

Addressing the Challenges of International Bribery and Fair Competition 2001

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

U.S. Department of Commerce
International Trade Administration
July 2001



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THE SECRETARY OF COMMERCE
Washington, D.C. 20230

The Honorable Richard Cheney
President of the Senate
Washington, DC 20510

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

Dear Mr. President and Mr. Speaker:

It is my honor to present to Congress the third annual report mandated by the International Anti-Bribery and Fair Competition Act of 1998 (IAFCA). Section 6 of the IAFCA directs that the Secretary of Commerce submit a report to the Senate and the House of Representatives assessing progress on the implementation of the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Bribery Convention) and addressing other related matters. In accordance with section 6 of the IAFCA, the report also addresses advantages that may accrue to international satellite organizations as a result of privileges and immunities granted by treaty and U.S. law.

I am pleased to report to you that meaningful progress has been made over the past year in the implementation of the OECD Bribery Convention. Thirty-two of the 34 Convention signatories have ratified it and 30 have laws on the books that make it a crime to bribe foreign public officials in international business transactions. In addition, peer-group monitoring of implementation of this very important anticorruption instrument has progressed to the second phase, dedicated to ensuring effective enforcement of Convention obligations. These are notable achievements in just under two and a half years since the OECD Bribery Convention's entry into force. The Bush Administration is committed to expanding trade, and this unique agreement is one more instrument we will use to secure this objective.

Since 1977, the Foreign Corrupt Practices Act has set a high standard of integrity for U.S. firms and individuals doing business overseas. With the progress to date on the OECD Bribery Convention, countries representing over three-quarters of global trade will be required to hold their companies to similar standards. The level playing field for lawful business activity we have sought for almost a quarter century for our companies may soon be a reality; good faith enforcement of the obligations of the OECD Bribery Convention should allow all companies to win contracts on the basis of price and quality alone.

The Honorable Richard Cheney
The Honorable J. Dennis Hastert
Page 2

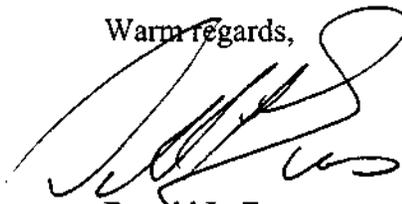
By promoting trade on fair terms, the OECD Bribery Convention will also contribute to the broader goal of improving national welfare within individual countries where all of our companies operate. Trade means economic growth, higher-paying and more plentiful jobs, and a rising standard of living in America and abroad. As the President has often stated, our Nation's greatest export is its democratic principles. It is when free men and women are able to conduct their business in free markets that the returns are greatest for all of us.

Effective implementation and enforcement of the OECD Bribery Convention are critical to its success. I am committed to deriving the intended benefits from this landmark agreement. As I said in my confirmation hearings, this Administration is committed to and will enforce our trade agreements. While these will be new rules of the game for many foreign firms, the experience of U.S. firms shows that companies can adapt: U.S. firms have learned this lesson well and have established comprehensive and effective corporate compliance programs. I will encourage my counterparts to urge their firms to undertake and abide by similar programs. As we proceed to monitor compliance with this important agreement, we will maintain close contact with the business community and nongovernmental organizations.

While nearly all of the OECD Bribery Convention's signatories have enacted laws to prohibit this pernicious practice, the legislation of a few still fails to meet the standards of the Convention, and one signatory still has not disallowed the tax deductibility of bribes. We will not relent in pressing these countries to fulfill their commitment to each of the other Parties to the Convention; this is a moral imperative.

Congress also requested in the IAFCA that this report address certain advantages available to the international satellite organizations, the International Telecommunications Satellite Organization (INTELSAT), and the International Mobile Satellite Organization (Inmarsat). Since passage of the IAFCA, Inmarsat completed its privatization and, as a result, there is no intergovernmental participation, including by the U.S. Executive Branch, in the Inmarsat private company. Therefore, this report focuses primarily on INTELSAT and its signatories. There were no significant findings or changes identified in this year's report, and advantages continue to diminish as the forces of privatization and globalization increase. Following INTELSAT's privatization scheduled for July 18, 2001, we can expect to see an even greater reduction in these advantages and an increasingly level playing field for satellite service providers. The Department of Commerce remains fully committed to that objective.

Warm regards,



Donald L. Evans

Executive Summary

The environments in which governments and businesses operate are changing rapidly. Globalization has created many new forces and energized old ones. In the area of international trade we have seen that the promotion of open and free markets around the world has set into motion the positive forces that now drive economic development, democratization, social freedoms and political stability. These same forces have produced a higher standard of life for many of the world's nations and raised the expectations of many others. In addition, competitive pressures and market demands are also changing the dynamics of doing business internationally.

Corruption, however, thwarts these forces and threatens, or at least postpones, the benefits of global trade. Corruption by and of public officials is a serious threat to governments and it undermines the rule of law. Furthermore, corruption materially affects the environments in which companies operate and erodes the fabric of everyday economic life; it is the invisible tax that raises the cost of doing business and unfairly places it on those least able to pay. For these reasons fighting corruption head-on is of critical importance to the U.S. and other governments around the world.

Adoption in 1997 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Bribery Convention) marked an important step forward in this effort.

The Bribery Convention has been signed by all thirty OECD members¹ and Argentina, Brazil, Bulgaria, and Chile; it entered into force on February 15, 1999.

As President George W. Bush recently emphasized in his statement on corruption submitted to the Second Global Forum on Fighting Corruption at The Hague in May 2001, only a few short years ago talking openly about corruption was considered taboo; now this is no longer true. The ability of governments to discuss corruption itself is a significant accomplishment. As disclosed in this report, progress on implementation of the Bribery Convention is also a major achievement. In just under two and a half years, almost all of the signatories are now Parties to the Bribery Convention and are under an international obligation to enforce their laws implementing the Convention.

This third annual report under the International Anti-Bribery and Fair Competition Act of 1998 (IAFCA) examines the continued progress that signatory countries have made in implementing the Convention. This report was prepared by the Department of Commerce's International Trade Administration and the Office of General Counsel working in close cooperation with the State Department, the Justice Department, the Treasury Department, the Office of the United States Trade Representative, and the staff of the United States Securities and Exchange Commission.

This report continues to focus primarily on national implementing legislation and its conformity with the obligations that all signatories have accepted. The legal framework is critical for Parties to fulfill their commitment to criminalize the bribery of foreign public officials. We will not have a comprehensive appreciation of the varying approaches to implementation until all signatories have ratified and implemented the Convention and their laws have undergone an assessment.

The report also highlights the present shift in focus to the enforcement of these obligations. The Parties to the Convention will now begin reviewing each other's experiences in securing rigorous enforcement of those laws when violations are found. We identify this as a priority for the Bush Administration and identify initiatives the U.S. government will take to secure the intended benefits from this landmark agreement. The report also addresses other issues identified in the IAFCA. Of particular note, the report reviews steps taken by signatories to implement the OECD recommendation to disallow the tax deductibility of bribes. It assesses antibribery programs and transparency in several major international organizations. Finally, the report examines progress made on advancing other goals in the IAFCA relating to fair competition in global satellite communication services.

Major Findings

- Meaningful progress has been made over the past year in the implementation of the OECD Bribery Convention. Our first objective—ensuring that all signatories ratify the Bribery Convention and enact implementing legislation—has been mostly achieved. In less than two and a half years, the Convention is nearing full ratification. As of June 4, 2001, thirty-two of the thirty-four Convention signatories had deposited instruments of ratification with the OECD Secretariat and thirty had laws on the books that make it a crime to bribe foreign public officials in international business transactions. These countries represent over three-quarters of global trade. Only Brazil, Chile, Ireland, and Turkey must still complete legislative action to bring the Convention into force. The United States will continue to press these countries to complete their legislative processes without delay.
- The OECD process to monitor implementation and enforcement of the Convention and the 1997 Revised Recommendation has proven to be rigorous. Thus far, review of the implementing legislation of twenty-eight countries, including the United States, has been completed by the OECD Working Group on

Bribery. The effectiveness of this process has been demonstrated by the willingness of several Parties to correct weaknesses identified in their implementation and enforcement regimes after their legislation has undergone review. The U.S. government assessments of the legislation of twenty-seven foreign Parties, including the seven reviewed since our last report (Argentina, France, Denmark, Italy, Luxembourg, the Netherlands, and Poland) are included in Chapter 2 of this report.

- We are concerned that some countries' legislation may be inadequate to meet all their commitments under the Convention, in particular the legislation of France, Japan, and the United Kingdom. We will continue to note our concerns in the Working Group meetings and also when appropriate, in bilateral contacts with the other governments.
- Phase II of the monitoring process—which will include on-site visits to study the enforcement structures and practices of Parties to the Convention—begins this year with the review of Finland. This will be a critical phase in ensuring rigorous enforcement of the Convention's obligations. The U.S. government believes that Phase II will be the true litmus test of a Party's commitment to the Convention and its eventual effectiveness.
- We are not aware at this time of any prosecution by another Party to the Convention for bribery payments to foreign public officials. However, as with investigations in this country, the confidentiality of the procedures prior to prosecution could be one factor. Nonetheless, we are disturbed by continuing reports of alleged bribery of foreign public officials by firms based in countries where the Convention is in force. In the coming year we will redouble our efforts to encourage the relevant authorities in each Party to address all credible allegations of bribery, and will seek to engage other signatory governments in coordinated action in situations where bribes have been solicited by foreign public officials.
- Another very important element in making the Convention a success is raising public awareness of the laws. This includes informing the relevant prosecutorial authorities of the new tools they have to prosecute corruption, as well as counseling businesses and the general public about the laws. While in important economies such as Belgium, Italy, Japan, Spain, and the United Kingdom, there continues to be relatively little official activity to publicize the Convention, other Parties have undertaken useful initiatives including Australia, Canada, the Czech

Republic, Korea, and the Netherlands. The United States will encourage other governments to increase public awareness.

- The United States takes monitoring of the Convention very seriously and has committed significant resources to this endeavor, at times through supplemental funding for the Working Group. A lack of adequate funding for the Bribery Working Group could jeopardize its ability to carry out its mandate. The United States will continue to press for adequate OECD funding for the Working Group.

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

- Further substantial progress has been achieved in implementing the OECD Council recommendation to eliminate any remaining tax deductibility for bribes to foreign public officials, with only one country (New Zealand) reporting that it has not yet completed action necessary to disallow these deductions. The United States, in cooperation with other OECD members, continues to provide technical assistance to the OECD's Fiscal Affairs Committee. With significant assistance from the U.S. Treasury Department, within the past year the Committee on Fiscal Affairs has completed work on a *Bribery Awareness Handbook* designed to serve as a manual for tax officials in signatory countries to assist them in detecting bribes.

- At the urging of the United States, OECD Ministers in their 2001 communique indicated that the OECD will move ahead on two issues 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. These channels of bribery and corruption are covered in the Foreign Corrupt Practices Act (FCPA), but not specifically covered in the Convention. After persistent encouragement by the U.S. government, and recognizing that such a gap in Convention coverage would be potentially a serious problem, the Working Group agreed to issue a questionnaire to signatories to explore this important issue.

- The Working Group and the United States have concluded that a targeted expansion of the

Convention membership to appropriate states could contribute to the elimination of bribery of foreign public officials in international business transactions. Since our last report, one applicant country (Slovenia) has been favorably considered for accession. We expect a small number of additional qualified applicants to satisfy the conditions for Working Group observership or full accession to the Convention in the coming years.

- U.S. agencies will continue to help U.S. businesses deal with the problem of international bribery. U.S. officials will intensify 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. The Department of State, in cooperation with the Commerce and Justice Departments, published a new edition of its brochure, *Fighting Global Corruption: Business Risk Management*, and the Department of Commerce maintains an Internet bribery hotline. The Department of Justice, under its Foreign Corrupt Practices Act Opinion Procedure, will issue opinions on the antibribery provisions of the Foreign FCPA with respect to certain prospective business transactions.

- Combating corruption is more than a responsibility of governments. Business associations and non-governmental organizations, such as Transparency International, are playing an important role in helping the U.S. government monitor implementation of the Convention and educate the public and the business community about the pernicious effects of corruption and how to combat it.

- International organizations are undertaking useful initiatives to promote cooperation on combating bribery and to ensure transparency and good business practices within their own programs. With active U.S. support, major international financial institutions, such as the International Monetary Fund, the World Bank, and the regional multilateral development banks, have intensified efforts to help client countries prevent corruption and improve the efficiency of funded projects. Noteworthy activities are also continuing in the OECD, the Organization of American States, the United Nations, the Organization for Security and Cooperation in Europe, and the World Trade Organization. INTELSAT, a major intergovernmental satellite organization, has maintained active programs to address transparency and antibribery issues in its operations.

- The report also addresses advantages that may accrue to international satellite organizations as a result of privileges and immunities granted by treaty and U.S. law. Over the past year there has been a reduction in these advantages, and following INTELSAT's privatization scheduled for July 18, 2001, we can expect to see an even greater reduction in these advantages and an increasingly level playing field for satellite service providers. (Inmarsat completed its privatization in 1999.)

In summary, since our last report to Congress in July 2000, nine additional signatory countries have adopted legislation to implement the Convention, and eleven more have deposited instruments of ratification with the OECD Secretariat; this is material progress. While four countries must still adopt laws to implement the Convention—and a number of others take action to correct deficiencies in their implementing legislation—ensuring rigorous enforcement of the Convention will be the next priority for the U.S. government. We also will encourage other governments to make it an important agenda item; bribery of foreign public officials continues to be a common threat to governments and businesses across the globe.

Over the past several years, the U.S. government has received reports indicating that the bribery of foreign public officials influenced the awarding of billions of dollars in contracts around the world. For example, in the period from May 1, 2000 to April 30, 2001, the competition for 61 contracts worth \$37 billion may have been affected by bribery of foreign officials, and of these contracts, U.S. firms are believed to have lost at least nine, worth approximately \$4 billion. Firms from Convention signatory countries continue to account for about 70 percent of these allegations. In other cases, we understand that U.S. firms withdrew from contract competitions because foreign officials demanded bribes or do not even seek business in countries where bribery is prevalent. (*See* Chapter 9.) The U.S. government is committed to reducing, and eventually eliminating, the number of contracts influenced by such bribery. Securing effective implementation and enforcement of the Bribery Convention will be instrumental to that objective.

¹The current member states of the OECD are Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, the Slovak Republic, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

Contents

Introduction	1
Chapter 1: Ratification Status	7
Chapter 2: Review of National Implementing Legislation	11
Concerns About Implementing Legislation.....	12
Summary of 1998 Amendments to the Foreign Corrupt Practices Act of 1977	14
Argentina.....	15
Australia	17
Austria	19
Belgium.....	21
Bulgaria	22
Canada	24
Czech Republic	26
Denmark	28
Finland	30
France	32
Germany	36
Greece	38
Hungary	40
Iceland	41
Italy	42
Japan	45
Korea	48
Luxembourg	50
Mexico	52
Netherlands.....	54
Norway	57
Poland	58
Slovak Republic	60
Spain	62
Sweden	64
Switzerland	66
United Kingdom	68
Chapter 3: Review of Enforcement Measures	71
Enforcement of National Implementing Legislation.....	71
U.S. Efforts to Promote Public Awareness	72
Efforts of Other Signatories	72
Monitoring Process for the Convention.....	75
Monitoring of the Convention by the U.S. Government	78
Chapter 4: Laws Prohibiting Tax Deduction of Bribes	81

Chapter 5: Adding New Signatories to the Convention	87
Chapter 6: Subsequent Efforts to Strengthen the Convention	89
Outstanding Issues Relating to the Convention.....	90
Other Issues Relating to Coverage.....	92
Chapter 7: Antibribery Programs and Transparency in	
International Organizations	93
INTELSAT	94
International Telecommunication Union	96
International Monetary Fund	97
World Bank.....	98
African Development Bank	101
Asian Development Bank	102
European Bank for Reconstruction and Development	104
Inter-American Development Bank.....	105
Organization of American States	108
Organization for Economic Cooperation and Development.....	109
Organization for Security and Cooperation in Europe	111
United Nations	112
World Trade Organization	113
Chapter 8: Private Sector Involvement in Monitoring and Implementation	115
Chapter 9: Additional Information on Enlarging the Scope of the Convention	119
Chapter 10: Advantages to International Satellite Organizations	123
APPENDIXES	
Appendix A: International Anti-Bribery and Fair Competition Act of 1998	129
Appendix B: Antibribery and Books and Records Provisions of the Foreign Corrupt Practices Act	137
Appendix C: Brochure on the Foreign Corrupt Practices Act	149
Appendix D: OECD Documents	155
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 E: Websites Relevant to the Convention and Anticorruption Issues	169

Introduction

History shows that expanded trade leads to more prosperous businesses, wider choices of goods, and lower prices for consumers. Expanding trade brings higher wages, more jobs, and economic growth. It benefits American consumers and taxpayers at all levels of society.

Expanding trade also has many benefits abroad. Open markets promote economic and political freedom around the world. Economic and political freedom creates increased competition, opportunity, and independent thinking that strengthen democracy. In turn, greater political freedom and democracy across the globe enhance U.S. national security. As we dismantle trade barriers and promote the rule of law around the world, especially in the developing world, we help create the economic and social conditions necessary for real change.

Corruption, however, is an impediment to trade. It takes many forms and affects trade in different ways. In many countries, it affects customs practices, licensing decisions, and the award of government procurement contracts. If left unchecked, bribery and corruption can negate market access gained through trade negotiations, undermine the foundations of the international trading system, and frustrate broader reforms and economic stabilization programs.

For more than two decades, the United States has sought to prevent the bribery of foreign public officials in

international business. This corrupt practice has many pernicious effects. It penalizes companies that try to compete fairly and win contracts through the quality and price of their products and services. It tarnishes the reputation of the companies engaging in bribery. Finally, it undermines good governance, retards economic development, and distorts trade.

In 1997, the United States took a major step forward in building an international coalition to address the problem when thirty-four exporting countries, including the United States, negotiated the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions within the Organization for Economic Cooperation and Development (OECD).

The following year, the Congress enacted the International Anti-Bribery and Fair Competition Act (IAFCA), which amended certain provisions of the Securities Exchange Act of 1934 and the Foreign Corrupt Practices Act of 1977 (FCPA) that relate to the bribery of foreign public officials. These changes were made to implement the Convention. The United States ratified the Convention on November 20, 1998, and deposited its instrument of ratification with the OECD on December 8, 1998. The Convention entered into force on February 15, 1999.

While the main focus of the IAFCA is on implementation of the OECD Convention, the Act also addresses

congressional concerns regarding privileges and immunities for international organizations which provide satellite communications services that may affect fair competition in that industry. (A review of these issues is contained in Chapter 10.)

U.S. Leadership on the Convention

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

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

Recognizing that bribery and corruption in foreign commerce could be effectively addressed only through strong international cooperation, the United States undertook a long-term effort to convince the leading industrial nations to join it in passing laws to criminalize the bribery of foreign public officials. The Omnibus Trade and Competitiveness Act of 1988 reaffirmed this goal, calling on the 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 1996 recommendation on eliminating the tax deductibility of bribes.

The Convention entered into force on February 15, 1999. We are nearing a milestone in implementation of the Convention just over two years since its entry into force: full ratification by all signatory states. As of June 4, 2001, thirty countries have laws on the books that make it a crime to bribe a foreign

public official in an international business transaction. We continue to urge those signatories that have not acted to conclude their internal processes as soon as possible to bring implementing legislation into force and those Parties with deficient legislation to amend their legislation without further delay. In addition, we have sharpened our focus on the need for all Parties to rigorously enforce their laws. We are, however, disturbed by continuing reports of alleged bribery of foreign public officials by firms based in countries where the Convention is in force. The Phase II reviews of national enforcement structures and practices will provide additional opportunities for the United States to emphasize the importance of making the Convention an effective instrument in the battle against international bribery. The U.S. government is vigorously enforcing its implementing legislation; we expect other Parties to do the same. We believe the Convention is the most important international anti-bribery instrument to date; effective implementation and enforcement of the Convention are critical to its success.

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 affect the conduct of companies in exporting nations.

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

- Make bribery of a foreign public official a predicate offense for purposes of money laundering legislation on the same terms as bribery of domestic public officials.
- Take necessary measures regarding accounting practices to prohibit the establishment of off-the-books accounts and similar practices for the purpose of bribing or hiding the bribery of foreign public officials.
- Provide mutual legal assistance to the fullest extent possible under their respective laws for the purpose of criminal investigations and proceedings under the Convention and make bribery of foreign public officials an extraditable offense.

The Convention tracks the FCPA closely in many important respects. Unlike the FCPA, however, it does not cover bribes to political parties, party officials, or candidates for public office. The United States has urged that the Convention be strengthened by including these individuals and organizations in the definition of foreign public official: the OECD Working Group on Bribery in International Business Transactions (Working Group) will continue to study these issues in 2001.

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 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 input from the private sector and nongovernmental organizations.
- An explanation of the laws enacted by each signa-

tory to prohibit the tax deduction of bribes.

- A description of efforts to add new signatories and to ensure that all countries that become members of the OECD are also Parties to the Convention.
- An assessment of efforts to strengthen the Convention by extending its prohibitions to cover bribes to political parties, party officials, and candidates for political office.
- An assessment of antibribery programs and transparency with respect to certain international organizations.
- A description of the steps taken to ensure full involvement of U.S. private sector participants and representatives of nongovernmental organizations in the monitoring and implementation of the Convention.
- A list of additional means for enlarging the scope of the Convention and otherwise increasing its effectiveness.

In addition, the IAFCA requests the following information about 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 2001 report to Congress addresses all the areas specified in Section 6 of the IAFCA. It updates information contained in the 2000 report and provides new information in several areas. Of particular note, this year's report assesses the national legislation of seven additional Parties, bringing the total number of foreign countries reviewed to twenty-seven. Future reports are expected to provide more extensive information as other signatory countries bring the Convention into effect, and we learn more about how countries are enforcing their antibribery laws.

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 Office of the United States Trade Representative, and the staff of the United States Securities and Exchange Commission, 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 its global trading partners. 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 illicit and harmful practices. Preparation of the annual reports to Congress under the IAFCA has been fully integrated into the United States' internal monitoring process. (More detailed information on monitoring is provided in Chapter 3.)

In addition, U.S. officials participate in the OECD process for monitoring implementation of the Convention. The Working Group is conducting a systematic review of measures taken by signatory countries to fulfill their obligations under the Convention. In Phase I of this review, the Working Group is examining national implementing legislation to assess whether it conforms to the requirements of the Convention. Through April 2001, the Working Group has examined the implementing legislation of twenty-eight countries, including the United States. In Phase II of the monitoring process, which begins this year with an examination of Finland, the Working Group will conduct on-site visits to assess steps that Parties are taking to enforce their antibribery legislation and fulfill other obligations under the Convention.

We continue to be encouraged by the seriousness with which many Parties have approached Phase I of the OECD review and by the concrete steps many have taken to make bribery of foreign public officials illegal under their domestic laws. However, while we have seen some positive action by certain countries, we are still concerned about the adequacy of several countries' implementing legislation and their apparent failure to meet all the standards of the Convention. Chapter 2 of this report provides a more detailed U.S. government analysis of national implementing legislation of twenty-seven foreign Parties and reviews specific areas of concern. We believe that the OECD's process of peer review has been effective in encouraging signatories to enact legislation that meets the standards of the Convention and for those Parties with deficient legislation to bring their implementing legislation into conformity with the Convention. As the Working Group progresses through Phase II of the OECD monitoring process, all Parties should expect the same level of candid and often critical peer review

afforded by the process, and to benefit from their shared experiences. Furthermore, all Parties have an interest in ensuring that they enact effective implementing legislation and fulfill their obligations under the Convention by rigorously enforcing those laws. Achieving these goals will require the continued active engagement and close cooperation of signatory governments, the private sector, and nongovernmental organizations.

Long-Term Commitment to Fighting Bribery and Achieving Fair Competition

After more than twenty years of effort, the United States is 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 damaging 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 countries represented an important and historic achievement.

Significant progress has been made this past year towards full implementation of the Convention. Nine more of the signatories now have laws on the books to implement the Convention, and we expect action by the remaining four in the very near term. While we will not refrain from pressing for final action by these four countries, and for those with deficient legislation to rectify the situation without further delay, we view this year as a milestone for the Convention. In nearing full ratification of the Convention, our efforts have shifted to ensure its strong enforcement. It is equally important that Parties enforce the laws they now have on the books; enforcement is the true litmus test of a Party's commitment to the Convention and its eventual effectiveness.

We recognize that this is a major undertaking for most Parties. Most Parties have had no experience in enforcing international antibribery laws. Many foreign companies are only beginning to adjust their internal policies to the new international legal standards on bribery. Full achievement of the goals of the Convention will take time. The Parties need to establish mechanisms for identifying potential violations of their implementing legislation, and for identifying and correcting weaknesses in their implementation programs. Moreover, prosecutors need to gain experience in prosecuting these new laws. Nevertheless, each Party is entitled to expect full compliance with commitments made by all of the other Parties to identify and eliminate bribery of foreign public officials in international business transactions. Each signatory to the Convention has acknowledged that

such bribery raises serious moral and political concerns; it undermines good governance and economic development, and distorts international competition. Furthermore, each has acknowledged that it shares a responsibility to combat such bribery in international business transactions.

