calling for a vote. When votes are determined to be necessary for a decision on a substantive question, voting generally is weighted according to the investment share in INTELSAT represented by each Board member (at least four Governors having at least two-thirds of the total voting share).[2] Thus, the U. S. signatory, Comsat, with the largest investment share in INTELSAT (approximately 19.8 percent as of March 1, 1999),[3] also has the largest proportional voting share within the Board of Governors.

In addition, Article X(b)(i) of the INTELSAT agreement provides that the Board of Governors is required to "give due and proper consideration to resolutions, recommendations, and views addressed to it by the Assembly of Parties or the Meeting of Signatories." This provides a mechanism for parties and signatories to oversee or otherwise affect the actions of the Board of Governors and, in doing so, the operations of the organization. Moreover, the U. S. government, and increasingly other governments, send representatives to the Board meetings accredited as part of their signatory delegations. (The U. S. representatives are present as part of the U. S. government "instructional process" created pursuant to statute and executive order to provide policy guidance to Comsat for its participation in the meeting.)

INTELSAT Provisions Regarding Procurement

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[1] See BG-Temp. 126-102 "List of Participants and Composition of the Board of Governors, International Telecom-munications Satellite Organization One Hundred TwentySixth Meeting 12–18 March 1999."

[2] Alternatively, a decision may be taken on the affirmative vote of the total number of Board of Governors minus three.

[3] Attachment No. 2 to MS-29-6 "Parties to the Agreement and Signatories to the Operating Agreement With Total National Investment Share Determined As of 1 March 1999."

The procurement of telecommunications satellites and related assets are among INTELSAT's largest business transactions. The Board of Governors adopts procurement procedures, regulations, terms and conditions consistent with the INTELSAT agreement. It reviews and approves individual major procurements and any substantive deviations from INTELSAT's standard terms and conditions that are considered significant departures from INTELSAT practice, or which raise significant policy issues. These procurement decisions, and decisions on more minor procurement matters, are carried out by the INTELSAT Management.

INTELSAT's Administrative Policies and Procedures Manual (ADM), which sets forth the official policy of the INTELSAT Management, includes a particular section addressing inappropriate conduct in the procurement process. It provides detailed guidelines for procurement and the reporting of any concerns or inappropriate actions on the part of proposers or staff during or prior to the procurement process. Moreover, the INTELSAT agreement establishes a process under which, in general, the award of INTELSAT procurement contracts is based on responses to open international invitations to tender, and is made to bidders offering the best combination of quality, price, and the most favorable delivery time.

In certain exceptional circumstances, the INTELSAT Board of Governors may decide to procure goods and services other than on the basis of responses to open international invitations to tender. Exceptions can be made when the estimated value of the contract does not exceed a certain dollar value determined by the Meeting of Signatories or when other particular circumstances described in Article 16 of the operating agreement exist. Article 16 provides for exceptions

> … where procurement is required urgently to meet an emergency situation involving the operational viability of the INTELSAT space segment; where the requirement is of a predominantly administrative nature best suited to local procurement; and where there is only one source of supply to a specification which is necessary to meet the requirements of INTELSAT or where the sources of supply are so severely restricted in number that it would be neither feasible nor in the best interest of INTELSAT to incur the expenditure and time involved in open international tender, provided that where there is more than one source they will all have the opportunity to bid on an equal basis.

Policy on Conflicts of Interest and Contributions

INTELSAT established in 1991 (and revised in 1997) a Statement of INTELSAT on Conflicts of Interest and Contributions. This policy, adopted by the Board of Governors and enshrined in the ADM, applies to all INTELSAT staff, including staff on regular, fixed-term, parttime, or temporary appointments. The policy specifically addresses the potential for improper payments, contributions, or other transactions and establishes a policy under which INTELSAT employees may not pay or offer any monies, gratuities, or favors from INTELSAT funds to government officials or personnel of any country or to any individual or organization. Contributions may not be made from INTELSAT funds to any political party, politician, or candidate for public office of any country. Gifts from INTELSAT funds of greater than a nominal value must be properly documented and approved by the director general and CEO or an officer designated by him. Cash gifts may not be accepted by INTELSAT employees. The policy establishes clear guidelines for handling nonmonetary gifts and the review of any gifts of greater than nominal value by the general counsel and the director general and CEO.

The policy includes an annual reporting requirement for all employees, requiring all employees to certify annually in writing that they have reviewed the policy and that they have been and are complying with it in all respects. The director general and chief executive officer then reports to the Board of Governors his determinations of any actual or potential conflict of interest reported, based on written recommendations by the vice president and general counsel. The Board generally reviews these determinations at its December quarterly meeting.

INTELSAT Audit Procedures

In 1987, a fraudulent and corrupt scheme involving the construction of INTELSAT's then-new headquarters building was uncovered by INTELSAT employees. The matter was reported to INTELSAT's external auditors and the chairman of the INTELSAT Board of Governors. The chairman immediately suspended, and the Board subsequently removed from office, the two involved INTELSAT officers: the director general (an American citizen) and the deputy director general (a Venezuelan citizen). The immunities of both of these officers were waived by INTELSAT and both were ultimately convicted in U. S. courts of criminal behavior. INTELSAT has instituted civil actions against the two individuals in an effort to collect damages from them. This incident led to the creation of additional audit mechanisms and oversight. These are detailed below.

There are three separate vehicles for INTELSAT activities and/ or records to be audited on a regular basis. First, INTELSAT has an Internal Audit Department to serve an independent appraisal function. The Audit Department has been given broad authority to review INTELSAT activities and records and to provide analyses, recommendations, and other comments to the Management following its review. Second, the INTELSAT Board of Governors has established an Audit Committee of the Board, to help ensure the soundness of INTELSAT's financial administration, audit, and reporting process. Finally, Article 12 of the INTELSAT operating agreement provides that "The accounts of INTELSAT shall be audited annually by independent auditors appointed by the Board of Governors. Any signatory shall have the right of inspection of INTELSAT accounts." In recent years, Arthur Andersen LLP (and previously KPMG Peat Marwick LLP) audited the balance sheet and related financial statements of INTELSAT.[4]

International Telecommunication Union

The International Telecommunication Union (ITU) facilitates cooperation among member states (some 180 countries) on the improvement and rational use of international telecommunications of all kinds. The ITU also encourages participation of other organizations and private sector entities in the activities of the ITU and promotes their cooperation with member states to advance ITU goals.

The ITU's decisionmaking process is essentially transparent and open to review and oversight by all member states. ITU members consider the views of governments, private sector entities and other organizations when undertaking activities that result in regulations, procedures and recommendations on the operation of telecommunication systems and services. ITU staff serve as the secretariat for ITU meetings and have responsibility for the coordination and publication of telecommunication service data needed for operation of services. Important decisions, however, are made by the member states themselves, not by the secretariat.

Members states of the ITU meet approximately every four years at a plenipotentiary conference. At this conference, members elect the secretary general, the deputy secretary general, and three sector directors (director of radiocommunication, director of telecommunication standardization and director of development). The plenipotentiary also elects a council which meets annually and a part-time radio regulations board. The council is responsible for overseeing the ITU's activities between conferences. World radiocommunication conferences occur every two to three years to revise the radio regulations, which allocate global frequencies and establish procedures for countries to assign frequencies and orbit positions. Adoption of radio regulations are made in a transparent manner by a consensus of the member states.

[4] See INTELSAT Annual Reports of 1995, 1996, and 1997.

Member states, private sector entities, and other interested organizations participate in the work of each ITU sector. The Telecommunication Standardization Sector studies technical, operating, and tariff questions and issues recommendations. Issues of particular concern to developing countries are studied by the Development Sector. Recommendations issued by the sectors are not binding on members, but are generally recognized by governments and private sector companies as global standards for the design of equipment and services. The Radio Regulations Board approves rules of procedure used by the director and Radiocommunication Bureau in the application of radio regulations.

The secretary general and the deputy secretary general direct the general secretariat. In addition to providing staff for meetings and conferences, the secretariat makes the necessary financial and administrative arrangements and prepares materials used for a report on the policies and strategic plan of the ITU. The three sector directors administer specialized secretariats that support the work of study groups within their sector. The U. S. is generally satisfied with the services and support provided by the secretariat for ITU meetings.

International Financial Institutions

The United States has, in cooperation with other shareholder countries, aggressively pressed the international financial institutions to put in place anticorruption strategies, policies and programs. As a result, the major institutions— the International Monetary Fund, the World Bank, and the African, Asian, Inter-American, and European regional multilateral development banks— are playing a growing role in promoting good governance, transparency, and accountability. Significant progress has been achieved. Corruption is now recognized as an important international and development issue that must be addressed. The following sections, which were prepared by the Treasury Department, provide a summary of steps taken by the six major international financial institutions.

International Monetary Fund

The IMF has become increasingly active in recent years in the fight against bribery and corruption. The United States, in cooperation with IMF management, has played a leading role in bringing about the transition from a traditional view that corruption was primarily a political problem with law enforcement as its solution to current conclusions that corruption adversely affects the formulation and implementation of macroeconomic and financial policies, undermines confidence in public policies and institutions, and discourages saving, investment and economic growth.

Traditional Emphasis on Good Governance

The Fund's normal functions and priorities have always been supportive of good governance in its member countries. Its promotion of free and open markets, price decontrol, and trade and capital market liberalization have resulted in increased transparency as well as greater economic efficiency. Support for central bank independence and the end to directed credits and preferential lending have struck at the core of some corrupt practices. Encouragement of respect for contracts and privatization of state-owned firms also have contributed to good governance. The IMF has promoted transparency in governmental fiscal policies and in related activities such as privatization. Where countries maintain international payments restrictions, the Fund encourages their implementation via market-related means rather than individual licensing decisions.

New Awareness of Corruption as an Economic Problem

The Fund is placing an increasingly strong emphasis on explicitly addressing governance and corruption problems and promoting good governance in the context of Fund surveillance and assistance programs. The first of two breakthroughs with regard to attitudes toward corruption in

member countries came in 1996, when the Partnership for Sustainable Global Growth underscored the need for "promoting good governance in all its aspects, including by ensuring the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption, as essential elements of a framework within which economies can prosper."

The Fund's second major step was the issuance in 1997 of guidance on the role of the Fund in governance issues. The guidance called for "a more comprehensive treatment of governance in both Article IV consultations and IMF-supported programs within the IMF's mandate and expertise [and] a more proactive approach in advocating policies and the development of institutions and administrative systems that aim to eliminate opportunities for rent seeking, corruption and fraudulent activity."

Analysis of Corruption's Impact on Economic Policy and Growth

In 1996, the staff produced studies on the implications of money laundering for macroeconomic performance and the international financial system. In 1997, the staff released a paper on Corruption, Public Investment, and Growth and conducted a seminar on Corruption, Governance, and Economic Policy.

Corruption and the Asian Financial Crisis and Problems in Africa

In a major speech in January 1998, Managing Director Camdessus said that domestic corruption and the lack of transparency about underlying economic and financial conditions contributed to the Asian financial crisis. He noted that Fund economic reform programs with Korea, Thailand and Indonesia included internationally accepted auditing and accounting practices, disclosure rules, and capital adequacy standards. The IMF already in 1997 had allowed an Enhanced Structural Adjustment Fund program to lapse in Kenya (i. e., suspended financial assistance) due to concerns that corruption was interfering with Kenya's ability to fulfill its economic policy commitments. Concerns about corruption also figured in Fund negotiations with Cameroon.

Stress on Fiscal Transparency

In April 1998, the Interim Committee of the Board of Governors of the IMF adopted a Code of Good Practices on Fiscal Transparency. Encouraging countries to bring their fiscal policies and practices up to the standards in the fiscal transparency code has become a routine aspect of IMF surveillance. The IMF is putting increased stress on governance issues as central to macroeconomic performance and plans to complete work in 1999 on a Code for Monetary and Financial Policy Transparency.

World Bank

The World Bank has been in the forefront among development banks in the fight against corruption, especially under the leadership of President James Wolfensohn. At the 1996 annual meetings of the World Bank and the IMF, President Wolfensohn highlighted the "cancer of corruption" and its devastating effect on development. He pledged to address corruption on all fronts. A Bank internal task force, the Corruption Action Plan Working Group, was charged to produce an action plan to fight corruption. In September 1997, the boardapproved strategy entitled "Helping Countries Combat Corruption: The Role of the World Bank" set forth a multifaceted plan to (1) prevent fraud and corruption within Bank-financed projects, (2) help countries that request Bank assistance to reduce corruption, (3) take corruption more explicitly into account in country lending strategies and project design, and (4) increase the Bank's cooperative support of efforts by other international organizations.

Since that time, the Bank has pressed forward on a number of fronts, including a thirty-point anticorruption action plan aimed at building on previous efforts. The action plan calls for increased candor about corruption, more focus and clarity in the Bank's own efforts, and greater openness to new ideas and experimentation. The Bank set up a simultaneous push on several fronts: (1) assisting countries that request Bank support; (2) mainstreaming anticorruption in the Bank's operations; (3) increasing knowledge and awareness about corruption; (4) controlling corruption in Bank-financed projects; (5) making in-house improvements; and (6) supporting international efforts and partnerships.

The IDA-12 replenishment agreement strengthens the linkage between new lending and borrower performance, including explicit consideration of good governance and efforts to combat corruption.

Internal Staff Ethics

The Bank's Code of Professional Ethics addresses conflicts of interest, the use of Bank resources and staff accountability. To ensure that Bank staff maintain the highest professional standards, the Ethics Office has been strengthened and the Bank has moved forward to investigate alleged staff corruption. The grievance system has been revised. An Oversight Committee on Fraud and Corruption has been established to review specific instances of allegations of fraud and corruption received by any member of the Bank. A confidential telephone hotline with multilingual capabilities is available for use by bank staff and the public. Monitoring and investigations have been enhanced, including the use of outside experts, in an attempt to locate any problems areas within the Bank. To date, investigations have turned up very few cases of in-house corruption, and these have been vigorously pursued by the Bank. Remedies included lawsuits and staff dismissals.

Auditing and Procurement

Special emphasis has been placed on procurement financed by the Bank. In 1996 and 1997 the Bank took the lead among the multilateral development banks by adding specific fraud and corruption language to its rules for procurement of both goods and services and for selection and employment of consultants. The amendments require that all borrowers of Bank loans, bidders, suppliers, and contractors under Bank contracts must "observe the highest standards of ethics during the procurement and execution of contracts." The strengthened rules state that the Bank will reject award proposals if it is determined that the bidder engaged in corrupt or fraudulent practices. It will cancel any portion of a loan allocated to a contract that was involved in corrupt or fraudulent practices. Firms will be ineligible for future Bankfunded contracts if they are determined to have engaged in corrupt activities. Procurement contracts may include provisions allowing the Bank to inspect suppliers and contractors accounts and records.

In September 1997, agreement was reached on a "nobribery undertaking," which could be included at a borrowing country's request and as part of a country's anticorruption program, on certain Bank-financed contracts. Importantly, the Bank is developing standard bidding documents (SBDs) for specialized procurement in information technology and pharmaceuticals. SBDs have an impact far wider than IBRD-financed contracts, since Bank standard bidding documents are sometimes used by borrowing country governments for their own national public sector procurement. Disclosure of any commissions and gratuities paid in association with a bid or a contract is now included in the standard bidding documents. Additional steps will be identified through a working group of procurement officials from all of the multilateral development banks to achieve agreement on uniform "best practice" procurement documents and rules among international financial institutions.

As part of the stepped-up campaign against corruption, during the past two years, projects are being audited by independent firms hired by the Bank. As a result of these audits, the Bank has

declared misprocurement on a number of contracts. Several firms and individuals have been declared ineligible to be awarded a World Bank– financed contract for specified periods or indefinitely because they were found to have violated the fraud and corruption provisions of the procurement guidelines or the consultant guidelines.

Research and Analysis

The Bank's current initiatives are rooted in part in its concerns about key influences affecting foreign direct investment and governance in developing countries. For example, in 1992 the Bank recognized corruption as a disincentive to foreign direct investment in its Guidelines on the Treatment of Foreign Direct Investment. The guidelines called upon member countries to take steps to prevent and control corrupt business practices, to promote accountability and transparency in dealings with foreign investors, and to cooperate with other countries in developing international procedures and mechanisms. In its reports on governance in 1992 and again in 1994, the Bank identified public sector management, accountability, legal frameworks, and transparency and information as areas of ongoing and future Bank work.

The Bank has become the focal point for developing innovative methods for analyzing and quantifying corruption in individual countries. The World Bank Economic Development Institute has created "diagnostic" approaches to measure and better understand the nature and scope of corruption. The analysis focuses on shortcomings in policies and institutions and contributes directly to design of strategies to improve governance. The Bank approach seeks to involve the broad participation of representatives of civil society as well as the government in the analysis and related workshops and task forces in order to develop a firm grass-roots commitment to transparency and the reform process. As of early 1999, eleven countries were engaged in serious empirical diagnostic exercises, and nearly forty others had expressed to the World Bank an interest in pursuing such in-depth analysis as a prelude to mounting anticorruption strategies.

Assistance to Member Countries

As an increasing number of members are prepared to acknowledge and combat corruption in their countries, the Bank is undertaking to integrate anticorruption measures into its mainstream operational work through training, technical assistance and loans. The Bank has also suspended or withheld assistance to certain countries where governments resisted implementing effective anticorruption programs.

African Development Bank

Corruption is having an extremely negative impact on economic development in many African nations. Poor governance and corruption are hindering proper resource management, undermining efforts to reduce poverty and obstructing sound private sector development by discouraging both domestic and foreign private investment. The African Development Bank (AFDB) has responded to this problem and taken a leadership role in promoting good governance and combating corruption in Africa.

The AFDB is preparing a formal policy on governance that is expected to be approved in 1999. The new policy will focus on accountability, transparency, participation, and judicial reform, and will give increased attention to the roles of the productive private sector and of nongovernmental organizations, such as Transparency International and the Global Coalition for Africa. Beyond this, formal agreement was recently reached with the AFDB shareholders to take a variety of governance and corruption issues into account in all aspects of its operations, including as a basis for lending allocations.

Internal Staff Ethics

The Articles of Agreement of the AFDB mandate that the AFDB maintain control mechanisms that preclude all forms of fraud and corruption from its lending and technical assistance operations. The AFDB is committed to high standards of transparency and accountability among its own staff and is working with international agencies and both foreign and African nongovernmental organizations to eliminate corruption. Internal controls have been enhanced and will be strengthened further, for example, through specific anticorruption training.

Auditing and Procurement

The AFDB has focused especially on the importance of an efficient and competitive procurement process, both in AFDB-financed projects and public sector procurement in member countries. In 1996, the AFDB significantly revised and improved its rules of procedure for the procurement of goods and services. It has stated that a good public procurement system should be based on the principle of open competitive bidding and a coherent and balanced regulatory framework. The AFDB requires the use of standard bidding documentation for international competitive bids and has improved procedures to ensure that procurement under AFDB projects is as transparent as possible. The AFDB has overhauled its procurement review process and Procurement Review Committee to ensure close monitoring of the manner in which contracts are awarded.

Recently, AFDB management proposed that explicit fraud and corruption language be added to the AFDB rules. These strong fraud and corruption amendments will be considered by the board this summer. The AFDB is actively participating in a working group of procurement officials from all of the international financial institutions. Additional steps, however, need to be taken through the working group of procurement officials from the multilateral development banks to achieve agreement on uniform "best practice" procurement documents and rules among international financial institutions.

Analysis and Research and Outreach

The AFDB is committed to supporting research by both national and regional research centers to study the causes and implications of corruption in African societies. The AFDB is planning to strengthen its own institutional capacity for analysis of governance issues and corruption in African member countries. In addition, the AFDB, World Bank and IMF recently established a joint institute in Abidjan which will provide a forum for more effective cooperation in analysis of the full range of Africa's economic challenges, including corruption.

The AFDB also is working to increase awareness of the negative effects of corruption and in November/ December 1998 hosted an important conference on "Public Procurement Reform in Africa," which was attended by Ministers and high-level officials from thirty-two African countries. The Conference was a watershed event in opening a dialogue on public procurement to promote improvements in how public resources in Africa are managed. The Conference emphasized the need for commitment to the reform process at the highest levels of government in order to support legal, organizational and professional institutional changes.

Assistance to Member Countries

The AFDB has been taking corruption and governance into account in its country strategy papers. Now this work is being expanded as the AFDB explicitly incorporates governance into its country performance assessments and subsequent resource allocation decisions. It has focused especially on support of civil service and judicial reforms to raise the level of human resources and technical know-how of procurement and law enforcement officials and thereby improve the detection and punishment of corrupt practices. The new policy emphasis on governance is expected to link lending programs directly to commitments to formal governance efforts by the borrowing countries.

The donors' report on the eighth replenishment of the African Development Fund specifies that strong linkage will be established between country performance and resource allocations to member countries. In the future, moreover, indicative country allocations are not to be regarded as entitlements to resources. Rather, access to AFDB resources will depend on annual assessments of each country's performance. The assessments will be based on the following broad criteria: (1) macroeconomic policies, (2) structural policies, (3) policies for growth with equity and poverty reduction, and (e) governance and public sector performance.

While helping those countries seeking assistance, the AFDB also has enhanced controls over its own projects and now will consider canceling part or all of a loan or grant if the project is tainted by acts of fraud or corruption. Key countries in which the AFDB's new policy stance will be significant include Nigeria and Kenya.

Asian Development Bank

The 1998 annual report of the Asian Development Bank (ADB) stated bluntly that corruption played "a central role in weakening governance institutions that contributed to the Asian financial crisis." Corruption thus was, according to the report, "one of the key problems behind the currency turmoil, corporate bankruptcies, and falling stock markets that have plagued the region since July 1997."

In July 1998, the ADB adopted an official anticorruption policy. The policy is built around three objectives: (1) supporting competitive markets and efficient, accountable, transparent public administration; (2) supporting promising anticorruption efforts and improving the quality of the ADB's dialogue with its developing member countries on governance, including corruption issues; and (3) ensuring that the ADB's staff, projects, and programs all adhere to the highest ethical standards. It sets forth four principles of good governance— accountability, transparency, predictability, and participation— and commits the ADB to integrating governance activities into its operations, programs, and technical assistance.

This new anticorruption policy is an extension of the ADB's formal Good Governance policy adopted in 1995. That policy represents an institutional commitment to making governance a fundamental concern and focus of ADB operations.

The ADB has set up a task force to implement the new anticorruption policy and created a specific Anticorruption Unit within the Office of the General Auditor. It also participates with the World Bank and other regional development banks in a new Multilateral Development Bank Coordinating Committee on Governance, Corruption, and Capacity Building.

Internal Staff Ethics

The ADB recently updated and strengthened its code of conduct for staff and has issued new staff guidelines specifically regarding anticorruption issues. It also has created independent internal mechanisms to address allegations of corruption and to improve recruitment, regulations, procedures, and management. In particular, the ADB is recruiting a small core of anticorruption specialists in the areas of public sector management and institutional development. Training programs on ethics and forensic accounting have been developed. New rules have also been adopted to protect whistle blowers and require sanctions, including possible dismissal and prosecution, for staff found to be involved in fraud and other forms of corruption.

Auditing and Procurement

The ADB has undertaken to strengthen its auditing functions and has created new disbursement guidelines to ensure integrity in the administration of its projects and programs. The Office of the

General Auditor conducts independent appraisals and audits of the ADB's financial, accounting, and administrative operations.

The ADB also has strengthened its procurement rules. Amendments to the rules were approved in 1998 and 1999 to add specific language on fraud and corruption, no-bribery pledges and, importantly, to require the use of ADB standard bidding documents. In the rules, the definition of corrupt practice includes the behavior of private as well as public officials. Furthermore, in contracts financed by the ADB, the contract documents must include an undertaking by the contractor that no fees, gratuities, rebates, gifts, commissions, or other payments, other than those shown in the bid, have been given or received in connection with the procurement process or in the contract execution. Additional work is under way through the working group of procurement officials from all the multilateral development banks to achieve agreement on uniform "best practice" procurement documents and rules among international financial institutions.

Research and Analysis

The ADB's more activist stance on corruption responds in part to new research showing that corruption has significantly reduced the performance of the Asian economies by distorting public investment, discouraging private investment, and wasting resources. The ADB has identified a variety of corrupt practices in the region. These include: illicit payments and misappropriations of funds; the outright theft and sale of posts or promotions; procurement fraud; disclosure of false financial information; extortion; abuse of judicial and tax offices; and design and selection of uneconomical projects to create opportunities for kickbacks. The ADB's new policies are aided by efforts made now by all ADB members to prohibit the bribery of public officials.

The ADB has set as priorities to improve its understanding of the unique corruption problems in individual Asian countries, provide more effective delivery of anticorruption assistance to ADB members, and learn from approaches to fighting corruption and establishing norms for good practices in other parts of the world.

Assistance to Member Countries

The ADB has identified six key areas of governance for special attention in its assistance to members: (1) participation, civil society, and social capital; (2) law and development; (3) the interface of the public and private sectors; (4) project and sector assistance; (5) core government functions at the national level; and (6) decentralization. The emphasis and precise form of future assistance to borrowers will vary depending on the country. Recent examples of projects already containing governance and anticorruption components are loans for financial sector reform in Indonesia, Korea, and Thailand and for corporate governance and enterprise reform in the Kyrgyz Republic. Examples of anticorruption technical assistance are capacity building in project accounting in Kazakhstan, the Kyrgyz Republic, and Uzbekistan and support for establishing the National Audit Office in Laos.