The Bush Administration will encourage governments to combat corruption affecting international trade. This has been established as a major negotiating objective in future trade agreements. In addition to supporting the OECD Convention, the United States has undertaken or supports a variety of other international initiatives to combat bribery and corruption and to promote good governance and business integrity.

- The U.S. government initiated and hosted the First Global Forum on Fighting Corruption, attended by 90 countries, in February 1999. The Dutch government organized the Second Global Forum on May 28-31 at The Hague, which was cosponsored by the U.S. government. President Bush in a statement submitted to the participants noted that the event will help to keep the promotion of integrity and transparency high on the international agenda. Senior Administration officials attended the Forum, including U.S. Attorney General John Ashcroft, who urged his fellow justice ministers to adopt the highest moral standard in their own behavior in order to have credibility in the fight against corruption. The Second Global Forum's Final Declaration stresses the importance of monitoring mechanisms including efforts undertaken in the of the OECD Convention. The Final Declaration also encourages the secretariats of the various regional monitoring mechanisms "to seek more ways for effective cooperation." The South Korean government will host a Third Global Forum in 2003.
- The United States is a Party to the Inter-American Convention Against Corruption negotiated under the auspices of the Organization of American States (OAS) in 1996. The United States deposited its instrument of ratification with the Secretary General of the OAS in September 2000. With the assistance of the United States, the OAS and the State Parties to the Inter-American Convention have reached agreement on creating a mechanism to monitor implementation of this convention. The evaluation mechanism will gauge how well the countries that have ratified the Convention are living up to their obligations.
- The United States is a signatory to the Criminal Law Convention on Corruption negotiated under the auspices of the Council of Europe (COE) in

1999. The United States participates in the formal COE mechanism created to monitor implementation of the convention.

- The United States supports work in the OECD Trade Committee seeking to address the question of what practices or characteristics of a trade regime may be susceptible to bribery and corruption in order to identify the factors and circumstances that may facilitate, encourage, or simply allow bribery and corruption to occur.
- United Nations is expected, within the next few months, to begin formal discussions and negotiations on a global comprehensive convention against corruption.
- We are encouraging the application of anticorruption principles adopted by the Global Coalition for Africa in 1999 and the work of the Asia Pacific Economic Cooperation (APEC) forum in promoting economic reforms that enhance good governance. Nine Asian countries, under the auspices of the Asian-Development Bank (ADB) and the OECD have prepared a working draft of an Anti-Corruption Action Plan for the Asia-Pacific region which will be proposed to interested countries of the region for their consideration and possible endorsement at the next ADB/OECD Conference hosted by the government of Japan, in Tokyo, November 28-30, 2001.
- Since 1998, the Heads of Government of the G-8 have directed their Senior Experts on Transnational Crime (Lyon Group) to explore ways to combat official corruption resulting from large flows of money between countries.
- The Congressional Helsinki Commission has been instrumental in promoting a strong initiative against corruption in the Organization for Security and Cooperation in Europe (OSCE). It has held hearings on U.S. government policies and measures against corruption in the OSCE region and globally. At the request of the Helsinki Commission Chairman, Senator Ben Nighthorse Campbell, the General Accounting Office this year will conduct a comprehensive examination of U.S. government international responses to the problems of corruption.
- The Stability Pact—a compact for cooperation among 40 countries and major international organizations created to help foster stability in Southeast Europe—recently established a program against corruption. This Stability Pact Anticorruption Initiative (SPAI) is currently being implemented by participant countries of Southeast Europe.

- The U.S. government, international business, non-governmental organizations, and members of civil society have mobilized to pressure governments and multilateral organizations to prevent corrupt practices, strengthen public institutions, and foster an anticorruption culture in society. U.S. government agencies that implement assistance programs overseas are now designing their programs so that they target law enforcement, good governance, public education, and other efforts considered important in any country's fight against corruption.

The United States is encouraging anticorruption and good governance initiatives in many international organizations, including the major international financial institutions (e.g., the World Bank and International Monetary Fund), the Organization of American States, the United Nations, and the World Trade Organization. (A review of these initiatives is provided in Chapter 7.) In addition to outreach activities, where appropriate, the United States encourages all international organizations to maintain high standards of ethics, transparency, and good business practices in their internal operations and the projects they administer.

Combating international bribery and corruption will require a long-term effort on many fronts to succeed. The Bush Administration is committed to pursuing this effort vigorously in close contact with Congress, the business community, and interested nongovernmental organizations.



Ratification Status

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the Convention") entered into force on February 15, 1999¹ for twelve of the thirty-four signatories to the Convention: Bulgaria, Canada, Finland, Germany, Greece, Hungary, Iceland, Japan, Korea, Norway, the United Kingdom, and the United States. In less than two and a half years, the Convention has been ratified by nearly all signatories—a remarkable achievement for a multilateral instrument that requires Parties to criminalize acts with trans-border consequences. As of June 4, 2001, thirty-two countries had deposited an instrument of ratification with the Secretary General of the OECD. These countries represent over three-quarters of global trade.

In addition to the twelve countries identified above, as of June 4, 2001, the following eighteen also had laws implementing the Convention: Argentina, Australia, Austria, Belgium, the Czech Republic, Denmark, France, Italy, Luxembourg, Mexico, the Netherlands, New Zealand, Poland, Portugal, the Slovak Republic, Spain, Sweden, and Switzerland. Of the remaining four signatory countries, Brazil, Chile, Ireland, and Turkey had not implemented the Convention under domestic law. Only Ireland and New Zealand have not deposited their instruments of ratification with the OECD. (Table 1 provides summary information on all signatories regarding

domestic ratification, enactment of implementing legislation, deposit of an instrument of ratification, and entry into force of the Convention.)

Since our last report, nine additional countries have adopted laws to implement the Convention. The legislation of seven of these Parties has been reviewed by the OECD Working Group on Bribery and by the U.S. government: Argentina, France, Denmark, Italy, Luxembourg, the Netherlands, and Poland. The U.S. government assessments of these seven countries have been included in Chapter 2 of this report. The OECD Working Group on Bribery assessments can be viewed at <http://www.oecd.org/daf/nocorruption/report.htm> and through a web-link on the Commerce Department Trade Compliance Center web-site at <http://www.mac.doc.gov/tcc>. New Zealand and Portugal adopted legislation after our cut-off date of April 30, 2001, but before publication of this report. It is anticipated that assessments of the implementing legislation of New Zealand, Portugal, and the remaining signatories will be included in next year's report.

In all of the signatory countries that have not completed the steps to bring the Convention into force, there has been notable progress in preparing implementing legislation and obtaining the necessary authorizations for ratifying the Convention. Each of these countries is expected to complete this process by the

end of 2001. The following status report on their internal legislative process is based on information obtained from U.S. embassies and reporting from the signatories themselves to the OECD, which is publicly available at <http://www.oecd.org/daf/nocorruption/annex2.htm>.

Brazil

The bill to ratify the Convention was approved by parliament on June 12, 2000 and was signed by the President on August 6, 2000. The instrument of ratification was deposited with the OECD Secretariat on August 24, 2000.² The Convention text was published in the Official Gazette of Brazil on November 30, 2000.

Draft implementing legislation was approved by the President and submitted to Congress on February 20, 2001. Once the legislation is approved, the text will go to the President for signature. The government expects to complete this process by the end of 2001.

Chile

The Chamber of Deputies approved the draft bill to ratify the Convention on March 23, 2000. The draft bill was then sent to the Senate on April 4, 2000 and was approved in March 2001. The instrument of ratification was deposited with the OECD Secretariat on April 18, 2001.

Chile currently has no legislative provisions criminalizing bribery of foreign public officials. Studies on the necessary amendments to national law are underway in the Presidential Secretariat General and other government agencies.

Ireland

Legislation to ratify and implement the Convention, entitled the Prevention of Corruption Bill 2000, was submitted to the Dail (the lower house of the Irish parliament) in January 2000. The "second stage reading" in the Dail was completed on December 15, 2000. The bill must now be reviewed and approved by the appropriate Dail Committee, voted on in the full Dail, followed by a vote in the Seanad (the upper house of the Irish parliament), and then be signed by the President. The government expects the process will be completed before parliament's summer 2001 recess. Legislation pending in the Irish parliament can be viewed or tracked at: www.irlgov.ie/oireachtas.

New Zealand

A bill to ratify and implement the Convention was initially introduced to parliament in September 1999, but consideration was delayed by changes in government. On

April 4, 2001, the government amended the draft legislation to make the bill's provisions apply extraterritorially and to alter the elements of a defense. The bill was approved by parliament and received royal assent on May 2, 2001 and entered into force on May 3, 2001. After cabinet approval, New Zealand will deposit its instrument of ratification. This action is expected to take place in late June 2001. It is expected that New Zealand's implementing legislation will undergo review at the June 26-28 Working Group plenary.

The Inland Revenue Department (IRD) is working on separate legislation to end the tax deductibility of bribes. That legislation will be introduced later in 2001.

Portugal

The National Assembly approved ratification by resolution number 32/2000 of December 2, 1999. Presidential decree number 19/2000 authorizing ratification was issued on March 31, 2000. Ratification of the Convention became effective with its publication in the official gazette on March 31, 2000, and the instrument of ratification was deposited with the OECD Secretariat on November 23, 2000.

On February 15, 2001, the Council of Ministers approved draft implementing legislation, and the National Assembly passed the legislation unanimously on April 5, 2001. The legislation was finalized by the First Committee on April 26, 2001, enacted by the President and entered into law upon publication in the official gazette on June 4, 2001.

Turkey

The bill ratifying the Convention received parliamentary approval on February 1, 2000, and entered into force on February 6, 2000. The instrument of ratification was deposited with the OECD Secretariat on July 26, 2000. An inter-ministerial committee has prepared draft implementing legislation, including amendments to the penal, income tax, and tender codes. The draft bill has been approved by the Ministry of Justice and the Prime Minister and was submitted to parliament on November 3, 2000, where it was forwarded to the Justice commission for discussion.

Efforts to Encourage Implementation

The United States has continued to give a high priority to encouraging signatories to complete their ratification procedures and enforce the Convention. Over the past year, U.S. officials have encouraged signatories to ratify and implement the Convention in both public state-

ments and direct contacts with foreign governments. The Secretaries of Commerce, State, and the Treasury, as well as senior officials of these agencies, have used a variety of opportunities to comment on the importance of the Convention and to underscore U.S. concern that all signatories implement it as soon as possible. These efforts have met with marked success. Since our last report, eleven additional signatories have become Parties to the Convention, among them important exporters such as France, Italy, and the Netherlands. We will continue our efforts to secure full implementation of the Convention and will exercise equal vigor in encouraging Parties to the Convention to faithfully and forcefully enforce the laws they have enacted. U.S. agencies will also continue to encourage the U.S. and foreign private sectors to support the Convention and to work to eliminate the bribery of foreign public officials in international business.

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

²Brazil, Chile, Portugal, Turkey, and Poland deposited instruments of ratification with the OECD Secretariat before domestic implementing legislation supporting the Convention was in place. Poland's implementing legislation entered into force before it became internationally bound under the Convention, and Portugal's implementing legislation entered into force on June 4, 2001. As of June 4, 2001, the other three remain without legislation specifically implementing the Convention.

Ratification Status of Signatory Countries to the OECD Anti-Bribery Convention (As of June 4, 2001)

Signatory Country	Ratified	Legislation Approved	Instrument of Ratification Deposited With OECD Secretariat ¹	Convention Enters Into Force
Totals:34	33	30	32	32
Argentina	October 18, 2000	November 1, 1999 ⁴	February 8, 2001	April 9, 2001
Australia	October 18, 1999	June 17, 1999	October 18, 1999	December 17, 1999
Austria	April 1, 1999	October 1, 1998 ²	May 20, 1999	July 19, 1999
Belgium	June 9, 1999	April 3, 1999 ²	July 27, 1999	September 25, 1999
Brazil	August 6, 2000		August 24, 2000 ⁵	October 23, 2000
Bulgaria	June 3, 1998	January 15, 1999	December 22, 1998	February 15, 1999
Canada	December 17, 1998	December 10, 1998	December 17, 1998	February 15, 1999
Chile	March 8, 2001		April 18, 2001 ⁵	June 17 2001
Czech Republic	December 20, 1999	April 29, 1999	January 21, 2000	March 21, 2000
Denmark	March 30, 2000	March 30, 2000	September 5, 2000	November 4, 2000
Finland	October 9, 1998	October 9, 1998	December 10, 1998	February 15, 1999
France	May 25, 1999	June 30, 2000	July 31, 2000	September 29, 2000
Germany	November 10, 1998	September 10, 1998	November 10, 1998	February 15, 1999
Greece	November 5, 1998	November 5, 1998	February 5, 1999	February 15, 1999
Hungary	December 4, 1998	December 22, 1998	December 4, 1998	February 15, 1999
Iceland	August 17, 1998	December 22, 1998	August 17, 1998	February 15, 1999
Ireland				
Italy	September 29, 2000	September 29, 2000	December 15, 2000	February 13, 2001
Japan	May 22, 1998	September 18, 1998	October 13, 1998	February 15, 1999
Korea	December 17, 1998	December 17, 1998	January 4, 1999	February 15, 1999
Luxembourg	January 15, 2001	January 15, 2001	March 21, 2001	May 20, 2001
Mexico	April 21, 1999	April 30, 1999	May 27, 1999	July 26, 1999
The Netherlands	December 13, 2000	December 13, 2000	January 12, 2001	March 13, 2001
New Zealand	May 2, 2001	May 2, 2001		
Norway	December 18, 1998	October 27, 1998	December 18, 1998	February 15, 1999
Poland	June 11, 2000	September 9, 2000	September 8, 2000	November 7, 2000
Portugal	March 31, 2000	June 4, 2001	November 23, 2000	January 22, 2001
Slovak Republic	February 11, 1999	September 1, 1999 ³	September 24, 1999	November 23, 1999
Spain	December 1, 1998	January 11, 2000	January 14, 2000	March 14, 2000
Sweden	May 6, 1999	March 25, 1999	June 8, 1999	August 7, 1999
Switzerland	December 22, 1999	December 22, 1999	May 31, 2000	July 30, 2000
Turkey	February 1, 2000		July 26, 2000 ⁵	September 24, 2000
United Kingdom	November 25, 1998	1889, 1906, 1916 ⁴	December 14, 1998	February 15, 1999
United States	November 20, 1998	November 10, 1998	December 8, 1998	February 15, 1999

¹ The Convention entered into force February 15, 1999. The Convention enters into force for all other signatories on the sixtieth day after each signatory deposits an instrument of ratification with the OECD.

² Date legislation came into effect.

³ Date partial implementing legislation came into effect.

⁴ The U.K. relied exclusively on existing legislation to implement the Convention and Argentina on legislation implementing the Inter-American Convention Against Corruption. (See Chapter 2 reviews).

⁵ Deposited instrument of ratification with legislation still being drafted or before parliament.

Review of National Implementing Legislation

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

The views contained in this chapter are those of the U.S. government agencies and staff mentioned above and not necessarily those of the Working Group on Bribery, the body at the Organization for Economic Cooperation and Development that is reviewing the implementing legislation of the signatories to the Convention in the OECD monitoring process. Information for the reviews in this chapter was obtained from, *inter alia*, implementing legislation and related laws of the countries listed above, reporting from U.S. embassies, private sector comments, publications, nongovernmental organizations,

the OECD Working Group Country Reports, and other public sources. The Working Group Country Reports on the implementing legislation reviewed to date are made public on the OECD website at <http://www.oecd.org/daf/nocorruption/index.htm>, and are linked through the Department of Commerce's website.

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

We have paid special attention to the penalties imposed for the offense of bribery of foreign public offi-

cials, 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/offendor.
- Coverage of payee/offeree.
- Penalties.
- Books and records provisions.
- Money laundering.
- Extradition/mutual legal assistance.
- Complicity (including incitement, aiding and abetting, or authorization), attempt, conspiracy.

Analyzing a Party’s implementing legislation is a complex undertaking that requires an understanding of not only the Party’s new laws implementing the Convention but also of the existing body of legislation relevant to bribery and corruption. Convention implementation differs markedly among the Parties depending on their individual legal systems. Some Parties enacted new legislation, whereas others amended existing domestic antibribery provisions of their laws. We have taken into consideration throughout the review process that the Convention seeks to ensure functional equivalence among the measures taken to sanction bribery, without requiring absolute uniformity or changes in fundamental principles of a Party’s legal system. (See paragraph 2 of the Commentaries on the Convention.) Nonetheless, individual country implementation of some elements (e.g., penalties, statute of limitations, etc.) diverges to such a degree that the issue will be addressed by the OECD Working Group on Bribery during its Phase II review.

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. Further analysis of implementing legislation and related laws is required for us to have a thorough understanding of how each country is attempting to fulfill its obligations to meet the Convention’s standards for criminalizing the bribery of foreign public officials. Equally important now that most signatories are Parties to the Convention will be how countries apply and enforce their implementing legisla-

tion. This analysis remains a high priority of the U.S. government agencies responsible for monitoring implementation of the Convention.

Concerns about Implementing Legislation

Based on information currently available, we remain generally encouraged by the efforts of the twenty-seven other Parties who have implemented the Convention. However, for a number of countries, we have concerns about how requirements have been addressed and, in some cases, the absence of specific legislative provisions to fulfill obligations under the Convention. Several countries, particularly France, Japan, and the United Kingdom have implementing or pre-existing legislation that we believe falls short of the Convention’s requirements. The concerns raised by the French legislation relate mostly to enforcement issues and will merit close scrutiny during the Phase II monitoring process of the Convention. Japanese officials have informed the Working Group on Bribery at the OECD that it has submitted legislation which they expect will be enacted shortly rectifying some of the deficiencies in its laws. The U.K., however, has not yet made public new draft implementing legislation, nor has it indicated when such legislation would be introduced to parliament. We have repeatedly called upon Japan and the U.K. in particular, since they are key exporters and influential OECD members, to act quickly to bring their implementing legislation into conformity with the Convention.

The following concerns are especially noteworthy and will require further examination during Phase II, the enforcement stage of the monitoring process of the Convention:

- *Deficiencies in France’s Implementation:* The basic statement of the offense in the French implementing legislation does not explicitly criminalize the “giving” of bribes as required by the wording of Article 1, paragraph 1 of the Convention, which reads “to offer, promise or give any undue advantage”. The absence of the word “giving” in the French legislation raises the potential that the French law applies only to the offer itself and that payments extending indefinitely into the future based upon an offer made before the effective date of the French legislation would not be criminalized. In addition, the French legislation appears to require that prosecutions of French nationals for extraterritorial bribery of a foreign public official must be preceded by a complaint from a “State victim,” e.g., a repre-

sentative of the State whose official was bribed, which is in our view extremely unlikely and has the potential of further reducing the possibility of French prosecutions over its own nationals. (We note that Luxembourg's implementing legislation, which was based on the French model, did not include such a condition for the prosecution of its nationals under its bribery law. In addition, Luxembourg's basic statement of the offense, which is otherwise very similar to the French version, includes the word "giving.") Finally, France implemented the Convention in conjunction with various EU anticorruption instruments. We are concerned that, in several circumstances, France affords more rigorous and comprehensive treatment of bribery of officials of EU states than it does of officials of non-EU states. For example, France apparently eliminated its requirement of dual criminality with respect to violations of EU conventions by non-French nationals who seek refuge in France but did not do so with respect to violations of laws implementing the OECD Convention. In addition, France permits the victim of a bribery scheme, e.g., a competitor, to initiate a public prosecution for bribery of French and EU officials, but not for bribery of non-EU officials. Third, France permits only the Paris Public Prosecutor and examining magistrate to investigate and bring prosecutions under the law implementing the OECD Convention, whereas domestic and EU corruption may be investigated and prosecuted by prosecutors and magistrates throughout the country.

- *Deficiencies in Japan's Implementation:* Japan's implementing legislation raises several issues. For example, the Japanese legislation contains a "main office" exception, which provides that the legislation will not apply where the person who pays a bribe to a foreign public official is employed by a company whose "main office" is in the corrupt foreign official's country. Thus, a Japanese national employed by a foreign company may not be prosecuted for the bribery of an official of that company's home country even if the bribe is offered or paid in Japan. We believe that this exception is a loophole in the Japanese implementing legislation. Also, we believe that the maximum fine of \$2.5 million for legal persons is not "effective, proportionate, and dissuasive," given the serious questions concerning its ability to confiscate the proceeds of the bribery. While we are encouraged that Japan has now taken steps to amend its implementing legislation to eliminate the "main office exception" and to expand its definition of for-

eign public official, further action will be required to correct all defects in its legislation, now almost two years since its legislation was found to be inadequate by the Bribery Working Group to fully implement the Convention.

- *Deficiencies in the U.K.'s Implementation:* For the United Kingdom, existing corruption law does not explicitly address bribery of foreign public officials, and its adequacy for implementing the requirements of the Convention is not, even in the views of British legal commentators, certain. The U.K. Government has recognized the need for new legislation but has not taken steps to introduce and pass such legislation in parliament. It is now almost two years since the U.K. legislation was reviewed by the Bribery Working Group, and we have yet to see final action. The inaction by the U.K. is disappointing.

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

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

- *Inadequate Penalties:* Several countries, including Italy, Japan, Mexico, The Netherlands, Norway, the Slovak Republic, and Spain have penalties that may fall short of the Convention requirement that they be "effective, proportionate and dissuasive."

- *Differing Standards for Bribery of EU Officials:* A number of European Union member countries, including France, implemented the Convention in conjunction with various EU anticorruption instru-

ments. The implementing legislation of some of these countries contains several definitions of the term “foreign public official”, or different jurisdictional requirements, depending on whether the foreign official is an EU official. We have concerns that this may lead to different penalties or uneven application of a country’s jurisdiction over bribes to EU officials vis-a-vis bribes to other foreign public officials.

- *Limited Statutes of Limitations:* Several countries, such as Denmark, Japan, Norway, Hungary, and the Slovak Republic have statutes of limitations periods that are three years or less. We are concerned that such short statutes of limitations may not fulfill the Convention requirement that statutes of limitations be sufficiently long so as to provide an adequate period of time for investigation and prosecution. However, Hungary, Norway, and the Slovak Republic have indicated that they are taking steps to address this deficiency in their respective laws.

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

- *Inappropriate Defenses:* Several Eastern European countries, such as the Czech Republic, the Slovak Republic, and Bulgaria have included a defense in their implementing legislation that exempts an individual from prosecution or the imposition of sanctions if the bribe is solicited, the individual pays or agrees to pay the bribe and thereafter the individual voluntarily and immediately reports the bribe or promise to pay a bribe to the authorities. Similarly, Italy has a possible defense under its law, called “concessione” (coercion), which may also excuse a briber where the official induced the bribe. Although there may be a rationale for permitting such a defense for domestic acts of bribery, the United States believes this defense is inappropriate for instances of transnational bribery and may constitute a loophole.

Many of the countries reviewed are considering—or are already in the process of amending—their implementing legislation to address concerns raised in the OECD Working Group monitoring process, including Argentina, Austria, Greece, the Czech Republic, Japan, Korea, Luxembourg, Norway, the Slovak Republic, Switzerland and the U.K. Our analysis has focused pri-

marily on existing legislation at the time of this writing, but we will monitor the progress of proposed amendments and report on any new legislation in subsequent reports. As we continue our analysis of implementing legislation and more information becomes available in the enforcement stage, we will be in a better position to assess the overall conformity of Parties’ laws with the Convention. The analysis will be useful for our participation in the Working Group and our dialogue with signatories on promoting effective implementation of the Convention.

Summary of Amendments to the FCPA

Through the FCPA, the United States declared its policy that American companies and companies traded on U.S. stock exchanges should act ethically in bidding for foreign contracts and should act in accordance with the U.S. policy of encouraging the development of democratic institutions and honest, transparent business practices. Since 1977, the FCPA has required issuers and U.S. nationals and companies to refrain from offering, promising, authorizing, or making an unlawful payment to public officials, political parties, party officials, or candidates for 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 implement the OECD Convention. First, the FCPA formally 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 the offer, promise to pay, payment, or authorization of the offer, promise, or payment of a foreign bribe while in the United States.

Third, the 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 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. A joint Commerce-Justice brochure summarizing the antibribery provisions of the FCPA is reprinted in Appendix C of this report.

One issue that has arisen with respect to the United States' implementation of the Convention is the existing disparity between the maximum term of imprisonment under the FCPA (five years) and that under the domestic corruption statute (fifteen years). (*See* 18 U.S.C. ' 201.) Article 3(1) of the Convention requires that each Party provide for a range of penalties for foreign bribery comparable to those provided for bribery of its own officials. The interested U.S. government agencies are considering whether to support an amendment to the FCPA to conform the penalties for domestic and foreign bribery offences.

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

Argentina

Argentina signed the Convention on December 17, 1997 and deposited its instrument of ratification with the OECD on February 8, 2001. The Argentine implementing legislation, entitled the *Statute on Ethics in the Exercise of Public Office (Law No. 25.188)*, was enacted on November 1, 1999 and entered into force on November 10, 1999. This legislation amended the Argentine Penal Code to implement the standards of the

Inter-American Convention Against Corruption (OAS Convention). According to Argentine officials, draft legislation to conform Argentine law to the requirements of the OECD Convention is being prepared for submission to Congress by July 2001.

Our main concern with the existing Argentine law is that it does not provide for liability of legal persons in the case of bribery of foreign public officials. The proposed bill to implement the OECD Convention includes provisions that may address deficiencies in the Argentine legislation, but it is not final and has not been submitted to the Argentine Congress. Therefore, this review only addresses the enacted provisions amending the Penal Code to implement the OAS Convention. We will continue to monitor the status of the draft legislation and provide further analysis in next year's report.

Basic Statement of the Offense

The basic statement of the offense of bribery under the Convention is contained in Article 258 *bis* of the Argentine Penal Code:

It shall be punished with 1 to 6 years of imprisonment and perpetual special disqualification to hold a public office, whoever offers or gives to a public official from another state, directly or indirectly, any object of pecuniary value, or other benefits as gifts, favors, promises or advantages in order that the said official acts or refrains from acting in the exercise of the official duties, related to a transaction of economic or commercial nature.

According to Argentine authorities, intent is required to commit the basic offense. Bribery payments to intermediaries are covered. Also, Argentine authorities stated that a "gift" may not necessarily constitute a bribe; factors such as value and the effect on the public official will be assessed to determine the status of the gift.

The basic statement of the offense does not cover acts or omissions of the public official not within her authorized competence, whereas the Convention requires that bribery to a foreign public official for any official act "in relation to the performance of public duties" be covered, "whether or not within the official's authorized competence." (*See* Convention Articles 1.1 and 1.4(c) and Commentary 19.) Argentine officials have explained that this deficiency would be addressed in the draft legislation.

Jurisdictional Principles

Argentina generally practices territorial jurisdiction. Pursuant to Penal Code Article 1.1, Argentina will exercise territorial jurisdiction over offenses committed even partially in Argentina or areas subject to its jurisdiction,

or relating to offenses whose effects occur in Argentina or areas subject to its jurisdiction. Any actions, e.g., a phone call or e-mail, may trigger Argentine territorial jurisdiction. "Effects" on Argentine territory may include undue benefits or contracts obtained in exchange for the bribe.

The Argentine Penal Code contains no provisions on nationality jurisdiction, although Argentina will assert nationality jurisdiction pursuant to Article 1.2 over offenses committed abroad by "agents or employees of Argentine authorities performing their duties," including public agencies and enterprises. Argentina establishes nationality jurisdiction through various treaties, but those treaties do not apply to Argentine nationals who commit bribery of a foreign public official abroad. Although the Convention does not require nationality jurisdiction, it does encourage consideration thereof where other offenses under a country's laws can be reached through such jurisdiction. (See Commentary note 26.)

Coverage of Payor/Offerer

Article 258 *bis* covers bribery by "whoever," but this includes only natural persons, not legal persons. Argentine officials have stated that proposed changes to the Argentine Penal Code, to be presented to Congress by July 2001, will introduce corporate criminal liability for bribery offenses. As Argentine law does not at this time cover legal persons, Argentina has not met its obligations under Convention Articles 2 and 3.2.

Coverage of Payee/Offeree

Article 258 *bis* covers bribes to a "public official from another State." There is a definition contained in the Argentine Penal Code for "public official," but that definition only applies to domestic bribery offenses. Argentine authorities have stated its courts may refer to the definition in the Convention as well as the Commentaries to ensure that "foreign public official" is properly defined. However, there is some uncertainty as to the legislation's coverage in practice, especially in light of other Conventions to which Argentina is a party that have different definitions of the same term. Additionally, Article 258 *bis* does not cover officials from international organizations as required by the OECD Convention.

Penalties

Article 258 of the Argentine Penal Code provides that individuals who commit bribery of foreign public officials are subject to being penalized by one to six years of "reclusion" and can no longer enjoy the right to hold a public office. These penalties are for the most part com-

parable to the provisions on bribery of domestic officials found in Penal Code Articles 258-259. One minor difference is that the aggravated bribery offenses for domestic officials, e.g., bribery of judges or where a public official is the offender, are punishable by imprisonment, or "prison" for a term of 3-10 years. Argentine officials have explained that the penalty for bribery of foreign public officials, "reclusion," is stricter than the penalty of national bribery offenses, "imprisonment," in that a term of reclusion may not be suspended. In addition, a fine of 90,000 Argentine pesos (approx. U.S.\$90,000) may also be imposed for both domestic and foreign bribery offenses with an "aim of monetary gain."

The bribe may be forfeited upon conviction pursuant to Article 23 of the Argentine Penal Code. If forfeiture is not possible, then Article 22 states that a fine of 90,000 pesos (approx. U.S.\$90,000) may be assessed. Seizure of both the bribe and bribe proceeds is possible under Article 231 of the Argentine Code of Criminal Procedure.

The Argentine legislation contains no criminal or administrative penalties for legal persons for the offense of bribing a foreign public official, contrary to the requirements of Convention Articles 2 and 3.2.

According to Articles 62 and 258 *bis* of the Argentine Penal Code, the statute of limitations period for bribery of foreign public officials is six years, and begins to run at midnight on the date the offense is committed (the date when the offer, promise or giving of the bribe took place). The statute of limitations can be suspended or interrupted pursuant to Article 67.

Books and Records Provisions

According to the Argentine government, the Law of Corporations No. 19.550, Statute of Financial Entities Law No. 21.526, National Securities Commission Law No. 17.811, and Insurance Companies Law No. 20.091, generally cover the types of accounting offenses required under the Convention. Articles 43-55, 51, and 54 of the Commerce Code provide that "traders" must report their commercial transactions and keep a book of original entries, an inventory, and balance sheet that reflects the accurate financial situation of the company. The Charter of the General Inspectorate of Companies, Article 12, gives that body the authority to impose penalties on individuals and entities, including for omissions and falsifications under the books and records provisions of the Convention. Furthermore, Article 300, Section 3 of the Argentine Penal Code penalizes with a prison term of six months to two years certain individuals for publishing, certifying, or authorizing a false or incomplete inventory, balance, or profit and loss

account. According to Argentine authorities, legal persons are generally subject to auditing requirements.

Money Laundering

Articles 277-299 of Argentina's Penal Code, as amended by Law No. 25.246 on Money Laundering, include bribery of domestic and foreign public officials as predicate offenses for the application of the money-laundering legislation, including the concealment of benefits from the crimes, and irrespective of where the underlying offense occurred. The money-laundering legislation does not apply to self-laundering.

Extradition/Mutual Legal Assistance

Extradition is governed by Article 6 of the International Co-operation in Criminal Matters Act (ICCMA) absent another relevant treaty. For extradition, dual criminality is required (imprisonment of at least one year under both the Argentine and requesting state's laws). Argentina will extradite its nationals only with their consent; otherwise, the case may be tried in Argentina.

Extradition by the United States and Argentina is governed by a 1972 bilateral treaty (entered into force in 1972).

Mutual legal assistance to foreign states may be provided pursuant to the ICCMA, when there is no other applicable treaty. Argentina does not require a minimum prison sentence or fine in order to grant mutual legal assistance. Mutual legal assistance between the United States and Argentina is governed by a 1990 bilateral treaty (entered into force in 1993). Bank secrecy cannot be invoked as grounds to refuse mutual legal assistance.

Complicity, Attempt, Conspiracy

Argentine Penal Code Articles 45 and 46 cover the offense of complicity. Article 45 provides that persons who take part in the commission of the criminal act, provide assistance or cooperation without which the offense could not be committed, and directly abet another to commit a criminal act, will all be punished by the same penalty as the perpetrator. Penal Code Article 46 covers incitement, aiding and abetting, direct or indirect cooperation, and authorization. It provides that someone who cooperates in any form in the commission of a criminal act and who gives assistance by carrying out a pre-empted promise, whether or not essential, will be punished by one-third or one-half of the full offense. Authorities state that accomplices may be punished whether or not the perpetrator is convicted.

Attempt is defined in the Argentine Penal Code under Articles 42-44. If the commission of the offense is

not concluded because of circumstances beyond the offender's will, then the penalty will be reduced to one-third or one-half of the full offense. According to Article 43, if an offender "voluntarily desists from performing a crime," including by voluntarily stopping an intermediary from completing the crime, she shall be exempted from liability.

Conspiracy is apparently not punishable under Argentine law. Argentine Penal Code Article 210 provides that whoever takes part in a group of three or more people having the purpose of committing an offense will be liable for "belonging" to the group. A member of such an association would be subject to a prison sentence of 3-10 years, whereas the "head" would be subject to at least 5 years.

Australia

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

Basic Statement of the Offense

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

- (a) the person: (i) provides a benefit to another person; or (ii) causes a benefit to be provided to another person; or (iii) offers to provide, or promises to provide, a benefit to another person; or (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
- (b) the benefit is not legitimately due to the other person; and
- (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to: (i) obtain or retain business; or (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person). Under Section 70.2(2), in determining whether a

benefit or a business advantage is "not legitimately due," the following are to be disregarded:

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

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

Jurisdictional Principles

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

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

Coverage of Payor/Offerrer

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

Coverage of Payee/Offeree

Under Section 70.1 of the Criminal Code, "foreign public official" is broadly defined to include employees or officials of, or persons who work under contract for or are otherwise in the service of, a foreign government body (or subdivision thereof), including members of legislatures; employees of, or persons who work under contract for or are otherwise in the service of, a public international organization; and authorized intermediaries of such persons. For this purpose, "foreign government

body" includes a "foreign public enterprise," which is defined to include instances in which the government exercises de jure or de facto control over the enterprise, or in which the enterprise enjoys special legal rights, benefits or privileges because of its relationship to the government.

Penalties

The Criminal Code provides that natural persons who are convicted of bribing a foreign public official are subject to a fine of A\$66,000 (approx. U.S.\$38,000), imprisonment for a maximum of ten years, or both. Bodies corporate are subject to a fine of A\$330,000 (approx. U.S.\$188,000). Previously, these exceeded the penalties in the Criminal Code for bribery of domestic public officials. However, the Criminal Code was amended to increase the penalties for domestic bribery to those imposed on bribery of foreign public officials.

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

Books and Records Provisions

Companies are required, under Section 298 of the Corporations Law, to keep financial records that "(a) correctly record and explain their transactions and financial position and performance; and (b) would enable true and fair financial statements to be prepared and audited." Violations of Section 298 are punishable by a criminal fine of up to A\$12,500 (approx. U.S. \$6,300). Under Section 296 of the Corporations Law, annual financial reports (required of most companies) must be consistent with the Australian accounting standards. Failure to comply with those standards can result in civil penalties for company directors. Section 310 of the Corporations Law requires that companies furnish external audit reports to the Australian Securities and Investment Commission.

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

Austria

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

The Austrian legislation raises a number of concerns. At present, it contains no criminal responsibility for legal persons, nor does it provide for sufficient comparable administrative or civil sanctions. The punishment for natural persons is limited to imprisonment of only two years, and there is no provision of fines for natural persons. We also are concerned that Austria may assert nationality jurisdiction only under the condition of dual criminality, i.e., when the offense is also punishable in

the country where it was committed, particularly in the case where an Austrian national bribes a foreign public official in a third country.

Basic Statement of the Offense

The basic statement of the offense is contained in Austrian Penal Code Section 307(1), which provides that: Whoever offers, promises, or grants a benefit for the principal or a third person to a foreign official for the commission or omission of an official act or a legal transaction in violation of his duties in order to gain or retain an order or other unfair advantage in international trade, shall be punished by imprisonment of up to two years.

Jurisdictional Principles

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

Coverage of Payor/Offerer

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

Coverage of Payee/Offeree

Foreign public officials are defined in Section 74 (4c) of the Austrian Penal Code as: any person who holds an office in the legislature, administration, or judiciary of another state, who is fulfilling a public mission for another state or authority or a public entity of another state, or who is an official or representative of an international organization.

Penalties

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

Austria will confiscate criminal proceeds pursuant to Penal Code Section 20, paragraph 4, although there are several exceptions under Section 20a paragraphs 1 and 2, i.e., where the enriched person has satisfied or has contractually bound itself to satisfy civil law claims in connection with the offense, or has been sentenced, or if the gains are removed by other legal measures. Also, confiscation is apparently not permitted if the gains are less than 300,000 Austrian shillings (approx. U.S. \$18,450), the gains are disproportionate to the cost of the proceedings, or it would constitute "inappropriate hardship."

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

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

Books and Records Provisions

Section 189, paragraph 1 of the Austrian Code of Commercial Law requires merchants to keep books and records in accordance with correct accounting principles. Section 190, paragraph 2 provides that all entries "must be complete, accurate, up-to-date, and orderly." Section 268 provides that annual financial statements and company reports must be examined by an auditor. The general accounting provisions apply to all persons engaged in

commercial activities, excluding small merchants. Also, certain small corporations are exempt from the obligatory annual audit. Under Section 122 of the Federal Law of Private Companies, the penalty for violation of the accounting provisions is imprisonment for up to two years or a fine. This applies to managing directors, members of the supervisory board, and agents. The same penalties apply under the Federal Law on Public Companies.

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

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

It is our understanding that requests originating from countries not mentioned above will be handled in accordance with Austrian Federal Law on Extradition and Judicial Assistance, and on the basis of reciprocity.

Consultations are also covered by the same law. The bribery of a foreign public official is an extraditable offense under the extradition treaties to which Austria is a party. It is our understanding that the condition of reciprocity will met with regard to the Convention, unless the requesting state refuses reciprocity. Similarly, dual criminality is required for the granting of mutual legal assistance, but it is our understanding that between Austria and Parties to the Convention, the condition will always be met under Article 1.

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

Complicity, Attempt, Conspiracy

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

Belgium

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

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

Basic Statement of the Offense

Article 246, Section 2 of the Criminal Code provides that "the act of proposing, whether directly or through intermediaries, an offer, promise or advantage of any kind to a person exercising a public function, either for himself or a third party, in order to induce him to act in one of the ways specified in Article 247 shall constitute active bribery." Article 247 specifies four different types of acts: (1) an act within the scope of a person's responsibilities that is proper but not subject to remuneration; (2) performance of an improper act, or refraining

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

Jurisdictional Principles

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

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

Coverage of Payor/Offeror

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

Coverage of Payee/Offeree

Under Article 250, Section 2, whether a person exercises a public function in another state is determined in

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

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

Penalties

We understand that the applicable penalties are derived not only from Articles 247-249, but also from other provisions of the Criminal Code. Individuals who commit bribery of a foreign public official are subject to fines ranging from BF20,000 to BF40 million (approx. U.S. \$420-\$840,000), and/or imprisonment for a period of six months to fifteen years. Legal persons face fines ranging from BF600,000 to BF72 million (approx. U.S. \$12,600-\$1.5 million). Penalties are more severe if the person to whom the bribe is offered or paid exercises certain functions relating to the investigation, prosecution, or adjudication of offenses, e.g., police officers, prosecutors, jurors, or judges. The existence of a bribery agreement between the payor/offeror and the payee/offeree is also an aggravating circumstance.

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

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

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

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

Articles 35-39 and 89 of the Code of Criminal Investigation permit seizure of bribes and the proceeds of bribery. Articles 42-43 of the Criminal Code authorize the confiscation of items that are the object of the offense or that were used or intended to be used to commit the offense (when they belong to the convicted person), any proceeds of the offense and patrimonial advantages derived directly from the offense, as well as any goods and assets acquired in exchange for these advantages and any income derived from investing them.

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

Bulgaria

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

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

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

Basic Statement of the Offense

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

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

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

Jurisdictional Principles

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

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

Coverage of Payor/Offeror

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

Coverage of Payee/Offeree

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

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

Penalties

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

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

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

Books and Records Provisions

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

Under Article 15 of the Law on Public Financial Control, the audit of the books and records of certain

enterprises is required, and auditors must report infractions to prosecuting authorities. Obligations on accountants are found in Article 57a(1) of the Accountancy Act.

Money Laundering

Under Article 253 of the Penal Code, "[a] person who concludes financial transactions or other transactions with funds or property of which he knows or supposes that they have been acquired by crime" is subject to punishment of imprisonment for one to five years and a fine of 3,000 to 5,000 Bulgarian leva (approx. U.S. \$1,300-\$2,200). In certain cases, these penalties are increased to imprisonment for one to eight years and a fine of 5,000 to 200,000 leva (approx. U.S. \$2,200-\$8,700).

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 of the Penal Code. Article 25.4 of the Bulgarian Constitution and Article 439b(1) of the Penal Procedure Code prohibit the extradition of Bulgarian nationals.

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

Complicity, Attempt, Conspiracy

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

Canada

The Canadian Corruption of Foreign Public Officials Act, 46-47 Elizabeth II ch. 34, was adopted on December

7, 1998, assented to on December 10, 1998, and entered into force on February 14, 1999.

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

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

Basic Statement of the Offense

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

Every person commits an offense who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official;

(a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or

(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

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

Jurisdictional Principles

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

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

Canada has not asserted extraterritorial jurisdiction for this offense. However, Canadian law provides that

any person who, while outside Canada, conspires to commit an indictable offense in Canada shall be deemed to have committed the offense of conspiracy in Canada. (See Criminal Code '465(4).) The penalties for conspiracy are the same as those for the substantive offense. (See Criminal Code '465(1)(c).)

Coverage of Payor/Offerer

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

Coverage of Payee/Offeree

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

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

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

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

Penalties

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

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

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

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

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

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

Books and Records Provisions

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

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

Complicity, Attempt, Conspiracy

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

Czech Republic

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

The Czech Republic made only minor modifications to its Criminal Code to implement the Convention, particularly with the addition of a definition for the terms "bribe" and "public official." Sources for this analysis include the Czech implementing legislation, relevant Criminal Code provisions, and information from the U.S. embassy in Prague.

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

Basic Statement of the Offense

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

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

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

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

The Czech legislation also contains a defense of "effective repentance" in Section 163, which provides that the criminal nature of bribery and indirect bribery shall not apply if the offender has provided or promised

a bribe solely because he has been requested to do so and reported the fact voluntarily and without delay to the prosecutor or police authority.

Jurisdictional Principles

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

Coverage of Payor/Offeror

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

Coverage of Payee/Offeree

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

Section 89, paragraph 9 of the Criminal Code provides that:

A public official shall mean an elected (public) representative or other person authorized by the state administration or local (municipal) authority, a court or other state organ, or a member of the armed forces or armed corps insofar as he takes part in the fulfilment of the tasks set by society and the state, for which he exercises authority entrusted to him as a part of his responsibility for fulfilment of such tasks. When exercising entitlements and competency according to special legal provisions a public official shall also mean a natural person holding the position of a forest guard, water guard, nature guard, hunting

guard or fishing guard. Criminal liability and protection of a public official under individual provisions of this Code shall require that a crime be committed in connection with the official's authority (competency) and responsibility.

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

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

Penalties

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

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

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

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

Books and Records Provisions

The Accounting Act No. 563/1991 Coll., as amended by the Act No. 117/1994 Coll. and Act No. 219/1997 Coll., governs the maintenance of books and records under Sections 6,7,11-16, 29 and 33. The Accounting Act applies to all legal and natural persons carrying on business that are required to report taxes. On January 1, 2001, a new Act on Auditors entered into force obligating auditors to notify immediately, to the statutory and supervisory bodies of the company, any indications of possible acts of bribery.

Money Laundering

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

Extradition/Mutual Legal Assistance

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

Mutual legal assistance may be governed by the 1959 European Convention on Mutual Legal Assistance in Criminal Matters. Where no treaty applies, mutual legal assistance is governed by Section 384 of the Code on Criminal Procedure. Under Section 56 of the Act on International Private and Procedural Law, Czech judicial authorities will

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

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

Complicity, Attempt, Conspiracy

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

Denmark

Denmark signed the Convention on December 17, 1997. The Danish parliament passed legislation amending the Danish Criminal Code and ratifying the Convention on April 4, 2000, and this legislation entered into force on May 1, 2000. Denmark deposited its instrument of ratification with the OECD on September 5, 2000.

Danish legislation seems to conform in the most part to the Convention requirements. However, we are concerned with the discrepancy between the statute of limitations for a natural person and for a corporate entity. In our view, the two-year limitation, applicable only to corporate entities, is insufficient.

Basic Statement of the Offense

Section 122 of the Criminal Code, as amended, provides:

Any person who unlawfully grants, promises or offers some other person exercising a Danish, foreign or international public office or function a gift or other advantage in order to induce him to do or fail to do anything in relation to his official duties shall be liable to a fine, simple detention, or imprisonment for any term not exceeding three years.

Although the law does not provide any specific defenses or definitions, the Danish authorities have represented that certain payments or gifts would not be deemed “unlawful,” i.e., “usual gifts” in connection with special events and “ordinary gifts” for acts already committed, provided there was no explicit or implicit agreement in advance of the official act. In addition, the legislative history indicates that the Danish authorities intend to permit a defense for facilitation payments in certain circumstances.

Intent is required to commit the basic offense. Danish authorities also state that third-party beneficiaries to the bribes are also covered by Section 122.

Jurisdictional Principles

Denmark will assert jurisdiction over any act committed in whole or in part within its territory or where the consequences of the criminal act are manifest in Denmark. Liability of legal persons depends upon the location in which the requisite natural person committed the crime.

Denmark also asserts nationality jurisdiction over acts committed outside the territory of any state. With respect to acts within another state’s territory, Denmark asserts nationality jurisdiction provided the crime is also punishable within that state.

Coverage of Payor/Offerrer

The Danish law applies to any person, irrespectively of nationality. Although the Danish law does not explicitly refer to payments through intermediaries, Danish law encompasses such payments through its law on complicity.

Danish law provides for the prosecution of legal persons for foreign bribery, subject to the discretion of the public prosecutor. The law requires that at least one natural person employed by the legal person have committed the crime with the requisite intent. That person, however, need not hold a managerial position and may be an agent rather than a salaried employee. Prosecution and conviction of the natural person is not a prerequisite for criminal liability of the legal person.

Coverage of Payee/Offeree

The Danish law does not, in and of itself, define foreign officials. However, the legislative history states that a person holding a “foreign public office or function” includes officials of foreign countries, public enterprises, and international organizations, and explicitly references the definition in Article 1(4)(a) of the Convention. It further provides that judges, elected and appointed officials, and employees of all levels of the foreign government are included, as well as officials of state-owned enterprises engaged in commerce and industry.

Penalties

As of July 1, 2001, Danish law provides for a term of imprisonment between seven days and three years and a fine. Legal persons may be fined. In addition, the gain realized from the offense of foreign bribery may be confiscated.

Under Danish law, fines are calculated according to a “day-fine” system in which the size of a single day-fine is dependent upon the defendant’s economic situation. The fine itself can range from a single day-fine of not less than 2 DKK (approx. U.S.\$0.22) to 60 day-fines of an indeterminate amount. The actual amount of day-fines, and thus the total amount of the fine, is set by the court according to the nature of the offense and the defendant’s means. Further, should a fine of 60 day-fines be deemed inadequate by the court due to the amount of profits obtained or that might have been obtained by the defendant from the violation, the court has the discretion to impose a fine outside of the day-fine system.

According to section 93 of the Danish Criminal Code, the statute of limitations for bribery of foreign public officials is five years for an individual, whereas it is two years for a legal person. The statute of limitations can be triggered or suspended pursuant to section 94. The statute begins to run the day when the act has ceased.

Books and Records Provisions

Denmark’s Bookkeeping Law requires companies to keep accounts in accordance with “good bookkeeping practices,” to promptly record transactions, and to substantiate every bookkeeping entry with a voucher showing the date and amount of the transaction. Violations of the Bookkeeping Law may be punished by a fine and imprisonment of up to one year.

Money Laundering

Denmark prohibits some forms of money-laundering through section 284 of the Criminal Code, which prohibits receiving stolen goods. Section 284 prohibits

acquiring the profits or gains from listed offenses, including domestic and foreign bribery, hiding them, or otherwise assisting in ensuring their availability for the benefit of another person.

Extradition/Mutual Legal Assistance

The United States has an extradition treaty with Denmark. Denmark does not, however, extradite its nationals except to other Nordic countries.

The United States does not have a mutual legal assistance treaty with Denmark, nor does Denmark have a general mutual legal assistance law. Thus, requests for assistance are handled through traditional letters rogatory. The Danish authorities will provide legal assistance when the request can be carried out in corresponding Danish proceedings.