European Bank for Reconstruction And Development

The European Bank for Reconstruction and Development (EBRD) operates in Central and Eastern Europe and the former Soviet Union. Unlike other regional banks that concentrate on assistance to developing countries, the EBRD's borrowing members are mainly countries in transition from centrally planned to market economies. The EBRD is aware that rapid political and economic change in these countries, including largescale privatization of state-owned companies, has created widespread opportunities for the diversion of both financial assets and exportable commodities, corruption in public works concessions, and serious economic crimes such as fraud and embezzlement.

As most of the EBRD's projects are with the private sector, the EBRD has directed substantial effort to improving corporate governance through increased accountability, transparency and respect for the rights of minority shareholders. The financial crisis in Russia, which resulted in unauthorized stripping of assets, presented difficult challenges for EBRD staff and shareholders. As a result, the EBRD has undertaken a reevaluation of its operations and will in the future place an even greater emphasis on ensuring sound corporate governance. Greater attention will also be given to advocating adequate regulatory, supervisory, and legal frameworks by borrowing country governments to improve the investment climate and deter opportunities for fraud and corruption.

Internal Staff Ethics

The EBRD's main internal focus has been on encouraging a culture of ethical behavior within the EBRD itself. In addition to educating staff to be aware and look out for fraud and corruption, the EBRD has also established rules and procedures for avoiding and detecting corrupt practices in EBRD-financed projects (which are predominantly private sector projects) and technical assistance.

The EBRD established a strong code of conduct to regulate the behavior of staff, which broadly defines corrupt practices and provides for close monitoring and disciplinary procedures. Recruitment is highly selective and based on full disclosure. Staff are required to file statements of compliance with the code. The receipt of gifts and honoraria is strictly controlled and illegal or improper payments are strictly forbidden. A management group consisting of the general counsel, personnel and internal audit oversees the code of conduct, with all matters ultimately going to the president of the EBRD. A code of ethical behavior for all staff dealing with external suppliers will be referred to the board for approval the summer of 1999. The EBRD is considering the creation of a fraud hotline mechanism, and explicit protection for whistle blowers.

Auditing and Procurement

To increase transparency and accountability within the EBRD there is a system of checks and balances involving an independent internal auditor, external auditor and the audit committee of the board of directors.

The EBRD routinely performs due diligence on prospective private and public sector clients. Through the due diligence process, the EBRD also checks that procurement and contracting is carried out with no conflict of interest and that purchasing methods which ensure a sound selection of goods and services at fair market prices have been applied in the best interest of the EBRD's clients. Loan and certain other agreements between the EBRD and clients typically include a number of covenants (such as compliance with international accounting standards, annual external audits of accounts, strict limits on lending to affiliated parties), supported by appropriate EBRD procedures, which further limit the opportunity for corrupt practices and money laundering or which would enable the EBRD to detect their occurrence. Among the multilateral development banks, the EBRD has developed cutting-edge approaches to due diligence on private sector operations.

The EBRD's procurement rules were strengthened in February 1998. Specific fraud and corruption language was adopted which is aimed at the procurement process as well as the execution of contracts for goods, works, and services in the areas of public sector operations, the selection of concessionaires and the selection of consultants. Moreover, the rules were amended to allow the EBRD to reserve the right to consider corruption in the context of contracts not financed by the EBRD. And, the EBRD may impose certain sanctions, including blacklisting, against clients or firms found by a judicial process or other official enquiry to have engaged in corrupt or fraudulent practices. Additional steps are being explored through the working group of

procurement officials from all of the multilateral development banks to achieve agreement on uniform "best practice" procurement documents and rules among international financial institutions.

Assistance to Member Countries

The EBRD helps countries to develop a legal framework that supports promotion of private sector activities and transition towards market-oriented economic policies. Through its Legal Transition Program, the EBRD has provided technical assistance on secured transactions laws, bankruptcy law, and concessions law, and developed "guidelines" on good corporate governance. Helping transition countries to create a predictable environment, based on the rule of law, will increase transparency and accountability and reduce opportunities for corruption.

Outreach

The EBRD has begun to cooperate with other national and international organizations to combat financial crimes and money laundering. In particular, the EBRD works closely with the OECD working groups on money laundering and tax evasion, as well as Europol. If there are questions on good standing of prospective clients, EBRD works with governments and private investigators to fully understand project sponsors and sources of funds.

Inter-American Development Bank

In December 1994, the Inter-American Development Bank (IDB) was given a clear mandate from hemispheric leaders at the Summit of the Americas to assist countries in combating corruption. In initial fulfillment of that mandate, the IDB created in 1996 a Task Force on Corruption and Other Financial Crimes.

A clear consensus has developed among IDB shareholders on the need for modernization and reform of the public sector and on the role of a smaller, efficient government that operates with accountability and transparency. The IDB finances activities intended to implement this consensus to reform those regulatory or institutional frameworks and aspects of government that most easily provide opportunities for public corruption and fraud.

Currently, the IDB is dealing with the issue of corruption at three levels: (1) supporting activities in member countries and in the region, (2) ensuring the IDBfunded projects and IDB staff maintain highest standards, and (3) participating in the international dialogue on corruption.

Internal Staff Ethics

The IDB has in place a code of ethics to ensure the integrity of its employees. Possible impropriety is investigated by the Office of the Auditor General in a process that ensures confidentiality, due process, and adequate protection of all parties. Additional safeguards are provided through an ethics committee, conduct review committee, and an independent investigation mechanism (a permanent roster of expert investigators). Cases of malfeasance are few but have resulted in forced terminations.

Auditing and Procurement

In January 1998, the IDB strengthened its basic procurement policies and procedures by adding specific fraud and corruption language. Under the new policy, the IDB will reject a proposal to award a contract, declare a firm ineligible to be awarded future contracts under IDBfinanced projects, and/ or cancel a portion of the loan or grant. The IDB may require that bid documents

include provisions that allow the IDB to audit suppliers and contractors' accounting records and financial statements pertaining to the execution of a contract. At the request of the borrowing country, a "no-bribery pledge" may be included in the bid documents. The working group of procurement officials from all of the multilateral development banks provides a good instrument to achieve agreement on uniform "best practice" procurement documents and rules among international financial institutions.

Research and Analysis

The IDB has begun to study the specific problems of corruption in Latin America. Studies on corruption in public health services and on asset laundering are under way.

In February 1998, the IDB hosted a groundbreaking seminar on Efficiency and Transparency in Public Sector Procurement, which was attended by ministers and high-level officials from many countries in Latin America and the Caribbean. The conference focused on four key procurement related areas (i. e., legal frameworks, state reform, information technology, and financial management) to promote a more open dialogue on public procurement and the fight against corruption.

Assistance to Member Countries

The IDB has provided assistance to borrowers to reform tax; customs and financial systems; modernize the public sector; define the state's role in the economy; strengthen the executive, judicial, and legislative branches; and establish appropriate regulatory and governmental supervision functions. Improvement in all of these activities serves to discourage and deter corruption.

More recently, the IDB has initiated regional projects to support implementation of the Inter-American Anticorruption Convention and promote integrity in financial markets. Other regional anticorruption initiatives included a seminar in 1998 on international money laundering, a training program for banking regulators and banking officials, and a study for judges and prosecutors that will support training activities in prosecuting assetlaundering cases.

Much, however, still remains to be done to effectively integrate awareness of corruption and necessary counter measures into the IDB's routine analysis, evaluation, technical assistance, and country lending programs.

Major International Organizations

Organization of American States (OAS)

Over the past several years, the Organization of American States (OAS) has played an active role in the fight against bribery and corruption in the Western Hemisphere. In public statements and joint resolutions, the OAS has underscored its concerns about the negative impact of these practices on good governance, economic development and other national interests. OAS members are increasingly aware that corrupt practices thwart the process of development by diverting resources needed to improve economic and social conditions. They also recognize that corruption is an obstacle to the observance of human rights.

At the 1994 OAS General Assembly, members called for the study of measures aimed at fighting corruption, improving efficiency in the running of public affairs, and promoting transparency in the management of public funds. The General Assembly adopted the resolution on Probity and Public Ethics on June 10, 1994, establishing a working group in the OAS Permanent Council to study

issues related to good governance and ethics. The Probity and Public Ethics Working Group (Probity Group) examined how national legislation was addressing these issues. It also provided a forum for discussing the control and oversight of existing administrative institutions. Following its review, the Probity Group made a checklist of crimes related to public ethics and developed recommendations on judicial mechanisms to address such crimes.

The first Summit of the Americas held in Miami in 1994 included as one of its major themes the need to address corruption. Democratically elected leaders of OAS member states issued a Summit Plan of Action, which mandated negotiation of an Inter-American Convention Against Corruption. The action plan encouraged governments to develop priorities for reform in several important areas, including transparency and accountability of government operations; oversight of government functions and related investigative and enforcement mechanisms; conflict-of-interest standards for public employees; effective deterrents to illicit enrichment; and antibribery measures. The Action Plan also endorsed development of a hemispheric approach to private and public sector corruption, including cooperation on extradition and prosecution.

The OAS General Assembly responded by adopting a resolution on June 9, 1995, which authorized two important follow-up actions. The first was for a seminar on probity and public ethics, which was subsequently held in Uruguay in November 1995. The second was for the drafting of an Inter-American Convention Against Corruption. Negotiation of this convention came to a successful conclusion on March 29, 1996, when twentyone countries signed the convention. Four additional countries signed on subsequent dates, including the United States, which signed on June 2, 1996. The convention entered into force on March 6, 1997. Of the twentyfive to sign the convention, sixteen countries have ratified it as of June 1999. President Clinton transmitted the convention to the Senate for advice and consent to ratification on April 1, 1998. It is still awaiting Senate approval.

The Inter-American convention was the first multilateral anticorruption treaty negotiated in the world. It covers a broad range of corrupt acts, including purely domestic corruption as well as transnational bribery. Signatories agree to enact legislation that makes 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.

In 1997, the OAS adopted the Inter-American Program for Cooperation in the Fight Against Corruption. The program called for measures which included adopting a strategy to secure prompt ratification of the convention, conducting comparative studies of legal provisions in member states, drafting codes of conduct for public officials, implementing a system of consultations with international organizations, conducting media campaigns, and formulating educational programs.

At the second Summit of the Americas held in Santiago on April 18– 19, 1998, leaders stated that they would resolutely support and implement the InterAmerican Program to Combat Corruption, especially the adoption of a strategy to achieve prompt ratification of the Inter-American convention by member nations. They agreed to sponsor workshops and other follow- up activities related to the convention, including a Symposium on Enhancing Probity in the Hemisphere, which was held in Chile later in 1998. They also endorsed the study of asset laundering, codes of conduct for public officials, information campaigns on the ethical values that sustain the democratic system, and other actions to promote good governance, such as legislation that obliges senior public officials to disclose personal assets and liabilities.

Summit participants agreed to encourage the approval of effective and specific measures to combat all forms of corruption, bribery, and related unlawful practices in commercial transactions, among others. These statements and others reflect the growing interest of hemispheric leaders in fighting bribery and corruption, and strengthening transparency and accountability in government.

To assist members in implementing the convention, the Inter-American Juridical Committee of the OAS approved, in August 1998, model legislation on illicit enrichment and transnational bribery. The committee also prepared a report on the subject and a guide to the model law for legislators.

Organization for Economic Cooperation And Development

The OECD has served as a key forum for industrial countries in developing an international consensus on combating international bribery and corruption. Its membership is composed of twenty-nine 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.

Over the past three years, the OECD has helped to facilitate two important breakthroughs in the fight against corrupt practices. In 1996, the OECD members adopted a recommendation that all members should prohibit the tax deductibility of bribes of foreign public officials. Up until then, a majority of members had refused to consider eliminating such practices because bribes to foreign public officials were widely accepted in many parts of the world. A year later at the May 1997 Ministerial, members agreed on a recommendation to negotiate a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, in conformity with an already agreed-upon set of common elements. These elements, with a few significant exceptions, track closely the provisions of the FCPA.

On November 21, 1997, negotiators from thirtyfour countries (all twenty-nine OECD member states and Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic) adopted the Convention at the OECD in Paris. It was signed on December 17, 1997. (Australia signed the Convention a year later after having completed required consultations with its parliament.) On February 15, 1999, the Convention went into effect for the twelve countries that had deposited instruments of ratification with the OECD. The OECD Working Group on Bribery is monitoring implementation of the Convention and following up on several important issues that were not included in the final text. (See Chapters 3 and 6.)

OECD support for international antibribery initiatives, however, has gone beyond negotiating the Convention and monitoring its implementation. The OECD has also undertaken a variety of outreach activities in Latin America, Asia, Eastern Europe and the former Soviet Union to assist countries in developing effective antibribery and good governance programs. A newly formed Anticorruption Unit within the Secretariat has responsibility for coordinating outreach activities. The Anticorruption Unit has created its own home page within the OECD Internet website to disseminate information about antibribery activities and the Convention.

In developing outreach programs, the Anticorruption Unit has sought to create synergy by using OECDwide expertise and by collaborating with public and private sector groups, including the U. S. Agency for International Development (USAID), the European Union (EU), the Organization for Security and Cooperation in Europe (OSCE), and Transparency International. During 1998, the OECD helped to organize several conferences and regional events that brought together business leaders, journalists, nongovernmental organizations, and professional associations to discuss the Convention and possible measures to fight bribery and corruption. The OECD and OSCE cosponsored a Conference on National and International Approaches to Improve Integrity and Transparency in July 1998 that was attended by more than 175 representatives of governments, nongovernmental organizations, international organizations, and the private sector from thirty-five OSCE member countries. The conference, which was held in Paris, discussed how best to fight corruption, promote good governance, and strengthen civil society. Participants agreed on the importance of establishing clear laws that can be predictably enforced, instituting educational programs, and sharing information among interested countries.

The OECD and OAS collaborated on a similar event for Latin American countries in Buenos Aires in September 1998. A workshop for governments, nongovernmental organizations and the corporate sector was held to examine ways to fight bribery in international business transactions. Participants encouraged countries to ratify and implement the Inter-American Convention Against Corruption and stressed the need for interaction between governments and civil society in order to prevent corrupt practices.

In October 1998, the OECD worked with USAID to organize a workshop in Istanbul on Combating Corruption in Transition Economies. Delegates from eleven countries of the former Soviet Union, the Black Sea Economic Cooperation group, OECD member countries, and several international organizations participated in the meeting. The group launched an informal anticorruption network for transition economies to help coordinate national and international anticorruption programs. A steering group comprised of representatives from the Soros Foundation, Transparency International, and international organizations was formed to identify network participants and encourage their participation. An Internet site is under construction that will make information on regional anticorruption efforts widely available and facilitate an electronic discussion group for network members.

The OECD's outreach program for 1999 focuses on two main areas: (1) broadening the discussion of the OECD Convention and related instruments and (2) sharing information on national, regional, and international initiatives. This strategy relies on the continuous development of partnerships among major stakeholders such as the business community, nongovernmental organizations, governments, and international organizations. In addition to organizing its own workshops, conferences, and seminars, the Anticorruption Unit is also participating in other international forums to disseminate information about the Convention and promote its objectives.

In February 1999, the OECD Anticorruption Unit cooperated with the OECD Development Center to organize a symposium in Washington on the role of the private sector in fighting corruption in developing and emerging economies. The Anticorruption Unit was also actively involved in Vice President Gore's conference on fighting corruption, which high level representatives from almost ninety countries attended in Washington on February 24– 26, 1999.

The Anticorruption Unit and OECD's Public Management Service (PUMA) will support a workshop for Asian economies in the fall of 1999 to discuss bribery and corruption in the Asia-Pacific region. Other sponsors include the Asian Development Bank, UNDP, and USAID. This meeting will bring together government officials and representatives of the business community and civil society to exchange experiences on fighting bribery and corruption, discuss ways to improve integrity and transparency in government, and strengthen internal and international cooperation. The Anticorruption Unit is planning additional meetings with Central and Latin American regional organizations to discuss anticorruption issues.

In another important joint initiative, the OECD and the European Union have established the Support for Improvement in Governance and Management in Central and Eastern European Countries (SIGMA) program to help thirteen Central and East European countries reform public administration and strengthen the integrity of state institutions. Operating within PUMA, SIGMA counsels governments on developing a professional civil service with high standards of ethical conduct; improving independent audit and financial controls; establishing transparent, fair public procurement systems; improving the administration's service to the public and businesses; and enhancing the effectiveness of laws and regulations. SIGMA's activities support institution building and complement other European Union– backed programs aimed at preparing these countries for eventual EU membership.

The SIGMA program is also engaged in an Internet project with Transparency International to produce an up-to-date online directory of national and international anticorruption programs operating in Central and Eastern Europe. Information on the Internet site will serve as a practical

reference guide for those involved in the struggle against corruption, including donors, governments, nongovernmental organizations, journalists, businesses, and trade unions. The project is intended to facilitate the exchange of information and experiences on anticorruption work and to improve donor coordination.

United Nations

As an international organization with broad membership, the United Nations has played an especially useful role in educating governments on the importance of good governance and the need for strong anticorruption programs. While UN resolutions on bribery and corruption are nonbinding, they have brought increased attention to the problem of corrupt practices and have encouraged member states to take action through national legislation and other international agreements, such as the OECD Antibribery Convention and the InterAmeri-can Convention Against Corruption.

Over the past decade, the United Nations has developed a number of proposals for assisting member states in their efforts to address bribery and corruption. In 1989, the Development Administration Division of Technical Cooperation for Development and the Crime Prevention and Criminal Justice branch of the UN Secretariat organized an interregional seminar at The Hague in collaboration with the Ministries of Foreign Affairs and Justice of the Netherlands. Their report included an overview of national responses to corruption and of emerging concerns and practical measures as well as a set of priorities and recommendations. At the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana August 27– September 7, 1990, Resolution 7 recommended that states should revise existing legal mechanisms or devise new ones to prevent and respond adequately to all forms of corruption. In the same resolution, it requested that the Criminal Justice Branch of the UN Secretariat offer practical assistance in the areas of strategic planning, legal reforms, public administration, training of officials, and the tendering of international aid projects.

On the basis of the work and recommendations of the UN Economic and Social Commission (ECOSOC) during the period 1992– 94, the issue of corruption was included in the program of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Cairo April 29– May 8, 1995. The congress devoted a special session to the subject and invited member states to improve policy development, increase the use of bilateral or multilateral cooperation agreements, and conduct more extensive research on corruption.

In a 1995 resolution adopted on the recommendation of the Commission on Crime Prevention and Criminal Justice at its fourth session, ECOSOC urged the member states to develop and implement anticorruption measures, to increase their capacity to prevent and adequately control corrupt practices, and to improve international cooperation in that field. ECOSOC also requested that the Secretary General review and expand the manual on practical measures against corruption.

On December 12, 1996, the General Assembly adopted an International Code of Conduct for Public Officials. It recommended that member states use the code as a tool to guide their efforts against corruption. Shortly thereafter, on December 16, 1996, the General Assembly adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions. In the declaration, member states pledged to criminalize bribery of foreign public officials in an effective and coordinated manner. They also endorsed denying the tax deductibility of bribes paid by any private or public corporation or individual of a member state to any public official or elected representative of another country.

The Secretary General presented a report to the Crime Prevention and Criminal Justice Committee of ECOSOC in Vienna April 28– May 9, 1997. The report gave an overview of the

problem of corruption, summarized international efforts at combating it, and recommended a more focused and systematic attack. This meeting was followed by an expert group meeting on corruption and the implementation of the declaration in Buenos Aires March 17– 21, 1997. The experts submitted a report to the Crime Prevention and Criminal Justice Committee with their conclusions and recommendations on combating corruption and implementing the International Code of Conduct.

On February 21, 1997, the UN General Assembly adopted a resolution, based on a recommendation by the ECOSOC, urging member states to take all possible measures to further implement the United Nations Declaration against Corruption and Bribery. The General Assembly also requested that the United Nations Conference on Trade and Development (UNCTAD) and other competent bodies of the United Nations system assist member states in areas relating to bribery and corruption.

One key area identified for assistance was the implementation of national programs to strengthen accountability and transparency. The UN bodies were also asked to help member states implement relevant conventions, declarations and instruments to combat corruption and bribery in international commercial transactions. The resolution welcomed the work performed by the United Nations Development Program in the field of good governance. The Secretary General was given responsibility for consulting with UNCTAD and reporting to the General Assembly on anticorruption and antibribery measures taken by member states, international and regional organizations, nongovernmental organizations and the private sector.

On February 2, 1998, the UN General Assembly adopted a resolution calling for International Cooperation against Corruption and Bribery in International Commercial Transactions. The resolution urged member states to implement the Declaration Against Corruption and Bribery in International Commercial Transactions and the International Code of Conduct for Public Officials, and to ratify, where appropriate, existing instruments against corruption.

The United Nations Commission on International Trade Law (UNCITRAL) is also providing valuable legal assistance to countries interested in improving their procurement laws and regulations and thus limiting the opportunities for bribery and corruption. In 1994, UNCITRAL approved a Model Law on Procurement of Goods, Construction, and Services, aimed at preventing bribery and corruption. A number of countries around the world have based their procurement laws or standards on provisions of the UNCITRAL Model Law. Many of the new democracies in Eastern European and Newly Independent States have benefited from UNCITRAL assistance. Albania and Poland, for example, have already enacted legislation based on the UNCITRAL model law.

World Trade Organization

Among the harmful consequences of bribery are adverse effects on trade flows, sometimes even negating market access gained through trade negotiations. In many countries, corruption is affecting customs practices as well as decisions on government procurement contracts. Bribery and corruption can not only undermine the foundations of the international trading system, but also frustrate broader reforms and economic stabilization programs. That is why the World Trade Organization, with the support of the United States, has also been a forum for advancing anticorruption initiatives.

Working through the WTO, the United States and a limited number of other members negotiated an Agreement on Government Procurement (GPA) to reduce corruption in government procurement. The GPA, which went into effect on January 1, 1996, establishes substantive procedural disciplines to ensure transparency and due process in procurement decisions. Although the GPA contains important disciplines, it is a plurilateral agreement, with only twenty-

six signatories: Aruba, Canada, member states of the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom), Hong Kong China, Israel, Japan, Liechtenstein, Norway, Republic of Korea, Singapore, Switzerland, and the United States. The Committee on Government Procurement is currently in the process of simplifying and improving the GPA pursuant to the mandate in Article XXIV(7)(b) of the agreement. One of the goals of the GPA revision is to make the agreement more accessible to nonparticipant WTO members.

The 1996 WTO Ministerial Conference in Singapore made an important contribution to international efforts to combat bribery and corruption by establishing a new Working Group on Transparency in Government Procurement. The working group was given a mandate to study transparency and to develop elements for inclusion in a WTO agreement. Over the past three years, the working group has made significant progress in fulfilling its mandate. The United States and several key trading partners have set a goal of having the working group complete its work on developing the elements of a multilateral agreement on transparency in government procurement before the upcoming WTO Ministerial Conference commences in Seattle on November 30, 1999.

The United States has taken the position that a WTO agreement on transparency in government procurement should address fundamental aspects of transparency, including

- Publication of information regarding the regulatory framework for procurement, including relevant laws, regulations and administrative guidelines.
- Publication of information regarding opportunities for participation in government procurement, including notices of future procurements.
- Utilization of competitive procurement procedures.
- Clear specification in tender documents of evaluation criteria for award of contracts.
- Availability to suppliers of information regarding contracts that have been awarded.
- Availability of mechanisms to challenge contract awards and other procurement decisions.

The WTO is also addressing issues related to individual trade transactions involving the movement of goods. In this context, corruption often has its genesis when the customs procedural environment of an importing country is neither transparent nor rules-based. In 1997, a WTO Working Party on Preshipment Inspection was established and completed its work in March 1999. It developed several immediate action items and other measures to be undertaken by members to strengthen the operation of the Agreement on Preshipment Inspection. The United States has also been leading an ongoing initiative towards full and timely implementation of the WTO Agreement on Customs Valuation by more than fifty WTO developing country members before the end of 2000. Proper implementation of the valuation agreement diminishes certain systemic problems that are often the starting point for corruption related to the assessment of duties and obtaining release of goods from the custody of customs officials.

In accordance with a mandate from the 1996 Ministerial Conference, the WTO Council on Trade in Goods has been undertaking exploratory and analytical work in the area of trade facilitation. In this context, the issue of customs integrity has been identified as a priority item. The United States, along with several of its key trading partners, is pressing other WTO members to include trade facilitation as a subject for future WTO work.

Private Sector Involvement in Monitoring and Implementation

The U. S. government has actively sought the involvement of the private sector in efforts to combat international bribery and promote adoption of the Convention. The U. S. private sector played an active advisory role throughout the negotiation of the Convention, as well as during the congressional debates over the amendments to the FCPA. Private sector support proved to be of great importance in achieving international agreement on the Convention and encouraging passage of implementing legislation by the first group of signatories to deposit their instruments of ratification with the OECD. As a result of this close collaboration, the groundwork for a government– private sector dialogue on implementing the Convention was already well established when the Convention entered into force. The Clinton Administration is pleased to report that it continues to enjoy a close working relationship with the private sector now that the Convention has reached the implementation and monitoring stage.