Complicity, Attempt, Conspiracy

Danish law provides for prosecution of every person who "contributed" to the commission of an offense and for the same penalties, except in special circumstances, as those applicable to the substantive offense. (*See* Criminal Code 23.) Danish law also provides for prosecutions of attempts, with lower penalties than for the completed offense. (*See* Criminal Code 21.) However, the offense of bribery is complete when a bribe is promised or offered, regardless of whether the bribe is accepted or received by the public official. Danish law does not provide for prosecution of conspiracies.

Finland

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

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

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

Basic Statement of the Offense

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

- (1) A person who to a public official, to an employee of a public corporation, to a soldier, to a person in the

service of the European Communities, to an official of another Member State of the European Union, or to a foreign public official, in exchange for his/her actions in service, promises, offers or gives a gift or other benefit, intended to the said person or to another, that affects or is intended to affect or is conductive to affecting the actions in service of the said person, shall be sentenced for bribery to a fine or to imprisonment for at most two years.

- (2) A person who in exchange for the actions in service of a public official or another person mentioned in paragraph (1) promises, offers, or gives a gift or other benefit mentioned in the said paragraph to another person, shall also be sentenced for bribery.

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

Jurisdictional Principles

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

Coverage of Payor/Offerer

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

Coverage of Payee/Offeree

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

- a person who in a foreign State has been appointed or

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

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

Penalties

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

Chapter 16, Section 28 of the Finnish Penal Code provides that the provisions on corporate criminal liability apply to bribery and aggravated bribery. Under Penal Code Chapter 9, Section 5, corporations can be fined from a minimum of 5,000 Finnish Markka (approx. U.S. \$712) to a maximum of FM5 million (approx. U.S. \$711,650). Chapter 9, Section 2 of the Penal Code provides that a Finnish corporation may be fined for the actions of its management representatives or employees, when acting within the scope of their employment on behalf of the corporation or for its benefit, if they act as accomplices in committing an offense or allowed the offense to happen. Section 2(2) states that even if a specific person cannot be identified as the offender, the corporation itself can still be fined.

Penal Code Chapter 9, Sections 4 and 6 set forth illustrative lists of factors that must be taken into account when determining sentencing of a corporation to a corporate fine and calculating the fines for corporations, including the lack of corporate oversight; the position of the offender in the corporation; the seriousness of the offense; the consequences to the corporation due to the

commission of the offense; measures, if any, taken by the corporation to prevent the offense from occurring; whether the offender sentenced is part of management; the size of the corporation; the amount of shares held by the offender; and the extent to which the offender can be held personally liable for the commitments of the corporation. For fines, the list also takes into account not only the size of the corporation, but also its solvency, earnings, and other indicators of its financial circumstances.

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

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

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

Books and Records Provisions

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

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

If a person with a legal obligation to keep accounts, his/her representative or the person entrusted with the keeping of accounts intentionally (1) neglects in full or in part the recording of business transactions or the balancing of the accounts, (2) enters false or misleading data into the accounts, or (3) destroys, conceals or damages account documentation and in this way

essentially impedes the obtaining of a true and sufficient picture of the financial result of the business of the said person or of his/her financial standing, he shall be sentenced for an accounting offense to a fine or to imprisonment for at most three years.

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

Chapter 5 of the Finnish Penal Code contains provisions on complicity, attempt, and authorization. Under Chapter 5, Section 1, if two or more persons have committed a crime together, they will be punished as principals. If the offense is carried out or attempted, under Chapter 5, Section 2 of the Penal Code, a person who encouraged another in committing the offense will be

punished for incitement as a principal. Complicity is covered by Chapter 5, Section 3, which provides that a person who acts to further the crime, whether it is carried out or attempted, will be sentenced under the same provisions as a principal. Finnish law does not specifically criminalize an attempt to bribe a foreign public official, as the basic prohibition already covers promising and offering bribes to such officials. Conspiracy is not punishable under the Finnish Penal Code.

France

France signed the Convention on December 17, 1997. The French government completed its internal processes for ratification of the Convention with the adoption of law no. 99-424 dated May 27, 1999, authorizing ratification of the Convention. The French implementing legislation, Act 2000-595, became final on June 30, 2000. France deposited its instrument of ratification with the OECD on July 31, 2000. The OECD Convention entered into force for France on September 29, 2000.

The legislation amends the French Penal Code to criminalize the bribery of foreign public officials by adding a new chapter containing three sections to the Penal Code at the end of Title III of Book IV, entitled "Interference with the Public Administration of the European Communities, the Member States of the European Union, other Foreign States and Public International Organizations." As indicated by the title, the legislation also incorporates France's obligations under various European Union conventions on corruption.

Our main concern with an earlier version of the French implementing bill had been that it contained a "grandfather clause" that would have exempted from prosecution future bribery payments relating to contracts entered into before the Convention's entry into force for France. Under pressure from the OECD and several OECD members, including the United States, this provision was removed during parliamentary review of the bill. However, we will continue to monitor this issue very closely as it is our understanding that there is a possibility that French judges could read the so called "principle of non-retroactivity" back into the law, particularly since the new legislation still does not explicitly state that the act of "giving" bribe payments is covered. The absence of the word "giving" in the French legislation raises the potential, denied by the French authorities, that the French law applies only to the offer itself and that payments extending indefinitely into the future based upon an offer made before the effective date of the French leg-

islation would not be punishable. Also, there are questions as to whether and to what extent a legal person can be prosecuted for the acts of employees or subordinates, and the French statute of limitations of only three years seems low.

In addition, we have several concerns about the jurisdictional and prosecutorial provisions in the French legislation. Although the French legislation provides for extraterritorial nationality jurisdiction, it appears to require that a complaint be filed with the French public prosecutor's office by an official of the payee/offeree's government in order for French prosecutors to assert jurisdiction in such cases. Such a requirement could cause a major loophole in the French authorities' ability to enforce their Convention obligations effectively over French nationals outside of French territory.

Further, France implemented both the OECD Convention and various EU anticorruption conventions at the same time. We are concerned that, in several instances, France afforded more rigorous and comprehensive treatment of bribery of officials of EU states than it did of officials of non-EU states. For example, for offenses under various EU conventions, France also allows for "non-nationality" jurisdiction over persons temporarily in France for committing certain offenses outside of France irrespective of otherwise applicable dual criminality requirements, but does not apply this basis of jurisdiction to similarly situated persons under the OECD Convention. Moreover, the new legislation provides that investigations for bribery offenses falling under the Convention may only be initiated by French prosecutors, even when the offense is committed on French soil; whereas prosecutions for bribery of domestic and European Union officials may be initiated by victims. This disparate treatment also could decrease the number of foreign bribery cases brought under the Convention, as prosecutorial discretion could never be overridden, unlike in the case of domestic and European Union officials context. Finally, the new legislation also provides that only the Paris Public Prosecutor, the examining magistrate, and the Correctional Tribunal will have jurisdiction to prosecute, investigate, and try offenses relating to the bribery of foreign public officials. This provision apparently applies only to cases brought under the OECD Convention and not to cases involving corruption of EU officials. We are uncertain why this special provision was included in the law and what effect that may have on enforcement. We will continue to monitor these issues very closely in the implementation stage.

Basic Statement of the Offense

The basic statement of the offense of active bribery under the Convention is contained in Articles 435-3 and 435-4 of the French Penal Code. These provisions apply to active corruption of officials of foreign States other than Member States of the European Union and of officials of public international organizations other than institutions of the European Communities. They provide that:

- 435-3 With regard to the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed in Paris on December 17, 1997, the act of unlawfully proposing, at any time, directly or indirectly, offers, promises, donations, gifts or any advantages whatsoever in order to cause a person of public authority, or a person carrying out public service, or a person vested with an elective mandate in a foreign country or in an international public organization, to act or refrain from performing an act within his/her duties, mission or mandate, or facilitated by his/her duties, mission, or mandate in order to obtain or retain business or another improper advantage in international business, is punishable by 10 years imprisonment and a 1 million franc (FF) fine (approx. U.S.\$129,000).

- It is also punishable by the same penalties to yield to a person cited above who unlawfully solicits, at any time, directly or indirectly, offers, promises, donations, gifts or any advantages whatsoever to act or refrain from acting as described above.

The prosecution of the crimes listed in this article may only be exercised at the request of the Public Prosecutor.

- Art. 435-4 With regard to the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions signed in Paris on December 17, 1997, the act of unlawfully proposing, at any time, directly or indirectly, offers, promises, donations, gifts or any advantages whatsoever in order to cause a magistrate, a jury member, or any other person who has a judicial function, an arbitrator or an expert appointed either by a court or by the parties, or a person whom a judicial authority has given the authority to conduct conciliation or mediation, in a foreign country or in an international public organization, to act or refrain from acting or refrain from performing an act within his/her duties, mission or mandate, or facilitated by his/her duties, mission, or mandate in order to obtain or retain business or another improper advantage in international business, is punishable by 10 years

imprisonment and a 1 million FF fine (approx. U.S.\$129,000).

- It is also punishable by the same penalties to yield to a person cited above who unlawfully solicits, at any time, directly or indirectly, offers, promises, donations, gifts or any advantages whatsoever to act or refrain from acting as described above.

The prosecution of the crimes listed in this article may only be exercised at the request of the Public Prosecutor.

The basic statement of the offense contained in Articles 435-3 and 435-4 is based on the French Penal Code Articles 433-1 and 434-9, which apply to bribery of domestic officials. Articles 435-3 and 435-4 contain a more detailed definition of foreign public official and include officials of public international organizations. Articles 435-3 and 435-4 are also limited to bribes made in order to obtain or retain business or an other improper advantage. Also, although bribe payments for third parties are not explicitly mentioned in the new Penal Code provisions, French officials explained that the provision would apply regardless of the ultimate beneficiary.

Neither the new provisions nor the domestic bribery provisions upon which they were based explicitly provide that "giving" bribe payments are covered, although French representatives have stated that such acts are implicit in the language of the provisions. It is our understanding that prior French law required proof of a "corruption pact" between the briber and the official receiving the bribe. This requirement made bribery offenses very difficult to prove, as bribery transactions are usually conducted in secret. With the addition of the language "at any time" to the basic statement of the offense, the French explain that there is no longer the need to prove when the "corruption pact" took place when the only evidence one has is the bribe payment. French authorities explain that the new law eliminates this requirement by assuming that an offer was renewed at the time of the payment. Although apparently there is case law to support this interpretation, we will not be certain that bribe payments stemming from pre-Convention contracts will be covered by the French legislation until the issue is decided by the French courts.

According to the French, Articles 435-3 and 435-4 do not apply to European Union officials, whereas the more specific provisions under new Penal Code Articles 435-1 and 435-2 are applicable. The articles covering bribery of both foreign public officials and EU officials generally appear to use the same language and call for the same penalties. However, the articles implementing the EU conventions do not contain the provision limiting the

initiation of prosecutions to public prosecutors. In other words, under French law, domestic bribery cases and bribery cases involving European Union officials, but not officials of other countries, may be initiated by victims, overriding the prosecutor's discretion; but this is not possible under the legislation implementing the OECD Convention, even if the offense is committed in France.

Jurisdictional Principles

Pursuant to Penal Code Article 113-2, France will exercise territorial jurisdiction over offenses committed at least in part in France or relating to offenses committed in France.

France will also assert nationality jurisdiction over French nationals who commit offenses outside of French territory only when the offense is punishable under the laws of the state where it occurred. Article 113-6. However, it is our understanding that such prosecutions against French nationals must also be preceded by a complaint from the State victim. This provision, particularly when coupled with the limitation that prosecutions can be initiated only by prosecutors, could seriously limit the effectiveness of French enforcement of Convention obligations, because officials of the payee/offeree government may be very reluctant to request French government action.

Furthermore, under certain circumstances, French courts can assert "non-nationality jurisdiction," provided for in Penal Code Article 689-1. This exceptional basis of jurisdiction only applies to enumerated offenses falling under various international conventions listed in Articles 869-2 to 689-7 of the Code of Criminal Procedure. The French implementing legislation contains a new article, Article 689-8, which provides that this special basis of jurisdiction can be used for offenses falling under various EU anticorruption instruments, but no such provision was added with respect to the OECD Convention. Therefore, France has provided for a jurisdictional regime that waives nationality and dual criminality requirements for some of its prosecutions in EU corruption cases, but not those falling under the OECD Convention, in apparent disregard for Article 5.

Also, new Penal Code Article 706-1 of the French implementing legislation provides that the Paris Public Prosecutor, the examining magistrate, and the Correctional Tribunal will have jurisdiction to prosecute, investigate, and try offenses relating to the bribery of foreign public officials. This centralizing provision apparently applies only to cases brought under the OECD Convention and not to domestic cases or those involving

corruption of EU officials. This raises concerns because apparently, according to the OECD Working Group Country Report on the French legislation:

the bribery of both European Union and French officials will fall within the responsibility of regional jurisdictional economic and financial poles, which were created to adapt the law to the complexity of financial and economic crime, and to strengthen the means of combating corruption. New working methods will be introduced: modern logistical means will be available and multidisciplinary teams will be placed at the disposal of specialized courts.

French officials explained that jurisdiction over offenses falling under the Convention will be prosecuted out of Paris for harmonization purposes.

Coverage of Payor/Offerer

The provisions to the French Penal Code appear to cover bribes made by “any person” including both natural and legal persons. Criminal responsibility for legal persons is dependant upon the offense having been committed by a natural person on behalf of the company. Penal Code Article 121-2.

Coverage of Payee/Offeree

Article 435-3 and Article 435-4 cover bribes made to “a person of public authority, or a person carrying out public service, or a person vested with an elective mandate in a foreign country or in an international public organization” and “a magistrate, a jury member, or any other person who has a judicial function, an arbitrator or an expert appointed either by a court or by the parties, or a person who a judicial authority has given the authority to conduct conciliation or mediation, in a foreign country or in an international public organization.” It is also our understanding that the legislation will be interpreted in light of the Convention and its Commentaries.

Penalties

For natural persons, Articles 435-3 and 435-4 of the French Penal Code provide a penalty of ten years imprisonment and a 1 million FF fine (approx. \$U.S.129,000). The same penalties apply to individuals who “yield to solicitations” under the same Articles. These are the same as the penalties for bribery of domestic officials.

Article 435-5 provides for additional penalties for natural persons, including: the loss of benefits [civic benefits, civil benefits, and family benefits for five years or more] pursuant to Penal Code Article 131-26; a ban on holding public office for a period of five years, or on holding a professional or commercial

position in the same field as the one held when the bribe occurred; publication and dissemination of the judgment pursuant to Article 131-35; and confiscation pursuant to Article 131-21 of the bribe or bribe proceeds, with the exception of objects subject to restitution. In addition, foreigners having violated the basic statement of the offense may be subject to deportation pursuant to Article 131-30 either permanently or for a period of ten years or more. Article 435-5 is based upon Article 433-22 of the Penal Code which sets forth penalties for natural persons for the bribery of domestic officials.

Legal entities, except for State entities, can also be found criminally liable under Penal Code Article 435-6 under the terms of Article 121-2 for violations of Articles 435-2, 435-3 and 435-4. The penalties include: a fine of five times the fine provided for natural persons, i.e., 5 million FF (approx. U.S.\$645,000), pursuant to Article 131-38 and, for a maximum of five years: banning the entity from participating in the professional or commercial activity, directly or indirectly, in which the offense was committed; placing the entity under judicial supervision; closure of the division/establishment used to commit the offense; exclusion of the entity from government procurement; banning the entity from raising public funds; prohibiting the entity from writing checks other than those that allow funds to be withdrawn or certified checks, and disallowing the use of credit cards; confiscation according to Article 131-21 of the bribe or bribe proceeds, except for objects subject to restitution; and publication and dissemination of the judgement against the entity as stipulated in Article 131-35. Article 435-6 is based upon Article 433-25 of the Penal Code which sets forth penalties for legal persons for the bribery of domestic officials.

The offense of bribery of foreign public officials will fall within the general statute of limitations under Article 8 of the French Penal Procedure Code, which is three years. Apparently the statute of limitations will start to run from the date the “corruption pact”—as it is referred to under French law, i.e., a meeting of minds between the briber and the recipient of the bribe—was agreed to, or from the occurrence of the last act relating to “the corruption pact.” (Arret Carignon. C. cass., 27/10/1997.) Pursuant to Articles 7 and 8 of the French Penal Procedure Code, the statute of limitations may be interrupted during investigations or prosecutions. After interruption, the limitation period begins anew. The statute of limitations is suspended if there is an obstacle of law or fact. Suspension stops the limitation period only temporarily.

Books and Records Provisions

According to the French government, Articles 8-17 of the French Commercial Code and Articles 1 to 27 of the related Decree of November 29, 1983, as amended, and the amended Ministerial Decree of April 27, 1982, generally cover the types of accounting offenses listed under the Convention. Also relevant are the Law of July 24, 1966 and the Decree of March 23, 1967.

Money Laundering

France punishes money laundering resulting from all offenses regardless of where the underlying offense occurred pursuant to Article 324-1 of the Penal Code.

Extradition/Mutual Legal Assistance

Dual criminality is necessary in order for France to grant an extradition request. In the absence of a treaty, the Law of March 10, 1927 requires that the requesting country either imposes a fine for the offense under its own law or provides for a minimum term of imprisonment of at least two years for the offense. If France does have an extradition treaty with the requesting country, the requesting country's law must provide for the minimum prison term for the offense according to the terms of the treaty. France will not extradite its nationals. The European Convention on Extradition and the bilateral extradition treaties to which France is a party provide that where a request has been refused on nationality grounds, the State refusing the request must submit the matter to its national authorities upon request from the State seeking extradition. In the absence of an extradition treaty, where France has denied an extradition request upon nationality grounds, Article 113-8 of the French Penal Code provides that France will submit the issue to its national authorities following an official condemnation by the State where the offense occurred.

France has signed treaties with the United States and the European Community regarding mutual legal assistance; it has also entered into many bilateral mutual legal assistance treaties. In the absence of a treaty, France does not require a minimum prison sentence or fine in order to grant mutual legal assistance, pursuant to the Law of March 10, 1927.

Pursuant to Penal Code Article 132-22, bank secrecy cannot be invoked to refuse mutual legal assistance.

Complicity, Attempt, Conspiracy

Penal Code Articles 121-6 and 121-7 cover the offense of complicity. Article 121-7 provides that accomplices are those who knowingly aid or assist in the facilitation or consummation of an offense, as well as persons

who by giving, promising threatening, ordering, or abusing authority or power cause an offense or give instructions so that it may be carried out. Penal Code Article 121-6 provides that accomplices will be treated the same as the principal author of the offense. The offense of bribery of a foreign public official occurs whether or not the offer to bribe the official is accepted. Therefore, attempt is not specifically mentioned in the provisions on the offense of bribery of foreign public officials, as it is not contained in the French Penal Code provisions on bribery of domestic officials. Conspiracy, as defined in the United States, is apparently not punishable under French law.

Germany

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

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

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

Basic Statement of the Offense

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

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

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

Whoever offers, promises, or grants an advantage to

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

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

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

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

Jurisdictional Principles

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

Coverage of Payor/Offeror

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

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

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

Coverage of Payee/Offeree

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

Penalties

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

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

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

As noted, corporations are not subject to criminal liability. However, they may be prosecuted administratively and subjected to fines under the Administrative Offenses Act. The statutory fines on corporations are up to DM1 million (approx. U.S.\$433,000) for intentional acts by a leading person and up to DM500,000 (approx. U.S. \$216,000) for negligent acts. (*See Administrative Offenses Act, '30.*) However, it is our understanding that corporations can be subject to fines up to the amount of the commercial advantage. (*See Administrative Offenses Act, '17(4).*) We have not received any information on how often this provision has been invoked against German corporations.

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

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

Greece

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

Sources for this analysis include Greek Law

2656/1998 implementing the Convention, as well as other information obtained by the U.S. embassy in Athens.

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

Basic Statement of the Offense

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

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

Jurisdictional Principles

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

Coverage of Payor/Offerer

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 man-

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

Coverage of Payee/Offeree

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

Penalties

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

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

seized during the criminal investigation/inquiry under the Code of Criminal Procedure Articles 258, 259, 260, 261, 266, 288, and 495.

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

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

Hungary

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

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

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

Basic Statement of the Offense

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

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

Jurisdictional Principles

Hungary applies the principles of territorial and nationality jurisdiction. (*See* HCC '3.) In addition, our

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

Coverage of Payor/Offerrer

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

Coverage of Payee/Offeree

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

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

Penalties

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

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

barred from being an executive officer in a particular profession for up to three years. (*See id.*)

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

Hungarian law covers attempt and abetting. (*See HCC '16-21.*)

Iceland

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

Basic Statement of the Offense

Section 109 of the General Penal Code provides:

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

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

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

Jurisdictional Principles

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

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

Coverage of Payor/Offerrer

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

Coverage of Payee/Offeree

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

Penalties

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

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

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

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

Section 20 of the General Penal Code provides that any attempt to commit a crime is punishable. Under Section 22 of the General Penal Code, all accomplices to

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

Italy

Italy signed the Convention on December 17, 1997. It adopted implementing legislation (Act No. 300) on September 29, 2000, which entered into force on October 26, 2000. Italy deposited its instrument of ratification of the Convention with the OECD on December 15, 2000, and the Convention entered into force for Italy on February 13, 2001. Although Italian law does not provide for criminal responsibility for legal persons, on May 2, 2001, the Council of Ministers approved the text of an implementing decree which will introduce administrative sanctions against legal persons for bribery pursuant to guidelines and principles set forth in Article 11 of the Italian implementing legislation and consistent with Italy's obligations under Articles 2 and 3 of the Convention. The decree will enter into force upon signature by the President and publication in the official gazette.

Generally, the Italian implementing legislation appears to fulfill the requirements of the Convention. One minor concern is that, in certain circumstances, Italian law provides for a defense for "*concessione*" (coercion), whereby the briber may not be penalized for being obliged or induced to make an illegal payment. We also note that Italian law does not provide financial penalties for natural persons convicted of bribery offenses. The added possibility of imposing financial penalties, although not required by the Convention, would make Italy's sanctions more "effective, proportionate and dissuasive" than would imprisonment alone. We will monitor both the use of the defense of *concessione* as well as the effectiveness of the penalties provided for in the Italian legislation during Phase II of the monitoring process.

Basic Statement of the Offense

In order to implement the Convention, Italy added a new Article 322 *bis* to its Criminal Code to establish the offenses of passive bribery of officials of the European Communities and, in Paragraph 2, subsection 2, the active bribery of foreign public officials. Article 322 *bis*

Paragraph 2, subsection 2, provides that the provisions of Articles 321 and 322 on domestic bribery will apply where money or other advantages are given, offered, or promised to foreign public officials. The term “foreign officials” is defined as:

persons carrying out functions or activities equivalent to those performed by public officials and persons in charge of a public service within other foreign States or public international organizations, when the offense was committed in order to procure an undue benefit for himself or others in international business transactions.

The Italian implementing legislation refers to Articles 321 and 322 on the bribery of domestic officials, which in turn reference the Italian provisions on passive bribery, including Articles 318, 319, 319 *bis*, 319 *ter*, and Article 320, by domestic officials in order to determine applicable penalties. Generally, the relevant articles concern two aspects of bribery: bribery acts where a bribe payment was made in order for a foreign public official to perform acts relating to one’s office, and, secondly, bribery for the public official to omit or delay such acts relating to one’s duties, or for breaching one’s duties. Intent is required for both categories of offenses. According to Italian officials, bribery through intermediaries is covered, as are bribes made for third parties.

Italian law contains a possible defense to the basic statement of the offense. Article 317 of the Criminal Code covers the offense of *concussione* by a public official. In such cases, only the public official would be liable for punishment and not the person who was “obliged” or “induced” to pay a bribe. This provision might weaken the effective application of the Convention. Italy has indicated, however, that defendants in bribery cases have only rarely invoked this provision, and even more rarely has it been successful.

Jurisdictional Principles

Italy practices both territorial and nationality jurisdiction. Under Article 6 of the Criminal Code, “[w]hoever commits an offense in the territory of the State shall be punished according to Italian law. An offense shall be deemed committed in the territory of the State when the act or omission, which constitutes it, occurred therein in whole or in part, or when an event which is a consequence of the act or omission took place therein.” The Italian courts have generally held that territorial jurisdiction applies where the offense originates abroad and is completed in Italian territory and where the offense is committed wholly abroad with the participation of another person in Italian territory. Italian

territory is held to include Italian aircraft and ships.

With respect to nationality jurisdiction, Articles 6 through 10 of the Criminal Code establish jurisdiction over offenses committed abroad in certain limited cases:

- jurisdiction over an Italian national or an alien for an offense committed by a public officer in service of the State by abusing the powers or violating the duties of one’s office, regardless of whether the citizen or alien is found within Italy, and
- jurisdiction in certain other limited cases over Italian nationals (or aliens) within Italian territory for offenses committed abroad.

We understand that Italian law does not require dual criminality for establishing jurisdiction over an offense which occurs entirely abroad.

Coverage of Payor/Offeror

Article 322 *bis*, establishing bribery of a foreign public official as an offense, does not specify to whom it applies. However, Article 322 *bis* is linked in the statutory scheme to Article 321, the corresponding article regarding domestic active bribery, which applies to “any person.” Under Italian law only natural persons can be held criminally liable.

As noted above, the newly adopted legislative decree will provide for administrative sanctions for a legal person found guilty of a bribery offense. Article 11 of the implementing legislation enabled the government to issue a decree providing for the administrative responsibility of legal persons and companies, associations, and bodies without legal personality that do not carry out statutory functions (partnerships). We understand that the definition of “legal persons” under Article 11 would include state-owned and state-controlled corporations when they are acting in their commercial capacity, but exclude them when they are exercising “public powers.” The Italian authorities explained that this provision would be interpreted narrowly to ensure that State and other public enterprises, including those that cover regions and municipalities, would not escape administrative liability.

Coverage of Payee/Offeree

As noted above, paragraph 2, subsection 2 of Article 322 *bis* of the Criminal Code applies to the bribery of “persons carrying out functions or activities equivalent to those performed by public officials and persons in charge of a public service within other foreign States or public international organizations.” We understand that the intent of Italian legislators is to criminalize the bribery of foreign public officials executing functions correspon-

ding to those of a public official under Italian law. Article 357 (defining “public officer”) and Article 358 (defining “person in charge of a public service”) of the Criminal Code do not correspond exactly to the definition of “foreign public official” in Article 1 of the Convention. The Italian authorities, however, represented that Italian case law illustrates that all the categories of public officials referred to in Article 1 of the Convention are indeed covered by Italian law.

Penalties

Penalties for a natural person convicted of giving, promising, or offering a bribe to a foreign public official for the performance of an act related to the office of the official or for an omission or delay of an act relating to the office of the official or for performance of an act in breach of official duties are covered in Articles 321 and 322 of the Criminal Code read in conjunction with Criminal Code Articles 318-320. Ranges of imprisonment depend on the severity of the offense and can vary from a term of imprisonment between 6 months and 3 years at the lower end to a term between 6 and 20 years for crimes in which another person has been wrongly sentenced to a term of imprisonment of more than 5 years. In certain circumstances, e.g., where the foreign public official does not accept the offer or promise of a bribe, the penalty can be reduced up to a maximum of one-third. Although the Convention does not require monetary penalties for natural persons, we believe that adding such sanctions could prove more dissuasive than imprisonment alone.

A natural person is also subject to a number of civil sanctions including permanent or temporary disqualification from holding public office, loss of capacity to enter into contracts with the public administration, and an obligation to make restitution and pay damages.

As stated above, the Italian legal system does not provide for criminal responsibility of legal persons. However, pursuant to Article 11 of its implementing legislation, the Italian government has issued a legislative decree to regulate administrative liability for legal persons. The following principles and guidelines in Article 11 are to have been followed in the legislative decree. Paragraph (1)(f) of Article 11 repeats the basic principle of the Convention that noncriminal penalties of legal persons should be “effective, proportionate and dissuasive.” Monetary sanctions under paragraph (1) (g) of Article 11 range from Italian Lire 50 million (approx. U.S.\$22,000) to Italian Lire 3 billion (approx. U.S.\$1.3 million) depending on the gravity (i.e., the amount of bribe proceeds) of the offense and the financial condition of the firm. Where

these two factors are “especially slight,” the range of fines is between Italian Lire 20 million (approx. U.S.\$9,000) and Italian Lire 200 million (approx. U.S.\$90,000). In addition, according to paragraph (1)(h) of Article 11, the fines shall not exceed the social capital or total assets of an enterprise. Paragraph (1)(n) of Article 11 states that the fines shall be reduced by one-third to one-half where the enterprise has adopted “conduct ensuring an effective compensation or restoration with regard to the offense committed.”

In addition, Article 11 provides for one or more of the following sanctions, in addition to fines, in “particularly serious cases”:

1. The closing (temporary or permanent) of the place of business.
2. Suspension or revocation of authorizations, licenses, or permits instrumental to the commission of the offense.
3. Disqualification (temporary or permanent) from carrying out the activity of the body and possible appointment of another body to carry out the activity where necessary to prevent damage to third parties.
4. Prohibition (temporary or permanent) from dealing with the public administration.
5. Temporary exclusion from obtaining any allowances, funding, contributions or aid, and possible revocation of those already granted.
6. Prohibition (temporary or permanent) from advertising goods and services.
7. Publication of the sentence.

Italian law provides for both preventive (e.g., to avoid aggravation or prolongation of an offense) and probatory (when evidence is to be acquired) seizure. Article 240 of the Criminal Code covers confiscation generally, and the Italian implementing legislation added a new Article 322-ter which covers confiscation in cases where the offense involved a gift or a promise. For legal persons, Article 11(1)(i) of the implementing legislation provides for confiscation of the bribe or the bribe proceeds, or their equivalent value.

The general statute of limitations is five years for the criminal offense of bribing a foreign public official and with respect to the application of administrative sanctions on a legal person or other covered body for the commission of an offense. In certain instances of aggravated bribery, the statute of limitations is 10 years. However, the deadline for commencing preliminary investigations is also relevant to the discussion of statutes of limitations. Where an investigation concerns an unknown person, the deadline is six months unless the public prosecutor requests an extension. In the case of an investigation of a

known person, the deadline is also six months unless the public prosecutor requests an indictment for trial or an extension. In the latter case, extensions are usually limited to 1 year, although in the case of complex investigations of “serious offenses” (including bribery of a foreign public official), investigations may be extended for two years.

Books and Records Provisions

Accounting and auditing requirements for Italian firms are specified in Article 13 of Presidential Decree 600/73 and Articles 2364 and 2400 of the Civil Code. Requirements for limited liability companies with a capital of at least Italian Lire 200 million (approx. U.S.\$90,000) are contained in Article 2488. Company executives who provide false financial information, or who unlawfully distribute profits, can be punished with imprisonment of one to five years and a fine of Italian Lire 2 million to 20 million (approx. U.S.\$900 to \$9,000). Auditors who commit this offense are subject to punishment of imprisonment of six months to three years and a fine of Italian Lire 200,000 to 2 million (approx. U.S.\$90 to \$900). Under Article 2409 of the Civil Code directors and auditors may be dismissed for accounting and auditing irregularities. Criminal and administrative penalties may also result under Legislative Decree No. 74 of March 10, 2000 for the issuance of false invoices and other false documents in order to evade taxes.

Money Laundering

Article 648 *bis* of the Criminal Code calls for the punishment of anyone who substitutes, transfers, or conceals money, goods, or assets obtained by means of an intentional criminal offense for the purpose of concealing the link between such assets and a predicate offense. This provision would only apply to a person who has laundered the money, who may not always be the person who committed the predicate offense. Italian law provides for punishment of a person who invests the proceeds from these crimes in financial assets and for the possibility of punishing a person for money laundering, even if the predicate offense has been committed abroad.

Extradition/Mutual Legal Assistance

Pursuant to Article 696 of the Code of Criminal Procedure, Italy will respond to requests for extradition under international conventions in force in Italy or under bilateral treaties, including the bilateral extradition treaty between the United States and Italy. Under Title II of the Code of Criminal Procedure, Italy may, in some cases, grant extradition to a country with which it does not have

a treaty. The Court of Appeal cannot consent to extradition in certain limited cases. For example, if the offense for which extradition is sought is punishable by death under the law of the requesting country, sufficient assurance must be provided that the accused will not be sentenced to death or, if already sentenced, will not be executed. Italian citizens can be extradited only pursuant to a treaty obligation. The extradition treaty between the United States and Italy does not permit refusal of extradition based on the nationality of the individual sought.

Italy is a party to the European Convention on Legal Assistance in Criminal Matters and to a number of bilateral legal assistance treaties, including a mutual legal assistance treaty with the United States. Article 696 of the Code of Criminal Procedure provides that letters requesting mutual legal assistance can be executed pursuant to such agreements. Where no treaty exists, mutual legal assistance can be granted pursuant to provisions in Title III of the Code of Criminal Procedure. The Court of Appeal and the Minister of Justice must refuse to grant assistance in certain limited instances, such as where the requested acts are expressly prohibited by Italian law or are in conflict with fundamental principles of the Italian legal system. Italian authorities have confirmed that mutual legal assistance will be granted for an offense coming within the scope of the OECD Convention. Italy will not deny mutual legal assistance in criminal investigations on the grounds of bank secrecy.

Complicity, Attempt, Conspiracy

Article 110 of the Criminal Code states that participants in the same offense shall each be subject to the prescribed punishment. In case of aggravating circumstances, such as the participation of five or more persons in the offense, the punishment shall be increased pursuant to Article 112. As the Criminal Code does not define participation, it is not evident whether aiding and abetting and authorization are covered. The Italian authorities have indicated that under Articles 322 and 322 *bis*, incitement to bribery is considered a completed crime and that these provisions would also apply to an attempt. Conspiracy does not exist in Italian law.

Japan

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

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

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

There are concerns as to whether the maximum fines for natural and legal persons are "effective, proportionate and dissuasive," as Article 3(1) of the Convention requires. There is also a concern that Japan will not subject the proceeds of bribery to confiscation, nor will it impose monetary sanctions of comparable effect (other than the criminal fines that otherwise apply to bribery) in lieu of such confiscation, as required under Convention Article 3(3). The "main office" exception to territorial jurisdiction is problematic, as is the fact that bribery is not included among the crimes subject to the application of nationality jurisdiction. Other concerns relate to the definition of "foreign public official," coverage of payments made to a third party at the direction of a foreign public official, and the length of the statute of limitations.

Basic Statement of the Offense

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

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

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

Jurisdictional Principles

Article 10 *bis* of the UCPL does not address basic jurisdictional principles. However, Article 1 of the Penal

Code sets forth the principle of territoriality. We understand that in order to establish jurisdiction, at least one element of the offense must be committed in Japan. Pursuant to Article 8 of the Penal Code, the provisions of Article 1 apply to the UCPL.

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

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

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

Coverage of Payor/Offeror

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

Coverage of Payee/Offeree

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

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

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

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

Penalties

Under Article 14 of the UCPL, legal persons can be held criminally liable. Article 14 provides that the maximum fine for legal persons is 300 million yen (approx. \$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 ¥3 million (approx. U.S. \$25,000). The corresponding penalties in Article 198 of the Penal Code for domestic bribery are imprisonment for up to three years or a maximum fine of ¥2.5 million (approx. U.S. \$21,000). According to the Japanese legislation, a fine or imprisonment can be applied in the alternative, but not together.

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

Books and Records Provisions

Companies and partnerships with capital equal to or exceeding ¥500,000 (approx. U.S. \$4,200) must, under Article 32 *bis* (1) of the Commercial Code, keep accounts and balance sheets that reflect the condition of the business and profits/losses. Such accounts must be kept in accordance with the requirements of the Financial Accounting Standards for Business Enterprises. Under Article 498 *bis* (1) of the Commercial Code, directors and others administering the affairs of a company are subject to non-criminal fines of up to ¥1 million (approx. U.S. \$8,400) for falsification of records.

Articles 281 and 282 of the Commercial Code contain certain requirements for the maintenance of financial records by companies that issue shares of stock. Under Article 266 *bis* (3), directors are liable for falsifying audit reports, prospectuses, etc. Share-issuing companies with capital of ¥500 million (approx. \$4.2 million) or more, or total liabilities of ¥20 billion (approx. U.S. \$168 million) or more, must be audited by external auditors pursuant to Article 2 of the Law for Special Exceptions to the Commercial Code.

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

Article 197 (1) of the SEL provides for criminal penalties (imprisonment for up to five years and/or fines of up to ¥5 million (approx. U.S. \$42,000) for persons who submit false registration statements. The corporation may also be penalized under Article 207. Individuals submitting false registration statements may also, under Article 18 of the SEL, be held civilly liable to injured investors.

Money Laundering

Under the Anti-Organized Crime Law, the acceptance of a bribe by (but not the act of bribing) a domestic or foreign official is a predicate offense for the purpose of Japan's money-laundering laws. Penalties include imprisonment for maximum terms of three to five years, or fines ranging from a maximum of ¥1 million to ¥10 million (approx. U.S. \$8,400-\$84,000).

Extradition/Mutual Legal Assistance

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

Complicity, Attempt, Conspiracy

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

Korea

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

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

Basic Statement of the Offense

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

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

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

Article 4 covers such bribes on behalf of a legal person by a "representative, agent, employee or other indi-

vidual working for [a] legal person...in relation to its business." There are two exceptions to the basic statement of the offense. Article 3(2) provides an exception for (1) bribes where they are "permitted or required by the law" in the country of the foreign public official and (2) facilitating payments.

Jurisdictional Principles

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

Coverage of Payor/Offeror

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

Coverage of Payee/Offeree

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

Penalties

For individuals, Article 3(1) of the FBPA provides for a maximum prison sentence of five years or a maximum fine which is the greater of 20 million won (approx. U.S. \$15,600) or twice the profit obtained as a result of the bribe. Article 3(3) provides that where imprisonment is imposed, "the prescribed amount of fine shall be concurrently imposed." The stated intent of Article 3(3) of

the FBPA is to effectively deprive the offeror/payor of the profits obtained from the bribery. Under Article 132 of the Korean Criminal Code, the criminal penalty for bribery of domestic public officials is imprisonment for a maximum of five years or a maximum fine of 20 million won (approx. U.S. \$15,600).

In addition to the fines imposed on representatives, agents, employees, or other individuals working for legal persons under Article 3, the entity itself may be fined under Article 4 where a representative, agent, or other employee of the legal entity, in the ordinary conduct of the business of the legal entity, commits the offense of bribery of a foreign public official. Article 4 of the FBPA provides for a maximum fine which is the greater of 1 billion won (approx. U.S. \$781,300) or twice the profit obtained as a result of the bribe. The same provision provides that fines will not be imposed if the legal person has paid "due attention" or has made "proper supervisory efforts" toward preventing the violation.

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

Books and Records Provisions

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

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

penalty, which shall be less than that of the author. Article 8 of the Korean Criminal Code links the above provisions to the FBPA by making them applicable to offenses enumerated in other criminal statutes.

Luxembourg

Luxembourg signed the Convention on December 17, 1997. The law implementing the Convention of January 15, 2001 (entitled the "Law of January 15, 2001 approving the Convention of the Organization for Economic Cooperation and Development on Combating Bribery of Foreign Public Officials in International Business Transactions and relating to misappropriation, destruction of documents and securities, dishonest receipt of money by a public officer, unlawful taking of interests and bribery and amending other legal provisions"), entered into force on February 10, 2001. Luxembourg deposited its instrument of ratification on March 21, 2001.

Our main concern with Luxembourg's legislation is that it provides for neither corporate criminal liability nor for effective, proportionate, and dissuasive non-criminal sanctions for corporations, as required by Articles 2 and 3.2 of the Convention. However, the Luxembourg authorities stated that a Justice Ministry working group has been set up to prepare a reform which would introduce the principal of criminal liability of legal persons at the end of 2001.

Basic Statement of the Offense

The basic statement of the offense is contained primarily in Criminal Code Articles 247, 249 para. 2, and Article 250 para. 2, concerning bribery of public officials, which by application of Article 252 now also apply to foreign public officials. Article 247 generally provides that the act of unlawfully proposing or giving, directly or indirectly, or offering, promising, giving, presenting, or providing any advantages whatsoever, to a person entrusted with, or agent of, public authority, a law enforcement officer, or a person charged with performing a public function or holding an elected office for herself or a third person in order that: (1) she acts or refrains from performing her duties, or (2) she uses her influence to obtain from an official or public administration advantages, employment, government procurement, or any other favorable decision, will be punished by imprisonment from five to ten years and a fine ranging from 20,000 Luxembourg francs (approx. U.S.\$420) to 7,500,000 francs (approx. U.S.\$157,350).

Articles 249 para. 2 generally provides that anyone solicited by a public official as defined above and

accepts, or who proposes offers, promises, gifts, presents, or any advantages whatsoever so that the official will act or refrain from acting according to her duties will be punished by imprisonment of five to ten years and fines of 20,000 francs (approx. U.S.\$420) to 7,500,000 francs (approx. U.S.\$157,350).

Article 250 para. 2 generally provides that anyone solicited by a member of the judiciary or any other person holding judicial office, arbitrator, or expert appointed by the court or by the parties, who accepts or who proposes offers, promises, gifts, presents, or any advantages whatsoever so that the official will act or refrain from acting according to her duties will be punished by imprisonment from ten to fifteen years and fines ranging from 100,000 francs (approx. U.S.\$2,098) to 10,000,000 francs (approx. U.S.\$209,800).

Article 252 generally provides that the provisions above apply to offenses involving elected or appointed public officials or those charged with such duties of another State, European Communities officials, officials or agents of public international organizations.

According to the Luxembourg officials, bribe payments to foreign public officials made through intermediaries or to third parties are covered by the provisions above. Intent is an essential condition of the offense. The basic offense of bribery of foreign officials goes beyond the Convention in that it is not restricted to bribery acts in order to obtain or retain advantages in international business transactions.

Jurisdictional Principles

Luxembourg practices both territorial and national-ity jurisdiction. (*See* Articles 7 *ter* and 5 of the Code of Criminal Procedure, respectively.) According to Article 7 *ter*, territorial jurisdiction applies where an act constituting an essential element of the offense occurs within the territory of Luxembourg. Therefore, under Luxembourg law a court may assert jurisdiction if the offense was committed abroad but its effects are realized in Luxembourg.

According to Luxembourg officials, the condition of dual criminality is not required in order for Luxembourg courts to assert jurisdiction over its nationals for the criminal offense of bribery of foreign public officials committed outside of its territory.

In addition, unlike France's implementing legislation, no complaint is required to be filed by a "State victim," e.g., a representative of the State whose official was bribed, in order for there to be prosecution of the offense. If a State victim does make such a complaint, prosecution is still discretionary.

Coverage of Payor/Offerrer

Luxembourg's Criminal Code provisions on bribery concern only natural persons. Luxembourg has indicated that a working group within the Ministry of Justice has been charged with developing amendments so that corporations will be penalized under its laws (*See also* discussion on penalties, *infra.*) Luxembourg officials predict that the bill will be introduced in Parliament at the end of 2001.

Coverage of Payee/Offeree

Criminal Code Article 252 applies the offenses of bribery of national public officials found in Articles 247, 249, and 250 to foreign public officials, European Communities officials, and officials of other public international organizations. Articles 247 and 249 define a public official as a person entrusted with or agent of public authority, a law enforcement officer, or a person charged with performing a public function or holding an elected office for oneself or a third person, and Article 250 covers members of the judiciary or any other person holding judicial office, arbitrators or experts appointed by the court or by the parties.

Penalties

Currently, Luxembourg's laws prohibiting bribery of foreign public officials provide for criminal penalties only for natural persons. Through the application of Criminal Code Article 252, the amounts of the fines and terms of imprisonment for bribery of foreign public officials under Luxembourg law are identical to those for domestic officials listed in Articles 247, 249, and 250 above.

There are no penalties for legal persons specifically for the bribery of foreign public officials under Luxembourg law at this time. Although dissolution of legal persons is possible under the law of Luxembourg as a criminal measure, Luxembourg's own *Conseil d'Etat* has indicated that it is doubtful that this penalty would apply to bribery of foreign public officials by legal persons, and it would be "inappropriate and disproportionate" if it were. (*See* Article 203 of the Act of August 15, 1915 on Commercial Companies as amended, and Article 18 of the Act of April 21, 1928, on non-profit associations and foundations as amended.)

A natural person sentenced to prison for more than five years is also subject to the following: deprivation of certain rights for life or for ten to twenty years such as the ability to serve in public office, vote or be elected, receive medals for public service, be an expert, witness, or someone who can certify official documents, provide evidence, act as a member of a family council or serve

to legally protect the incompetent, bear arms, hold a teacher or other public education position, or hold other licenses. (*See* Criminal Code Articles 10-12.)

Luxembourg officials have stated that both the bribe and the bribe proceeds may be seized (Code of Criminal Procedure Articles 66 *et seq.*) and confiscated (Criminal Code Article 31 *et seq.*), although it is unclear whether the bribe proceeds can be confiscated from a legal person. Luxembourg also has stated that confiscation of goods is possible from both natural and legal persons and third parties. Because confiscation of the bribery instrument (e.g., the bribe itself or the object of value) is dependent upon the conviction of the natural person who owns the assets, it is unclear whether such confiscation is possible from legal persons or third parties who own the assets but who have not been convicted. Where confiscation is no longer possible, a fine in the same amount may be imposed.

Under the law of January 15, 2001, the statute of limitations for bribery of foreign public officials is ten years, and may apparently be triggered the day the "corruption pact" between the public official and the briber was agreed upon, the date of the last bribery payment, or the date when the public official acts or refrains from acting (pursuant to the corruption pact). The Law of January 15, 2001, obviated an earlier defect in the law, whereby the statute of limitations was decreased to only three years when the judge found that due to attenuating circumstances the offense should have been classified as a misdemeanor instead of a crime. Under Article 637 of the Code of Criminal Procedure, the statute of limitations may be interrupted by the prosecutor's investigation or judicial proceedings.

Books and Records Provisions

Articles 8 and 9 of the Commercial Code contain general provisions on bookkeeping that apply to merchants, including both natural and legal persons. Article 477 of the Commercial Code contains provisions on false documents. Penalties for falsifying business, banking, or private documents range from imprisonment from five to ten years. Under Luxembourg law, companies are required to undergo auditing of their accounts and, depending on their size, may be required to use an independent auditor. Since 1998, certain sectors, e.g., professions, within the financial sector, are required by statute to exercise internal controls.

Money Laundering

The Act of August 11, 1998, added money-laundering offenses to the Luxembourg Criminal Code and expanded the list of predicate offenses for money laun-

dering to include both bribery of domestic and foreign public officials. (See Article 506-1 of the Criminal Code.) The money-laundering legislation covers both the bribe and the bribe proceeds. The legislation applies even when the bribery offense occurs in another country, as long as bribery is also a criminal offense under that country's laws. (See Article 506-3 of the Criminal Code.) In addition to present disclosure requirements on financial institutions, the new money laundering legislation also requires auditors, notaries, casinos, and other similarly situated establishments to report suspicious facts that may evidence money-laundering activity to the State Prosecutor.

Extradition/Mutual Legal Assistance

Extradition may be granted for persons committing bribery of foreign public officials, pursuant to Article 2 of the European Convention on Extradition of December 13, 1957, which requires that a person must be charged with an offense carrying a penalty of imprisonment of at least one year. Luxembourg officials stated that the Convention will serve as a legal basis for extradition. The extradition treaty between the United States and Luxembourg has been in force since August 13, 1884, and was supplemented by a subsequent extradition convention which entered into force on March 3, 1936.

Luxembourg will not extradite its nationals. Pursuant to bilateral or multilateral conventions, a country requesting extradition of a Luxembourg national which has been refused can lodge a complaint with the Luxembourg authorities to initiate an investigation of the offense in Luxembourg or, if no treaty exists, the alleged offender may be prosecuted on the condition of reciprocity.

Luxembourg laws relating to mutual legal assistance include the Act of August 8, 2000, on international mutual legal assistance in criminal matters and various bilateral and multilateral treaties. A treaty with the United States was signed on March 13, 1997, and entered into force on February 1, 2001.

According to Luxembourg officials, the terms of imprisonment for bribery of foreign public officials under its laws are adequate for purposes of mutual legal assistance pursuant to Article 5 of the Act of August 8, 2000 on international mutual legal assistance in criminal matters. Dual criminality will be deemed to exist if mutual legal assistance is sought concerning an offense falling under the Convention.

Also, according to Luxembourg officials, bank secrecy is not a ground for refusing mutual legal assistance in criminal matters. (See Law of April 5,

1993, Article 40.) Full cooperation with legal requests is also required of auditors, notaries, casinos, and other similar establishments under the Act of August 11, 1998, *supra*, concerning organized crime and money laundering.

Complicity, Attempt, Conspiracy

Criminal Code Articles 66, 67, and 69 address the offenses of complicity under Luxembourg law. Attempt is covered under Criminal Code Article 51. There are no conspiracy provisions in Luxembourg's law similar to the concept of conspiracy in U.S. law.

Mexico

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

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

Basic Statement of the Offense

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

The same penalties provided in the previous article shall be imposed on [a person] who, with the purpose of retaining for himself/herself or for another party, undue advantages in the development or conducting of international business transactions, offers, promises, or gives, whether by himself/herself or through a third party, money or any other advantage, whether in assets or services:

1. To a foreign public official in order that he/she negotiates or refrains from negotiating the carrying out or the resolution of issues related to the functions inherent to his/her job, post, or commission;
2. To a foreign public official in order to perform the carrying out or the resolution of any issue that is beyond the scope of the inherent functions to his/her job, post, or commission.

Jurisdictional Principles

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

Coverage of Payor/Offerrer

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

Coverage of Payee/Offeree

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

Penalties

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

concealing or attempting to conceal or disguise their origin, ownership, destination, or location.