U.S. Government Outreach Since 1988

In the Omnibus Trade and Competitiveness Act of 1988, Congress directed the executive branch to pursue an agreement with trading partners of the United States in the OECD to criminalize bribery of foreign public officials in international business transactions, along the lines of the FCPA. Since that time, the U. S. government has actively sought involvement of the private sector in antibribery initiatives. For the past eleven years, U. S. officials have met frequently with private sector groups about international bribery and have both sponsored and participated in anticorruption conferences around the world. They have also hosted and attended many government– private sector informational meetings on anticorruption matters. And they have solicited the views of many individual private sector entities regarding international anticorruption strategies in the OECD and other international forums, such as the United Nations, the World Trade Organization, the Organization of American States, and the Asia-Pacific Economic Cooperation forum. In short, the U. S. government has sought to ensure that the experiences of the private sector play an important role in shaping the U. S. anticorruption strategy, and that individual private sector companies have an opportunity to present their views on the Convention.

Role in the Negotiation of the Convention And Amendments to the FCPA

During the negotiations on the Convention, U. S. private sector representatives met with U. S. negotiators and their counterparts in other countries to support its adoption. It was due in significant part to private sector involvement that the negotiations were successful and that the Convention was adopted on November 21, 1997, and signed on December 17, 1997.

Furthermore, the private sector helped to secure bipartisan congressional support for the prompt passage of the IAFCA, the amendments to the FCPA implementing the Convention under U. S. law. Through numerous letters and memoranda, the private sector informed U. S. officials of its views on the amendments and conveyed its opinions and support of the implementing legislation to Congress. The private sector also hosted numerous private sector– government informational meetings on the Convention and the implementing legislation and participated in congressional hearings on the IAFCA.

Role in Monitoring and Implementation Of the Convention

Since the Convention entered into force on February 15, 1999, the Clinton Administration has continued its productive dialogue with the private sector on monitoring and implementation. Senior U. S. officials, including Commerce Secretary William Daley, Treasury Secretary Robert Rubin, Commerce Under Secretary for International Trade David Aaron, Under Secretary of State Stuart Eizenstat, and other senior U. S. officials had many contacts with private sector groups on the Convention. For example, Daley's speech to the Board of Directors of Transparency International in January of this year reviewed the Convention and the U. S. government's strategy for monitoring its implementation.

Already this year, the Clinton Administration has sponsored and participated in several conferences to promote private sector interest in the monitoring and implementation of the Convention. Representatives of the private sector attended the Vice President's February Conference on fighting global corruption, where the Convention was highlighted in remarks by several U. S. officials. Representatives from nearly ninety countries participated in the conference. U. S. officials also discussed the Convention with private sector representatives in February at the "Washington Conference on Corruption: Fighting Corruption in Developing Counties and Emerging Economies: the Role of the Private Sector" sponsored by the OECD Development Center and several nongovernmental organizations. These conferences are just two recent examples of ongoing exchange with the private sector on the Convention.

In addition, U. S. officials have provided information on the Convention to the private sector by participating in numerous meetings on the Convention held by corporations, law firms, and business associations, such as the National Association of Manufacturers and the Business Roundtable. U. S. officials regularly attend meetings 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 Organization of Employers.

U. S. agencies continue to make use of the existing advisory committee structure as a forum for dialogue with the private sector when discussions go beyond the exchange of information and into the solicitation of recommendations of advice on specific matters of policy. For example, the Department of Commerce maintains an ongoing dialogue with the private sector through its regularly scheduled meetings of Industry Sector Advisory Committees (ISACs), Industry Functional Advisory Committees (IFACs), and the President's Export Council (PEC). Commerce has 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 transatlantic trade barriers and relay their findings to their governments. TABD members have stressed the importance of fighting corruption and bribery at all of its annual conferences. The State Department receives input on bribery issues through its Advisory Committee on International Economic Policy. At these meetings, U. S. officials have given detailed presentations on the status of the Convention and its implementation and have requested input from the companies represented.

The U. S. private sector has also participated in monitoring the Convention through international business groups, such as the OECD's Business and Industry Advisory Committee. BIAC is an officially recognized business advisory group composed of private sector representatives from OECD member countries. It has strongly supported the Convention and spoken out frequently on the need to fight corruption and bribery.

The U. S. government will continue to work with the private sector and nongovernmental organizations, like Transparency International, and will also be extending lines of dialogue to other organizations. The International Trade Administration's Trade Compliance Center will be using its Compliance Liaison Program and other private sector initiatives to enlist the cooperation of the private sector in monitoring bribery of foreign public officials and implementation of the Convention. The business community and nongovernmental organizations can help by providing

the U. S. government with additional "eyes and ears" for tracking bribery and possible violations of the ethical standards in the Convention. Individuals, companies and nongovernmental organizations can report this information directly on the Trade Compliance Center's Trade Complaint Hotline.

The U. S. government, for its part, will continue to share as much information as possible about the monitoring process with the private sector. U. S. officials respond to public inquiries on the Convention and the status of its implementation on a daily basis. Both the Commerce Department's Office of General Counsel and Justice Department's Criminal Division have posted the Convention and related commentaries, as well as the full text of the IAFCA and other background materials, on their websites. The Justice Department has posted on its website the responses of the United States to the OECD Phase I Questionnaire on our implementing legislation and the full text of the FCPA. Moreover, Commerce has provided detailed information on the status of the implementation of the Convention by our trading partners and final versions of several signatories' implementing legislation as the legislation has become publicly available. Commerce's Trade Compliance Center has also included on its website an Exporters' Guide to help businesses understand key provisions of the Convention. In addition, the United States Information Agency, the U. S. Office of Government Ethics, and the State Department also have websites with information on anticorruption issues.

In summary, the U. S. government has worked hard over the years to build a strong working relationship with the U. S. private sector in order to combat international bribery and corruption. We are committed to maintaining this valuable relationship during the monitoring and implementation phase of the Convention.

Additional Information on Enlarging the Scope of the Convention

The IAFCA directs that the report to Congress review additional means for enlarging the scope of the Convention or otherwise increasing its effectiveness, taking into account the views of private sector participants and representatives of nongovernmental 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 chapter of the 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 FCPA.

Additional Individuals and Organizations and Other Means of Enlarging the Convention

Chapter 6 reviewed U. S. efforts to strengthen the Convention by broadening the prohibitions. The U. S. government has focused on expanding coverage explicitly to include a prohibition of the bribery of foreign political parties, party officials and candidates for political office as in the FCPA. Failure to cover such bribes may prove to be a significant loophole, and the OECD Working Group on Bribery is currently examining these issues as it reviews the five outstanding issues on the Convention. In the context of these discussions, we also raised informally with Working Group members the issue of payments to immediate family members.

As noted earlier in the report, however, most signatories do not support any changes in the scope of the Convention's coverage at this time. They prefer to monitor implementation of the Convention before making any decisions on amendments to the Convention. OECD ministers, at their May 1999 ministerial meeting, directed that the Working Group should continue its examination of the issues identified for further study, which include bribes to foreign political parties, party officials, and candidates for public office.

The United States has continued to press for action on these outstanding issues. Under Secretary for International Trade David Aaron, for example, personally raised these issues in bilateral meetings with counterparts at the May 1999 ministerial meeting. As a result of these and other vigorous U. S. interventions, the U. S. position calling for further study of all five issues was reflected in the ministerial communique.

After we have more experience with monitoring implementation of the Convention, we will be in a better position to assess its effectiveness in combating international bribery. In making our assessment we will continue to consult with representatives of the private sector and nongovernmental organizations to obtain their views.

Improved Record Keeping

The provisions of Article 8 of the Convention on accounting practices are not as comprehensive as those in Section V of the 1997 Recommendation of the Council on Combating Bribery in International Business Transactions (See Appendix B). Article 8 directs signatories to take certain measures regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards to prohibit certain practices that might facilitate the bribing of foreign public officials or of hiding such bribery. The 1997 Recommendation, however, addresses a wider range of safeguards against corruption, including accounting requirements, independent external audits, and internal company controls.

The United States would like to see signatories to the Convention implement all elements of Section V of the 1997 Recommendation. OECD members had previously accepted the 1997

Recommendation and the United States will continue to encourage them to institute those practices without delay.

Impact on U.S. Business

The U. S. government has long been aware of the problems 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. businesses. It was because of such problems that the U. S. Congress enacted the FCPA to bring a halt to the 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.

The FCPA's impact was widely felt. One positive effect was that 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 throughout the world. But the FCPA also put U. S. firms at a disadvantage relative to their foreign competitors who were able to bribe foreign officials without fear of penalty and even benefited from being able to deduct such bribes from their taxes. This disparity was one of the reasons the U. S. government sought to convince other countries to prohibit bribes to foreign public officials and enact legislation similar to the FCPA.

In the 1998 Trade Promotion Coordinating Committee's National Export Strategy report, it was estimated that in the period 1994– 98 the outcome of approximately 240 contracts valued at $108 billion may have been affected by bribery involving foreign firms.

From May 1998 through April 1999, additional allegations of bribery were made involving fifty-five contracts worth approximately $37 billion.

Entry into force of the Convention in February 1999 represented an important step in our goal of leveling the playing field for U. S. business in the global marketplace. We are concerned, nonetheless, that even when the Convention is fully implemented, differences in coverage between the Convention and the FCPA may result in continued advantages for foreign competitors. Of particular concern to the U. S. government are bribes offered or paid to political parties, party officials, or candidates, categories that are not explicitly covered by the Convention (See Chapter 6 on Subsequent Efforts). Our concern is that failure to prohibit the bribery of parties, party officials, and candidates may create a loophole through which bribes may be directed in the future. Although since 1977 the FCPA has prohibited such bribery and no loophole in U. S. law has existed, our experience has shown that such bribery may be effective. For example, the very first case brought under the FCPA involved a payment to a political party and party officials for the purpose of paying for the transportation from New Zealand to the Cook Islands of a sufficient number of voters to ensure the reelection of a legislative majority for the ruling political party and head of the party. Bribes to political parties, party officials, or candidates are no less pernicious than bribes to government officials.

U. S. agencies are taking a variety of measures to help U. S. business deal with the problems of international bribery. As noted elsewhere in this report, U. S. officials will be intensifying their outreach to the private sector to solicit its views on how best to implement the Convention and to share information on signatories' laws and policies regarding bribery. Special attention will be given to the needs of small and medium-size exporters, which face an especially difficult challenge in dealing with international bribery and corruption.

As part of this effort, U. S. companies of all sizes will be able to report problems with bribery directly to the Commerce Department on the Trade Complaint Hotline of the Trade Compliance

Center. In addition, the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure enables U. S. firms and individuals to obtain an opinion as to whether certain prospective conduct conforms to its FCPA enforcement policy. These procedures are available to assist firms and individuals in determining whether a particular transaction falls within the purview of the law. We will continue to assess the impact of the Convention on U. S. business in determining our policies on implementation of the Convention and on efforts to strengthen its provisions.

Advantages to International Satellite Organizations

This chapter responds to the reporting requirements in Section 6 (7) of the IAFCA which requests information on advantages, in terms of immunities, market access, or otherwise, enjoyed by the international satellite organizations (ISOs), the International Telecommunications Satellite Organization (INTELSAT), and the International Mobile Satellite Organization (Inmarsat), the reason for such advantages, and an assessment of progress toward fulfilling the policy described in Section 5 of the IAFCA. It was prepared by the National Telecommunications and Information Administration (NTIA) of the U. S. Department of Commerce.

INTELSAT is a treaty-based global communications satellite cooperative with 143 member countries. INTELSAT was created to enhance global communications and to spread the risks of creating a global satellite system across telephone operating companies from many countries. Inmarsat was created to improve the global maritime communications satellite system that would provide distress, safety, and communications services to seafaring nations in a cooperative, cost-sharing entity. Comsat Corporation (Comsat) is the U. S. signatory to INTELSAT (and was formerly the signatory to Inmarsat) participating in the commercial operations of this international satellite organization.

To assist in the preparation of this report, NTIA issued a Request for Comments in the April 12, 1999, *Federal Register.*[1] NTIA sought views of all interested parties through this notice. The comments received are posted on NTIA's website. With the cooperation of the State Department, requests were sent to U. S. embassies seeking information on "favorable treatment" to INTELSAT and/ or Inmarsat. NTIA considered all the above information in preparing its analysis.

In the time between passage of IAFCA and preparation of this report, Inmarsat completed its privatization process. As a result of privatization, the executive branch no longer conducts oversight of Inmarsat acting through Comsat. Consequently, INTELSAT is the focus of this report. INTELSAT states that it is taking steps toward "procompetitive privatization" and that it expects full privatization by 2001. Chapter 7 reviews antibribery programs and transparency with respect to INTELSAT and several other international organizations. Issues involving INTELSAT procurement decisions, audit procedures, and staff ethics are discussed in that chapter.

Privileges and Immunities

INTELSAT and its signatories, when acting in the INTELSAT context, benefit from the unique advantage of access to privileges and immunities. While these privileges and immunities have provided INTELSAT and its signatories some commercial advantages— freedom from antitrust action and freedom from taxation of INTELSAT itself— these privileges and immunities were probably necessary to spur development and deployment of international satellite telecommunications. First, when INTELSAT was created there was no experience with international telecommunications by satellite and no assurance that a successful commercial venture might result. Considerable commercial risk attended the launch of this enterprise. In order to attract a large number of signatories/ investors, the entity required some corresponding protections. Second, INTELSAT was established with a core public service mission. That mission— providing global interconnectivity for international public telecommunications

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[1] 64 Fed. Reg. 17625 (1999).

services— is embedded in INTELSAT's organic documents as a "public service obligation." To fulfill this public service obligation, INTELSAT was granted privileges and immunities consistent with an intergovernmental organization. Finally, because of its structure, INTELSAT's signatories were exposed to unlimited liability which could be partially mitigated by the grant of privileges and immunities.

The Federal Communications Commission (FCC) has indicated that Comsat, INTELSAT, and Inmarsat have enjoyed advantages due to the grant of privileges and immunities. In a 1997 proceeding, the FCC noted that Inmarsat and INTELSAT have "unique characteristics as treaty-based organization[s] that enable them to distort competition."[2] The FCC also found that Comsat, in its role as signatory, benefits from the immunities afforded INTELSAT and Inmarsat. The FCC rejected Comsat's arguments that it never claimed immunity, and stated that Comsat overlooked the benefits that it derived in its signatory capacity from the ISOs' immunities. The FCC concluded that

[i] n that capacity, Comsat participates in business and commercial decisions protected by this immunity. We find that this extension of immunity provides Comsat a competitive advantage. It allows commercial decisions and activities to be conducted under a cloak of immunity unavailable to Comsat's competitors.[3]
In a subsequent proceeding, the FCC substantially reiterated its concern regarding the potential for anticompetitive conduct as a result of the ISOs' privileges and immunities. In that proceeding, the FCC found that
[t] he immunity enjoyed by Comsat is a clear advantage over competitors that do not enjoy similar protection. Comsat's immunity protects Comsat in its broad signatory activities from suits based on antitrust, tort and contract claims.
Moreover, as we have previously found, the INTELSAT activities of Comsat and the other signatories entail substantial commercial activities that are protected by their immunity. As the U. S. signatory, Comsat sits on the INTELSAT Board of Governors and Inmarsat Council and participates in decision making on all matters related to the commercial operation of a satellite system. INTELSAT's financial, legal, operational and strategic decisions provide the basis upon which Comsat offers service to U. S. consumers. These are the same type of commercial activities undertaken by Comsat's competitors with one key difference: Comsat's competitors have no immunity from suit and legal process for these types of activities and are subject to the U. S. competition laws, including antitrust laws.
Absent an appropriate waiver of immunity, nothing would prevent Comsat from engaging in unilateral or coordinated anticompetitive activities. … Permitting one participant in a market to be shielded from liability for its anticompetitive business and commercial behavior while holding its competitors subject to liability for those acts is inconsistent with fair and competitive telecommunications markets and regulating in the public interest.[4]

The FCC allowed, however, that Comsat could make application to provide domestic service if such application included "an appropriate waiver of immunity from any suit." To date, there is no record that Comsat has made such application. There is no reason to assume that the FCC

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[2] Amendment of the FCC's Regulatory Policies to Allow Non-U. S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Report and Order, 12 FCC Rcd 34094, para. 125 (1997).
[3] Id.
[4] Comsat Petition for Partial Relief from the Current Regulatory Treatment of Comsat World Systems' Switched Voice, Private-Line, and Video and Audio Services, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, para. 161 (1998) (" Comsat Non-Dominant Order").

would grant INTELSAT direct access to the U. S. market with or without a similar waiver of its immunities. The issue of direct access is currently under consideration at the FCC.[5]

Neither INTELSAT, Inmarsat, nor their signatories have retained all of their privileges and immunities as the privatization of INTELSAT and Inmarsat has proceeded. Inmarsat's residual intergovernmental organization— responsible for monitoring Inmarsat's implementation of its global maritime distress and safety (GMDSS) function— retains its privileges and immunities. That residual intergovernmental entity, however, is not an operating service provider. Neither the privatized Inmarsat nor its earlier spin-off, ICO-Global, have privileges or immunities. As noted below, INTELSAT made a partial waiver of its privileges and immunities as to its relationship with the spin-off, New Skies. The U. S. government found that waiver to be sufficient in the broader context of the INTELSAT negotiations. Like ICO, New Skies has no privileges or immunities. At this point, U. S. government representatives are unaware of any anticompetitive conduct resulting from ISO use of privileges and immunities.

It should be noted that under provisions of the Communications Satellite Act, three "instructional agencies"— NTIA, the FCC, and the Department of State's Office of Communications and Information Policy— are authorized to issue joint instructions to Comsat on a wide range of matters affecting the role of Comsat in INTELSAT.[6] Moreover, the instructional agencies have routinely been given access to signatory deliberations within INTELSAT's Board of Governors (and, formerly, in Inmarsat's Council). The role of the instructional agencies may be useful in blunting some of the anticompetitive threat inherent in privileges and immunities.

In the end, the impact of the grant of privileges and immunities cannot be clearly resolved. A reasonable person might conclude that the ISOs benefitted from their privileged status. Proving that case and proving that any benefit was conferred with an anticompetitive intent or effect, however, is a different matter. Moreover, it cannot be said that those who established the ISOs in legislation intended otherwise— never anticipating the development of robust competition or its consequences in global satellite communications.

Market Access

Market access is at the center of U. S. policy concerns related to international telecommunications, including satellite telecommunications. U. S. firms such as PanAmSat and Orion face significant barriers to providing international satellite services in many foreign markets. Although these barriers are gradually coming down, they are still a serious problem.

However, these barriers are largely a reflection of the power of foreign monopoly telecommunications providers. Although these monopoly providers are also signatories to INTELSAT, INTELSAT is not itself a source of these market access problems. To elaborate, INTELSAT provides *wholesale* satellite capacity to telecommunications providers in signatory countries, not the high-profit links to *retail* customers. Absent INTELSAT, a foreign monopoly service provider could simply substitute another source of wholesale satellite capacity and still retain its monopoly over sales of satellite services to retail customers.

For that reason, privatization of INTELSAT will not reduce either the incentive or the ability of monopoly foreign telecommunications providers to restrict access to their retail, end-user market— the market most sought by U. S. satellite services firms. (Although some conjecture that

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[5] See Direct Access to the INTELSAT System, Notice of Proposed Rulemaking, IB Docket No. 98-192, FCC 98-280 (rel. Oct. 28, 1998).

[6] See, e. g., Communications Satellite Act of 1962, Pub. L. No. 99-33, Section 146, 99 Stat. 425 (1985).

having additional competitors in the wholesale market might put pressure on foreign governments to open their local monopolies, such an effect is speculative.)

To be sure, privatization of INTELSAT is important for its own sake— for the benefits it will bring to satellite services users, providers, and investors. But privatization of INTELSAT will not provide a lever for opening the monopoly foreign markets that resist competitive entry. The problems of foreign telecommunications monopolies must be addressed directly, through bilateral negotiations or by enforcing and expanding market-opening multilateral arrangements such as the WTO agreement.

Barriers to market access may derive from legal, regulatory, economic, technical, and operational policies. Barriers may reflect policies instituted prior to the emergence of international telecommunications competition. Such barriers can be expected to have the effect of raising end-user prices, stalling deployment of new technologies and limiting end-user options. If barriers exist in an arena that favors an ISO and its signatories, the playing field becomes or remains uncompetitive.

The consequences of barriers to market entry were highlighted by the FCC in its 1998 rulemaking on Comsat's petition on nondominance:

Legal barriers to entry in many countries make it difficult for a U. S. authorized carrier to offer switched voice service in a foreign market. Historically, the most significant entry barrier in international telecommunications has been obtaining an operating agreement with monopoly telecommunications service provider before providing service to a particular country. In the case of U. S. satellite service providers, obtaining the authority to provide service in a particular country, including authority to transmit and receive from an earth station within a country (sometimes referred to as landing rights), remains a significant legal barrier to entry.[7]

In the mid-1980s, the U. S. government advocated separate and competing (satellite) systems. In doing so, the United States encountered considerable hostility from ISO signatories, most of whom decided not to deal with any separate system. Initially, the separate systems were prohibited by U. S. policy from carrying basic voice traffic, preserving that market exclusively for the ISOs. The limitation on voice traffic, however, has since been removed. Separate systems have focused on development of the video market.

This segregation of voice and video markets remains a residual source of concern. In its filing with NTIA, PanAmSat noted that, while it can provide full-time video service in 129 countries, only eight countries allow PanAmSat to offer switched voice traffic. PanAmSat notes that it cannot offer any voice service in five global regions— Western Europe, Eastern Europe, North America, Central and South Asia, and the Middle East.[8] PanAmSat did not indicate whether it seeks to provide voice service in all these countries as a wholesaler (similar to INTELSAT) or as a retailer (similar to AT& T, MCIWorldcom, Sprint, and others in the United States). PanAmSat also cites ten countries (India, Argentina, Brazil, Colombia, Ecuador, Guatemala, Honduras, Nicaragua, Paraguay, and Pakistan) where INTELSAT, by practice, has been exempted from licensing fees or other cumbersome regulatory requirements to which PanAmSat is subject.[9]

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[7] Comsat Petition for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, para. 82 (1998).

[8] See Comments of Panamsat Corporation at 9 (May 12, 1999). Comments are available at NTIA's website http://www.ntia.doc.gov.

[9] Id. at 8.

INTELSAT remains a dominant satellite voice traffic carrier, but this appears to be more a historic artifact than the product of any continuing practice encouraged by INTELSAT. Although the voice traffic market is shrinking for satellite service providers (most traffic is now carried by submarine fiber optic cable),[10] that market can provide a platform of relatively steady (if lowmargin) revenue sufficient to permit a further expansion of service into video and data markets. Unfortunately, the relationship between a monopoly operating company and its "regulator," in many countries, may perpetuate preferences for use of INTELSAT or fiber optic capacity for which the national operating company has an ownership interest. The forces of global competition and World Trade Organization enforcement can be expected to reduce these incentives over time.

Comsat, in its comments to NTIA, states that "Whereas at one time COMSAT was virtually the only INTELSAT signatory that was *not* a government entity, today about 75 % of INTELSAT's ownership is held by companies that are fully or partly privatized. In fact, of those signatories with an ownership share of .5% or more, all but six are fully or partly private, and four of those six have announced plans to privatize in the near future."[11]

The ISOs have exercised market power in their treatyderived technical coordination role with separate systems. When the INTELSAT agreement was written, parties were given the power to review "separate systems" to avoid significant economic harm to INTELSAT. Such coordination included reviews of the separate systems business plans to determine whether or not these competitors posed such a threat. Over the past nine years, the INTELSAT parties have eliminated the economic harm test. The technical coordination process, though occasionally contentious, is now conducted with little evident intent to use the process as a means of limiting competition.

It is clear that the separate systems faced formidable market access difficulties in the past. In recent years, however, these once-threatened enterprises have grown and become highly successful. Once small, both PanAmSat and Orion have become part of substantially larger enterprises (Hughes and Loral) and PanAmSat reported net revenues in 1998 of slightly more than $750 million, or about three quarters of INTELSAT's revenues and more than $100 million in excess of Comsat's 1998 net revenues.

In its filing with NTIA, Iridium identified two countries (Mexico and South Africa) where market access remains a problem.[12] The U. S. government will continue to pursue resolution of these problems. We note the April 7, 1999, statement reported in *Communications Daily* by Iridium's then-Chairman that "Iridium expects to win licenses to serve an additional 80 countries this year, increasing [the] total to 230 covering virtually every country except those that have been embargoed." This progress is important as Iridium's anticipated market access problems were central to many of the discussions surrounding Inmarsat's creation of ICO— a direct competitor to Iridium.

As telecommunications competition has emerged, international satellite communications has not been a priority arena for regulators or policymakers in other countries seeking to introduce competition. This is not necessarily a sign of regulator indifference, however. Rather, it seems to reflect a matter of simple priority and use of government resources in different countries. In fact, for 1998, the ISOs together had total revenues below $1.5 billion, a small portion of that year's estimated $26 billion in revenues for satellite communications services.

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[10] In its comments, INTELSAT provides a summary of growth in the undersea fiber optic cable voice traffic. See Comments of INTELSAT at 6 (May 12, 1999). Comments are available at NTIA's website, http://www.ntia.doc.gov.
[11] See Comments of Comsat at 20 (May 12, 1999). Comments are available at NTIA's website, http://www.ntia.doc.gov.
[12] See Comments of Iridium LLC and Motorola, Inc at 6. Comments are available at NTIA's website, http://www.ntia.doc.gov.

For many countries, participation in the ISOs has historically represented a minuscule fraction of the national operator's telecommunications revenue. For instance, except for Norway's investment in Inmarsat, no European signatory to the ISOs owned more than ten percent of either ISO. In most cases, European ownership has been far closer to five percent or lower. In addition, many European operators (and, increasingly, operating companies from other parts of the globe) made significant investments in undersea cable as the preferred technology for voice and data communications. In addition, more and more ISO signatories are finding investment opportunities in nonISO satellite communications enterprises.

Separate from the question of foreign market access for competing (non-INTELSAT) satellite systems is that of direct access to the INTELSAT system for nonsignatory customers (communication carriers and endusers). There are four options for direct access that permit nonsignatory operators and users to obtain technical data or space segment capacity directly from INTELSAT rather than through INTELSAT signatories:

- Level One direct access permits customers to receive technical and operational information.
- Level Two direct access permits customers to meet with INTELSAT management and staff regarding INTELSAT tariffs, space segment availability, and other related commercial considerations.
- Level Three direct access permits customers to enter into contractual arrangements with INTELSAT for ordering, using, and paying for INTELSAT space segment at the same rate paid by signatories.
- Level Four direct access permits customers, in INTELSAT member countries, to make capital investments in INTELSAT in proportion to their space segment utilization just as signatories do.[13]

While the United States has not allowed for direct access, ninety-four other INTELSAT countries have instituted either Level Three or Level Four direct access of some nature. Although the Clinton Administration believes that direct access is procompetitive, it recognizes that direct access implemented elsewhere has been designed to address a problem that does not exist in the United States, e. g., control of all international facilities and services by a single, dominant carrier.[14]

In its comments to NTIA, the Satellite Users Coalition (AT& T, MCI WorldCom, and Sprint) complain that the absence of direct access in the United States, deliberately helps foreign carriers:

Another unfortunate side effect of Comsat's monopoly is that many of its U. S. customers are beginning to route INTELSAT traffic through the facilities of foreign signatories of INTELSAT (such as Teleglobe, the Canadian signatory). This routing is inefficient, bypasses the U. S. earth station facilities in which U. S. carriers have large investments, and gives U. S. carriers a strong incentive to build future INTELSAT earth stations in other countries. The result is that investment in the United States decreases and U. S. jobs move abroad.[15]

In a broader context, the Department of Commerce is persuaded that, where market barriers exist, the World Trade Organization's (WTO) Group on Basic Telecommunications (GBT) agreement

[13] Direct Access to the INTELSAT System, Notice of Proposed Rulemaking, IB Docket No. 98-192, FCC 98-280, para 9 (rel. Oct. 28, 1998).
[14] See Comments of Comsat Corporation at 18. Comments are available at NTIA's website http://www.ntia.doc.gov.
[15] See Letter from Satellite Users Coalition to Milton Brown, NTIA, dated May 12, 1999, Attachment at 4. (Attachment to the Letter is the Joint Testimony of AT& T, MCI WorldCom and Sprint (" Satellite Users Coalition") before Senate Committee on Commerce, Science, and Transportation Subcommittee on Communication, April 30, 1999.

provides broad protection to address such problems. Admittedly, as PanAmSat points out in its filing with NTIA, neither the Russian Federation nor the Peoples' Republic of China belong to the WTO. While acknowledging that the Russian Federation and the Peoples' Republic of China represent a significant portion of the world's potential telecommunications users, their absence from or participation in the WTO is beyond this report's ambit. PanAmSat also notes that only sixty-five of INTELSAT's 139 signatory countries committed to implementing the WTO Reference Paper on Regulatory Principles.[16]

On the other hand, the INTELSAT signatory countries committing to the reference paper, together with other countries committing to it, represent approximately 90 percent of the world's basic telecommunications revenues. The reference paper is particularly important since it commits participating countries to establish independent regulatory bodies, assures foreign operating companies the ability to interconnect with networks in other countries at fair prices, forbids anticompetitive practices such as cross-subsidization, and requires regulatory and licensing transparency for basic telecommunications services.

Where INTELSAT was once nearly the only provider of international satellite services— affording it a degree of control over market access opportunities— the market is now marked by other global service providers as well as numerous regional and national satellite systems. Planned systems suggest that this pattern will continue with new services to be provided by wellfunded multinational organizations such as Teledesic, Spaceway, Cyberstar, and Skybridge, among others.

The issue of market access is likely to become less important as the newer systems expand their multinational character, engaging capital, marketing, and technical support from other firms. Thus, where there were once distinct competitive advantages for the ISOs and their signatories, the forces of competition and technology have reduced those advantages. As further privatization of INTELSAT is implemented, that advantage is likely to disappear altogether.

Preferential Tax Treatment

INTELSAT is exempt from federal, state, and local taxation. Comsat is not. Other signatories are subject to the taxation regime of their sovereign state. Stateowned post, telephone, and telegraph (PTT) operating companies are generally tax exempt. The tax treatment varies according to the code of different states. There is no evidence suggesting preferential or advantageous national tax treatment for ISO signatories simply because of their status as ISO signatories.

National Contracts—Preference for ISOs

There is little data available upon which any conclusion may be drawn regarding any preference given to the ISOs or their signatories. No embassy reported any indication of improper preference although it may be assumed that where state-owned or monopoly providers exist they are recipients of such contracts.

Similarly, there is no evidence that the ISOs have received undue preference in the award of contracts from the U. S. government.

Access to Spectrum and Orbital Slots

In the Comsat Non-Dominant Order, the FCC took note of INTELSAT's unique and favorable position in acquiring orbital slots and spectrum and stated that it agreed "with PanAmSat and

[16] See Comments of PanAmSat Corporation at 22 (May 12, 1999). Comments are available at NTIA's website http://www.ntia.doc.gov.

other commenters that Comsat through INTELSAT has a significant competitive advantage in obtaining spectrum and orbital locations."[17]

Comsat took exception to PanAmSat's assertions but the FCC summarized the matter in the following fashion:

Comsat's statement, however, incorrectly implies that the Commission exercises its responsibilities as the notifying administration on behalf of INTELSAT in the same manner as it does on behalf of U. S. licensees. As the notifying administration on behalf of INTELSAT, the Commission does not assert any regulatory authority over INTELSAT's decision to register with the ITU (International Telecommunications Union) for spectrum and orbital locations. The Commission only acts as a "copper wire" or "mail box" in officially submitting the filings to the ITU on INTELSAT's behalf. There is no regulatory review of INTELSAT's submissions; they are often transmitted to the ITU the day after being submitted to the Commission by INTELSAT. In comparison, ITU submissions on behalf of applicants for U. S. licenses are subject to rigorous review in connection with the licensing process. Comsat's argument, therefore, does not address the concern raised by PanAmSat. INTELSAT is able to obtain spectrum and orbital locations through the ITU without being subject to any national regulatory review. We conclude that this is a competitive advantage over U. S. licensees.[18]

Advantageous access to the spectrum may be attributed to the procedural advantages of the ISOs and the fact that the ISOs were the original market entrants and, therefore, had first choice of the available resources. For instance, Iridium states that even today the privatized Inmarsat has access to nearly half of the 66 megahertz (MHZ) of the global Mobile Satellite System (MSS) Lband— thereby occupying more spectrum than all the other MSS systems now in existence or planned. In addition, according to Iridium, Europe has already assigned all 30 MHZ of the 2 gigahertz (Ghz) MSS global spectrum available until January 1, 2005, to Inmarsat and its affiliate ICO. Taken together, this means that Inmarsat and ICO will control approximately 75 percent of the global MSS spectrum available until 2005. By comparison, Iridium itself only has access to 5.15 MHZ, while Globalstar, Ellipso, and Constellation will share a total of 27.85 MHz.

Thus, the ISOs have been able to acquire preferred access to orbital slots and associated spectrum frequency. With privatization, however, it is expected that the former ISOs will conduct themselves as normal corporate entities and, correspondingly, be treated the same as any other satellite service provider seeking regulatory approval for space systems. In this context, it should be noted that INTELSAT deregistered five orbital slots, and transferred others, following the creation of its spinoff, New Skies.

Conclusion

This chapter has briefly reviewed the advantages identified in IAFCA as important for examination. The review suggests that the ISOs have, in the past, had advantages through use of their privileges and immunities; by market access control by many of their signatories; and by their ease of access to spectrum frequency and orbital slots. Data is not available to further analyze the extent of advantages that may have been derived from other issues identified by the Committee on Commerce for review, such as tax advantages, advantages in regulatory treatment, and advantages through government ownership or government contracts.

Areas where advantages have existed appear to be diminishing. The reason that these advantages are disappearing is the result of the combined effect of ISO privatization, global and

[17] See Comsat Non-Dominant Order at para. 92.
[18] Id.

national trends in telecommunications liberalization and competition, the WTO/ GBT agreement, and ongoing attention of U. S. industry and government.

It is important to distinguish between the ISOs, their signatories, and national governments. The ISOs themselves were established in an entirely different era and have been committed to the dual purposes of providing a communications service on a commercial basis while also fulfilling certain public service obligations.

The ISOs provided a very small, often negligible increment of revenue to the signatories, with the exception of Comsat. Conduct by the signatories during, for instance, the emergence of separate systems, probably reflected their desire to preserve the status quo, than any willful intent by the senior management of a signatory to retain control of a market that produced minor revenues.

Thus, we expect that the advantages that have been afforded to INTELSAT in the past have withered away, or will do so with privatization.

Appendix A: International Anti-Bribery and Fair Competition Act of 1998

One Hundred Fifth Congress of the United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday, the twenty-seventh day of January, one thousand nine hundred and ninety-eight

An Act

To amend the Securities Exchange Act of 1934 and the Foreign Corrupt Practices Act of 1977 to improve the competitiveness of American business and promote foreign commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the ‘International Anti-Bribery and Fair Competition Act of 1998’.

SEC. 2. AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT GOVERNING ISSUERS.

(a) PROHIBITED CONDUCT.—Section 30A(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1(a)) is amended—

(1) by amending subparagraph (A) of paragraph (1) to read as follows:

‘(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or’;

(2) by amending subparagraph (A) of paragraph (2) to read as follows:

‘(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or’; and

(3) by amending subparagraph (A) of paragraph (3) to read as follows:

‘(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or’.

(b) OFFICIALS OF INTERNATIONAL ORGANIZATIONS.—Paragraph (1) of section 30A(f) of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1(f)(1)) is amended to read as follows:

‘(1)(A) The term ‘foreign official’ means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

‘(B) For purposes of subparagraph (A), the term ‘public international organization’ means—

‘(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

‘(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.’.

(c) ALTERNATIVE JURISDICTION OVER ACTS OUTSIDE THE UNITED STATES.—Section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) is amended—

(1) by adding at the end the following:

‘(g) ALTERNATIVE JURISDICTION.—

‘(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 12 of this title or which is required to file reports under section 15(d) of this title, or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

‘(2) As used in this subsection, the term ‘United States person’ means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.’;

(2) in subsection (b), by striking ‘Subsection (a)’ and inserting ‘Subsections (a) and (g)’; and

(3) in subsection (c), by striking ‘subsection (a)’ and inserting ‘subsection (a) or (g)’.

(d) PENALTIES.—Section 32(c) of the Securities Exchange Act of 1934 (15 U.S.C. 78ff(c)) is amended—

(1) in paragraph (1)(A), by striking ‘section 30A(a)’ and inserting ‘subsection (a) or (g) of section 30A’;

(2) in paragraph (1)(B), by striking ‘section 30A(a)’ and inserting ‘subsection (a) or (g) of section 30A’; and

(3) by amending paragraph (2) to read as follows:

‘(2)(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 30A of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

‘(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 30A of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.’.

SEC. 3. AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT GOVERNING DOMESTIC CONCERNS.

(a) PROHIBITED CONDUCT.—Section 104(a) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2(a)) is amended—

(1) by amending subparagraph (A) of paragraph (1) to read as follows:

‘(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or’;

(2) by amending subparagraph (A) of paragraph (2) to read as follows:

‘(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or’; and

(3) by amending subparagraph (A) of paragraph (3) to read as follows:

‘(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or’.

(b) PENALTIES.—Section 104(g) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2(g)) is amended—

(1) by amending subsection (g)(1) to read as follows:

‘(g)(1)(A) PENALTIES.—Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

‘(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.’; and

(2) by amending paragraph (2) to read as follows:

‘(2)(A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

‘(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.’.

(c) OFFICIALS OF INTERNATIONAL ORGANIZATIONS.—Paragraph (2) of section 104(h) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2(h)) is amended to read as follows:

‘(2)(A) The term ‘foreign official’ means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

‘(B) For purposes of subparagraph (A), the term ‘public international organization’ means—

‘(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

‘(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.’.

(d) ALTERNATIVE JURISDICTION OVER ACTS OUTSIDE THE UNITED STATES.—Section 104 of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2) is further amended—

(1) by adding at the end the following:

‘(i) ALTERNATIVE JURISDICTION.—

‘(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

‘(2) As used in this subsection, the term ‘United States person’ means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.’;

(2) in subsection (b), by striking ‘Subsection (a)’ and inserting ‘Subsections (a) and (i)’;

(3) in subsection (c), by striking ‘subsection (a)’ and inserting ‘subsection (a) or (i)’; and

(4) in subsection (d)(1), by striking ‘subsection (a)’ and inserting ‘subsection (a) or (i)’.

(e) TECHNICAL AMENDMENT.—Section 104(h)(4)(A) of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2(h)(4)(A)) is amended by striking ‘For purposes of paragraph (1), the’ and inserting ‘The’.

SEC. 4. AMENDMENTS TO THE FOREIGN CORRUPT PRACTICES ACT GOVERNING OTHER PERSONS.

Title I of the Foreign Corrupt Practices Act of 1977 is amended by inserting after section 104 (15 U.S.C. 78dd-2) the following new section:

‘SEC. 104A. PROHIBITED FOREIGN TRADE PRACTICES BY PERSONS OTHER THAN ISSUERS OR DOMESTIC CONCERNS.

‘(a) PROHIBITION.—It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 or a domestic concern (as defined in section 104 of this Act), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

‘(1) any foreign official for purposes of

‘(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

‘(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

‘in order to assist such person in obtaining or retaining business for or with, or directing business to, any person;

‘(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

‘(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

‘(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

‘in order to assist such person in obtaining or retaining business for or with, or directing business to, any person; or

‘(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

‘(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party

official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

‘(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

‘in order to assist such person in obtaining or retaining business for or with, or directing business to, any person.

‘(b) EXCEPTION FOR ROUTINE GOVERNMENTAL ACTION.—Subsection (a) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

‘(c) AFFIRMATIVE DEFENSES.—It shall be an affirmative defense to actions under subsection (a) of this section that—

‘(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official’s, political party’s, party official’s, or candidate’s country; or

‘(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

‘(A) the promotion, demonstration, or explanation of products or services; or

‘(B) the execution or performance of a contract with a foreign government or agency thereof.

‘(d) INJUNCTIVE RELIEF.—

‘(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

‘(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

‘(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony

touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

‘(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

‘(e) PENALTIES.—

‘(1)(A) Any juridical person that violates subsection (a) of this section shall be fined not more than $2,000,000.

‘(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

‘(2)(A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

‘(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

‘(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

‘(f) DEFINITIONS.—For purposes of this section:

‘(1) The term ‘person’, when referring to an offender, means any natural person other than a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

‘(2)(A) The term ‘foreign official’ means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

‘(B) For purposes of subparagraph (A), the term ‘public international organization’ means—

‘(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (22 U.S.C. 288); or

‘(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

‘(3)(A) A person’s state of mind is knowing, with respect to conduct, a circumstance or a result if—

‘(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

‘(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

‘(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

‘(4)(A) The term ‘routine governmental action’ means only an action which is ordinarily and commonly performed by a foreign official in—

‘(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

‘(ii) processing governmental papers, such as visas and work orders;

‘(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

‘(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

‘(v) actions of a similar nature.

‘(B) The term ‘routine governmental action’ does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

‘(5) The term ‘interstate commerce’ means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—

‘(A) a telephone or other interstate means of communication, or

‘(B) any other interstate instrumentality.’.

SEC. 5. TREATMENT OF INTERNATIONAL ORGANIZATIONS PROVIDINGCOMMERCIAL COMMUNICATIONS SERVICES.

(a) DEFINITION.—For purposes of this section:

(1) INTERNATIONAL ORGANIZATION PROVIDING COMMERCIAL COMMUNICATIONS SERVICES.—The term ‘international organization providing commercial communications services’ means—

(A) the International Telecommunications Satellite Organization established pursuant to the Agreement Relating to the International Telecommunications Satellite Organization; and

(B) the International Mobile Satellite Organization established pursuant to the Convention on the International Maritime Satellite Organization.

(2) PRO-COMPETITIVE PRIVATIZATION.—The term ‘pro-competitive privatization’ means a privatization that the President determines to be consistent with the United States policy of obtaining full and open competition to such organizations (or their successors), and nondiscriminatory market access, in the provision of satellite services.

(b) TREATMENT AS PUBLIC INTERNATIONAL ORGANIZATIONS.—

(1) TREATMENT.—An international organization providing commercial communications services shall be treated as a public international organization for purposes of section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) and sections 104 and 104A of the Foreign Corrupt Practices Act of 1977 (15 U.S.C. 78dd-2) until such time as the President certifies to the Committee on Commerce of the House of Representatives and the Committees on Banking, Housing and Urban Affairs and Commerce, Science, and Transportation that such international organization providing commercial communications services has achieved a pro-competitive privatization.

(2) LIMITATION ON EFFECT OF TREATMENT.—The requirement for a certification under paragraph (1), and any certification made under such paragraph, shall not be construed to affect the administration by the Federal Communications Commission of the Communications Act of 1934 in authorizing the provision of services to, from, or within the United States over space segment of the international satellite organizations, or the privatized affiliates or successors thereof.

(c) EXTENSION OF LEGAL PROCESS:

(1) IN GENERAL: Except as required by international agreements to which the United States is a party, an international organization providing commercial communications services, its officials and employees, and its records shall not be accorded immunity from suit or legal process for any act or omission taken in connection with such organization’s capacity as a provider, directly or indirectly, of commercial telecommunications services to, from, or within the United States.

(2) NO EFFECT ON PERSONAL LIABILITY: Paragraph (1) shall not affect any immunity from personal liability of any individual who is an official or employee of an international organization providing commercial communications services.

(3) EFFECTIVE DATE: This subsection shall take effect on May 1, 1999.

(d) ELIMINATION OR LIMITATION OF EXCEPTIONS:

(1) ACTION REQUIRED: The President shall, in a manner that is consistent with requirements in international agreements to which the United States is a party, expeditiously take all appropriate actions necessary to eliminate or to reduce substantially all privileges and immunities that are accorded to an international organization described in subparagraph (A) or (B) of subsection (a)(1), its officials, its employees, or its records, and that are not eliminated pursuant to subsection (c).

(2) DESIGNATION OF AGREEMENTS: The President shall designate which agreements constitute international agreements to which the United States is a party for purposes of this section.

(e) PRESERVATION OF LAW ENFORCEMENT AND INTELLIGENCE FUNCTIONS.—Nothing in subsection (c) or (d) of this section shall affect any immunity from suit or legal process of an

international organization providing commercial communications services, or the privatized affiliates or successors thereof, for acts or omissions-

(1) under chapters 119, 121, 206, or 601 of title 18,United States Code, the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801 et seq.), section 514 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 884), or Rules 104, 501, or 608 of the Federal Rules of Evidence;

(2) under similar State laws providing protection to service providers cooperating with law enforcement agencies pursuant to State electronic surveillance or evidence laws, rules, regulations, or procedures; or

(3) pursuant to a court order.

(f) RULES OF CONSTRUCTION.—

(1) NEGOTIATIONS.—Nothing in this section shall affect the President's existing constitutional authority regarding the time, scope, and objectives of international negotiations.

(2) PRIVATIZATION.—Nothing in this section shall be construed as legislative authorization for the privatization of INTELSAT or Inmarsat, nor to increase the President's authority with respect to negotiations concerning such privatization.

SEC. 6. ENFORCEMENT AND MONITORING.

(a) REPORTS REQUIRED.—Not later than July 1 of 1999 and each of the 5 succeeding years, the Secretary of Commerce shall submit to the House of Representatives and the Senate a report that contains the following information with respect to implementation of the Convention:

(1) RATIFICATION.—A list of the countries that have ratified the Convention, the dates of ratification by such countries, and the entry into force for each such country.

(2) DOMESTIC LEGISLATION.—A description of domestic laws enacted by each party to the Convention that implement commitments under the Convention, and assessment of the compatibility of such laws with the Convention.

(3) ENFORCEMENT.—As assessment of the measures taken by each party to the Convention during the previous year to fulfill its obligations under the Convention and achieve its object and purpose including—

(A) an assessment of the enforcement of the domestic laws described in paragraph (2);

(B) an assessment of the efforts by each such party to promote public awareness of such domestic laws and the achievement of such object and purpose; and

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

(4) LAWS PROHIBITING TAX DEDUCTION OF BRIBES.—An explanation of the domestic laws enacted by each party to the Convention that would prohibit the deduction of bribes in the computation of domestic taxes.

(5) NEW SIGNATORIES.—A description of efforts to expand international participation in the Convention by adding new signatories to the Convention and by assuring that all countries which are or become members of the Organization for Economic Cooperation and Development are also parties to the Convention.

(6) SUBSEQUENT EFFORTS.—An assessment of the status of efforts to strengthen the Convention by extending the prohibitions contained in the Convention to cover bribes to political parties, party officials, and candidates for political office.

(7) ADVANTAGES.—Advantages, in terms of immunities, market access, or otherwise, in the countries or regions served by the organizations described in section 5(a), the reason for such advantages, and an assessment of progress toward fulfilling the policy described in that section.

(8) BRIBERY AND TRANSPARENCY.—An assessment of anti-bribery programs and transparency with respect to each of the international organizations covered by this Act.

(9) PRIVATE SECTOR REVIEW.—A description of the steps taken to ensure full involvement of United States private sector participants and representatives of nongovernmental organizations in the monitoring and implementation of the Convention.

(10) ADDITIONAL INFORMATION.—In consultation with the private sector participants and representatives of nongovernmental organizations described in paragraph (9), a list of additional means for enlarging the scope of the Convention and otherwise increasing its effectiveness. Such additional means shall include, but not be limited to, improved recordkeeping provisions and the desirability of expanding the applicability of the Convention to additional individuals and organizations and the impact on United States business of section 30A of the Securities Exchange Act of 1934 and sections 104 and 104A of the Foreign Corrupt Practices Act of 1977.

(b) DEFINITION.—For purposes of this section, the term "Convention" means the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on November 21, 1997, and signed on December 17, 1997, by the United States and 32 other nations.

Appendix B: OECD Documents

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

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

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

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

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 whicha declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

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

Article 11 - Responsible Authorities

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

Article 12 - Monitoring and Follow-up

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

Article 13 - Signature and Accession

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

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

Article 14 - Ratification and Depositary

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

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

Article 15 - Entry into Force

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

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

Article 16 - Amendment

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

Article 17 - Withdrawal

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

ANNEX
STATISTICS ON OECD EXPORTS

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

New Zealand	6,663	0.4	
Czech Republic ***	6,263	0.3	
Greece *	4,606	0.3	
Iceland	949	0.1	
Total OECD	**1,801,661**	**100.0**	

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

Source: OECD, (1) IMF

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

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

Adopted by the Negotiating Conference on

November 21, 1997

General:

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

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

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

Re paragraph 1:

Article 1 establishes a standard to be met by Parties, but does not require them to utilize its precise terms in defining the offense under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offense does not require proof of elements beyond those which would be required to be proved if the offense were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically

limited to this case, could both comply with this Article. Similarly, a statute which defined the offense in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.

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

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

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

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

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

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

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

Re paragraph 2:

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

Re paragraph 4:

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

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

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

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

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

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

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

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

Article 2. Responsibility of Legal Persons:

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

Article 3. Sanctions:

Re paragraph 3:

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

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

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

Re paragraph 4:

Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in

public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re paragraph 1:

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

Re paragraph 2:

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

Article 5. Enforcement:

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

Article 7. Money Laundering:

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

Article 8. Accounting:

Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has

implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offenses referred to in Article 8 will generally occur in the company's home country, when the bribery offense itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

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

Re paragraph 1:

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

Re paragraph 2:

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

Article 10. Extradition

Re paragraph 2:

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

Article 12. Monitoring and Follow-up:

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

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

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

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

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

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

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

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

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

Article 13. Signature and Accession:

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

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

Adopted by the Council on May 23, 1997

THE COUNCIL

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

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

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

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

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

Welcoming other recent developments which further advance international understanding and cooperation 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 cooperation, 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 cooperation 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 cooperation 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 cooperation with the Committee for Fiscal Affairs, the Development Assistance Committee and other OECD bodies, as appropriate. This follow-up will include, in particular:

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

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

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

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

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

IX. NOTES the obligation of Member countries to 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 cooperation 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 cooperate 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.

Appendix C: U.S. Responses to OECD Questionnaires

Response of the United States to the Phase I Questionnaire
DAFFE/ IME/ BR(98) 8/ ADD1/ FINAL
October 30, 1998

QUESTIONNAIRE 1999: FIRST SELF-EVALUATION AND MUTUAL REVIEW

A. QUESTIONS CONCERNING THE CONVENTION
Formal Issues
F. 1. Signature of the Convention:

The United States signed the Convention on December 17, 1997.

F. 2. Ratification of the Convention:

The President of the United States sent the Convention to the Senate on May 1, 1998 for its advice and consent to ratification. The Senate voted its advice and consent on July 31, 1998, and the President is expected to sign the instrument of ratification in early November.