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

Books and Records Provisions

Mexican law requires natural and legal persons to keep proper accounts, to accurately record transactions and inventory, and to maintain an adequate accounting system that best suits the conditions of business and enables the identification and tracking of each financial transaction. The penalties range from approximately U.S.\$150 to \$3,600 for most accounting offenses. (*See* Federal Fiscal Code "28, 30; Fiscal Regulations "26, 29, 30, 32, 32A.) Further, if the accounts are deliberately falsified, e.g., by keeping two sets of books, the penalty for natural persons includes three months to three years of imprisonment. For companies with listed securities the maximum fine is approximately U.S. \$450,000. (*See* Securities Market Law '26 *bis*.)

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

Complicity, Attempt, Conspiracy

Mexican law holds that accomplices are punishable as principals. (*See* Penal Code '13.) Accomplices include

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

The Netherlands

The Netherlands signed the Convention on December 17, 1997 and deposited its instrument of ratification with the OECD Secretariat on January 12, 2001. The Dutch enacted bills ratifying and implementing the Convention on December 13, 2000, which came into force on February 1, 2001. Aruba and the Netherlands Antilles must still pass implementing legislation before the Convention will become effective for those parts of the Kingdom of the Netherlands.

Basic Statement of the Offense

The basic statement of the offense is found in several amended provisions of the Dutch Penal Code Articles 177, 177a, 178, and 178a. Article 177 of the Penal Code criminalizes bribery of a public servant where there is a breach of that public official's duty. Article 177a establishes the offense of bribing public officials in order to obtain an act or omission not in breach of her official duties. Article 178 criminalizes bribery of judges. Article 178a provides that Articles 177, 177a, and 178 apply to foreign as well as domestic officials. The abovementioned provisions criminalize the rendering or offering of gifts, promises, or services to public officials. According to Dutch officials, "promises" includes offering. Intent is implicitly required in the offenses, and the perpetrator may be pursued for the offense whether or not the official acts, as long as the offer was made. The bribery offenses described exceed the obligation of Article 1 of the Convention in that they cover bribes in exchange for past acts or omissions. Also, the offenses go beyond Article 1 of the Convention in that they are not restricted only to bribes made in the conduct of international business.

Although not specifically stated in the statute, legislative history and case law relating to domestic bribery indicates that the offense covers bribes made through intermediaries. The bribery provisions do not explicitly refer to third parties, although the Dutch government has

stated that they would apply to bribes made to third parties with the knowledge of the public servant, as the foreign public official will have received something of value to influence her actions.

Jurisdictional Principles

The Netherlands practices both territorial and nationality jurisdiction. Article 2 of the Dutch Penal Code provides that the criminal law of the Netherlands is applicable to any person who commits a criminal offense within the Netherlands. Article 3 provides that offenses committed on Dutch vessels and aircraft are covered under Dutch law. Territorial jurisdiction is interpreted broadly and includes telephone calls, faxes, and e-mail. Dutch citizens are also subject to nationality jurisdiction by Dutch courts under Penal Code Article 5.1. In the case of bribery of foreign public officials, it would appear that such nationality jurisdiction will only apply subject to dual criminality, i.e., the offense must be considered a serious offense under both Dutch law and the laws of the country where the offense was committed. Also, there is no precedent in Dutch case law for applying nationality jurisdiction to legal persons, although the Dutch government has stated that in its view legal persons can have nationality and there is academic literature contending that nationality jurisdiction could apply to legal persons under Article 5 of the Penal Code.

Coverage of Payor/Offendor

Articles 177, 177a, and 178 apply to any person. Article 51.1 provides that criminal offenses can be committed by both natural and legal persons. According to the Dutch authorities, the concept of legal person is broadly interpreted under Dutch jurisprudence. Legal persons include ship owning firms, unincorporated associations, partnerships, and special funds. (*See* Article 51.3 Dutch Penal Code.) Under Dutch law, the concept of legal persons is found primarily under civil law and includes the State, municipalities, water control corporations, all regulatory bodies, associations—including religious associations—cooperatives, mutual insurance societies, companies limited by shares, private companies with limited liability, and foundations.

Article 51.2 provides that where a criminal offense has been committed by a legal person, the institution of criminal proceedings may be instituted and penalties may be imposed against (1) legal persons, (2) those who have ordered the commission of the criminal offense and those in control of the unlawful behavior, or (3) against both the legal person and those who ordered or have control over the behavior at issue.

For the legal person to be liable under Article 51.2(1), the offense must be imputed to a natural person, although the natural person does not have to hold a managerial position, and the legal person must have accepted either the acts, the possibility of the acts, or the same types of acts in the past. If it is clear that the legal person in some way condoned the acts, then it is not necessary to identify a particular natural person.

The Dutch government explained that in order to hold natural persons of the company liable under Article 51.2(2), it is not required that they hold positions on the board or be directors or owners of the legal person. Such natural persons can instead have de facto control, e.g., they have illustrated their intent that the offense be carried out, are aware of the possibility that the offense may take place, or they fail to prevent the acts. There is also case law indicating that a person can be considered as holding a managerial position if she has authority or influence over the organization or parts of the organization. Natural persons who explicitly order the prohibited act and, in some cases, those who suggest such acts will be held liable. For the offense under Article 51.2(2), the legal person must have committed a criminal offense.

Coverage of Payee/Offeree

Article 178a provides that the offenses covered in Articles 177, 177a, and 178 also apply to foreign public officials. The definition of foreign public official as set forth in Penal Code Article 178a is “persons in the public service of a foreign state or an international legal organization” and judges “of a foreign state or an international law organization.”

“Public servant” is defined under Penal Code Article 84 as “all persons elected to public office in elections duly called under law” as well as arbitrators and personnel of the armed forces. According to the bill’s legislative history, “official” has been interpreted broadly by the Dutch courts to include appointed public officials who perform State duties and also includes members of Parliament and municipal councils. “Public servant” has been defined by the Dutch Supreme Court as “one who under the supervision and responsibility of the authorities has been appointed to a function of which the public character cannot be denied with a view to implementing tasks of the state and its organs.”

According to the Dutch government, the language in Article 178a that provides there should be “equal treatment” of foreign public officials in comparison with domestic officials should ensure that the definition of foreign public official should be read as broadly as that of

“public servant.” Moreover, the Dutch explained that Dutch courts will also use the Convention to interpret the implementing legislation and that the Convention definition of “foreign public official” will therefore govern.

Penalties

Under Article 177 of the Dutch Penal Code, the imprisonment and the fine for bribery of foreign public officials acting in breach of official duties for natural persons have been increased from the penalty for bribery of domestic officials from two years and a category 4 fine (i.e. 25,000 guilders, approx. U.S.\$9,600) to four years and a category 5 fine (100,000 guilders, approx. U.S.\$38,400), and for legal persons, a fine that may be increased to the amount of the next highest level than that for natural persons, which would be 1 million guilders (approx. U.S.\$384,000). However, for the penalties of bribery of foreign public officials where the official is not acting in breach of duties under Article 177a.1(1), the prison sentence for natural persons is not more than two years or a category 4 fine (25,000 guilders, approx. \$9,600), and for legal persons, a fine of not more than the amount of the next category, which would be category 5, or 100,000 guilders (approx. U.S.\$38,400.) For breaches of Articles 178.1 (where the purpose of the bribe is to influence a judge's decision) and 178.2 (where the bribe is intended to obtain a conviction in a criminal case), the prison terms for natural persons are six and nine years respectively, and 25,000 and 100,000 guilders respectively. For legal persons under the same provisions, the penalties are not more than 100,000 guilders and 1 million guilders, respectively.

The fines are comparable to those of other offenses, such as those for theft, embezzlement, etc. However, except for the penalties for bribery of a foreign public official where the official is acting in breach of official duties, the penalties are less than those for passive bribery under domestic law. According to the Dutch government, fines and imprisonment can be applied simultaneously.

In addition to prison terms and fines for natural persons, Article 28 of the Dutch Penal Code provides that certain rights can be withdrawn, e.g., the right to hold public office, serve in the armed forces, or serve as an advisor before the courts. Also, legal persons may be dissolved on application by the Public Prosecutor's office, and injured parties may bring civil cases for damages against legal persons for unlawful acts, such as bribery of foreign public officials.

Moreover, pre-trial seizure of the bribe and proceeds is permissible under Articles 94 and 94a of the Code of

Criminal Procedure, and is discretionary in nature. Article 33 of the Penal Code provides for forfeiture of the bribe, but not the proceeds. Again, the forfeiture is discretionary. Where the bribe is in the possession of a bona fide third party who has no knowledge of the bribe, it is not subject to forfeiture. However, under Penal Code Article 36e1 concerning unlawfully obtained gains, courts can order payment by the briber so that she is returned to the financial state present before the bribe took place.

The statute of limitations for bribery offenses is set forth in Article 70 of the Penal Code. For bribery acts to public officials breaching their official duties (Article 177) and for bribery of judges (Article 178), the statute of limitations is 12 years; for bribery acts of officials acting outside the scope of their duties (Article 177a), the statute of limitations is 6 years. The statute of limitations period commences on the date after the offense was committed, and is terminated if the offense is prosecuted.

Books and Records Provisions

Accounting requirements under Dutch law are contained in Articles 361,362 et. seq. of Book 2 of the Civil Code. Article 225 of the Penal Code addresses fraudulent accounting practices.

Money Laundering

There are currently no specific provisions establishing a money-laundering offense under Dutch law, although the Dutch authorities have stated that efforts are underway to establish such an offense. There are, however, Dutch provisions on stolen property in Articles 416 and 417 *bis* of the Penal Code. According to the Dutch government, Articles 416 and 417 *bis* cover both the bribe and the bribe proceeds for the act of bribing a foreign public official, and therefore fulfill the requirement under Article 7 of the Convention.

Extradition/Mutual Legal Assistance

Section 51a of the Extradition Act as amended provides that the new offenses of bribery of foreign public officials are extraditable offenses. However, the offenses of bribing judges under Article 178 are not covered, so extradition requests based on Article 178 must be made pursuant to a treaty. Under Section 5(1)(a) of the Extradition Act, extradition is allowed only where the penalty of imprisonment is one year or more in both the Netherlands and the requesting State.

Section 4(1) of the Extradition Act forbids the extradition of Dutch nationals, except in cases where the Minister of Justice is given a guarantee that the Dutch national can serve any eventual term of imprisonment in

the Netherlands. Also, when such an extradition request is refused, the Dutch prosecutors will address the case as required by the Convention.

The Dutch government has said that where a treaty is a condition for providing mutual legal assistance Article 9 of the Convention satisfies that condition. Mutual legal assistance must be treaty based where the information requested is from the tax department, or where it covers a political question. Moreover, where the request concerns financial information, a treaty may be required. The Netherlands is a party to the European Treaty Regarding Mutual Legal Aid in Criminal Cases of 1959 and bilateral mutual legal assistance treaties. Articles 552h and 552s of the Code of Criminal Procedure apply to substantive issues of mutual legal assistance. In the absence of a treaty, "reasonable" requests for mutual legal assistance will be honored pursuant to Penal Code Article 552K.2. Article 551K of the Penal Code provides that every effort will be made to comply with mutual legal requests based upon treaties. Requests for mutual legal assistance will not be honored where the object of the request is based upon punishing the defendant due to nationality, race, or religion, pursuant to Article 552L.1 or where honoring the request would cause double jeopardy. Also, the request may not be honored if the alleged offender is undergoing trial in the Netherlands.

The only mutual legal assistance situation where prison terms are relevant is in the case of a request for document seizure. Document seizure can only be provided where extradition would be available for the underlying offense.

The Dutch government has stated that mutual legal assistance should not be denied under Dutch law on bank secrecy grounds.

Complicity, Attempt, Conspiracy

The Dutch Penal Code Articles 47.1(2), 48, and 49.1 address complicity, incitement, aiding and abetting and authorization required under Convention Article 1.2. Article 47.1(2) provides that a person who by gifts, promises, abuse of authority, or violence provides the means to commit an offense is liable as a principal. Article 48 provides that those who intentionally assist in the commission of an offense and those who provide the means necessary for the commission of the offense are liable as accessories. Article 49.1 provides for the penalties for accessories to the offense.

Dutch law on attempt is found in Penal Code Articles 45.1, 45.2, and 46b. There are no conspiracy provisions under Dutch law, although Article 140.1 of the Penal Code provides that participation in an organization

whose objective is to commit serious offenses is punishable by a maximum term of imprisonment of five years or a category 4 fine.

Norway

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

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

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

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

Basic Statement of the Offense

Section 128 of the Penal Code provides:

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

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

Jurisdictional Principles

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

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

Coverage of Payor/Offeror

Section 128 specifically covers acts by "any person."

Coverage of Payee/Offeree

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

Penalties

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

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

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

Books and Records Provisions

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

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

Poland

Poland signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD Secretariat on September 8, 2000. Poland implemented the OECD Convention by amendments to its Penal Code, Code of Criminal Procedure, Act on Combating Unfair Competition, Act on Public Orders, and Banking Law. These amendments came into force on February 4, 2001.

Our chief concern with Poland's implementing legislation is its failure to create criminal liability for legal persons. Instead, Poland has adopted an administrative law that is unduly restrictive and cumbersome and will likely prove difficult to apply.

Basic Statement of the Offense

Article 229.5 of the Penal Code provides that a person "who provides or promises to provide a material or personal benefit to a person performing a public function in a foreign state or in an international organization, in relation to the performance of that function" shall be subject to the same penalties as a person who violates Poland's domestic bribery law. Apart from generally applicable defenses of mistake of law or fact, there are no specific defenses provided for this offense. However, a "facilitation payment" would likely be deemed to be a payment to obtain an "act of less significance," and would be punished less severely than a bribe to influence the award of business.

According to Polish authorities, intent is required to commit the basic offense. Bribery payments through intermediaries are not expressly covered by the Penal Code, although Polish authorities state that the general provisions would cover the offense. (*See* Penal Code 29, 18.) Also, the authorities state that "promises to provide" includes both the act of promising as well as offering, although legal authorities and judicial decisions state the contrary.

Jurisdictional Principles

Polish law provides for jurisdiction over a crime committed within Polish territory or where the consequence is intended to take place within Polish territory. (*See* Penal Code 5.) Further, although generally applicable, Polish law provides for nationality jurisdiction that is conditioned upon dual criminality. (*See* Penal Code 109, 111.1.) Polish law provides for unconditional extraterritorial nationality jurisdiction whenever required by an international agreement. (*See* Penal Code 113.) Poland interprets the Convention as requiring it to assert nationality jurisdiction over foreign bribery offenses without the requirement of dual criminality.

Coverage of Payor/Offendor

The Polish law applies to any "person," regardless of nationality. Polish law does not provide for criminal liability over legal persons. However, as part of its implementing legislation, Poland amended its unfair practices law to provide for administrative liability for legal persons that violate Article 229.5. (*See* Act on Combating

Unfair Competition 15a.) The responsibility for prosecuting legal persons is entrusted to the Office of Protection of Competition and Consumers, which may only act after receiving a referral from the public prosecutor's office. Pursuant to this law, liability requires proof that a natural person violated the foreign bribery law while acting on behalf of the company and within his authority to represent the company, take decisions on its behalf, or exercise control over it, or that a lower level employee or agent did so with the consent of such a person. Prosecution and conviction of the culpable natural person is a prerequisite to corporate liability unless such a prosecution is not possible due to lack of jurisdiction or other legal impediments.

Coverage of Payee/Offeree

Poland's bribery law does not define who is a "person performing a public function." Other provisions of Polish law, however, encompass a broad range of "public officials," including elected officials, judges, state prosecutors, employees of state and local governments and other "state institutions," and members of the military. (See Penal Code 115.13.) Further, Polish case law indicates that the term "person performing a public function" encompasses individuals who do not have the status of a public official but nonetheless perform a public function, e.g., one whose activities in the public sphere are regulated by law, as well as employees and officials of public enterprises and agencies. Polish law also covers payments to a public official through an intermediary. However, with respect to payments to third parties, Polish law prohibits only the payment of a pecuniary benefit but not the provision of a non-pecuniary benefit. (See Penal Law 115.4.)

Penalties

Polish law provides for a complex structure of sanctions, in which the penalty is dependent upon the nature of the public official's act and the amount of the bribe. Penalties range from 6 months to 12 years for aggravated offenses and a fine or imprisonment of up to two years where "the act is of less significance." (See Penal Law 229(1)-(4).) The courts may impose a fine ranging from 100 to 720,000 Zloty (PLN)(approx. U.S.\$25 to \$181,000) where the crime was committed, as in most bribery cases, to obtain a material benefit and may also order debarment from public contracting. Legal persons are subject to a fine of up to 10 percent of their pre-tax revenue for the year preceding the final action of the Office for Protection of Competition and Consumers. (See Unfair Competition Law 22d.)

Polish law also provides for the forfeiture of the proceeds of bribery, including any "financial benefit" from the offense. (See Penal Code 44-46.) In some circumstances forfeiture is only possible upon conviction. (See Penal Code 44, 45.) When the specific proceeds have been concealed or dissipated, then the court may order the forfeiture of substitute assets. Further, where a natural person committed the offense on behalf of a legal person, the criminal court may "obligate" the legal person—separately and apart from administrative proceedings under the Unfair Competition Law—to return the financial benefit, in whole or in part, to the State Treasury.

According to Poland's penal code, aggravated bribery has a statute of limitation of ten years, while mitigated bribery has a five year limitation. (See Penal Code 101.2.) The period is initiated the day that the crime is committed. Additionally, there is a ten-year time period with respect to the statute of limitations for imposing a fine on entrepreneurs for unfair competition. (See Combating Unfair Competition article 22d.2.)

Books and Records Provisions

Poland's Act on Accountancy requires companies to maintain accurate books and records that reflect each economic operation engaged in by the company. Further, all companies are required to prepare annual financial statements and economic activity reports that reflect honestly the financial status and profitability of the entity. The failure to maintain such accurate financial statements is punishable by a fine ranging from 230 to 2,208,000 PLN (approx. U.S.\$58 to \$555,000) and up to two years imprisonment. (See Accountancy Act 77.2.) In addition, individuals who fail to keep books or records or "dishonestly" do so may be punished under the Fiscal Penal Law by fine or by a period of up to two years of imprisonment. (See Fiscal Penal Law 60-61.)

Money Laundering

Bribery of foreign officials is a predicate offense for the application of the Poland's money-laundering offense, Penal Law 299.

Extradition/Mutual Legal Assistance

The 1996 U.S.-Poland Extradition Treaty provides for extradition for offenses that are punishable under the laws of both parties by deprivation of liberty for a maximum period of more than one year. Poland does not, however, extradite its nationals.

Poland entered into a mutual legal assistance treaty with the United States in 1996. In addition, Poland will provide assistance to other countries based on bilateral

treaties, multilateral treaties such as the European Convention on Mutual Legal Assistance in Criminal Matters of 1959, or its Code of Criminal Procedure. Similarly, Poland will provide assistance in civil enforcement actions against legal persons pursuant to its unfair competition law.

Complicity, Attempt, Conspiracy

Article 18.1 of Poland's Penal Law provides that a person who directs or orders another person to commit a crime is responsible for the crime as a principal. Articles 18.2 and 18.3 establish liability for inducing or aiding and abetting another to commit an offense. Article 19 states that these latter acts carry the same penalties as those for committing the actual bribery, but the court may apply an "extraordinary mitigation of punishment." Attempts are punishable by the same penalty as the substantive offense unless the person voluntarily abandons the prohibited act or prevents the consequences from taking place. (*See* Penal Law 13.1, 15.1.) However, a person who extends a bribe offer that is not accepted would be deemed to have committed the substantive offense rather than an attempt. Poland does not have a separate offense of conspiracy.

Slovak Republic

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

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

Basic Statement of the Offense

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

Whoever offers, promises or gives a bribe or other undue advantage, whether directly or through an intermediary, to a foreign public official in order that the official act or refrain from acting in relation to the

performance of official duties with the intention to obtain or retain business or other improper advantage in the conduct of international business, shall be punished...

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

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

Jurisdictional Principles

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

Coverage of Payor/Offendor

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

Coverage of Payee/Offeree

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

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

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

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

Penalties

The penalty for violation of the base offense under Sections 161b and 161c is punishment of up to two years and a monetary sanction. However, when the offender acts as part of an organized group or derives an "advantage of a large extent," defined as 22 million Slovakia koruna (approx. U.S. \$433,840), the range of imprisonment is increased from one to five years. In addition, an offender may be fined up to SKK 5 million (approx. U.S. \$98,600) and, pursuant to Sections 55 and 73 of the Criminal Code, any asset that was used to commit the crime or was obtained as a result of the crime may be forfeited from the offender or confiscated from third parties.

Books and Records Provisions

Slovak law requires all companies, including state-owned enterprises, to maintain "accounts in a complete, open, and correct manner so that they fairly report all events that are subject to accounting." (See Law on Accounting No. 563/1991 Coll, '7(1).) Companies that meet certain income requirements are required to have audited financial statements and to publish certain information concerning their financial statements (*id.* at '20.) Auditors are required to report evidence of money laundering but not other crimes. (See Law No. 249/1994 Coll. to Prevent Laundering Proceeds of Most Serious Crimes.) Violations of the Accounting Law are punishable by fines of up to SKK 1 million (approx. U.S. \$19,720). (See Law on Accounting, '37.) In addition, the use of false or dis-

torted data in connection with the keeping of commercial records may also be punished under Section 125 of the Criminal Code, which carries with it sanctions that include bans on future business activities, forfeiture of property, and monetary sanctions and, if the offender violated a specific duty resulting from the law or his employment, imprisonment from one to five years. Additionally, on October 5, 2000, the parliament approved a bill making additional persons within a corporation accountable for reporting suspicious transactions, as well as progressively eliminating anonymous bank accounts.

Money Laundering

Bribery of a foreign official is a predicate offense for the Slovak Republic's money-laundering law, provided that the amount laundered exceeds SKK 4 million (approx. U.S. \$79,000). (See Cr. Code '252.)

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

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

Spain

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

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

Basic Statement of the Offense

Article 445 *bis* of the Spanish Penal Code provides: Whoever, through presents, gifts, offers or promises, bribes or attempts to bribe, directly or through intermediaries, authorities or public officials, whether foreign or from international organizations, in the exercise of their position for themselves or for a third party, or complies with their demands, so that they act or refrain from acting in relation to the performance of official duties, to obtain or retain a business or other improper advantage in the conduct of international business, will be punished pursuant to the penalties set forth in Article 423.

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

Jurisdictional Principles

Spain exercises both territorial and nationality jurisdiction. Under Article 23 of the Judiciary Organic Act, Spanish courts may assert jurisdiction over any acts com-

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

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

Coverage of Payor/Offeror

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

Coverage of Payee/Offeree

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

Penalties

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

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

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

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

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

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

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

Pursuant to Spanish Penal Code Articles 131 and 33, the length of the statute of limitations depends on the severity of crime allegedly committed. Accordingly, the statute of limitations for bribery of foreign public officials subject to punishment under Article 419 is ten

years, and the statute of limitations for bribery punishable under Article 420 is five years. Article 132 provides that the statute of limitations period begins on the date the offense was committed, or when the last act of a continuous series of offenses took place, or when the illegal activity ceased.

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

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

absence thereof, using the Convention as a basis. Article 3.3 of the Passive Extradition Act provides that where extradition is refused due to nationality, the charge will be reported to the Attorney General for appropriate legal action.

Complicity, Attempt, Conspiracy

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

Sweden

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

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

Basic Statement of the Offense

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

Jurisdictional Principles

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

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

Coverage of Offeror/Payor

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

Coverage of Payee/Offeree

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

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

Penalties

Chapter 17, Section 7 provides that bribery of foreign (or domestic) public officials is punishable by a fine or imprisonment for a maximum of two years. (The maximum sentence in Sweden for the most severe crimes is imprisonment for ten years.) Guidelines for determining the appropriate penalty, including aggravating and mitigating circumstances, are listed in Chapter 29 of the Penal Code. Fines, which are assessed in accordance with Chapter 25 of the Penal Code, generally range from 900 to 150,000 Swedish crowns (approx. U.S. \$84 -\$14,000).

Under Chapter 36, Section 8, corporate fines for "entrepreneurs" may range from 10,000 to 3 million Swedish crowns (approx. U.S. \$930 -\$278,000). Chapter 36, Section 9 provides that in determining the amount of the fine, "special consideration shall be given to the nature and extent of the crime and to its relation to the business activity." Chapter 36, Section 10 sets forth certain circumstances requiring the mitigation or nonimposition of corporate fines.

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

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

Switzerland

Switzerland signed the Convention on December 17, 1997. The Swiss parliament adopted a law ratifying and implementing the Convention on December 22, 1999. Because of a mandatory three-month period (allowing for a possible referendum) which began on January 11, 2000 (the date that the legislation was published in the *Official Gazette*), the law did not enter

into force until May 1, 2000. Switzerland deposited its instrument of ratification with the OECD on May 31, 2000. This analysis is based on the relevant Swiss Penal Code provisions and information from the U.S. Embassy in Bern.