F. 3 Enactment of any necessary implementing legislation:

The Administration sent draft legislation implementing the Convention to the Congress on May 4, 1998. The Congress passed implementing legislation on October 21, 1988, and it is expected that the President will sign it into law in early November. A copy of the implementing legislation is attached at Tab 1 and a copy of the amended FCPA is attached at Tab 2.

F. 4. Entry into force of any necessary implementing legislation:

The implementing legislation will enter into force upon signature by the President.

Substantive issues
0. The Convention as a whole
0.1 Describe the general approach of your national law to implementing the Convention (1 page maximum length). (Note Commentaries 1 and 2.)

The United States believes the bribery of foreign government officials in international business transactions is a serious threat to the development and preservation of democratic institutions and strongly supports effective implementation of the Convention to assure fair and open competition in international business. Since 1977, the United States has outlawed bribery of foreign officials in commercial transactions by its nationals and companies organized under its laws. In addition, the United States has worked with other countries and in various international fora, including the OECD, the United Nations, the Council of Europe, and the Organization of American States, to encourage the enactment of similar prohibitions by other major trading countries.

The Convention approved by this Working Group and signed by representatives of the OECD member States and five other countries in December 1997closely parallels the United States Foreign Corrupt Practices Act (the "FCPA"). In a few areas, e. g., coverage of bribes by non-

nationals and coverage bribes to officials of international organizations, the Convention was broader than the FCPA, and the United States has enacted legislation to conform the FCPA to those provisions of the Convention. In other areas, e. g., coverage of political parties, party officials, and candidates for public office, the Convention is narrower than the FCPA, and the United States continues to encourage that these areas be addressed.

1. Article 1. The Offence of Bribery of Foreign Public Officials

1.1 Describe how your national law and legal system implement the requirements of Article 1, concerning the offence of bribery of foreign public officials. In this description pay particular attention to explaining how your law treats the elements in the following checklist. The Commentaries corresponding to the Article provide guidance on the interpretation of certain elements.

The Foreign Corrupt Practices Act of 1977 (the "FCPA"), as amended, 15 U. S. C. §§ 78m, 78dd-1, *et seq.,* requires all publicly-traded corporations to maintain transparent books and records and prohibits *all* U. S. companies and nationals from making any payment or gift, or offering to do so, to a broad range of foreign public officials. Specifically, the FCPA prohibits:

1. the use of the mails or other means or instrumentality of interstate commerce

2. corruptly

3. in furtherance of an offer, payment, promise to pay or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value

4. to any foreign official, foreign political party, foreign political party official, or any other person knowing that all or a portion of such gift will be offered, given or promised, directly or indirectly, to such persons

5. for the purpose of:

-influencing any act or decision of such officials,
-inducing such officials to do or omit to do any act in violation of the lawful duty of such officials,
-obtaining an improper advantage, or
-inducing such officials to use their influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality
6. to assist the payor of such payment or gift in obtaining or retaining business for or with, or directing any business to, any person.

Prior to its 1998 amendments, the FCPA substantially implemented Article 1 of the Convention. It established a criminal offense for U. S. nationals and businesses to bribe, or attempt to bribe, foreign officials in connection with obtaining or retaining business. To fully implement the Convention, the United States has amended the FCPA to cover prohibited acts by "any person," including foreign nationals who take any act within the United States in furtherance of a bribe or attempted bribe; to assert nationality jurisdiction over U. S. nationals and businesses for acts taken outside the United States; to expand the definition of foreign public official to include officials of international organizations; and to explicitly incorporate the Convention's terminology with respect to "other improper advantage."

In addition to the subjecting American companies to criminal prosecutions, the passage of the FCPA encouraged American businesses engaged in international business to develop comprehensive corporate compliance programs, in which corporations establish procedures to

prevent the payment of bribes, conduct internal investigations when allegations of bribery are brought to management's attention, and voluntarily disclose to the government any bribery uncovered as a result of their investigation. The combination of vigilant enforcement by the government and voluntary compliance programs by the private sector, in our view, has significantly reduced the payment of bribes by American businesses.

In addition to criminal penalties, the FCPA provides for significant civil and penal remedies, including injunctions, fines, and imprisonment. Civil enforcement responsibility over public companies is entrusted to the United States Securities and Exchange Commission (the "SEC"), and criminal enforcement over all companies and individuals, as well as civil enforcement over non-public companies, is entrusted to the Department of Justice.

- **any person**

As amended, the FCPA covers bribes paid by "any person." Prior to its 1998 amendments, the FCPA prohibited bribes and attempted bribes by "issuers" and "domestic concerns," as well as their officers, directors, employees, agents, and their shareholders acting on behalf of the issuer. 15 U. S. C. §§ 78dd-1, 78dd-2. "Issuers" included any corporation, domestic or foreign, that had registered a class of securities with the SEC or is required to file reports with the SEC, i. e., any corporation with its stocks, bonds, or American depository receipts traded on U. S. stock exchanges or the NASDAQ Stock Market. "Domestic concerns" included all citizens, nationals, and residents of the United States as well as all business entities, other than issuers, that had their principal place of business in the United States or which were organized under the laws of the United States or a political subdivision thereof. See 15 U. S. C. § 78dd-2(h)(1). The 1998 amendments extended coverage of the FCPA to all other persons, natural or juridical, who do any act in furtherance of a bribe while in the territory of the United States. *See* 15 U. S. C. § 78dd3.

- **intentionally**

The FCPA requires that the person charged have undertaken an act in furtherance of the unlawful payment "corruptly." "Corruptly" requires intent. As stated in the legislative history of the FCPA: The word 'corruptly' is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome. *See* Senate Report No. 114, 95th Cong., 1st Sess. 10, *reprinted in* 1977 U. S. Code Cong. & Ad. News 4098, 4108.

- **to offer, promise, or give**

The FCPA covers acts in furtherance of "an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value." *See* 18 U. S. C. §§ 78dd-1(a); 78dd-2(a); 78dd-3(a).

- **any undue pecuniary or other advantage**

The FCPA covers both the payments of money or the gift "of anything of value." *See* 18 U. S. C. §§ 78dd-1(a); 78dd-2(a); 78dd-3(a).

- **whether directly or through intermediaries**

The FCPA prohibits payments or gifts (or offers thereof) either directly or through intermediaries. An unlawful payment under the FCPA includes payments made to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly" to a foreign official. 15 U. S. C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

- **to a foreign official**

As amended, the FCPA definition of "foreign official" includes "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." *See* 15 U. S. C. §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2).

The FCPA thus applies to payments to foreign officials who are employees of "instrumentalities" of foreign governments and public international organizations. Although the FCPA does not contain an explicit reference to "public enterprises" or any definition thereof, the United States has consistently applied to the FCPA to cover bribery of officials of public enterprises. State-owned business enterprises may, in appropriate circumstances, be considered instrumentalities of a foreign government and their officers and employees to be foreign officials. The Department of Justice, which enforces the criminal provisions of the FCPA, has not adopted a bright-line test for determining which enterprises are instrumentalities. Among the factors that it considers are the foreign state's own characterization of the enterprise and its employees, i. e., whether it prohibits and prosecutes bribery of the enterprise's employees as public corruption, the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government.

The FCPA also prohibits payments to "any candidate for foreign political office" and "any foreign political party or official thereof" to influence that party's or individual's decision-making or to induce that party or individual to take any act or to use its or his influence in connection with obtaining or retaining business.

Although the FCPA does not define "foreign country," Other provisions of the U. S. Code provide guidance. For instance, the Foreign Agent Registration Act, which has been incorporated into other statutes, provides:

The term "government of a foreign country" includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States.

22 U. S. C. § 611(e). *See also* 5 U. S. C. § 7342(a)(2) (gifts from foreign governments). Title 18 of the United States Code, which contains most federal criminal offenses (but not the FCPA), provides:

The term "foreign government" … includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.

Finally, the United States has made specific provisions for certain governments. For instance, although the United States does not recognize Taiwan as an independent sovereign state, the U. S. Code provides that wherever U. S. laws refer to foreign countries or governments such terms

should be read to include Taiwan and such laws, including the FCPA, should apply with respect to Taiwan. *See* 22 U. S. C. § 3303.

- **for that official or for a third party**

Whether the public official benefitted personally from an unlawful payment or gift or directed that the payment or gift be directed to a third person is irrelevant under the FCPA. The sole issue is whether the payment or gift (or offer or promise) of money or anything of value was made to the public official.

- **in order that the official act or refrain from acting in relation to the performance of official duties**

The FCPA prohibits payments that are intended to "influenc[e] any act or decision of [a] foreign official in his official capacity, or [to] induc[e] such foreign official to do or omit to do any act in violation of the lawful duty of such official, or [to] induc[e] such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality." *See* 18 U. S. C. §§ 78dd-1(a); 78dd-2(a); 78dd-3(a).

The FCPA includes payments to induce a foreign public official to use his influence, whether or not the award of specific business is within his authorized duties.

- **in order to obtain or retain business or other improper advantage**

The FCPA prohibits payments made to influence a foreign public official's decision or to induce him to do or omit to do an act "to assist such [issuer, domestic concern, or other person] in obtaining or retaining business for or with, or directing business to, any person." *See* 18 U. S. C. § 78dd-1(a), 78dd-2(a), 78dd-3(a). The 1998 amendments to the FCPA clarify that the FCPA covers payments to" secure any improper advantage" in connection with obtaining or retaining such business. *See id.*

The legislative history of the FCPA, even prior to the 1998 amendments, made it clear that "' retaining business' . . . is not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, such as the payment to a foreign official for the purpose of obtaining more favorable tax treatment." H. R. Conf. Rep. No. 576, 100th Cong., 2nd Sess. 918, *reprinted in* 1988 U. S. Code Cong. & Ad. News 1547, 1951.

Under the FCPA, it is the payor's intent that is relevant, not the actual result. It is not a defense that the payment was gratuitous. Thus, even if the payor was the most qualified bidder and would have received the contract without making the unlawful payment, the payor's corrupt intent is sufficient to obtain a conviction.

The FCPA does not prohibit "facilitating or expediting payment[s] . . . to expedite or to secure the performance of a routine governmental action." 15 U. S. C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b). The FCPA provides an illustrative list of what qualifies as "routine governmental action." This list includes:

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; and

(v) actions of a similar nature.

The FCPA, however, states that "routine governmental action" does not include "any decision . . . to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party." 15 U. S. C. §§ 78dd-1(f)(3)(B), 78dd-2(h)(4)(B), 78dd-3(f)(4)(B).

- **in the conduct of international business**

The FCPA is limited to payments to obtain or retain business. Such payments, when made to foreign public officials by U. S. nationals or business entities, necessarily involve "international" business.

1.2 On what basis does your legal system establish complicity in the bribery of a foreign public official as a criminal offense?

Complicity in a crime is considered "aiding and abetting" under U. S. law. Aiding and abetting of any crime is itself a crime under United States law, and a person convicted of aiding and abetting a crime is punishable to the same extent as if he had committed the crime himself. *See* 18 U. S. C. § 2(a) (" Whoever . . . aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). Similarly, one who causes another to commit a crime is punishable as a principal under U. S. law. *See* 18 U. S. C. § 2(b).

Because these provisions apply to all crimes under U. S. law, the FCPA does not itself contain an explicit aiding and abetting provision. The FCPA does, however, contain an explicit prohibition on the "authorization of the payment of any money, or . . . authorization of the giving of anything of value." *See* 18 U. S. C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).

Under U. S. law, the crime is complete upon the authorization of the bribe, regardless of whether the bribe is actually offered or paid and regardless of whether it is successful, provided that the jurisdictional element is satisfied. However, where a person encourages or incites a third party to commit an act, but does not himself do any act within the scope of the FCPA, e. g., where he is not in a position to authorize the act, that person can only be prosecuted if the third party actually violates the FCPA. Under U. S. law, a person who "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal" in the crime. 18 U. S. C. § 2. As discussed herein, it is not necessary that the bribe be actually paid or that it be successful, it is only necessary that the third party violate the FCPA by offering, promising, or authorizing the unlawful payment or gift.

1.3 How does your legal system treat attempt and conspiracy to bribe a domestic public official? How are attempt and/ or conspiracy treated with respect to bribery of a foreign public official?

The FCPA is modeled on the United States law concerning bribery of a domestic official, *see* 18 U. S. C. § 201, and the treatment of attempt and conspiracy under both laws is the same. Under U. S. law, it is a crime to conspire to commit any other crime. *See* 18 U. S. C. § 371. Thus, there is no separate conspiracy provision either in the United States' domestic bribery laws or in the FCPA. The United States has repeatedly brought conspiracy prosecutions for conspiracies to

violate the FCPA. *See, most recently, United States v. Mead ,* Cr. 98-250-01 (D. N. J. 1998); *United States v. Crites,* Cr. 3-98-073 (S. D. Ohio 1998).

There is no general "attempt offense" under U. S. law. However, neither a completed payment nor a successful result is a requirement under the FCPA. *See* Senate Report No. 114, 95th Cong., 1st Sess. 10, *reprinted in* 1977 U. S. Code Cong. & Ad. News 4098, 4108 (The FCPA "does not require that the act be fully consummated, or succeed in producing the desired result."). Both laws prohibit an *offer* or *promise* as well as a payment. The legislative history on this point is also very clear: a corrupt offer is sufficient. This is the same approach as is contained in the United States' laws concerning bribery of a domestic official. *See* 18 U. S. C. § 201.

2. Article 2: Responsibility of Legal Persons
2.1 Does your national law or legal system establish criminal responsibility of legal persons for the bribery of a foreign public official? If it does, describe with a significant level of detail how criminal liability of legal persons is applied. Address questions such as:

Which legal entities or which companies are subject to criminal responsibility? Are state-owned or state-controlled companies subject to criminal responsibility?

Is the criminal responsibility of the legal person based on a strict liability concept, or does it depend on a culpable act by a representative of the company??

Is the criminal responsibility of the legal person engaged by the act of a high level executive of the entity or by the act of any employee?

Under general legal principles, the United States holds legal persons criminally responsible for the bribery of a foreign public official, as it does for any other crime. The United States Code provides that the "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U. S. C. § 1. Prior to the 1998 amendments, the FCPA applied only to "issuers," a term that, in general, refers to publicly-traded companies, *see* 15 U. S. C. § 78dd-1, and "domestic concerns," a term that was defined to include "any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship." *See* 15 U. S. C. § 78dd-2(h)(1)(B). The 1998 amendments expanded the FCPA's coverage to any legal person, wherever incorporated, that takes any act in furtherance of an unlawful bribe within the territory of the United States.

The United States has approximately eleven mixed-ownership (governmental/ private) corporations and seventeen wholly-owned Government corporations, most of which are involved in the banking system either by making credit available or guaranteeing loans. *See* 31 U. S. C. § 9101. The United States has never brought a criminal prosecution against a government-owned corporation under the FCPA.(1) Nothing in the statute, however, would prohibit such a prosecution. Thus, if a government-owned enterprise is organized as a corporate identity according to the laws of the state of incorporation or and thus falls within the definition of a "domestic concern," "issuer," or "person" under the FCPA, the Department of Justice could bring a criminal prosecution against such an enterprise.

With the exception of certain regulatory offenses related to health and safety, the United States does not apply strict liability in the case of criminal liability. A corporation is held accountable for the unlawful acts of its officers, employees, and agents under a *respondeat superior* theory when the employee acts (i) within the scope of his or her duties and (ii) for the benefit of the corporation. In both instances, these elements are interpreted broadly. For example, an employee may be entrusted to market a corporation's goods. If he commits a crime in the course of and related to the marketing of the corporation's goods, that crime will be deemed to have been in the scope of

his duties. Similarly, an employee may act for many purposes, most of which may be in his own interests. However, if the corporation derives a benefit from the employee's unlawful acts, that act will be deemed to have been for its benefit. Thus, a corporation is generally liable for the acts of its employees with the limited exception of acts that are truly outside the employee's assigned duties or which are contrary to the corporation's interests, e. g., where the corporation is the *victim* rather than the beneficiary of the employee's unlawful conduct.

Corporate criminal liability is premised on the act of *any* corporate employee, not merely high-level executives. Participation, acquiescence, knowledge, or authorization by higher level employees or officers, however, will be relevant to the determination of the appropriate sanction. Under the applicable sentencing guidelines, higher fines may be imposed when a corporation's management participates in or fails to take appropriate steps to prevent unlawful conduct.

2.2 If the answer to the initial question in 2.1 above is "no," describe with a significant level of detail how your national law or legal system establishes the liability of legal persons for the bribery of a foreign public official. As in 2.1, address questions such as:

Which legal entities or which companies are subject to responsibility for bribery of a foreign public official? Are state-owned or state-controlled companies subject to responsibility for the offence?

Is the responsibility of the legal person based on a strict liability concept, or does it depend upon a culpable act by a representative of the company?

Is the responsibility of the legal person engaged by the act of a high level executive of the entity or by the act of any employee?

The United States' answer to 2.1 was "yes."

3. Article 3: Sanctions

3.1 Describe the criminal penalties which your legal system applies to bribery of domestic public officials.

The relevant statute is 18 U. S. C. § 201, which provides for a fine of "not more than three times the monetary equivalent of the thing of value [offered or given to the public official]" or imprisonment for not more than fifteen years, or both, and the possibility of disqualification from holding "any office of honor, trust, or profit under the United States." In addition, under the alternative fines provision of the United States Code, the maximum fine is the greater of $250,000 for an individual or $500,000 for an organization or twice the gross pecuniary gain to the defendant or the gross pecuniary loss to the victim of the crime. *See* 18 U. S. C. § 3571. In addition, in cases involving bribery related to a government contract, an organization or individual may be barred from doing business with the United States government generally or with specific agencies. See *Federal Acquisition Regulation* 9.4 (48 C. F. R. Subpt. 9.4) (disbarment from all government contracting for conviction or civil judgment for fraud or other offense indicating lack of business integrity); *see also* Foreign Assistance Act of 1961 § 237(1) (Overseas Private Investment Corporation); 7 C. F. R. § 1493.270 (Commodity Credit Corporation).

3.2 Describe the effective, proportionate, and dissuasive (nature and level of) criminal penalties for bribery of a foreign public official for natural, and, if applicable, legal persons.

The FCPA provides that a legal person may be sentenced to pay a fine of not more than $2,000,000 and that a natural person may be sentenced to pay a fine of not more than $100,000

and imprisoned not more than five years. As with bribery of domestic public officials, the actual fines that may be imposed are substantially higher due to the alternative fines provisions of the United States Code. Thus, the maximum fine is the greater of $250,000 for an individual or $500,000 for an organization or twice the gross pecuniary gain to the defendant or the gross pecuniary loss to the victim of the crime. *See* 18 U. S. C. § 3571. Thus, defendants in FCPA cases have often been fined greatly in excess of the amounts specified in the FCPA itself. Further, defendants convicted of FCPA offenses risk disbarment from federal contracting, particularly in the sale of military equipment to foreign governments, sales that are regulated by the U. S. government.

In addition, the FCPA provides for civil penalties, which may include both a fine and an injunction. *See* 15 U. S. C. §§ 78u(c); 78dd-2(d) & (g); 78dd-3(d) & (e); 78ff(c).

3.3. For natural persons, are the penalties of deprivation of liberty in cases of bribery of a foreign public official sufficient to enable effective mutual legal assistance? Explain.

The penalties under the FCPA include imprisonment of natural person for up to five years. FCPA offenses are, therefore, serious offenses under the U. S. legal system, and the United States government will seek legal assistance from other countries to aid in the prosecution of these offenses.

3.4. Are the penalties of deprivation of liberty in cases of bribery of a foreign public official sufficient to enable extradition? Explain.

The penalties under the FCPA include imprisonment of natural person for up to five years. FCPA offenses are, therefore, serious offenses under the U. S. legal system, and the United States government will seek extradition from other countries.

3.5 If, under your legal system, criminal responsibility is not applicable to legal persons (and hence criminal penalties are not described in the reply to 3.1 above) describe the effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, applicable to legal persons for bribery of foreign officials.

As noted above, criminal responsibility is applicable to legal persons under the United States legal system, and legal persons face substantial criminal sanctions. In addition, however, legal persons are also liable to substantial civil sanctions, including fines and permanent injunctions, and may also be barred from government contracting or from participating in certain foreign sales programs, such as government contract guarantees.

3.6. By what laws or other dispositions does your legal system 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?

As noted above, a defendant that is a legal person may be fined *twice* the pecuniary value of the gross gain from the unlawful payment or $2,000,000, whichever is greater. In addition, although forfeiture is not provided for in the FCPA itself, violations of the FCPA are predicate offenses for the money laundering offense, and forfeiture is available under that provision. *See* 18 U. S. C. §§ 1956 & 981, 982.

3.7. If your legal system does not provide for seizure and confiscation of the bribe, the proceeds of the bribery of a foreign public official, or the property the value of which corresponds to that of such proceeds (the reply to 3.5 is null), describe how your legal system applies monetary sanctions of comparable effect.

See response to 3.5.

3.8. Does your legal system impose additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official? If the answer is "no," has your country considered the imposition of such additional sanctions?

Persons that violate the FCPA are subject to both civil and administrative sanctions. Civil sanctions may include additional fines, as well as a permanent injunction prohibiting them from engaging in the unlawful business practices. Administrative sanctions may include disbarment from government contracting, e. g., government contracting, including defense procurement, *see* 10 U. S. C. §2408 (prohibiting defense-related employment by individuals convicted of procurement-related felony); 48 C. F. R. Subpt. 9.4 (disbarment of any company convicted of crime involving fraud or indicating lack of business integrity); and from participation in various government programs, e. g., overseas investment guarantees. *See,* e. g., Foreign Assistance Act of 1961 § 237(1) (Overseas Private Investment Corporation); 7 C. F. R. § 1493.270 (Commodity Credit Corporation).

4. Article 4: Jurisdiction

4.1 Does your country establish jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory? In what way does your legal system adopt a broad interpretation of the territorial basis for jurisdiction? Explain the cases in which a partial connection of the offense to the territory would enable jurisdiction to be established.

Prior to its amendment in 1998, the FCPA asserted only territorial jurisdiction. It required that the defendant "make use of the mails or any means or instrumentality of interstate commerce … in furtherance of an [unlawful payment, gift, or offer, or authorization of the same]." It was not necessary, however, that the payment, gift, offer, or authorization itself have taken place in the United States, only that an act in furtherance have taken place. Thus, if two officials of a corporation, at least one of whom was in the United States, corresponded (by mail, fax, or Email) or spoke with each other over the telephone concerning a planned unlawful payment, that would be sufficient for the United States to assert jurisdiction, even if the payment itself, the official to be bribed, the person actually paying the bribe, and the money to be used to pay the bribe are all outside the territory of the United States.

The United States interprets "territory" broadly. It includes the actual territorial boundaries of the fifty States, as well as territories, possessions, and commonwealths. In addition, it includes areas within its territorial waters, aboard ships and airplanes flying under its flag, and aboard aircraft en route to the United States.

The 1998 amendments expanded the FCPA to cover "any person." For non-U. S. nationals and non-U. S. companies, the amended FCPA requires that the person to be prosecuted actually have committed an act in furtherance of a bribe within the U. S.

4.2. Does your country have jurisdiction to prosecute its nationals for offenses committed abroad? If the answer is "yes," does it establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles? Describe the conditions under which your country would have jurisdiction to prosecute a national for the offense of bribery of a foreign public official.

Under its constitutional principles, the United States has jurisdiction to prosecute its nationals for offenses committed abroad, although it is a jurisdiction that is rarely invoked. As amended, the FCPA asserts nationality jurisdiction in cases of bribery of foreign government officials. The

amended FCPA reaches all issuers or other businesses "organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof" and all U. S. nationals who "corruptly do any act outside the United States in furtherance of [an unlawful payment, gift, or offer, or authorization thereof]."

4.3. What procedures do you have in place to allow consultations and eventual transfer of a case to another Party which can also establish jurisdiction over an alleged offense described in this Convention?

The United States frequently arranges consultation on such matters through the Department of Justice's Office of International Affairs, which is the Central Authority for the United States on mutual legal assistance matters.

4.4. Has your country reviewed whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials? Have any steps been taken to improve the basis for establishing jurisdiction?

The United States believes that its expansive definition of territorial jurisdiction has been effective and sufficient to reach bribery by U. S. nationals and businesses. However, to close any possible gaps, the United States has expanded the jurisdictional scope of the FCPA to include an assertion of nationality jurisdiction. See 4.2 above.

5. Article 5: Enforcement

5.1. Describe the rules and principles which govern investigation and prosecution of the bribery of a foreign public official. In particular, under what circumstances are your authorities permitted to initiate, suspend, and terminate an investigation or prosecution?

FCPA investigations are subject to the same rules and principles as govern any federal criminal or SEC civil investigation. A prosecutor is required, as always, to make an initial assessment of the merits of the cases, the likelihood of obtaining sufficient evidence to obtain a conviction, and the availability of sufficient investigative and prosecutive resources. Political or economic interests are not relevant to this decision. To ensure that uniform and consistent prosecutive decisions are made in this particular area, all FCPA investigations are supervised by the Criminal Division of the U. S. Department of Justice. Similarly, political or economic interests are not relevant to the SEC's decisions to investigate or bring cases to enforce the civil provisions of the FCPA against issuers.

5.2. Can the investigation and/ or prosecution of the bribery of a foreign public official 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? For what reasons, and under what circumstances?

FCPA prosecution decisions are based on the merits of the case, not political or economic considerations. Political bodies and non-criminal government bodies have no influence on the investigation and prosecution of foreign public officials. FCPA investigations and prosecutions are handled by career prosecutors and supervised by the Criminal Division of the U. S. Department of Justice. There is no requirement that any other agency within the U. S. government be consulted before bringing charges. The SEC, which enforces the civil provisions of the FCPA against issuers, is an independent, nonpartisan agency. SEC investigations are handled by experienced attorneys, under the direction of a five-member Commission.

6. Article 6: Statute of Limitations

6.1. In your legal system, what, if any, is the statute of limitations applicable to the offense of bribery of a foreign public official?

The statute of limitations for FCPA offenses is five years. See 18 U. S. C. § 3282. However, when the government needs to obtain evidence from a foreign country, the statute may be suspended for up to three years. *See* 18 U. S. C. §3292.

7. Article 7: Money Laundering

7.1. Is bribery of a domestic public official a predicate offense for the purpose of application of your country's money laundering legislation? Explain your approach. Does it matter where the bribery occurred?

Bribery of a domestic public official is a predicate offense under the Money Laundering Control Act. *See* 18 U. S. C. § 1956(c)(7)(a) (incorporating 18 U. S. C. § 1961(1), which lists 18 U. S. C. § 201 as a predicate offense). It does not matter where the bribery occurred. The Money Laundering Control Act explicitly provides for extraterritorial jurisdiction over U. S. nationals and, provided that some conduct occurred within the U. S., over non-U. S. nationals. *See* 18 U. S. C. § 1956(f).

7.2. Is bribery of a foreign public official a predicate offense for the purpose of application of your country's money laundering legislation? Explain your approach. Does it matter where the bribery occurred?

Bribery of a foreign public official has been a predicate offense under the United States Money Laundering Control Act since 1992. *See* 18 U. S. C. § 1956(c)(7)(D). As noted, both with respect to the FCPA and the Money Laundering Control Act, where the bribe took place is irrelevant. The Money Laundering Control Act contains an assertion of extraterritorial jurisdiction over U. S. nationals and, in some circumstances, non-U. S. nationals. *See* 18 U. S. C. § 1956(f).

8. Article 8: Accounting

8.1. In the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, does your country prohibit the establishment of off-the-books accounts,

- **the making of off-the-books or inadequately identified transactions,**
- **the recording of non-existent expenditures,**
- **the entry of liabilities with incorrect identification of their object,**
- **the use of false documents**

for the purpose of bribing foreign public officials or hiding such bribery?

In addition to the anti-bribery provisions of the FCPA, the statute also requires issuers with a class of securities registered pursuant to Section 12 of the Securities Exchange Act of 1934 (" Exchange Act") --or any issuer that is required to file reports under Section 15(d) of the Exchange Act— to maintain records that accurately reflect transactions and dispositions of corporate assets, and to maintain systems of internal accounting controls. Section 13(b)(2)(A-B) of the Exchange Act requires that issuers "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer." This section also requires issuers to "devise and maintain a system of internal accounting controls" sufficient to provide reasonable assurance that all transactions engaged in

by the issuer were executed in accordance with management's authorization and were recorded in a fashion that permits preparation of financial statements in conformity with generally accepted accounting principles, and that allows for accountability of assets. The system of internal controls must also provide reasonable assurances that any access to the issuer's assets is authorized, and, finally that periodic reviews are made to determine and correct any irregularities with respect to the accountability for an issuer's assets.

Following the enactment of the FCPA in 1977, the SEC adopted two rules under Section 13 of the Exchange Act to implement the accounting provisions, Rules 13b2-1 and 13b2-2. Rule 13b2-1 prohibits any person from "directly or indirectly falsif[ying] or caus[ing] to be falsified any book, record, or account subject to section 13(b)(2)(a)" of the Exchange Act. That is, the rule prohibits any falsification of an issuer's books and records. Rule 13b2-2 makes it unlawful for directors or officers of an issuer to lie to the issuer's independent auditors. The rule further provides that no director or officer of an issuer shall, directly or indirectly, make or cause to be made, a materially false or misleading statement, or to omit to state, or cause another person to omit to state, any material fact necessary to make the statements made not misleading to an accountant in connection with the (1) audit or examination of the financial statements of an issuer, or (2) the preparation or filing of any document or report filed with the SEC.

8.2. Which companies are subject to these laws and regulations?

The books and records provisions of the FCPA apply to all "issuers," that is, companies with securities registered with the Securities and Exchange Commission.

8.3. Describe the civil, administrative, or criminal penalties for such omissions and falsifications in respect of the books, records, accounts, and financial statements of such companies.

Pursuant to section 21 of the Exchange Act, 15 U. S. C. 78u, the SEC is authorized to bring an action in the United States District Court against issuers to enjoin acts and practices in violation of the Exchange Act, including violations of the FCPA anti-bribery and accounting provisions. Under the Exchange Act, administrative remedies also may be available. In addition to its injunctive powers, the SEC may seek civil monetary penalties of $10,000 for a violation of the anti-bribery provisions of the FCPA. (Section 32(c) of the Exchange Act, codified at 15 U. S. C. 78ff.) For violations of the accounting provisions of the FCPA, the SEC may seek civil monetary penalties. 15 U. S. C. 78u. Moreover, criminal prosecutions may be brought by the Justice Department for "willful" violations of the accounting provisions of the FCPA, which actions can lead to fines of up to $1 million and/ or imprisonment for up to 10 years with respect to any person, except that when a person is other than a natural person, the maximum fine rises to $2.5 million.

9. Article 9: Mutual Legal Assistance

9.1. Under which laws, treaties, and arrangements will your country be able to provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings 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 primary legal vehicle for prompt and effective mutual legal assistance will be the bilateral mutual legal assistance treaties (MLATs) in force between the United States and the other Parties to this Convention. We have MLATs in force with the following signatories to this Convention: Argentina, Canada, Hungary, Italy, Korea, Mexico, the Netherlands, Spain, Switzerland, the United Kingdom, and Turkey. The Congress has approved additional MLATs with Brazil, the Czech Republic, Luxembourg, and Poland, but they are not yet in force. In addition, Title 28, U. S.

Code, Section 1782, authorizes U. S. courts to compel production of evidence for foreign authorities. In addition, various U. S. law enforcement agencies administer individual statutes that provide for cooperation between the agency and its foreign counterparts. Finally, U. S. law and practice permits and encourages informal cooperation, and in many cases mutual assistance will be possible without reliance on statutory or treaty procedures.

9.2. Will such assistance be conditional on dual criminality? If so, will dual criminality be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention?

Under U. S. law, mutual legal assistance is generally not conditional on dual criminality unless such a condition is contained in the mutual legal assistance treaty between the U. S. and the Requesting State. For example, the MLAT between the U. S. and Switzerland requires dual criminality for any assistance that requires compulsory measures.

9.3. Will it be possible for your authorities to decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy? If yes, please explain.

U. S. law generally does not require us to decline mutual legal assistance on the ground of bank secrecy.

10. Article 10: Extradition

10.1. Is bribery of a foreign public official deemed to be an extraditable offense under your country's law and the extradition treaties between your country and Parties?

Whether the bribery of a foreign public official is an extraditable offense depends on the terms of the bilateral extradition treaty in force between the U. S. and the requesting state. In the U. S., extraditable offenses are those prescribed by treaty. When the OECD Convention is in force, the offense described in Article 10(1) of the Convention will be an extraditable offense under every extradition treaty in force between the U. S. and another Party to this Convention.

10.2. In the absence of an extradition treaty with another Party, does you country consider that this Convention is a legal basis for extradition in respect of the offence of bribery of a foreign public official?

The U. S. does not consider this Convention as a legal basis for extradition to any country with which the U. S. has no bilateral extradition treaty in force. In cases where the U. S. does have a bilateral extradition treaty in force, that treaty serves as the legal basis for extradition for offenses covered by this Convention. The United States has bilateral extradition treaties in force with the following countries that signed the Convention: Argentina, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, 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, Spain, Switzerland, Sweden, Turkey, and the U. K. In addition, the United States has signed an extradition treaty with Korea, but it is not yet in force.

10.3. Can your country extradite its nationals for the offence of bribery of a foreign public official?

Yes, the U. S. can extradite its nationals. The U. S. usually draws no distinction between nationals and other persons in extradition matters.

10.4. If the answer to 10.3 is "no", in cases where nationality is the sole reason for declining a request to extradite a person for bribery of a foreign public official, what rules and procedures exist so that the case will be submitted to your country's competent authorities for the purpose of prosecution?

Since the answer to 10.3 is yes, this question is not applicable.

10.5. Is the existence of dual criminality a condition for extradition? if so, is that condition deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention?

Whether dual criminality is a condition for extradition depends on the terms of the applicable extradition treaty. If dual criminality is a condition under the applicable extradition treaty between the U. S. and any other Party to this Convention, the U. S. would deem that condition to be fulfilled if the offense for which extradition is requested is within the scope of Article 1 of the OECD Convention.

11. Article 11: Responsible authorities

11.1 Has your country notified to the OECD Secretary-General an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for the matters of consultation (Art. 4.3), mutual legal assistance (Art. 9), and extradition (Art. 10)?

The United States has not yet made such a notification but expects to do so once the United States deposits its instrument of ratification with the Secretary General. The United States expects to designate the Department of Justice's Office of International Affairs as the responsible authority for consultation and mutual legal assistance and the Department of State as the responsible authority for extradition.

B. QUESTIONS CONCERNING IMPLEMENTATION OF THE 1997 RECOMMENDATION

1. General

1.1 Has your country taken any measures, other than those reported in response to questions in section A above, to meet the goal set forth in Section 1 of the Recommendation, i. e., to deter, prevent, and combat the bribery of foreign public officials in connection with international business transactions?

On June 27, 1996, the United States signed the OAS Inter-American Convention Against Corruption and has since submitted it to the Senate for its advice and consent to ratification. In addition, the United States has participated as an observer in the Council of Europe's expert working group on corruption and has contributed to the development of the draft Criminal Law Convention on Corruption that is currently under consideration in the Council of Europe. Finally, the Departments of Justice and Commerce and the SEC regularly participate in business and legal programs designed to educate the business and legal community as to the requirements of the FCPA.

1.2 Has your country examined the areas listed in paragraphs i) through vii) of Section II of the Recommendation and taken any concrete and meaningful steps to meet the goal set forth in Section 1 of the Recommendation?

The United States has examined the seven areas listed in Section II of the 1994 Recommendation. As set forth in the Questionnaire Response of the United States, dated March 15, 1995 (the "1995 U. S. Response"), concerning the Recommendation, United States criminal, civil, and administrative law all contain concrete and meaningful provisions intended to meet the goal set forth in Section 1 of the Recommendation. The Secretariat is respectfully referred to the 1995 U. S. Response for more detailed descriptions of these provisions. In summary:

i) criminal laws and their application: As discussed above in section A and in the 1995 U. S. Response at page 325, the United States, since the enactment in 1977 of the Foreign Corrupt Practices Act, has prohibited the bribery of foreign officials by U. S. issuers and domestic concerns, i. e., U. S. business entities and individuals, using the U. S. mails or other means or instrumentalities of interstate commerce. In 1998, following the signing of the OECD Convention, the United States amended the FCPA to prohibit bribes of foreign officials by American companies and nationals even where no act in furtherance of the bribe took place within the United States and, further, to assert jurisdiction over non-U. S. companies and nationals who take any action in furtherance of a bribe of a foreign public official while within the United States.

In addition, as described in the 1995 U. S. Response at page 17, thirty-seven states have enacted bribery laws that prohibit bribery in a commercial context. See 1995 U. S. Response, Tabs B-1 to B-37. These laws can form the basis of a federal criminal prosecution under the Travel Act, 18 U. S. C. § 1952. The United States Government has recently prosecuted a matter involving a bribe of officials of the Government of Panama in which it charged an officer of a U. S. company with violations of both the FCPA and the Travel Act (incorporating the commercial bribery law of the State of New Jersey). *See United States v. Mead,* Cr. 98-240-01 (D. N. J. 1998)

Finally, as described in the 1995 U. S. Response at pages 20-25, bribery of foreign public officials is a predicate offense under the Racketeer Influenced and Corrupt Organizations Act (RICO) and the Money Laundering Control Act. *See* 18 U. S. C. §§ 1956, 1961-1964 (attached at Tabs C & D to 1995 U. S. Response).

ii) tax legislation, regulations and practice: As described below at 3.1 and in the 1995 U. S. Response at page 30, bribes and kickbacks are not deductible under the Internal Revenue Code and the unlawful deduction of bribes, kickbacks, and gratuities may be prosecuted as a civil or criminal violation. *See* 26 U. S. C. §§ 162(c) & 7206 (attached at Tab E to 1995 U. S. Response).

iii) company and business accounting, external audit and internal control requirements and practices: As discussed below at 4.1 and at pages 32-35 of the 1995 U. S. Response, United States law requires transparent books and records. The FCPA contains an extensive and detailed section requiring issuers to maintain records that accurately reflect transactions and disposition of corporate assets and to maintain systems of internal accounting controls. *See* 18 U. S. C. §78m (attached at Tab A-5 to 1995 U. S. response). In addition, the United States government encourages business organizations to implement codes of conduct and compliance programs to address the application of the FCPA to a company's activities and those of its officers, directors, employees, agents, and shareholders. *See,* e. g., General Electric Company's code of conduct (attached at Tab F to 1995 U. S. Response). Although the government does not approve or disapprove of the contents of these programs, the Sentencing Guidelines that guide a federal court's imposition of fines on corporate defendants recognize the value of such programs by permitting the court to reduce the sentence where a violation occurs despite an adequate compliance program. *See* U. S. S. G. § 8C2.5(f) (attached as Tab F-1 to the 1995 Response). Otherwise, a company's failure to ensure the compliance of its employees, agents, and contractors may give rise to severe penalties.

iv) banking, financial, and other relevant provisions to ensure that adequate records would be kept and made available for inspection and investigation: As discussed below at 4.1 and at page 36 of the 1995 U. S. Response, various federal and state laws require the maintenance of

financial and other business records. In addition, federal banking law requires U. S. financial institutions to report suspicious transactions, including transactions involving the suspected proceeds of criminal activity. *See* 12 Code of Federal Regulations (C. F. R.) § 21.11(c) (national banks); *see also* 12 C. F. R. § 208.20(c) (state banks); 12 C. F. R. § 208.62(c) (state banks); 12 C. F. R. § 563.180(d)(3) (savings associations); 31 C. F. R. § 103.21(c) (other banks); *see also* U. S. Response to Four Issues Questionnaire.

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: As discussed in 5.1 below and at pages 36-40 of the 1995 U. S. Response, the United States Government, or any of its agencies, may suspend a contractor from public contracting upon its indictment for a violation of the FCPA and may debar that contractor upon its conviction. See Federal Acquisition Regulations System, 48 Code of Federal Regulations, chapter 1 (attached at Tab G to 1995 U. S. Response) and related agency specific regulations (attached at Tabs G & H to 1995 U. S. Response).

vi) civil, commercial, and administrative laws and regulations, so that such bribery would be illegal: As described at pages 25-30 of the 1995 U. S. Response, the FCPA also contains civil provisions, enabling the SEC and the Department of Justice to obtain injunctions against companies that violate the FCPA's books and records and anti-bribery provisions. Pursuant to its authority over issuers, the SEC has promulgated two rules prohibiting the falsification of a companies books and records and prohibiting an issuer's officers from lying to or making materially false or misleading statements to an issuer's internal accountants or its independent auditors. *See* Regulations §§ 240.13b2-1 and 240.13b2-2 (attached at Tab A-6 to 1995 U. S. Response). In addition, the RICO statute provides for civil penalties and some courts have held that the FCPA may provide a predicate for a civil RICO suit brought by a private plaintiff. *See* Tab C to 1995 U. S. Response.

2. Criminalization of Bribery of Foreign Public Officials

See section A above.

3. Tax Deductibility

3.1 Describe how the tax laws and regulations of your country treat bribes of foreign public officials, in particular whether such bribes are deductible.

The United States Internal Revenue Code provides:

No deduction shall be allowed . . . for any payment made, directly or indirectly, to an official or employee of any government, or of any agency or instrumentality of any government, if the payment constitutes an illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment is unlawful under the Foreign Corrupt Practices Act of 1977.

I. R. C. 162(c)(1) (26 U. S. C. § 162(c)(1)). *See also* 26 C. F. R. §1.212-1(p) (nontrade or nonbusiness expenses also non-deductible if they are of a type disallowed under § 162(c)). Section 162(c) also applies to payments to foreign officials that, if made to a U. S. official in the U. S., would be unlawful under U. S. laws. 26 C. F. R. § 1.162-18(a)(1)(ii). In addition, this provision applies to "indirect payments" which include payments "which inures to [the foreign official's] benefit or promotes his interests, regardless of the medium in which the payment is made and regardless of the identity of the immediate recipient or payor." 26 C. F. R. § 1.162-18(a)(2). The government bears the burden of proof to show that the payment was unlawful, but a criminal conviction or civil judgment is not a prerequisite. I. R. C. §162(c)(1); 26 C. F. R. § 1.162-18(a)(5).

In addition, illegal bribes, kickbacks, or other payments to public officials by "controlled foreign corporations" are included as income to the U. S. parent corporation. 26 C. F. R. § 1.952-1(a)(4); 26 C. F. R. § 1.964-1(5). In addition, a taxpayer's "basis," or the amount of his investment in a closely-held corporation, is reduced by the amount of any illegal bribes, kickbacks, and other unlawful payments. 26 C. F. R. § 1.1367-1. This increases the tax ultimately paid when the taxpayer sells or otherwise disposes of his share in the corporation.

4. Accounting requirements, External Audit and Internal Company Controls

4.1 Are the laws, rules, and practices with respect to accounting requirements, external audit, and internal company controls consistent with the principles set forth in Section V of the Recommendation? Explain briefly. (Note questions 8.1, 8.2, and 8.3 in Section A above.)

As described above in response to questions 8.1, 8.2, and 8.3 in Section A and below, U. S. laws, rules, and practices regarding accounting requirements, external audit, and internal company controls are consistent with the principles set forth in Section V of the Recommendation.

Adequate Accounting Requirements

Section 13(b)(2) of the Securities Exchange Act of 1934 applies to companies with securities that are registered with the SEC and requires that such companies keep accurate books and records and maintain adequate internal accounting controls. Section 13(b)(5) makes it illegal for any person to knowingly assist a company in its failure to follow Section 13(b)(2). Rule 13b2-1 and Rule 13b2-2, promulgated by the SEC under Exchange Act Section 13(b) 2), provide that the SEC can take legal action against persons who directly or indirectly falsify books and records of a public company or who lie to or otherwise mislead accountants in connection with the preparation or audit of financial statements that are included in a filing made with the SEC.

The SEC requires that public companies prepare financial statements in conformity with Generally Accepted Accounting Principles (" GAAP"). Among other things, GAAP require companies to record or disclose in their financial statements all material contingent liabilities.

Independent External Audit

U. S. law and SEC rules require public companies to undergo an annual external audit of their financial statements and to file for public view those audited financial statements with the SEC. Companies registering securities for the first time are also required to file financial statements audited by an external auditor with the SEC and to provide those financial statements to investors before their securities can be sold to the public. SEC rules and the code of professional conduct issued by the American Institute of Certified Public Accountants (" AICPA") require external auditors to be independent of the companies they audit. The SEC requires auditors of public companies to comply with Generally Accepted Auditing Standards ("GAAS") in performing their audits. GAAS are professional standards established by the AICPA with SEC oversight. GAAS address the auditor's responsibility concerning material errors, irregularities or illegal acts by a client and its officers, directors, and employees. Additionally, the auditor has a responsibility to obtain an understanding of an entity's internal control structure, and when an auditor becomes aware of certain reportable conditions relating to weaknesses in internal controls during an audit, the auditor has a responsibility under GAAS to report such conditions to the board of directors of the company.

In 1995, Congress added Section 10A to the Exchange Act to address the responsibilities of independent auditors who discover an illegal act, such as the payment of bribes to domestic and foreign government officials, in connection with their audits of public companies. Generally,

Section 10A requires that auditors who become aware of illegal acts report such acts to appropriate levels within the company, and if the company fails to take appropriate action, provides for notification to the SEC by the auditor. If the SEC finds that an independent public accountant has willfully violated this section, the SEC may issue a cease and desist order or impose a civil penalty against the accountant and any other person that was a cause of such violation.

Internal Company Controls

As stated above, Section 13(b)(2) of the Securities Exchange Act of 1934 requires that public companies maintain adequate internal accounting controls. Investment companies and certain broker dealers are required to file with the SEC reports from their auditors on the entities' internal control systems. The Auditing Standards Board of the AICPA has promulgated a professional standard that guides auditors when reporting on managements assertions regarding the effectiveness of the company's system of internal control over financial reporting.

All companies registered on the major U. S. stock exchanges and with NASDAQ are required to maintain an audit committee of the board of directors that consists of at least a majority of independent directors. Additionally, all banks and savings and loan associations are required to maintain an audit committee of the board of directors made up entirely of independent directors. When auditors report instances of potential illegal acts committed by a company or its management to the SEC, they are protected from private actions regarding the contents of their report by Section 10A of the Private Securities Litigation Reform Act of 1995.

4.2 Has your country either reviewed or modified laws, rules, and practices with respect to accounting requirements, external audit, and internal company controls in view of the principles set forth in Section V of the Recommendation? Has your country taken steps to improve the use of such laws, rules, and practices in order to prevent and detect bribery of foreign public officials in international business transactions?

See response to Question 4.1 above.

5. Public Procurement

5.1 Do your country's laws and regulations permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of your national laws?
(Note question 3.7 in question A above.)

Departments and agencies of the United States may suspend companies accused of fraud or "any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor." F. A. R. § 9.407-2(a) (48 C. F. R. § 407-2(a)). Upon conviction or civil judgment, the government may bar such companies from all public contracts for a period of three years. F. A. R. § 9.406-2(a) (48 C. F. R. § 9.406-2(a)). Suspension and disbarment is not limited to the specific program or agency defrauded and applies to the all government contracting. F. A. R. § 9-401. (48 C. F. R. § 9.401). In addition, specific agencies, such as the Overseas Private Investment Corporation and the Commodity Credit Corporation have specific FCPA disbarment provisions. *See* Foreign Assistance Act of 1961 § 237(1); 7 C. F. R. § 1493.270.

5.2 Does your country apply procurement sanctions to enterprises that are determined to have bribed domestic public officials? Are such sanctions applicable in cases of bribery of foreign public officials?

See 5.1 above.

6. International Cooperation

6.1 Has your country explored or taken any steps to improve the efficiency of the mutual legal assistance that you are able to render to other participants in cases of bribery of foreign public officials.

The United States continually strives to improve the efficiency of mutual legal assistance provided to other states in all criminal investigations, including those for bribery of foreign officials. Our efforts in this respect include:

(1) We have dramatically expanded the number of bilateral mutual legal assistance treaties (MLATs) in force. The U. S. is currently a party to twenty MLATs in force, and we have signed twenty new MLATs in the past two years. We also signed the Organization of American States (OAS) Mutual Legal Assistance Treaty, which provides for mutual assistance relationships with thirty three other nations, and participated in the negotiation of a proposed United Nations Convention on Organized Crime that would include provisions on global mutual legal assistance. We also signed nineteen new extradition treaties in the past two years, and each of these could permit extradition for bribery of foreign officials.

(2) Last year, we proposed to our Congress to enact new federal laws to streamline the legal procedures within the U. S. for providing assistance to foreign authorities. That legislation is still pending.

(3) In February, 1998, the United States demonstrated its support for the improvement of international cooperation procedures by hosting a United Nations Expert Working Group meeting on modernizing the UN Model Mutual Assistance Treaty, a document that is used around the world in MLAT negotiations. The Expert Group recommended several changes to the Model Treaty aimed at increasing the efficiency of mutual assistance practice.

(4) In the past two years, we have consulted with other nations on the implementation of our bilateral MLATs and other instruments on international cooperation.

(5) In January, 1998, we conducted extensive training to U. S. prosecutors and investigative officials on techniques for promptly executing foreign requests for mutual legal assistance.

1. The United States federal securities laws have been applied to state-owned enterprises in other contexts. A civil injunctive action was brought by the SEC in 1977 against Pertamina, the state-owned oil enterprise of Indonesia, for having solicited the sale of stock in a New York restaurant. Pertamina consented to the entry of a permanent injunction against violation of the United States federal securities laws.

Supplemental Response to the Phase I Questionnaire

Note: Subsequent to filing its response to the Phase I questionnaire, the United States supplemented its answers with the following additional information and clarifications. The United States has also provided additional information in response to questions received from other OECD members.

ARTICLE 1 THE OFFENSE OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

1.1.2 The legislative history also refers to "evil motive or purpose". Does this imply that intent alone, without "evil motive", would not be enough for violation of the FCPA?

The FCPA is a specific intent crime. This means that the government does not satisfy its burden of proof merely by showing that the defendant intended to do a particular act and that he thereby violated the statute, as is required for general intent crimes. Instead, the government is required to prove that the defendant acted "corruptly," or as set forth in the legislative history, with an "evil motive or purpose, an intent to wrongfully influence the recipient." S. Rep. No. 114, 95th Cong. 1st Sess. 10 (1977). The language in the legislative history is not an additional requirement but a definition of "corrupt intent." As explained in *United States v. Li ebo,* 923 F. 2d 1308, 1312 (8th Cir. 1991), "An act is 'corruptly' done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means. The term 'corruptly' is intended to connote that the offer, payment, and promise was intended to induce the recipient to misuse his official position." *Cf. Bryan v. United States,* 118 S. Ct. 1939, 1945 (1998) (approving a similar definition of "willful"). Thus, an intent that is not corrupt will not violate the statute.