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

Basic Statement of the Offense

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

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

Jurisdictional Principles

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

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

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

Coverage of Payor/Offerer

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

Coverage of Payee/Offeree

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

Penalties

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

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

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

Article 70 of the Penal Code provides that the statute of limitations for a criminal act is ten years for violations punishable by imprisonment of more than three years, which is the case for bribery of a foreign public official. According to Article 71, the statute of limitations will run from the day when the accused committed the act; or, if the actions were done in several stages, then from the day of the last of the acts; or, if the actions lasted over a longer period, then from the last day of their completion. Article 72 provides that the statute of limitations will not run during an ongoing investigation or following a judicial decision concerning the accused. In the case of bribery of a foreign public official, the clock may be stopped for a maximum of fifteen years.

Books and Records Provisions

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

Money Laundering

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

Extradition/Mutual Legal Assistance

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

Swiss law on mutual legal assistance is provided for in the EIMP. Mutual legal assistance in foreign criminal proceedings is provided for in Part III of the EIMP. More specifically, discovery of procedural or official Swiss

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

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

Complicity, Attempt, Conspiracy

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

United Kingdom

The United Kingdom signed the Convention on December 17, 1997. Parliament approved ratification on November 25, 1998, and the U.K. deposited its instrument of ratification with the OECD on December 14, 1998. The U.K. Government has recognized the need for new legislation but has not taken steps to introduce and pass such legislation in parliament. It is now almost two years since the U.K. legislation was reviewed by the Bribery Working Group, and we have yet to see final action.

We based our analysis on the texts of relevant U.K. laws, a March 1998 report of the U.K. Law Commission that considered how the U.K. would meet the requirements of the Convention, information obtained from non-governmental organizations, and reporting from the U.S. embassy in London.

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

Basic Statement of the Offense

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

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

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

Jurisdictional Principles

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

Coverage of Payor/Offerer

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

Coverage of Payee/Offeree

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

Penalties

The penalty for corruption in a magistrate's court is a maximum of six months imprisonment and/or a fine of £5,000 (approx. U.S. \$7,090). For convictions in crown courts, the penalty is a maximum of seven years imprisonment and/or an unlimited fine. There are no express provisions on corporate criminal liability, but we understand that companies can be fined for breaches of the criminal law. There is no statute of limitations under U.K. laws for prosecution of bribery cases. U.K. courts may order confiscation of the bribe and the bribe proceeds under the Criminal Justice Act of 1988, as amended by the Proceeds of Crime Act of 1995. Following a conviction, Section 43 of the Powers of Criminal Courts Act of 1973 allows a court to order forfeiture from the offender of lawfully seized property used to commit or facilitate the offense. It is our understanding that under Section 4 of the Criminal Justice (International Cooperation) Act of 1990, the U.K. Secretary of State may decide whether to grant a request for receiving assistance in obtaining evidence, such as bank records, inside the U.K.

Books and Records Provisions

The Companies Act of 1985, Sections 221, 222, and 722 prohibit generally the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents. These provisions govern private and public limited companies, companies limited by guarantee, and unlimited companies. Section 223 provides that failure to comply with Sections 221 and 222 is an offense unless the company officer can show that he acted honestly and the default was excusable under the circumstances. On summary conviction, the penalty for an offense under Section 223 is a maximum term of six months and/or a fine of £5,000 (approx. U.S. \$7,090), on conviction by indictment, the penalty is imprisonment for a maximum term of two years and/or an unlimited fine. For violation of Section 722, the penalty is an unlimited fine, and if the violation persists, a daily fine. Section 17 of the Theft Act of 1968 also contains an offense for false or fraudulent accounting, the penalty for which is imprisonment for a maximum of two years. The Companies Act of 1985 also provides that certain companies must have an external audit.

Money Laundering

It is our understanding that since offering and accepting bribes are indictable offenses, they automatically fall

within the purview of the Criminal Justice Act of 1988, as amended by the Criminal Justice Act of 1993, which sets forth the U.K. money-laundering legislation, both as to the bribe and the bribe proceeds.

Extradition/Mutual Legal Assistance

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

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

Complicity, Attempt, Conspiracy

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

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

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

Review of Enforcement Measures

Enforcement of National Implementing Legislation

As of July 2001, the Convention has been in force for almost two and a half years for twelve signatories, including five G-7 countries, and for over a year for almost two-thirds of the signatories. The U.S. government recognizes that achieving Convention goals will take time. The Parties need to establish mechanisms for identifying potential violations of their implementing legislation, and for identifying and correcting weaknesses in their implementation programs. Moreover, prosecutors need to gain experience in prosecuting these new laws. Nevertheless, each signatory is entitled to expect full compliance with commitments made by all signatories to identify and eliminate bribery of foreign public officials in international business transactions.

We are not aware of any prosecution by another Party to the Convention for bribery payments to foreign public officials at this time. However, as with investigations in this country, the confidentiality of the procedures prior to prosecution could be one factor. Nonetheless, we are disturbed by continuing reports of alleged bribery of foreign public officials by firms based in countries where the Convention is in force. While reports in the general media

are not always sufficiently credible to lead to an official response, the recurring reporting of some allegations should have initiated inquiries by some of the Parties to the Convention. While not all inquiries will or should lead to prosecutions, we expect that during Phase II reviews governments will be prepared to explain sufficiently the procedures and methods they have developed for identifying and pursuing cases of transnational bribery.

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

In the twenty-four years since the passage of the FCPA, the Department of Justice has brought over thirty criminal prosecutions and six civil injunctive actions.¹ In addition, the United States Securities and Exchange Commission (SEC) has brought several civil enforcement actions against issuers for violations of the antibribery provisions and numerous actions for violations of the books and records provisions of the FCPA. In the period January 2000 to May 2001, the SEC settled two cases involving allegations of violations of the books and

records provisions of the FCPA involving illicit payments to foreign officials. The defendants in each case agreed to pay substantial civil penalties in excess of \$250,000.

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

U.S. Efforts to Promote Public Awareness

For many years prior to the adoption of the Convention, the U.S. government sought to educate the business community and the general public about international bribery and the FCPA. As a result, U.S. companies engaged in international trade are generally aware of the requirements of U.S. law. Since U.S. ratification of the Convention and the passage of the IAFCA, the U.S. government has increased efforts to raise public awareness of U.S. policy on bribery and initiatives to eliminate bribery in the international marketplace.

President George W. Bush has made it clear that increasing accountability and transparency in governance around the world is an important foreign policy objective for his Administration. In his May 28, 2001, statement on corruption submitted to the Second Global Forum on Fighting Corruption and Safeguarding Integrity (Second Global Forum) at The Hague, the President also advised participants that the United States is committed to bringing renewed energy to the global anticorruption agenda, and to increasing the effectiveness of the American policies and programs that address this important issue.

Over the past year, Secretaries Norman Y. Mineta and Donald L. Evans, and other senior Commerce officials, including Under Secretary Grant D. Aldonas, have spoken out against international bribery and urged support for the Convention. At the May 2001, OECD Ministerial, Secretary Evans made it clear that the Bush Administration is determined to fight bribery and corruption in international business transactions. Recognizing that the OECD Antibribery Convention was a significant step to eliminate these activities, the Secretary in meetings with business and labor representatives committed the Commerce Department to continue to promote efforts to have the Convention implemented and enforced by every signatory.

The Secretaries of State and the Treasury, the U.S. Attorney General and senior officials in their Departments

have been supportive as well. In May 2001, at the Council of the Americas 31st Washington Conference, Secretary of State Colin L. Powell urged participants to fight corruption, noting that corruption can destroy the strongest democracy, if it is not dealt with effectively.

In a May 31, 2001, speech during the Second Global Forum, U.S. Attorney General John Ashcroft urged countries not to wait for further anticorruption studies or additional international agreements before implementing their existing treaty obligations.

Officials of the Commerce, State, and Justice Departments are also in regular contact with business representatives to brief them on new developments on antibribery issues and discuss problems they encounter in their operations. As part of a vigorous outreach program, the three departments provide on their Internet websites detailed information on the Convention, relevant U.S. laws, and the wide range of U.S. international activities to combat bribery. In May 2001, the State Department, in cooperation with the Commerce and Justice departments, also re-published a brochure titled *Fighting Global Corruption: Business Risk Management* that contains information about the benefits of good governance and strong corporate antibribery policies, the requirements of U.S. law and the Convention, and various international initiatives underway to combat business bribery and official public corruption. The brochure is being made available to U.S. and foreign companies and business associations. The brochure can be found at www.state.gov. (See Chapter 8 for more information on U.S. government outreach initiatives on bribery and corruption.)

Efforts of Other Signatories

Rigorous enforcement of these new laws against bribery of foreign public officials is one part of the process in making the Convention a success. Another very important element is raising public awareness of the laws. This includes informing the relevant prosecutorial authorities of the new tools they have to prosecute corruption, as well as counseling businesses and the general public about the laws.

For years, businesses from many of the signatory countries were able to bribe foreign officials without fear of penalty; they even benefitted from being able to deduct such bribes from their taxes. This is no longer the case for most of the signatories to the Convention. It is the responsibility of each Party to the Convention to publicize that bribes are no longer an acceptable way to obtain an international contract, and that serious criminal

penalties can be imposed upon those who bribe or attempt to bribe foreign public officials.

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

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

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

The government of **Australia** developed an extensive campaign to raise public awareness of its anticorruption policies. The Australian government has issued press releases and placed advertisements in trade publications to explain the Convention and government efforts to fight corruption. It has also organized seminars in Australia and overseas to brief Australian companies. In addition, the Australian federal police maintain a hotline and e-mail site for reporting all crimes, including bribery, known as “crimestoppers.” It can be reached in Australia at 1-800-333-000, or over the internet at the e-mail address www.crimestoppers@afp.gov.au.

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

Canada's Justice Department has published a booklet on the Convention and Canada's antibribery laws titled *The Corruption of Foreign Officials Act* that is available to its business community. The Justice, Foreign Affairs, and International Trade Ministries also prepare an annual report to parliament on the implementation of the Convention. Under the auspices of the federal Transnational Crime Working Group, a study was conducted, titled *Impact on Canada of Corrupt Foreign Officials in Other Countries*, which was completed in September 2000 and recently made public. The study recommends that the government create a new body to coordinate federal anticorruption activities, in part because “[t]here is a general feeling in parts of the business community that Canadian commerce suffers abroad because individual businesses do not pay bribes on a routine basis as a means of securing contracts.” The study further recommends that “research into the scope and impact of corruption on Canadian commercial interests and on the issue of trade distortions caused by corruption is required.” The government has also established a training program for its foreign service officers on its legislation implementing the Convention and has held a number of regional seminars this past year. In addition to these government initiatives, several nongovernmental organizations, including Transparency International, the Canadian Bar Association, and the Canadian Association of Manufacturers and Exporters, are helping to raise public awareness by holding seminars on the Convention and related issues.

The government of the **Czech Republic** has initiated a highly publicized war on corruption as part of its anti-crime efforts. As part of this campaign, the Ministry of Interior publishes an annual report on progress in the fight against corruption. The report is available on the Ministry's website (www.mvcr.cz/korupce). The government also has organized a number of seminars over the

past several years to brief national and municipal officials on its anticorruption legislation. Czech officials also have given numerous broadcast and print media interviews on corruption and bribery issues. In addition to these government initiatives, the Transparency International branch in the Czech Republic has conducted its own public information campaign, distributing posters and pamphlets that incorporate information on the Convention. The government and Transparency International Czech Republic will host the 10th International Anti-Corruption Conference, October 7-11, 2001 in Prague. This joint meeting of politicians, government officials, and representatives of the private sector, nongovernmental organizations and international development agencies is the first of its kind in Central and Eastern Europe.

In **France**, magistrates and the media are continuing to foster public awareness with their investigations into domestic and international corruption cases, including alleged bribes by a major French oil company and more recently a probe into the sale of arms to an African country through a French company. The French chapter of Transparency International has also been particularly active. Despite the wide coverage of corruption cases, the OECD Convention has not been publicized by the government or the media. However, a special government-related internet site on corruption, which includes articles on the latest scandals and links to special anticorruption sites, can be found at www.adminet.com/obs/corruption.html.

In **Germany**, public outrage over alleged improper donations to the Christian Democratic Union political party has raised the profile of anticorruption issues. The German government and business associations have been working together to publicize antibribery laws in seminars and newsletters. For example, the U.S. Consul General of Dusseldorf and the North Rhine-Westphalia State Minister of Justice held a conference on enforcement of the OECD Convention for prosecutors and judges in June 2000, which was followed in March 2001 by a roundtable hosted by the Consul General at which U.S. and German business representatives discussed possible ways to reduce corrupt practices abroad. Increasingly, German companies are starting to develop internal procedures to promote compliance with the law. To encourage companies in that direction, the German government now requires all applicants for Hermes export credit guarantees to declare that financed transactions have been and will remain free of corruption.

In **Greece**, the Ministry of Justice circulated a questionnaire to all prosecutors' offices during the summer 2000 to report all potential cases concerning the application of the Convention.

Korea has seen a dramatic increase in national anti-corruption activities over the past two years. President Kim Dae Jung established a presidential anticorruption commission to investigate corruption and make policy recommendations. In February 2000, President Kim personally inaugurated a new anticorruption website on which Korean citizens may report complaints about unfair treatment and public corruption. Under the leadership of Mayor Goh Kun, the city of Seoul has undertaken a high-profile anticorruption campaign featuring a new online procurement information system that allows citizens to monitor the entire administrative process of government procurement and civil applications. On December 10-13, 2000, the Korean government sponsored and organized jointly with the Asian Development Bank the "Seoul Conference on Combating Corruption in the Asia-Pacific Region." The Seoul metropolitan government and the United Nations will co-host an international symposium on anti-corruption on August 30-31, 2001 in Seoul. The event will bring together world experts and high-ranking officials from Asia and Africa and is aimed at expanding Seoul's two-year-old On-line Procedures Enhancement system (OPEN) that enables citizens to monitor online civil applications for permits or approval in areas vulnerable to corruption. In addition, the GOK will host the Third Global Forum and the Eleventh International Anti-Corruption Conference in 2003.

In **Mexico**, the Vicente Fox administration is sponsoring the establishment of a semi-autonomous National Council on Corruption, which will be composed of individuals chosen for their credibility on corruption issues. The Council will evaluate government anticorruption efforts and will be the primary vehicle through which civil society expresses its views on corruption. Eighty-one organizations, including prominent business organizations and NGOs, will support the public-private partnership.

The **Netherlands** hosted the Second Global Forum on Fighting Corruption on May 28-31, 2001, in The Hague. This important conference was attended by some 1,600 participants, including ministerial and senior-level representation from 143 countries and 30 nongovernmental organizations (NGOs). The conference's Final Declaration emphasized the "Guiding Principles" for effective national anticorruption efforts that were developed by the United States at the First Global Forum. The Final Declaration also stressed the importance of monitoring mechanisms for the implementation of instruments such as the OECD, Council of Europe, and Inter-American anticorruption conventions.

The **Slovak Republic**, under the leadership of Prime Minister Mikulas Dzurinda, has called for a national program to fight corruption. Many high-level officials, including the Prime Minister and Interior Minister, have publicly condemned official bribery and pledged to take action against it. The government has organized several inter-ministerial conferences to discuss the problem.

Sweden has been an active supporter of the Convention. Senior officials have spoken out against international corruption and publicly emphasized Sweden's willingness to expand the scope of its international cooperation to combat the problem.

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

Monitoring Process for the Convention

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

OECD Monitoring

The OECD has established a rigorous process to monitor implementation and enforcement of the Convention and of the 1997 Revised Recommendation of the Council On Combating Bribery In International Business Transactions (Revised Recommendation). Our experience with Phase I of the process confirms that it is a serious undertaking that encourages Parties to fulfill their obligations under the Convention. Evaluating implementation of the Convention is a challenging project given the diverse legal systems of signatory countries.

The OECD review process seeks to accommodate these differences by focusing on the functional equivalence of measures and the identification of the strengths and weaknesses of the various approaches to implementation.

Over the past two years, the effectiveness of this process has been demonstrated by the willingness of several Parties to correct weaknesses identified in their implementation and enforcement regimes after their legislation has undergone the review process.

Framework for Monitoring

Article 12 of the Convention instructs the signatories to carry out a program of systematic followup to monitor and promote the full implementation of the Convention through the Working Group on Bribery. Guidance for the Working Group on monitoring and followup is provided in the Revised Recommendation.

The key elements of the monitoring program are as follows:

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

Operation of the Working Group

To carry out its mandate, the Working Group agreed at its July 1998 meeting to certain modalities concerning the system of self-evaluation and peer group evaluation provided for in the Convention and Revised Recommendation. The Working Group recognized that a rigorous process of multilateral surveillance of implementation was necessary to ensure the effectiveness of these instruments.

The monitoring process has been divided into two stages, an implementation phase (Phase I) and an enforcement phase (Phase II). The objective of Phase I is to evaluate whether a Party's implementing legislation meets the standards set by the Convention and the

Revised Recommendation. The objective of Phase II is to study and assess the structures and methods of enforcement put in place by countries to enforce the application of those laws. The modalities are summarized below and are also available on the OECD's public website at <http://www.oecd.org//daf/nocorruption/selfe.htm> for Phase I and <http://www.oecd.org//daf/nocorruption/selfe2.htm> for Phase II.

Phase I began in the latter part of 1998 with the distribution of a questionnaire to signatories soliciting information on how their respective laws and legal systems implement the Convention and the Revised Recommendation. The Working Group was instructed to report periodically on the results of the Phase I review to the OECD Ministers. The Phase I questionnaire contained a comprehensive list of questions on how Parties intend to fulfill their obligations under the Convention and the Revised Recommendation. Countries were asked, among other things, to:

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

To encourage a candid and frank discussion among the Working Group members in evaluating each other's laws, the Working Group agreed that questionnaire responses would be treated as confidential unless the country examined decided to make public its own responses. For example, the U.S. responses can be found at www.usdoj.gov/criminal/fraud/fcpa/intgmt.htm.

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

Several weeks before each Working Group meeting to examine implementing legislation, the OECD Secretariat prepares a draft analysis and questions based on the country's responses to the Phase I questionnaire. The designated lead examiners also prepare

advance written questions. The examined country then provides written responses to the secretariat's analysis and to the questions posed. At the beginning of each segment of the monitoring meeting, the designated lead examiners and the examined country have the opportunity to make general opening remarks. The lead examiners begin the questioning and discussion by raising issues that were highlighted as problems during the written exchange stage. Following discussion and consultation within the Working Group, 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. The summaries and recommendations are confidential until the OECD Ministers have approved publication of the reports.

From April 1999 through May 2000, the Working Group completed the reviews of twenty-one signatory countries and provided its first report to Ministers at the June 26-27, 2000 Ministerial meeting. The report summarizing the results of the monitoring process and individual country assessments was subsequently derestricted and made available to the public on the OECD website. Since then the implementing legislation of seven additional Parties has been reviewed. The report on the results of the monitoring process through the April 2001 Working Group meeting and individual assessments for these seven additional Parties of the Working Group was transmitted to Ministers at the May 15-17, 2001 OECD Council meeting at Ministerial level and subsequently derestricted and posted on the OECD website at <http://www.oecd.org//daf/nocorruption/instruments.htm>. The Commerce Department Trade Compliance Center also maintains a link to these materials through its site at <http://www.mac.doc.gov/tcc>.

Phase II of the monitoring process—the goal of which is to study the structures in place to enforce the laws and rules implementing the Convention and to assess their application in practice—begins this year with the review of Finland. Drafting of the Phase II questionnaire and the procedures for conducting on-site visits was completed at the December 2000 Working Group meeting and formally adopted by written procedure in January 2001.

To carry out Phase II monitoring, the Working Group will conduct an evaluation for each country that has undergone a Phase I review, which will include an on-site visit to the country in question in accordance with established terms of reference or procedures. The subsequent evaluation will be based on replies by the country to the Phase II questionnaire, the results of the on-site visits, deliberations within the Working Group,

and discussions with the private sector.

An objective of Phase II is to improve the capacity of Parties to fight bribery in international business transactions through critical mutual evaluation of each Party's compliance with the requirements of the Convention and Revised Recommendation. Shortcomings will be identified and effective approaches to implementation will be shared with the other Group members.

In order to obtain an overall impression of the functional equivalence of a Party's efforts to implement the Convention effectively, the questionnaire will request information on how a Party has dealt with cases under the Convention and examine the institutional mechanisms that are in place to effectively enforce its laws. In addition, the questionnaire will seek information on the promotional efforts the country has made to educate the public on the Convention. Detailed responses will be required on a country's application of its implementing legislation as it relates to the elements of the Convention and the Revised Recommendation. The questionnaire is available on the OECD website at <http://www.oecd.org//daf/nocorruption/selfe2.htm>.

On-site examination teams will be comprised of one to two members of the OECD Secretariat and up to three experts from each of the two lead examining countries. The on-site visits will take from two to three days. The examiners will review questionnaire responses of the country undergoing review and may request additional information. The country undergoing review will be expected to provide information concerning the application of its laws and practices implementing the Convention. The on-site reviews will be an opportunity to learn what remedial steps have been taken by those countries found to have deficient implementation during the Phase I review, and also to explore horizontal issues which pertain to situations where Parties have implemented obligations of the Convention in widely divergent ways (e.g., varying statutes of limitations or sanctions). While the country undergoing review will not be expected or required to disclose information otherwise protected by the country's laws and regulations, information on enforcement and prosecutions will greatly improve the usefulness of on-site visits for the country reviewed and the other members of the Working Group.

The secretariat and lead examiners will prepare a preliminary draft report on the state of enforcement and application of the Party's laws and other measures implementing the Convention and Revised Recommendation in the country undergoing evaluation. The country examined will then be given an opportunity to comment on the draft report before its submission to the Working Group.

After discussion by the Working Group, during which the country undergoing examination will be given an opportunity to make observations, a final report will be adopted, which will include an evaluation by the Working Group. Like Phase I reviews, the Phase II report and evaluation may contain recommendations to the country undergoing review on how to improve its domestic laws and practices to effectively combat bribery of foreign public officials in international business transactions. As with Phase I evaluations, the reports will remain confidential until transmitted to the OECD Ministers, at which time they will be made available publicly.

As stated above, Finland volunteered to be the first Convention Party to undergo review and evaluation, expected before the end of 2001. It is envisioned that examinations of all participants in the Working Group will be completed by 2005 at the latest. The U.S. government believes that Phase II will be the true litmus test of a Party's commitment to the Convention and its eventual effectiveness.

Although Working Group meetings and on-site visits are confidential proceedings, the monitoring process will provide opportunities for input by the private sector and nongovernmental organizations. Throughout Phase I reviews, Transparency International has submitted its own assessment of the implementing legislation of a number of the examined countries and has provided input on various other issues ranging from coverage of bribes to political parties and candidates to recommendations for implementation of the accounting and auditing provisions of the Convention and the Revised Recommendation.

The Working Group also encourages private sector input through other channels. It has had a number of consultations concerning the Convention and related issues 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. The United States will continue to advocate broad public access to information on implementation and enforcement of the Convention. We will encourage countries undergoing Phase II on-site examinations to provide opportunities for the secretariat and lead examiners to meet with a broad section of representatives of the private sector and civil society to ascertain their views on implementation and enforcement of the Convention and Revised Recommendation. We will also continue to urge these same groups to express their views and submit information to the Working Group when it meets to discuss and finalize individual country reports and evaluations.

With Phase II monitoring about to get underway, the Working Group is moving to a critical phase in making the Convention an effective instrument—ensuring rigorous enforcement of the Convention’s obligations. The United States takes monitoring of the Convention very seriously and has committed significant resources to this endeavor, at times through supplemental funding for the Working Group. However, a lack of adequate funding for the Working Group could jeopardize its ability to carry out its mandate. The United States will continue to press for adequate OECD funding for the Working Group, as it is the responsibility of all OECD Members and Convention signatories to support the work of the Group.

Monitoring of the Convention By the U.S. Government

Monitoring implementation and enforcement of the Convention has been a priority for the U.S. government since it entered into force. The Bush Administration is equally committed to ensuring full compliance with agreements with our trading partners. At the Commerce Department, monitoring compliance with the Convention—and international agreements generally—remains a high priority. Secretary Evans stated at his confirmation hearing before the Senate Commerce Committee that “compliance [with trade agreements such as the Convention] is going to be an absolute with me.” Other U.S. agencies are also actively involved and making important contributions. The Commerce, State, Justice, and Treasury Departments and the staff of the SEC continue to cooperate as an interagency team to monitor implementation and enforcement of the Convention. Each agency brings its own expertise and has a valuable role to play.

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

Preparation of these annual reports to Congress is also an integral part of the monitoring process within the U.S. government. To fulfill the IAFCA's reporting requirement, the Commerce Department organizes an interagency task force early in the year to coordinate work on the congressional report and review ongoing initiatives to monitor the Convention over the longer term. U.S. embassies in signatory countries assist in this process by obtaining information on host government laws and assessing the progress in implementing the

Convention, taking into account the views of both government officials and private sector representatives. These diplomatic reports provide valuable information for our analysis.