1.1.3 Since the Convention prescribes that the offence be directed at the offering, promising or giving of any undue pecuniary or other advantage, the precise meaning of "acts in furtherance of" is unclear. Does this encompass the simple communication of a bribe in person? Additionally, the "act in furtherance" of the bribe is not consistent in relation to the different categories of persons (see part 4 Jurisdiction).

The "act in furtherance" element is intended to ensure that the defendant does more than merely conceive the idea of paying a bribe without actually undertaking to do so. Proof of an act in furtherance establishes that the defendant did not merely think about and then reject the idea of paying a bribe but instead committed himself to doing it and thereafter took some act to accomplish his objective. Further, in most cases, several individuals may be involved in authorizing or making a bribe payment or offer at different stages in the process. The "act in furtherance" requirement makes it clear that a person does not have to have been a participant in every stage of the process to be prosecuted under the Act.

It is not required that the defendant actually pay the bribe. The simple offer, whether conveyed in person or through intermediaries, is sufficient to complete the crime.

The FCPA, as amended, is consistent in its requirement of an "act in furtherance" regardless of the identity of the defendant. All defendants, regardless of their nationality, must have taken some act in furtherance of the unlawful payment.(1)

The FCPA does distinguish between U. S. companies and nationals, on the one hand, and foreign companies and nationals, on the other, in terms of the requisite location of the act (anywhere in the world for U. S. companies and nationals vs. in the U. S. for foreign companies and nationals) and the requisite nature of the act (use of interstate means or instrumentalities for U. S. companies and nationals while in the U. S. *vs.* any act in the U. S. for foreign companies and nationals). The basis of this jurisdictional distinction is the limited jurisdiction granted to the federal government in the U. S. Constitution "to regulate commerce with foreign Nations, and among the several States." U. S. Const., Art. I, sec. 8. cl. 3; *see also* U. S. Const., amend. X (" The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). As set forth in the legislative history for the 1998 amendments, this interstate commerce nexus is satisfied for non-U. S. nationals and businesses who, by their very nature, are acting in international commerce when they enter the U. S. to take an action in furtherance of a bribe overseas. Similarly, when a U. S. national or business acts abroad, it necessarily acts in international commerce. *See* S. Rep. 277, 105th Cong., 2nd Sess. (1998); H. Rep. 802, 105th Cong., 2nd Sess. (1998).

1.1.4 Can the U. S. clarify whether the term "anything of value" in the FCPA is as comprehensive as "other advantage" in the Convention?

The United States views "anything of value" as being as comprehensive as "other advantage." "Anything of value" means any thing that is of value to the recipient. It therefore is interpreted according to its plain meaning and encompasses anything that is given to an official to obtain an improper advantage in a business transaction. For instance, in the very first FCPA prosecution, *U. S. v. Kenny Int'l Corp.* (D. D. C. 1979), the bribe was provided to pay the cost of chartering an aircraft to fly voters to the Cook Islands to re-elect the Premier.

Can the U. S. cite case law on either of the affirmative defenses, particularly for "reasonable and bona fide expenditure"?

There is no case law on this issue. However, the issue has arisen in the context of FCPA Review Procedure requests.(2)

In Release 81-02 (December 11, 1981), the Department stated it would take no enforcement action where the requestor wished to provide samples of its products to officials of the Soviet Ministry of Foreign Trade. The Department stated that the FCPA was not implicated where

(i) the samples were intended for the officials' inspection, testing, and sampling; (ii) the samples were not intended for their personal use; and (iii) the Soviet government had been informed that the company intended to provide the samples.

In Releases 82-01 (January 27, 1982), 83-03 (July 26, 1983), and 85-01 (July 16, 1985), the Department stated it would take no enforcement action where the requestor intended to host foreign officials while they were attending meetings, site inspections, and product demonstrations and to pay "reasonable and necessary expenses, including meals, lodging, entertainment, and traveling." Similarly, in Releases 92-01 (February 1992) and 96-01 (November 25, 1996), the Department found that the FCPA was not implicated by agreements to provide training to government personnel as part of joint ventures with foreign governments.

In Release 83-02 (July 26, 1983), the Department stated that it would take no enforcement action where an American company proposed to invite the general manager of a foreign government entity to extend his vacation in the United States to take a promotional tour of the company's facilities. The company would pay the reasonable and necessary actual expenses of the general manager and his wife during the time he spent touring its facilities. The Department concluded that the FCPA was not implicated where the expenses would be paid directly to the service providers and not to the general manager and the expenses would be accurately recorded in the company's books and records.

1.1.6 *Public Enterprises:* Is there case law on this point?

There is no case law on this issue. However, in several FCPA Review Procedure Releases, the Department has treated entities that were owned or controlled by a foreign government as instrumentalities of the foreign government. *See* Release 80-04 (October 29, 1980) (Saudia, the Saudi government-owned airline), Release 83-2 (July 26, 1983) (expenses of a general manager of a foreign entity that was owned and controlled by the foreign government); Release 93-01 (April 20, 1993) (a quasi-commercial entity wholly owned and supervised by a foreign government); Release 96-02 (November 26, 1996) (state-owned enterprise).

Official capacity vs. public function: Is there case law on this point?

The phrase "official capacity" is self-explanatory. It is intended to distinguish between acts that an official does or is able to do because he holds a position as a public official as opposed to acts that he may do as a private person.

This issue was addressed in part in FCPA Review Procedure Release 95-02 (September 14, 1995), the Department stated that it would take no enforcement action concerning a proposed creation of a company in a foreign country in which a majority of the investors would be foreign officials. The Department concluded that the FCPA was not implicated where, *inter alia,* no official of the relevant ministry of foreign country would be an investor in the company and none of the investors were in positions which would enable them to grant or deny business to the company. In addition, the government officials who were investors in the company certified to the Department that they would recuse themselves from any government decision with respect to any matter affecting the company, that their official duties did not include responsibility for deciding or overseeing the award of business by the government to the parties to this request, and that they would not seek to influence other foreign government officials whose duties include such responsibilities.

In Release 95-03 (September 14, 1995), the Department stated that it would take no enforcement action concerning a joint venture with a relative of the leader of a foreign country who was a prominent businessman and was also, due to his holding various public and party offices, a foreign official. The Department concluded that the FCPA was not implicated where the foreign joint venturer's official duties did not involve awarding or denying business to the company and he undertook to notify the company if his duties changed, where the joint venture partner agreed to initiate no meetings with government officials, and where he agreed, when meeting with government officials, to certify to the most senior official present that he was acting solely in a private capacity.

1.1.9 It is not clear whether the addition of "to secure any improper advantage" to that list is meant to comply with the Convention's requirements here, and if so, how in fact this would operate.

The Commentaries define "improper advantage" as "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." OECD Commentaries at ¶ 4. The United States has long interpreted the three pre-existing elements of the FCPA (payments to influence any official act or decision of an official, to induce the official to do or omit to do any act in violation of his official duty, or to induce the official to use his influence to affect any act or decision of the government) to encompass payments "to secure any improper advantage," as defined in the Commentaries. The insertion of the Convention's language into the statute merely clarified and lent a Congressional imprimatur to that interpretation.

For example, in a recent prosecution, under the pre-1998 version of the FCPA, the United States charged a corporation and two of its executives with authorizing a payment to Panamanian officials to obtain a favorable lease in the Panama Canal Zone. The United States, and the jury, interpreted this payment as being intended to assist the defendant corporation in obtaining or retaining business because the lease would improve its competitiveness and profitability. See *United States v. Saybolt Inc.* (98 Cr 10266 WGY) D. Mass. 1998; *United States v. David Mead & Frerik Pluimers* (Cr. 98-240-01) D. N. J., Trenton Div. 1998.

Routine governmental action: **Is there case law on this point?**

There is no published case law on this matter. As noted, in the recent Saybolt matter, the U. S. prosecuted the company under the theory that payment to Panamanian officials to obtain a

favorable lease was intended to obtain or retain business. The United States did not, in that case, consider the awarding of a lease a routine governmental action.

ARTICLE 2 -RESPONSIBILITY OF LEGAL PERSONS

2.1.2 Will accountability lie even when there have been no unlawful acts by a "superior"?

Under U. S. law, corporate liability is not predicated upon authorization by a "superior" or manager. A corporation is liable for the acts of its employees, of whatever rank, if they act within the scope of their duties and for the benefit of the corporation. Whether the corporate management condoned or condemned the employee's conduct is irrelevant.

ARTICLE 3 SANCTIONS

3.3 Could the U. S. confirm that these penalties are sufficient to enable compliance with requests for mutual legal assistance?

The United States will honor requests for mutual legal assistance premised on the Convention. The United States generally does not link the providing of mutual legal assistance to other States with the penalty that it imposes for the analogous domestic violation.

3.4 Could the U. S. confirm that these penalties are sufficient to enable the compliance with requests for extradition?

Generally, our extradition treaties provide for extradition for any offense that is punishable under the laws of both the requesting and requested State by a maximum term of imprisonment exceeding one year. The penalty for a violation of the FCPA is well in excess of one year. Accordingly, even prior to the U. S. becoming a Party to the OECD Convention, if the foreign State requesting extradition under such a treaty had also penalized foreign commercial bribery by a maximum term of imprisonment exceeding one year, extradition would be have been possible, subject to the other terms of the treaty. In any event, once the United States became party to the OECD Convention, under Article 10(1) of the Convention all of our extradition treaties with countries that have also ratified the Convention were automatically deemed to incorporate the offenses criminalized in Article 1 of the Convention.

A number of our older extradition treaties determine whether extradition should be granted on the basis of a list of extraditable offenses. As stated above, once the United States became a party to the OECD Convention, under Article 10(1) of the Convention our extradition treaties with countries that have ratified the Convention were automatically deemed to incorporate the offenses criminalized in Article 1 of the Convention.

3.6 Since there is a ceiling on the possible fine, the full value of the bribe and proceeds of bribery, or the property the value of which corresponds to that of such proceeds, may not be fully recovered. Could the U. S. clarify what factors determine the amount of sanctions?

There is, in fact, no ceiling on the possible fine. Fines imposed for violations of the FCPA, like those imposed in all federal criminal cases are governed by the Alternative Fines Act, 18 U. S. C. § 3571. This Act states:

Alternative fine based on gain or loss.— If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless

imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.

This section, therefore, ensures that a fine well in excess of the full value of the bribe and the proceeds of bribery may be imposed. It is sufficient to assure that "the bribe and the proceeds of the bribery of a foreign 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." OECD Convention, art. 3, ¶ 3.

In practice, sentencing of individuals and businesses in the United States is governed by the Sentencing Guidelines. These Guidelines require the Court to impose a fine based upon an offense level that is tied directly to "the value of the bribe or the improper benefit to be conferred." *See* U. S. S. G. § 2B4.1(b)(1). The commentary makes it clear that the "value of the improper benefit" refers to the "value of the action to be taken or effected in return for the bribe." U. S. S. G. § 2B4.1 comment. (n. 2). The commentary also provides an example:

[I]f a bank officer agreed to the offer of a $25,000 bribe to approve a $250,000 loan under terms for which the applicant would not otherwise qualify, the court, in increasing the offense level, would use the greater of the $25,000 bribe, and the savings in interest over the life of the loan compared with alternative loan terms. If a gambler paid a player $5,000 to shave points in a nationally televised basketball game, the value of the action to the gambler would be the amount that he and his confederates won or stood to gain.

U. S. S. G. §2B4.1 comment. (backg'd).

The same rules apply to domestic corruption cases. *See* U. S. S. G. 2C1.1. As set forth in the commentary to that

Guideline:

The value of "the benefit received or to be received" means the net value of such benefit. Examples: (1) A government employee, in return for a $500 bribe reduces the price of a piece of surplus property offered for sale by the government from $10,000 to $2,000; the value of the benefit received is $8,000. (2) a $150,000 contract on which $20,000 profit was made was awarded in return for a bribe; the value of the benefit received is $20,000. Do not deduct the value of the bribe itself in computing the value of the benefit received or to be received. In the above examples, therefore, the value of the benefit received would be the same regardless of the value of the bribe.

Id. at comment. (n. 2). The commentary continues:

In determining the net value of the benefit received or to be received, the value of the bribe is not deducted from the gross value of such benefit; the harm is the same regardless of value of the bribe paid to receive the benefit. Where the value of the bribe exceeds the value of the benefit or the value of the benefit cannot be determined, the value of the bribe is used because it is likely that the payer of such a bribe expected something in return that would be worth more than the value of the bribe. Moreover, for deterrence purposes, the punishment should be commensurate with the gain to the payer or the recipient of the bribe, whichever is higher.

Id. at comment. (backg'd).

In practice, assume, as set forth in the example above, that a bribe is paid for a contract that results in a benefit to an individual or a corporation of $20,000. Applying the Guidelines and not

making any adjustments for acceptance of responsibility, role in the offense, or criminal history, that benefit results in an offense level of 12. *See* U. S. S. G. § 2B4.1, 2F1.1. With that offense level, the court is required to impose a fine between $3,000 and $30,000. For a corporate defendant, again making no adjustments, the court is required to impose a fine between $40,000 and $80,000, and the fine could be even more depending on the actual pecuniary gain to the corporation. *See* U. S. S. G. §§ 8C2.4, 8C2.5, and 8C2.6.

Sharing of forfeited assets with foreign countries: *Please confirm.*

The United States has a firm policy of sharing with foreign governments property that has been forfeited to the United States with the assistance of foreign authorities. Since 1989, the United States has shared more than $173.2 million with the governments of thirty different nations in recognition of their efforts in achieving forfeitures under United States law. Other nations have shared approximately $19.6 million in forfeited assets with the United States. We believe that mutual asset forfeiture sharing creates an additional incentive for law enforcement authorities to cooperate with one another and, as a result, an atmosphere in which more assets are actually forfeited and more criminal enterprises are dismantled.

Under United States law, there are three statutory bases through which the Attorney General and/or the Secretary of the Treasury may transfer forfeited property to a foreign country that participated directly or indirectly in acts leading to the seizure and forfeiture of the property: 18 U. S. C. § 981(i)(1) (for money laundering forfeitures), 21 U. S. C. § 881(e)(1)(E) (for drug related forfeitures) and 31 U. S. C. § 973(h)(2) (for property forfeited under laws enforced by the Department of the Treasury). All three statutes condition such a transfer upon: (1) approval by the Attorney General or the Secretary of the Treasury, (2) approval by the Secretary of State, (3) authorization for such a transfer in an international agreement between the United Sates and the foreign country to which the property would be transferred; and (4) if applicable, certification of the foreign country under 22 U. S. C. § 2291(h) (Section 481(h) of the Foreign Assistance Act of 1961). As a result, to the extent that property involved in offenses covered under the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions is forfeited to the United States as a result of money laundering offenses, the United States could share that property with foreign governments.

To facilitate international sharing, the United States has entered into numerous agreements that permit the transfer of assets to other nations, including at least seven that could apply should property involved in offenses covered under the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions be forfeited to the United States. In addition, forfeiture articles in Mutual Legal Assistance Treaties between the United States and several additional nations include provisions that would permit international sharing. Where no standing agreement on the sharing of forfeited assets exists between the United States and other nations, the United States typically negotiates case-specific agreements that permit the transfer of such property.

ARTICLE 4 JURISDICTION

4.2. Can the US comment on whether it expects that U. S. jurisdiction over nationals will be more frequently invoked in relation to offenses committed in contravention of the FCPA?

The United States does not expect the addition of nationality jurisdiction to have a significant impact upon the volume of prosecutions. The territorial jurisdiction in place since 1977 is extremely broad and requires only that some act in furtherance, one that need not even be criminal in and of itself, take place in the United States. The amendment of the statute to include nationality jurisdiction, however, eases the government's burden by enabling a prosecution to proceed on that basis alone without the need to prove an act was committed within U. S. territory.

4.3 Are there any legal instruments requiring consultation and eventual transfer of a case to another Party?

Apart from the obligation to consult contained in Article 4, the United States is not a party to any international legal instrument that absolutely obligates it to consult regarding, or eventually transfer to another Party for investigation or prosecution, a criminal case covered by this Convention. As a practical matter, as stated in our previous response provided, we consult regularly with our law enforcement partners in such matters.

4.4 Could the U. S. comment on the rationale for the difference in treatment and whether this may lead to uneven application of the legislation?

As set forth above, the difference in treatment is due to federal constitutional principles and the requirement that a federal crime have a federal nexus, here the use of means or an instrumentality of interstate commerce. The United States does not believe that this will result in an uneven application of the legislation. It would be a rare case in which a business in the United States succeeded in authorizing or paying a bribe without making use of the mails or other means or instrumentalities of interstate commerce. For example, such means and instrumentalities include phone lines, thus encompassing all phone calls, fax transmissions, telexes, and email messages, air, sea, rail, and auto travel, as well as interstate and international bank wire transfers. Moreover, the communication or travel need not actually cross interstate or international boundaries; it is sufficient if the defendant made use of interstate instrumentalities even for intrastate communication or travel. *See* 15 U. S. C. §§ 78c(a)(17), 78dd-2(h(5), 78dd-2(f)(5).

ARTICLE 5 ENFORCEMENT

5.1. Is there scope for the Department of Justice to refuse to prosecute a case? If so, under what circumstances? Is the refusal to prosecute made public?

The United States respectfully refers the Secretariat to Section 5 of its response to the Phase 1 questionnaire. The decision whether to initiate or decline charges in a particular case is governed by the following factors:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.

Principles of Federal Prosecution, U. S. Attorney's Manual §927.230.

The Department's decision not to prosecute generally is not made public. The Department, however, may notify a target individual or company that an investigation has been concluded, and the company may choose to release that information.

ARTICLE 9 -MUTUAL LEGAL ASSISTANCE

9.2 Could the U. S. confirm whether in a case where, pursuant to a treaty between the U. S. and another Party, mutual legal assistance is conditional or dual criminality, it will be deemed to exist if the offence in question is within the scope of the conviction?

The United States generally does not require dual criminality as a condition precedent to the providing of mutual legal assistance. Where a request for mutual legal assistance from another State requires the taking of extremely intrusive measures (for example, the issuance and execution of a warrant for search and seizure), dual criminality may be required. However, where required, the dual criminality principle has always been interpreted liberally in favor of providing international cooperation. Indeed, with respect to the offenses covered by the Convention, as set forth in Article 9(2), seeking mutual legal assistance for an offense established pursuant to Article 1 of the Convention will satisfy any dual criminality requirement imposed under U. S. laws or treaties.

9.3 Does this mean that it is possible to decline assistance on the ground of bank secrecy?

When seeking court orders on behalf of foreign States that seek mutual legal assistance, the United States has taken the position before its courts that assistance may not be declined as a result of privacy provisions of U. S. banking law. Moreover, it is the policy of the United States that where a domestic law provides for executive discretion in denying assistance, the executive branch does not decline assistance on that basis.

ARTICLE 10 EXTRADITION

10.2 What is the situation in cases where the U. S. does not have a bilateral treaty in force and there is a request for extradition for the offences covered by the Convention? Where bilateral treaties exist, is it possible that in practice their efficacy could be limited because extradition may be limited to offences specifically listed in the treaty?

Under U. S. law, extradition for the offenses established by the Convention may be carried out only if there is an extradition treaty in force between the United States and the State seeking extradition. With respect to the second question, as stated in the response to question 3.4 above, a number of our older extradition treaties determine whether extradition should be granted on the basis of a list of extraditable offenses. However, once we became party to the OECD Convention, under Article 10(1) of the Convention, our older "list" extradition treaties were automatically deemed to incorporate the offenses criminalized in Article 1 of the Convention.

10.3 Can the U. S. clarify whether it is possible to decline extradition on the ground of nationality. If so, under which circumstances?

It is the policy of the United States not to decline extradition on the ground of nationality. Moreover, under Title 18, United States Code, Section 3196, the extradition of U. S. nationals is authorized (subject to the other requirements of the applicable treaty) even where the applicable extradition treaty does not obligate the United States to do so.

1. If, however, a group of individuals is charged with conspiracy to violate the FCPA under 18 U. S. C. § 371, the government must only prove that each defendant entered into the criminal *agreement* and that, thereafter, at least one conspirator did an overt act in furtherance of the agreement.

2. The Releases discussed herein are intended only as examples of the Department of Justice's interpretation and application of the FCPA in particular contexts. Pursuant to the FCPA, the Department has promulgated regulations that permit issuers and domestic concerns to obtain a statement from the Department "as to whether a certain, specified, prospective— not hypothetical— conduct conforms with the Department's present enforcement policy." See 28 C. F. R. § 80.1. An Opinion Release issued pursuant to these regulations is binding on the Department of Justice only, and not other agencies of the United States Government, is applicable only to

parties which join in the request, and provides a safe harbor only to the extent that a requestor accurately describes the proposed transaction. *See* 28 C. F. R. §§ 80.4, 80.10, 80.11, 80.13.

Appendix D: OECD Questionnaire and U.S. Responses on Four Issues Related to Corruption

Explanatory Note of the OECD Secretariat on Questionnaire

A Questionnaire Circulated by the OECD Working Group on Bribery in International Business Transactions

The attached note has been revised to take into consideration the discussion of the Working Group at its meeting on June 29 to July 1,1998. It contains in Annex 1 a questionnaire on how national laws would apply to a number of cases of undue payments.

Introduction

1. At is meetings on March 30 and April 1 and on June 29 to July 1, 1998, the Working Group on Bribery discussed

ways to respond to the decision of the OECD Council that the CIME through its Working Group on Bribery shall examine on a priority basis the following issues with a view to reporting conclusions to the 1999 OECD Council meeting at Ministerial level:

— bribery acts in relation with foreign political parties;
— advantages promised or given to any person in anticipation of that person becoming a foreign public official;
— bribery of foreign public officials as a predicate offense for money laundering legislation;
— the role of foreign subsidiaries in bribery transactions;
— the role of offshore centres in bribery transactions.

2. The Chairman of the Group suggested that with respect to the first four issues the Secretariat

should propose a questionnaire to elicit information on whether current national laws and national laws

which would be adopted to implement the Convention, as well as any other relevant laws or measures (administrative law, corporate governance standards), would cover a number of significant cases of undue payments that concern the Group. The delegation of France offered to submit a note on approaches to the role of offshore centres in bribery transactions, and this has since been issued as DAFFE/ IME/ BR(98) 11.

3. The present note suggests a number of basic cases that are relevant to each of the four issues. A questionnaire is attached as Annexe 1. Delegates to the Working Group are requested to submit replies to the questionnaire to the Secretariat by **September 18, 1998** so that they may be part of the basis for discussion at the informal meeting of experts to be held on October 5–6,1998.

Foreign political parties and party officials

4. A number of delegates are concerned that important cases of undue offers or payments to foreign political parties or party officials which are part of a quid pro quo transaction to obtain the award of a specific business contract or improper business advantage from a foreign public official acting in relation to the performance of official duties, will fall outside the coverage of the Convention. (The Group would not be concerned with illegal party or campaign financing intended only to develop a favourable relationship with public officials.)

5. The basic, direct bribery transaction concerning a foreign public official is one involving two actors: the briber and the recipient who is the public official who is induced to act or refrain from acting in relation to the performance of official duties. The Convention will cover offers or payments to political party officials when this is part of a direct 2-actor transaction between the briber and the foreign public official:

— when the party official is a public official or exercises a public function, including the case of a one-party state; or,
— when the transaction is between the briber and the public official and the political party is the beneficiary of the bribe transaction.

6. The quid pro quo transaction to obtain the award of a business contract or improper business advantage from a foreign public official can be more complex if there are three actors— the briber, the party official and the public official. If both the party official and the public official are involved with the offeror in the bribe contract, then it is a typical case of direct bribery with an intermediary. The bribe contract remains a contract between the briber and the public official. (However, if the party official is serving as an intermediary, but has not yet made the offer to the public official, then the crime has not been fully committed. It is only in the preparatory stage.)

7. A more interesting case is a typical situation involving political parties and party officials where two actors, the offeror/ payer and the party official conclude the bribe contract; the party official promises to influence the public official to award the business or improper advantage. The third actor, the public official is not a direct participant in the illegal bargain, but provides the illegal quo. The public official is possibly unwitting, i. e., not aware of the bribe bargain, and consequently, merely the tool used by an outsider, the party official, who does not have the necessary qualification (public official) in order to deliver the illegal quo.

8. Participating countries might cover the case of a 3-actor transaction where the contract is between the offeror and the party official in a number of ways:

— The party official is considered to be an agent, intermediary or accomplice. The case is then covered by traditional concepts and by the Convention;
— The offer or payment to the party official might be covered by laws on trading in influence, party financing, or misuse of company funds.

9. The direct approach where the party or party official is equated to a public official, as in the US

Foreign Corrupt Practices Act (FCPA), might be seen as another alternative. The FCPA expressly criminalises (emphasis added),

"the use of the US mails or any means or instrumentality of US interstate and foreign commerce in furtherance of any offer, payment, promise to pay— or authorisation of any offer, payment or promise to pay— any money or thing of value to foreign government or political party officials or candidates for foreign political office for the purpose of influencing their acts or decisions or inducing them to use their influence to affect or influence any act or decision of a foreign government in order to assist in the obtaining or retaining business or directing of business to any person".

It would not, however, be necessary to isolate this case in legislation. Instead, one could ask whether the situation described in the FCPA— where a briber makes an offer or payment to a party official in order to influence a public official in the performance of his/ her duty— would be covered by the application and interpretation of general provisions. In this situation, is the foreign political party official an intermediary, agent, or accomplice? Do other concepts apply, such as traffic in influence, party financing, misuse of company funds, conspiracy or oneparty state?

Candidates

10. The case of offers or payments to a candidate for public office might be treated like the 3-actor situations described above where the second and third actor are the same person, acting at different moments in time. The offer/ payer (actor 1) makes the bargain with the candidate (actor 2), who then changes status and becomes the public official (actor 3). Two variations might be considered:

1) The offer/ promise is made before the election, and the payment is made before the election; the pro quo occurs later, after the election when the candidate is a public official.

2) The offer/ promise is made before the election; the payment or part of it is made (or is meant to be made) later when the candidate is a public official; and the pro quo occurs later when the candidate is an official.

11. In variation 2, when a payment is made after the candidate has become an official, in fact, the full quid pro quo transaction has occurred with the public official. The payment is part of the quid and, in effect, repeats the offer/ promise. The case is obviously covered by the Convention. On the other hand, if the payment is only meant to be made, but is not made, it will be more difficult to pursue the illegal bargain as an attempt to bribe. If the bribe transaction is interrupted because the candidate does not become an official this might be an "attempt": there is intent, but the object of the attempt does not achieve the quality (public official) to carry out the bargain. A similar situation might arise if the candidate becomes an official, but there is no post election payment for other reasons.

12. The first variation in paragraph 10 above, reflects a frequent real-life situation in which the offeror will make a significant campaign contribution. It is more difficult to cover and may be treated differently by countries participating in the Convention. Two ways to cover this case might be:

1) Candidates are equated to public officials in the law, which is the case of the FCPA or Japanese criminal law in domestic cases. 2) The offer or promise to a candidate of undue advantage is treated as a preparatory act, an attempt or a conspiracy to bribe.

Bribery as a predicate offense for Money laundering

13. The Convention requires "national treatment" for money laundering: if bribery of a domestic

public official is a predicate offense for money laundering legislation, the bribery of a foreign public official should also be a predicate offense. A number of delegates expressed concern that this solution would lead to an imbalance in the application of the Convention, despite the general trend among countries to expand the list of predicate offenses.

14. A simple means to begin to assess eventual coverage of the Convention is to inquire of each participating country whether bribery of domestic public officials is a predicate offense for money laundering legislation. Is a bank officer who has reason to believe that a deposit to his bank is a

bribe payment to a domestic official obliged to report the transaction to appropriate authorities? Would prosecutors have a basis for acting against the bank officer if he did not report the deposit to the appropriate authorities? In the foreign public official variation, is a bank officer who has reason to believe that a deposit is a bribe payment to a foreign official obliged to report the transaction to appropriate authorities? Does failure to report provide prosecutors with a basis for acting against the bank officer?

15. The fact that the proceeds of a bribe of a foreign official (profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery) will be subject to seizure as required by Article 3, paragraph 3 of the Convention, will increase incentives to hide proceeds in the financial system. A case would be where a company deposits or transfers the proceeds of a contract that was obtained by virtue of a bribe. Under money laundering legislation, would a bank officer who has reason to believe that the funds are the proceeds of a contract obtained by bribery of a domestic or foreign official be obliged to report the deposit to the appropriate authorities? Would prosecutors have a basis in money laundering legislation for acting against the bank officer if he did not report the deposit to the appropriate authorities?

Foreign Subsidiaries

16. The question of the role of foreign subsidiaries is essentially whether authorities in the country of the headquarters of the corporation can take action against officers of the company headquarters or the company if its foreign subsidiary bribes a foreign public official. The interesting case is where the authorities of the country where the company is headquartered can not take direct jurisdiction because the bribe takes place entirely outside the country of company headquarters and the officers of the subsidiary who are directly responsible are not nationals of the country of company headquarters. The relevant action could be taken by criminal prosecutors against officers of the company headquarters or against the company where the country applies the concept of corporate criminal liability. Action might also be taken by other authorities against officers of the company headquarters or the company. Actions by non-prosecutorial authorities will be especially interesting when a country does not apply the concept of corporate criminal liability.

What actions are possible when in the circumstances described above (the act occurs outside the home territory and is accomplished by non-nationals) the representative of the foreign subsidiary pays a bribe to a foreign public official and:

a) the company headquarters knows nothing about the bribe?
b) the company headquarters "should have known" about the bribe?
c) the company headquarters actually knows about the bribe?
d) the company headquarters authorised the bribe?

Annexe 1

United States Response to OECD Questionnaire Relating to Four Issues

Political parties and party officials

Case 1: A company officer approaches a political party or political party official and offers to pay or pays a substantial sum to the party, if the political party or party official promises that a public official will award a specific business contract or improper advantage to the company.

1.1. How would your national criminal or other laws treat this case if the contribution were to a national political party, with the purpose of obtaining a contract or advantage from your national government?

United States law covers payments to U. S. public officials or promises made to a public official to pay another person or entity, which would include the official's political party. *See* 18 United States Code (U. S. C.) § 201. The essence of a section 201 charge is a *quid pro quo* involving the public official, *i. e.,* the payment must be intended to influence an official act by the public official to induce the public official to assist in the commission of a fraud, or to induce the public official to do any act in violation his lawful duty. Section 201 is, therefore, somewhat narrower than the Foreign Corrupt Practices Act (FCPA), which covers payments made to foreign political parties and party officials to influence the political party or party official to take some action in their *party* capacity. *See* 15 U. S. C. §§ 78dd-1(a)(2), 78dd-2(a)(2).

In Case 1.1, there is no indication that the public official is aware of the agreement between the company officer and the political party official. In such cases, it is highly unlikely that the government would bring a prosecution under section 201, although it might be possible to prosecute the matter as a conspiracy to commit mail or wire fraud with the object of defrauding the United States of the honest and faithful service of the public official. However, such a prosecution could only be brought if there was a clear corrupt intent on the part of the party official. If the agreement were simply to lobby a U. S. public official in exchange for a donation, such activity would not violate U. S. law.[1]

If the public official was aware of the conditions of the donation and agreed to them, *i. e.,* if the promise to make the donation was made directly to the public official or was communicated to the public official by the party official, then a prosecution under section 201 could be brought. Where the payment is made to a third party, such as the political party or party official, the recipient of the payment may be charged as a co-conspirator or aider and abetter. *See* 18 U. S. C. §§ 2, 371.

In addition, U. S. campaign finance laws might also be applicable to these facts.

1.2. How would your national laws that will implement the Convention treat this case if it involved a foreign political party and a foreign public official?

Possibilities might be: the party official is considered to be an agent, intermediary or accomplice; the offer or payment to the party official might be covered by laws on trading in influence, party financing, or misuse of company funds; the concept of a one-party state; or a direct approach where the party or party official is equated to a public official in the law. (See paragraphs 4-9 above.)

The FCPA specifically covers bribes to foreign political parties and party officials in exchange for their influence in the award or retention of business. Under the FCPA, political parties are directly covered, and a finding that the party or the party official was acting as the public official's agent, intermediary, or accomplice is not required, although that case would also be covered under sections 78dd-1(a)(3) and 78dd-2(a)(3).

Candidates for political office

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[1] Some state laws, however, may impose a duty of fidelity upon employees, including political party officials, that would prohibit them from accepting any compensation from any person other than their employer, here the political party. In such states, the federal government may bring a prosecution based on the state law under the ITAR statute, 18 U. S. C. § 1952.

Case 2: A company officer agrees with a candidate for public office to make a substantial campaign

contribution in return for the promise that the candidate will award the company a contract if the candidate wins the election and becomes a public official.

2.1. How would your national criminal or other laws treat this case if the contribution were to a candidate for a national public office?

Under the facts in Case 2, a prosecution could not be brought under section 201, which applies only to public officials or persons "selected to be a public official," which includes individuals already elected or appointed to office who had not yet assumed their duties but not candidates for public office. *See* 18 U. S. C. 201(a)(2). (Similarly, federal prosecution for bribery of state officials under the Hobbs Act and 18 U. S. C. § 1346 generally requires that the state official either have been elected or appointed to office.) Generally, for constitutional and public policy reasons, United States law does not strictly regulate the promises made by a candidate to potential supporters and donors. It is possible, however, in egregious cases, that facts such as those described in Case 2.1 could result in a prosecution for conspiracy to commit mail or wire fraud, that is to defraud the people of the United States of the honest and faithful service of their officials or for violation of the Federal Election Campaign Law, which is intended to prohibit corruption of candidates and the electoral process. At a minimum, the corporate officer and candidate for public office described in Case 2.1 could be prosecuted under 18 U. S. C. § 600 for the unlawful promise of a benefit in exchange for political activity, a misdemeanor.

2.2. How would your national laws that will implement the Convention treat this case if it involved a candidate for a foreign public office?

Possibilities might be that the candidate is equated to a public official in the law, or the offer or promise to a candidate of undue advantage is treated as a preparatory act, an attempt or a conspiracy to bribe, or that the case be covered by laws on the financing of political parties or election campaigns. (See paragraphs 10-12 above.)

The FCPA covers bribes to candidates of political parties (i) to obtain business from the party *and* (ii) for the party to assist in obtaining business from the government. There is no requirement that the business be awarded immediately, therefore, the prospective agreement described in Case 2 could be covered.

Because the FCPA covers candidates directly, there is no need to treat the bribe as a preparatory act, an attempt, or a conspiracy. Further, because the offer or payment constitutes the violation, the crime (or the authorization of a prospective offer or payment) is not dependent on the success of the candidate's candidacy.

Case 3: A company officer offers a candidate for public office a substantial campaign contribution immediately and another substantial payment once he/ she has been elected, in return for the promise that the candidate will award the company a contract if the candidate wins the election and becomes a public official. The second payment— after the election— is not made.

3.1. How would your national criminal or other laws treat this case if the contribution were to a candidate for a national public office?

The first payment and the promise of a second payment would be covered only under the circumstances described in 2.1. The second payment or even merely a renewed offer or promise of payment, if made after the candidate was elected or took office, would violate section 201.

Under section 201, the crime is complete upon the offer or promise, regardless of whether the payment was made.

3.2. How would your national laws that will implement the Convention treat this case if it involved a candidate for a foreign public office?

The answer is the same as for 2.2. Once the authorization, offer or payment is made, whether the payment is made, whether the payment is actually made is irrelevant.

Bribery as a predicate offense for money laundering

Case 4: A deposit is made to a domestic bank. An officer of the bank has reason to believe that the deposit is a bribe payment to a domestic public official.

4.1. Under your money laundering legislation is the bank officer obliged to report such a deposit to appropriate authorities? Does the failure to report the transaction to the appropriate authorities give criminal prosecutors or other authorities a basis to take action against the bank officer?

U. S. law requires bank officers to report:

Transactions aggregating $5,000 or more when the bank "believes . . . that it was used to facilitate a criminal transaction, and the bank has a substantial basis for identifying a possible suspect or group of suspects."

Transactions aggregating $25,000 or more, regardless of whether the bank can identify suspects, "where the bank believes . . . that the bank was used to facilitate a criminal transaction, even though there is no substantial basis for identifying a possible suspect or group of suspects."

Any suspicious transaction or transactions aggregating more than $5,000 that involve potential money laundering "if the bank knows, suspects, or has reason to suspect that the transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities . . . as part of a plan to violate or evade any law or regulation or to avoid any transaction reporting requirement under Federal law. . . [or] where the transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction."[2]

It does not matter where the bribery occurred. The Money Laundering Control Act explicitly provides for nationality jurisdiction over U. S. nationals and, provided that some conduct occurred within the U. S., jurisdiction over nonU. S. nationals. *See* 19 U. S. C. 1956(f), 1961(1).

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[2] See 12 Code of Federal Regulations (C. F. R.) § 21.11(c) (national banks); see also 12 C. F. R. § 208.20(c) (state banks); 12 C. F. R. § 208.62(c) (state banks); 12 C. F. R. § 563.180(d)(3) (savings associations); 31 C. F. R. § 103.21(c) (other banks). Bribery of a domestic public official is covered both directly and indirectly as a "criminal transaction" and a money laundering predicate. See 18 U. S. C. §1956(c)(7)(a) (incorporating 18 U. S. C. § 1961(1), which lists 18 U. S. C. § 201 as a predicate act). The law provides that the bank will not be liable in a civil action for making such a report. See 31 U. S. C. §5318 (g). The law further provides the failure to make such a report may subject the bank to civil enforcement actions by the appropriate supervisory agency. See 12 C. F. R. § 21.11(i) (national banks); see also 12 C. F. R. § 208.20(I) (state banks); 12 C. F. R. § 208.62(i) (state banks); 12 C. F. R. § 563.180(d)(10) (savings associations); 31 C. F. R. § 103.21(i) (other banks). However, there is no provision for criminal prosecution of the bank officer or the bank unless, of course, they are personally implicated in the underlying crime.

4.2. How would your national money laundering laws treat this case if the bank officer has reason to believe that the deposit is a bribe payment to a foreign public official?

The reporting requirement applies to violations of all U. S. laws. Thus, both bribery of domestic and foreign officials is covered. In addition, bribery of a foreign as well as of a domestic public official is a predicate offense to a charge of money laundering. *See* 18 U. S. C. 1956(c)(7)(D).

Case 5: A company's financial officer makes a deposit or transfer to a domestic bank of company assets received in payment of a contract with the national government. An officer of the bank has reason to believe that the funds are the proceeds of a contract obtained by bribery of a domestic public official.

5.1. Under your money laundering legislation is the bank officer obliged to report the transaction to appropriate authorities? Does the failure to report the transaction to the appropriate authorities give criminal prosecutors or other authorities a basis to take action against the bank officer?

Same answer as for 4.1. The issue here and in 4, above, is why the bank officer would think the transaction was suspicious.

5.2. How would your national money laundering laws treat this case if the bank officer has reason to believe that the funds are the proceeds of a contract obtained by bribery of a foreign public official?

Same answer as for 4.2.

Foreign subsidiaries

Case 6 The foreign subsidiary of a corporation with headquarters in your country bribes a foreign public official in order to obtain a contract. The bribery act occurs entirely outside your territory; the officers of the subsidiary who are directly responsible are not nationals of your country.

6.1. Under your national laws and/ or rules that will implement the Convention, can your authorities take action in criminal or non-criminal proceedings against officers of the corporation headquarters or against the corporation headquarters itself:

a) if the company headquarters knows nothing about the bribe?

No, with respect to the anti-bribery provisions. However, regarding 6.1 (a-d), to the extent that the parent corporation controls 50 percent or more of the equity ownership of the subsidiary or consolidates its financial reports with those of the foreign subsidiary, it may be held liable under the books and records provisions of the FCPA. In the absence of active knowledge by the parent corporation, the Department of Justice would be unlikely to charge a criminal violation unless the parent had "consciously disregarded;" was "willfully blind;" or practiced "deliberate ignorance" with respect to the conduct of the affairs of the subsidiary.

b) if the company headquarters "should have known" about the bribe?

Under general principles of criminal liability, a parent corporation is not criminally responsible for the acts of a subsidiary company, except in cases where the parent has authorized, directed or controlled the subsidiary's actions. Under the FCPA, a person— whether a natural or a legal person— is criminally (and civilly) liable for the act of an agent when it has "knowledge" that its agent has offered, promised or paid a bribe to a foreign government official. Knowledge is defined

in the FCPA as including not only actual knowledge, but also "willful blindness" and "reckless disregard". In addition, under the current version of the FCPA, there must also be proof that the U. S. person, or its agent, used the U. S. mails or some means or instrumentality of interstate or international commerce in furtherance of the offer, promise or payment of a bribe. Under the proposed amendments to the FCPA, there will be no requirement of a nexus to the U. S. mails or an instrumentality of interstate commerce.

c) if the company headquarters actually knows about the bribe?

See 6.1(b), above.

d) if the company headquarters authorised the bribe?

Where a U. S. corporation authorizes, directs or participates in the payment of a bribe by one of its subsidiaries, it may be held liable for it. 18 U. S. C. §§ 78dd-1(a); 78dd-2(a).

6.2. Under your national laws and/ or rules that will implement the Convention, can any of your authorities take action against the foreign subsidiary? What other circumstances are necessary?

Under proposed legislation to implement the Convention, it will be unlawful for a subsidiary of a U. S. firm (or any other foreign-incorporated legal person), to take any actions while in the territory of the United States, in furtherance of an offer, payment, promise to pay or authorization of a bribe to a foreign official or to a foreign political party, party official or candidate for foreign political office.

Under proposed amendments to the FCPA to implement the Convention, it will be unlawful for any U. S. person who is an officer, director, employee, agent or stockholder acting on behalf of the foreign subsidiary, while outside the territory of the United States, to take any actions in furtherance of an offer, payment, promise to pay, or authorization of a bribe to a foreign official or to a foreign political party, party official, or candidate for foreign political office.

Appendix E: U.S. Note on Bribery of Foreign Political Parties, Party Officials, and Candidates for Political Office in International Business Transactions

Note by the U. S. delegation submitted to the OECD Working Group on Bribery in International Business Transactions for its meeting November 3– 5, 1998.

I. Introduction

Under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed December 17, 1997, bribes offered or paid to foreign political parties, party officials, or candidates for political office are not explicitly covered. The definition of "foreign public official" in Article 1(4)(a) does not include political parties, party officials, or candidates. Commentary No. 16 states that, under the legal principles of some countries, persons who exercise de facto public authority (e. g., political party officials in single party states) may be considered to be foreign public officials. Also, it is noted in Commentary No. 10 that, under the legal systems of some countries, an advantage promised or given to any person in anticipation of that person becoming a foreign public official would be covered by the Convention. It is not clear how many OECD members would fall into one or both of these categories, but it appears that such members would be in the minority.

II. Working Group Consideration

During the negotiation of the Convention, the United States urged that bribes offered or paid to foreign political parties, party officials, or candidates for political office be explicitly covered. Such explicit coverage is provided in the U. S. Foreign Corrupt Practices Act (FCPA). (See 15 U. S. C. 78dd-1(a)(2), 78dd-2(a)(2).) Consensus support for inclusion of political parties, party officials, and candidates could not be achieved, as a number of delegations objected to defining such persons as "public officials". However, the OECD Council agreed that treatment of political parties, party officials, and candidates was one of several issues meriting additional examination by the Working Group on Bribery in International Business Transactions. In December 1997, the Council issued its Decision on Further Work on Combating Bribery in International Business Transactions (C(97) 240/ FINAL), in which it requested that the Working Group examine on a priority basis several issues with a view to reporting conclusions to the 1999 OECD Council meeting at Ministerial level, including:

- bribery acts in relation with foreign political parties; and
- advantages promised or given to any person in anticipation of that person becoming a foreign public official.

III. Policy Concerns

The Preamble to the Convention sets forth several of the primary reasons why bribery in international business transactions is a pernicious practice:

- Such bribery raises serious moral and political concerns;
- It undermines good governance and economic development; and
- It distorts international competitive conditions.

These concerns apply no less to bribes offered or paid to political parties, party officials, or candidates than to bribes offered or paid to government officials. Although political party officials may not hold public office, they play an important role in the democratic process and wield special authority and influence within the political system. For their part, candidates represent potential public authority, contingent upon their election or appointment. Thus, corruption on the part of political party officials or candidates can be said to constitute a breach of the public trust. Bribes to political parties, party officials, or candidates are no less pernicious than bribes to government officials.

Moreover, there is a danger that individuals and companies will interpret lack of coverage of political parties, party officials, and candidates under the Convention as a loop-hole to be exploited, offering a roadmap for bribers who can no longer safely bribe government officials. Such circumvention would undermine the effectiveness of the Convention.

To the extent that some members of the Working Group may have had difficulty in accepting a definition of "public official" that embraces political parties, party officials, and candidates, it is not necessary that these categories of persons be included within the definition of "public official". If the member nations agree that the bribery of political parties, party officials and candidates should be prohibited, such persons can be defined without regard to any consideration as to whether they are, or are not, "public officials".

It should be underscored that this discussion concerns only bribes paid to political parties, party officials, or candidates in order to obtain or retain business or other improper advantage in the conduct of international business. Issues relating to campaign financing are outside the scope of the Working Group's current examination.

IV. Scope of the Problem

The experience of the United States in enforcing the Foreign Corrupt Practices Act (FCPA) over a 20year period has demonstrated that bribery of political parties, party officials, or candidates for political office occurs in international business transactions. The very first case brought under the FCPA involved a payment to a political party and party officials for the purpose of paying for the transportation from New Zealand to the Cook Islands of a sufficient number of voters to ensure the reelection of a legislative majority for the ruling political party and the head of the party, Prime Minister Sir Albert Henry. (U. S. v. Kenny International Corporation, D. D. C. 1978.)

Numerous reports in the international media in recent years have alleged that the payment of bribes to political parties, party officials and candidates has been used to secure government business. (See Room Document 1, 4th November 1998). In countries in which there is only one political party, or

in which a single party is predominant, parties and their officials may exercise substantial influence over the award or retention of government business. In addition, bribery of a candidate for office may appear attractive in any situation in which it appears that the candidate is likely to be elected or appointed, and will then have authority to award business to or retain business for the bribing person.

V. Conclusion

Taking measures to prevent the bribery of political parties, party officials, and candidates in international business transactions would be consistent with the objectives of the Convention and would contribute to more effective anticorruption efforts.

Appendix F: Websites Relevant to the Convention and Antibribery Issues

United States Government

Department of Commerce
Commerce Home Page:
http://www.doc.gov

Market Access and Compliance**:**
http://www.mac.doc.gov

Trade Compliance Center**:**
http://tcc.mac.doc.gov/index.html

Trade Agreements:
http://www.mac.doc.gov/tcc/treaty.htm (Search Issues for Bribery)

Exporter's Guide to the OECD Anti-Bribery Convention:
Exporter's Guide

Trade Complaint Hotline:
Hotline

Office of the General Counsel:
http://www.doc.gov/ogc/occic/

Anti-Corruption Review:
http://www.doc.gov/ogc/occic/

Department of State

Home page:
http://www.state.gov

Department of Justice

Criminal Division Fraud Section:
http://www.usdoj.gov/criminal/fraud/fcpa/

United States Agency for International Development
Home page:
http://www.info.usaid.gov/

Notable Websites on Global Initiatives

Note! - When you click on some of the following links, you will be leaving the Trade Compliance Center web site. You may wish to review any privacy notices that might be available on these sites since their information collection practices may differ from ours.

Organization for Economic Cooperation and Development

Home page: http://www.oecd.org/

OECD Anti-Corruption Network:
http://www.oecd.org/daf/psd/acnet2.htm

OECD Anti-Corruption Unit Combating Bribery and Corruption in International Business Transactions:http://www.oecd.org/daf/nocorruption/

Downloaded documents and links to national legislation of Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Korea, New Zealand, Switzerland, and the United States can be accessed at the above address or at
http://www.oecd.org/daf/nocorruption/links1.htm

United Nations

Home page: http://www.un.org

World Bank

World Bank Anti-Corruption Knowledge Resource Center (efforts to combat bribery):
http://www.worldbank.org/wbi/governance/

Organization of American States

Anticorruption Network: http://www.oas.org/En/prog/juridico/emglisj/fightcur.html

Transparency International

Home page:
http://www.transparency.de/

International Chamber of Commerce

Home page:
http://www.iccwbo.org

Standing Committee on Extortion and Bribery:
http://www.iccwbo.org/home/extortion_bribery/committee.asp

Extortion and Bribery in International Business Transactions (1999 revised version):
http://www.iccwbo.org/home/statements_rules/rules/1999/briberydoc99.asp

Country Websites With Convention-Related Legislation

Australia

The government response (tabled in the Senate on March 11, 1999) to the Treaties Committee Report on the OECD Convention and the Draft Implementing Legislation may be found at http://www.aph.gov.au/hansard/hanssen.htm.

Select March 11, 1999 and go to p.2634). The Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 is at
http://www.aph.gov.au/parlinfo/billsnet/bills.htm.
The Bill's Explanatory Memorandum is also on the site:
http://www.aph.gov.au/parlinfo/billsnet/em.htm

Austria

The government site (in German only) is
http://www.ris.bka.gv.at/.

Belgium

The text of the law passed on February 10, 1999, is available on the site of the Moniteur Belge at
http://www.just.fgov.be/
To find the text, choose the Moniteur published on 23.03.1999.

Canada

Link to the site for the Department of Justice / Ministère de la Justice (http://canada.justice.gc.ca/Loireg/index_en.html) or go directly to the Act concerning the Corruption of Foreign Public Officials:
http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/government/S-21/S-21_4/S-21_cover-E.html

Denmark

Implementing legislation can be found on the Department of Justice web site (in Danish only) at
http://www.folketinget.dk/Samling/19981/lovforslag_oversigtsformat/L232.htm

Finland

Implementing legislation can be found on the government web site (in Finnish and Swedish) at
http://valtioneuvosto.fi/liston/base.lsp?k=en

France

The draft law modifying the penal code and the penal procedure code relating to combating bribery and corruption can be found on the website of Legifrance (in French only) at
http://www.legifrance.gouv.fr/html/accueil.htm

Norway

The text of Norway's penal code can be found at
http://www.lovdata.no/all/

Switzerland

Swiss laws can be found on Recueil Systématique du Droit Fédéral (available in French, German and Italian only) at
http://www.admin.ch/ch/f/rs/rs.html
Search for the Swiss Penal Code of December 21, 1937, which will soon be amended to comply with the Convention.