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

In the year ahead, the Department of Commerce, in close collaboration with the State and Justice Departments and other responsible agencies, plans to continue its rigorous monitoring of the Convention. However, because most signatories now have laws on the books to implement the Convention, we will focus our efforts to monitor enforcement of the Convention. The following specific actions will be taken.

- The Department of Commerce will continue to ensure that there is an integrated approach to monitoring that includes legal assessments of implementing legislation, outreach to the private sector, appropriate diplomatic initiatives, and timely analysis of the latest developments on international bribery and corruption.
- The Trade Compliance Center, which has responsibility in the Commerce Department for monitoring compliance with international trade agreements with the United States, and the Office of General Counsel will continue to give heightened attention to bribery in international business transactions and implementation of the Convention. This effort will include strong outreach to the U.S. business community and nongovernmental organizations. The Trade Compliance Center will, in close cooperation with the Office of General Counsel and interested U.S. agencies, also continue to oversee preparation of the annual reports to Congress required by the IAFCA.
- Enforcement of implementing legislation is critical to ensuring that the Convention is effective in deterring the bribery of foreign public officials in international transactions. As almost all of the signatories are now Parties to the Convention, we will enhance our efforts to urge the relevant authorities in each Party to address all credible allegations of bribery of foreign public officials. When information is received relating to acts of bribery that may fall within the jurisdiction of other Parties to the Convention, the information will be forwarded, as appropriate, to national authorities for action.

- As Parties to the Convention, we must take preventive action when we learn bribes are being solicited in an international tender. We will seek to engage other Parties to take coordinated action when such allegations are made and approach such governments to let them know our companies cannot pay bribes, will not pay bribes, and that such tenders must be decided on the commercial merits of the proposal.
- The Department of State will continue to use its Advisory Committee on International Economic Policy (ACIEP) to obtain private sector views concerning the Convention and to keep nongovernmental organizations abreast of progress in the fight against corruption.
- The Departments of Commerce and State, working with other U.S. agencies, will continue to support active diplomatic and public affairs efforts to promote the goals of the Convention. Senior officials will continue to raise issues relating to 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 that they can effectively participate in the monitoring process and engage foreign governments in a dialogue on key bribery-related issues.

The United States continues to have the most intensive monitoring program of the other signatory countries. It is transparent and open to input from the private sector and nongovernmental organizations. We expect other signatory countries to find it in their interest to ensure that the other Parties to the Convention are complying with the obligations of the Convention. As noted above, a recent Canadian study recommends that the Canadian government create a new body to coordinate federal anti-corruption activities. We urge other Parties to bring renewed energy to the global anticorruption agenda to expose corrupt practices—including bribery of foreign public officials—and bring the sunshine of public scrutiny, where, ultimately, these practices cannot survive. Among other anticorruption initiatives, the U.S. government will continue giving a high priority to monitoring implementation of the Convention so that U.S. businesses can fully realize the benefits of this important international agreement.

¹Since 1977, the U.S. Department of Justice has prosecuted 15 additional cases involving bribery of foreign public officials under federal criminal statutes other than the FCPA.

Laws Prohibiting Tax Deduction of Bribes

The OECD Council made an important contribution to the fight against bribery in 1996: it recommended that member countries that had not yet disallowed the tax deductibility of bribes to foreign public officials should reexamine such treatment with the intention of denying deductibility. This recommendation was reinforced in the OECD Council's 1997 Revised Recommendation on Combating Bribery in International Business Transactions, which laid the foundation for negotiation of the OECD Antibribery Convention. All thirty-four signatories to the Convention have agreed to implement the OECD Council's recommendation on denying the tax deductibility of bribes. Substantial progress on implementing the Council's recommendation has been made, with only New Zealand reporting that it has not yet completed action necessary to disallow these deductions. Nonetheless, deductibility in some countries that have laws currently in effect may continue for one or more of the reasons identified below.

As part of the monitoring process on the Convention and the OECD Council's recommendation, the OECD gathers information on signatories' laws implementing the recommendation on tax deductibility. Information on current and pending tax legislation regarding the tax deductibility of bribes is available on the OECD website (<http://www.oecd.org/daf/nocorruption/instruments.htm>). Since 1998, the OECD has posted country-by-country

descriptions of the treatment of the tax deductibility of bribes in signatory countries and a summary of pending changes to their laws. The information on the website is based entirely on reports that the signatories themselves provide to the OECD Secretariat.

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

We continue to seek more detailed information on the signatories' tax and bribery laws so that we will have a better understanding of how the disallowance of tax deductibility will be applied in practice. As part of that effort, the Treasury Department is working to ensure that the Committee of Fiscal Affairs, the OECD body responsible for tax issues, takes a more active role in monitoring the progress of countries in implementing the OECD Council's recommendation. Treasury is also providing U.S. technical expertise to the Committee on Fiscal Affairs in order to assist members in their monitoring work. For example, with significant assistance from U.S. Treasury officials, the Committee on Fiscal Affairs has completed work on a *Bribery Awareness Handbook*. This

handbook, which is designed to serve as a manual for tax officials in signatory countries to assist them in detecting bribes, includes a discussion of several specific factors indicating when a bribe may have occurred and examines techniques for uncovering bribes.

We believe that our information will continue to improve as the OECD's monitoring process creates and makes available publicly a more complete record of each signatory's legal, regulatory, and administrative framework for disallowing the tax deductibility of bribes.

Beginning in 2001, the Committee on Fiscal Affairs will assist the Working Group on Bribery in designing questions to ask Parties during Phase II reviews regarding their implementation of the Convention and the Revised Recommendation. The Committee on Fiscal Affairs will also participate in reviewing the responses to these questions. In addition, the Committee on Fiscal Affairs will continue to work with non-member countries who have expressed an interest in the Convention and related anticorruption issues and will review the capability of these countries to abide by the Convention and the Council's Recommendation. The Department of State was instrumental in ensuring that adequate funds were allocated to the Committee on Fiscal Affairs to support this important monitoring work.

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

Signatories to the Convention have made substantial progress on implementing the OECD Council's recommendation to disallow the tax deductibility of bribes, and further progress is expected in the year ahead. Only one OECD member country (New Zealand) has reported that it has not yet completed action necessary to disallow these deductions. Luxembourg adopted legislation denying deductibility for bribes in December 2000, and legislation previously adopted by the Swiss parliament became effective on January 1, 2001. In addition, France amended its legislation to remove "grandfather" provisions from its laws that might have allowed tax deductibility to continue for contracts entered into before the Convention entered into force for France.

Despite important positive steps taken by signatories to the Convention, we remain concerned that tax deductibility of bribery payments may still exist. Deductibility in some signatory countries (e.g., Austria, Belgium, Japan, the Netherlands) that have laws currently in effect may continue for one or more of the following reasons: the legal framework may disallow the

deductibility of only certain types of bribes or bribes by companies above a certain size; the standard of proof for denying a tax deduction (e.g., the requirement of a conviction for a criminal violation) may make effective administration of such laws difficult; and the relevant laws may not be specific enough to deny deductibility of bribes effectively in all circumstances. The United States has noted its concerns about the effectiveness of measures disallowing tax deductibility in diplomatic exchanges with other Convention signatories and at meetings of the OECD Working Group on Bribery and the Committee on Fiscal Affairs.

The purpose of describing the limitations of country laws concerning 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 addressed and eliminated. Further, it must be recognized that enactment of rules denying deductibility is only the first step. Careful monitoring is needed to ensure that the rules are enforced.

Report on Country Laws Relating to the Tax Deductibility of Bribes

Argentina

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

Australia

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

Austria

According to legislation passed in late October 1998, bribes paid to foreign public officials are generally no longer deductible for income tax purposes. The Tax Amendment Law of 1998, published in *Bundesgesetzblatt* (Federal Law Gazette) number I/28 of January 12, 1998, amended Section 20, paragraph 1, subparagraph 5 of the Income Tax Act. Under the new legislation, any cash or in-kind remuneration whose granting or receipt is subject to criminal punishment is not deductible from taxable income. The disallowance

applies to bribes that are subject to criminal punishment under the Criminal Code, which was amended in August 1998 to extend criminal liability to bribery of foreign public officials. A deduction may be disallowed before a finding of a criminal violation. However, if no criminal violation is found in a court proceeding, the tax administration may have to allow the tax deduction.

Belgium

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

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

Brazil

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

Bulgaria

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

Canada

Since 1991, the Income Tax Act has disallowed the deduction as a business expense of payments in connec-

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

Chile

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

Czech Republic

Czech taxation law and regulations do not allow deductions of bribes paid to foreign public officials. Deductibility is not possible even in cases where the bribe could be treated as a gift. Gifts are deductible only in exceptional cases under two specific conditions. The gift must be made for one of the following specific purposes: science, education, culture, fire protection, or some other social, charitable, or humanitarian purposes. The gift must not be above a strictly determined percentage of the tax basis. Only if both conditions are fulfilled can the gift be treated as deductible for tax purposes. Although Czech law has never permitted the deduction of bribes, this prohibition was not previously explicit in legislation. The Czech Republic amended its laws on December 12, 2000, however, to provide that payments to foreign public officials are not deductible, even in countries where such payments are tolerated or are not considered an offense.

Denmark

The Ministry of Taxation's Act No. 1097 of December 29, 1997, which amended the Danish income tax assessment act, repealed provisions allowing for tax deductibility for bribes to public officials effective on January 1, 1998.

Finland

Finland does not have statutory tax rules concerning bribes to foreign public officials. Similar payments to domestic public officials are nondeductible on the basis of case law and the practice of the tax administra-

tion. It is expected that this case law would also apply to disallow deductions for bribes paid to foreign public officials. On this basis, the tax administration in practice currently denies deductions for bribes to foreign public officials.

France

The French parliament passed legislation denying the tax deductibility of bribes to foreign public officials on December 29, 1997, as part of the Corrective Finance Bill for 1997. The law does not allow the deduction of amounts paid or advantages granted directly or through intermediaries to foreign public officials within the meaning of Article 1.4 of the Convention. As originally enacted, the legislation was "grandfathered," in that it might have allowed tax deductibility to continue for contracts entered into before the Convention entered into force for France.

Responding to criticism by other OECD members, including the United States, the French parliament voted in February 2000 to remove the grandfather provision in the tax legislation. This amendment took effect on September 29, 2000, the date the Convention entered into force in France.

Germany

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

Greece

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

Hungary

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

Iceland

Since June 1998, Iceland has not allowed the deductibility of bribes to foreign as well as domestic pub-

lic officials and officials of international organizations on the basis of law (Section 52 of the Act No. 75/1981 on Tax on Income and Capital as amended by Act No. 95/1998).

Ireland

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

Italy

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

Japan

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

Korea

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

Luxembourg

The Luxembourg parliament adopted legislation on December 14, 2000 that denies the deductibility of bribes.

Mexico

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

The Netherlands

The relevant tax laws do not expressly deny the tax deductibility of bribes to foreign public officials. Instead,

deductibility is denied only where there has been a conviction by a Dutch court or a settlement upon payment of a fine, etc., with the Dutch prosecutor to avoid prosecution. On February 9, 2001, however, the Council of Ministers approved the intention of the State Secretary of Finance to prepare a bill amending the fiscal treatment of bribes. If enacted, the new law will provide that tax officials can refuse the deduction of certain expenses where they are reasonably convinced based on adequate indicators that the expenses consist of paid bribes, thus removing the requirement of a conviction.

New Zealand

Legislation to prohibit the tax deductibility of bribes is being drafted by the Inland Revenue Department and is expected to be submitted to parliament later in 2001.

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 a punishable offense for both the briber and the recipient of the bribe. 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 relative to illegal payments, such as bribes, to foreign public officials.

Slovak Republic

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

Spain

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

Sweden

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

Switzerland

A draft bill on the denial of tax deductibility of bribes to foreign public officials was submitted in spring 1998 to the cantons and other interested parties for consultation. (Matters of direct taxation are mostly within the competence of the cantons.) The bill was then submitted to the national parliament and passed in December 1999. The bill entered into force and became effective as of January 1, 2001.

Turkey

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

United Kingdom

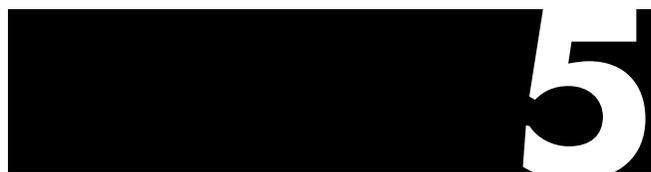
Under Section 577A of the Income and Corporations Tax Act 1988, enacted under the U.K. Finance Act of 1993, the U.K. does not allow deductions for any bribe if that bribe is a criminal offense, contrary to the Prevention of Corruption Acts. The U.K. has declared that the Prevention of Corruption Acts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

United States

The United States does not allow deductions for bribes paid to foreign government officials, if that bribe is a criminal offense. Both before and after the United States criminalized bribery of foreign government officials, the government 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 does not depend on a conviction in a criminal bribery case.

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



Adding New Signatories to the Convention

As we approach complete ratification and implementation of the Convention, the Working Group and the United States have concluded that a targeted expansion of the Convention membership to appropriate states could contribute to the elimination of bribery of foreign public officials in international business transactions. Therefore, the Working Group has developed criteria for accession to the Convention, and since our last report, one applicant country has been favorably considered for accession. We expect a small number of additional qualified applicants to satisfy the conditions for Working Group observership or full accession to the Convention in the coming years.

Development of Accession Criteria

Article 13.2 of the Convention provides that it shall be open to accession by nonsignatories that have become full participants in the OECD Working Group on Bribery or any successor to its functions. In addition, the OECD Commentaries on the Convention encourages nonsignatories to participate in the Working Group provided that they accept the 1997 OECD Revised Recommendation of the Council on Combating Bribery in International Business Transactions and the 1996 OECD Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials.

Faced with an increasing number of requests for accession to the Convention, in mid-1999, the Working Group began discussions on the subject and asked the United States to lead an ad hoc group to define criteria and entrance procedures for Working Group membership and Convention accession. The ad hoc group produced an approach intended to permit a selective increase in signatory states, while at the same time eliminating inappropriate motivations for membership or accession (e.g., use of accession as a prestige symbol or as a stepping stone to participation in other OECD bodies). In presupposing a slow expansion and limiting it to carefully chosen states, the policy proposals also were intended to preserve the critically important ability of the Working Group to continue its effective evaluation of Convention implementation and, equally significant, to not hinder the near-term start of enforcement reviews or broadening of Working Group attention to new issues.

The proposals developed by the U.S.-led ad hoc group were approved by the full Working Group in October 1999, as set forth in an OECD Council resolution, the accession criteria require that signatory states be "major players" and demonstrate that their inclusion would be of "mutual benefit."

The Working Group also agreed that other factors could be taken into account in order to provide some flexibility. For example, it was agreed the term "major

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

A first step toward the enlargement of Convention membership was taken at an outreach session on June 5, 2000. Fourteen states and Hong Kong¹ responded to invitations issued by the OECD Secretariat. At this information session, accession criteria, Convention obligations, and Working Group activities and admission procedures were explained. All participants in the session were asked to respond to a questionnaire seeking information on entrance qualifications. Eight of these applicants responded to this initial request for information and only two, including Slovenia, responded to a later request for additional information in a timely manner.

Application of Accession Criteria

In April 2001, the Working Group on Bribery completed its first examination of an applicant for accession to the Bribery Convention. In response to instructions of the OECD Council to provide a technical opinion on the participation of Slovenia in the Working Group, the group recommended that Slovenia be invited to become a full participant in the Working Group. The group judged that Slovenia is a "major player," as interpreted by the Working Group, and that its accession would offer necessary "mutual benefit."

Slovenia's prospective accession will be historic. It will mark the first time that Convention accession and Working Group membership have been offered since the Convention came into force in February 1999. In part, this first expansion of membership is linked to the fact that Convention ratification is now virtually complete. It is also key that implementation appears to be well in hand and that Phase II examinations of Convention enforcement are about to commence. Taken as a whole, these factors appear to ensure that initiation of expansion now will not detract from the overall goal of maintaining a high-standard Convention with rigorous peer monitoring.

At the time of this writing, there are still nine countries in the applicant queue, and we anticipate that a measured and targeted expansion may take place in the next several years. However, in its report to Council on Slovenia's examination, the Working Group noted that resource constraints will need to be factored into future decisions on expansion. In addition, the Group cautioned that the recommendation for immediate full participation for Slovenia should not be regarded as a precedent for future candidates. The Group determined that candidates not as well qualified as Slovenia might expect to be offered a period of observership in the Group, or be advised to pursue association with other anticorruption instruments. It is also apparent that the Group remains concerned that applicant states not see accession as a prestige symbol or as a stepping stone to participation in other OECD bodies. Finally, the United States and other members of the Working Group expressed special interest in seeking more regional diversity among prospective signatories.

Anticorruption Declaration

An earlier proposal for a possible anticorruption declaration has been shelved by the Working Group, at least for the time being. The United States and some other delegations had viewed such an instrument as useful both for current parties to the Convention and for nonsignatories interested in a closer association with anticorruption activities. It was, among other things, viewed as a means of letting nonsignatories demonstrate their commitment to an improved investment climate and contribute to better governance standards worldwide. However, advances concerning other anticorruption instruments over the past year, including the decision to begin negotiation of a comprehensive United Nations convention against corruption, have persuaded a majority of the Working Group that an OECD anticorruption declaration for nonsignatories is unnecessary at this time.

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

Subsequent Efforts to Strengthen the Convention

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

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

The United States has been unable to convince other Convention signatories to include this broader coverage of bribery in the Convention. We did succeed, however, in getting signatories to keep this issue and certain other issues under study. Five issues were iden-

tified by the OECD Council in December 1997 for additional examination:

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

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

The United States has continued to express its concern at OECD meetings about the need to broaden coverage of the Convention and also with signatory governments on a bilateral basis; it has insisted that this subject remain on the OECD agenda for further discussion. Over the past year, important work was undertaken within in the Working Group and under the sponsorship of Transparency International.

Outstanding Issues Relating to the Convention

Political Parties, Party Officials, and Candidates

The United States has kept the issues of bribes to foreign political parties, and candidates for office on the OECD's agenda. Nevertheless, we continue to face indifference and even strong resistance from many other countries. This resistance seems to arise in part from the fact that many countries implemented the Convention by simply amending their domestic corruption laws, rather than enacting a freestanding law such as the FCPA. These countries, in particular, have resisted expanding their definition of "public official" to include political parties, party officials, and candidates, in large part due to the potential effect upon domestic corruption law. In addition, other countries have argued that such bribes are already covered by their national laws (e.g., through laws on trading in influence). We are concerned, however, that these laws may not be sufficiently comprehensive to encompass all corrupt payments to political parties, party officials, and candidates. Nevertheless, most countries are of the view that Parties should implement the Convention as it is and monitor implementation over time to see whether changes are necessary.

In successive ministerial communiqués, OECD ministers have called for attention to these and the other three issues. In addressing these issues, the 2001 communiqué indicated that ministers expected progress towards final action on these issues: "OECD will move ahead on related issues: 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; and the role of foreign subsidiaries and of off-shore centers in bribery transactions." The U.S. delegation has been adamant in having the issues of bribes to political parties and candidates carefully analyzed by the Working Group. It has regularly raised the question of further coverage of the Convention at Working Group meetings and has pressed to keep these issues on the agenda.

In October 2000, at La Pietra, Italy, Transparency International (TI) convened a meeting of twenty-eight individuals from nine countries representing the private sector, public institutions, and civil society to review issues relating to corruption and political party financing. The U.S. government participated in these discussions which

resulted in the "La Pietra Recommendations"—five proposals intended to address concerns that payments to political parties may be used to circumvent the intentions of the Convention. An informal Working Group consultation with civil society, the private sector, and trade union representatives was held in February 2001 to consider possible future actions on the bribery of political parties and candidates. Experts drawn from the group of participants at La Pietra presented the recommendations and sought to illustrate potential problem areas due to the lack of coverage of the Convention of certain bribe payments made to political parties and their officials. While many Working Group members are still reluctant to engage in further discussion of revising the Convention, we were successful in making progress on exploring these issues further. Recognizing that such a gap in Convention coverage would be potentially a serious problem, the Working Group agreed to issue a questionnaire to signatories to determine whether their laws implementing the Convention applied to bribes to political parties and candidates. The questionnaire also will request information concerning bribery transactions involving foreign subsidiaries. We expect the questionnaire to be circulated in late summer 2001.

Bribery as a Predicate Offense to Money Laundering

Article 7 of the Convention requires a Party that has made bribery of its own public officials a predicate offense for applying its money-laundering legislation do so on the same terms for the bribery of a foreign public official. Based on the reviews of implementing legislation, most signatory countries do make bribery of a foreign public official a predicate offense for application of money-laundering legislation in accordance with this standard. However, some signatories have not made bribery of their public officials a predicate offense; other signatories have placed conditions on the application of their money-laundering legislation. For these reasons, there are differences among the signatories with respect to money-laundering that could result in uneven application of the Convention.

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 by listing specific offenses or statutory provisions.

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

tion between a misdemeanor and a felony).

Therefore, if all parties to the Convention would make bribery a serious offense for the purposes of domestic money-laundering legislation, there would seem to be no need for going beyond the requirements in Article 7 of the Convention. Language endorsing the application of bribery as a predicate offense for money laundering was included in the G-8 conclusions at Moscow in October 1999. Since then, a consensus appears to have emerged within the OECD Working Group on Bribery on the need to make bribery a predicate offense for money-laundering legislation. In its June 2000 ministerial communique OECD ministers recommended that bribery of foreign public officials should be made a serious crime for triggering the application of money-laundering legislation. The 2001 ministerial communique included money laundering among the issues that the OECD will address further in the coming year. The Working Group has committed to review any action the Financial Action Task Force has taken regarding the recommendation of ministers and will examine this issue during Phase II reviews.

In the United States, bribery of a foreign public official in violation of the FCPA is a predicate offense for purposes of the Money Laundering Control Act. As part of the National Money Laundering Strategy, on January 16, 2001, the U.S. government released new guidance to help U.S. financial institutions avoid transactions that might involve the proceeds of official corruption. The *Guidance on Enhanced Scrutiny for Transactions That May Involve the Proceeds of Foreign Official Corruption* encourages U.S. financial institutions to scrutinize large accounts and transactions that may involve the proceeds of corruption by senior political figures, their immediate families, or close associates. The guidance, issued by the Department of the Treasury, the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the Department of State, is available on the Internet at www.treas.gov/press/releases/ps1123.htm.

In addition, on October, 30, 2000, eleven major U.S. and European private banks concluded their year-long effort to establish money-laundering guidelines. The Global Anti-Money Laundering Guidelines for Private Banking, also known as the Wolfsberg AML Principles, stipulate that the banks will conduct due diligence on the source of wealth and the source of funds and will accept only those clients reasonably established to be legitimate. The principles, which were discussed at the December 2000 Working Group meeting, can be viewed at www.wolfsbergprinciples.com.

The Role of Foreign Subsidiaries

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

No OECD member country holds parent corporations absolutely liable for the criminal acts of their subsidiaries. In the United States and other Convention signatories that impose liability on legal persons, parent corporations may be held liable only for the acts of their subsidiaries that are authorized, directed, or controlled by the parent corporation. The United States has, therefore, urged further examination of strong standards of corporate governance, business ethics, and international accounting standards to ensure that foreign subsidiaries do not use their independence to obtain business through means prohibited to their parents.

The Working Group has recommended that countries introduce the concept of corporate responsibility of the parent in the supervision of the activities of the foreign subsidiary. It also has considered whether civil sanctions arising from the lack of effective supervision merited further examination. The Group also recommended the encouragement of corporate governance programs to promote self-regulation. The Working Group will focus on the nature and the extent of the issues concerning bribery transactions that involve foreign subsidiaries when it issues the questionnaire to signatories in late summer 2001 with regard to bribes to political parties and candidates.

The Role of Offshore Financial Centers

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

Working Group activity. This work continues.

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

Other Issues Relating to Coverage

Immediate Family Members of Foreign Public Officials

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

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

Private Sector Corruption and Other Issues

The issue of private sector corruption, which goes beyond the scope of the Convention, has been addressed

in sessions of the Working Group and in informal consultations with representatives of civil society, notably the OECD Trade Union Advisory Committee (TUAC) and the Business and Industry Advisory Committee (BIAC). The Working Group concluded in July 1999 that the question of bribery within the private sector was largely undefined and unexplored, but nevertheless important. A summary and conclusions of the International Chamber of Commerce study on “private to private bribery” are expected to be presented to the Working Group after its finalization in the autumn of 2001. The Working Group has not addressed the question of corruption of officials for purposes other than to obtain or retain business.

The Working Group sessions with TUAC and BIAC also have dealt with the solicitation of bribes and the protection of whistle blowers (either within government or business) who come forward to expose corruption. Solicitation remains on the agenda of the Working Group as an area of concern and possible followup in the context of the Revised Recommendation. Whistle blowing is a subject that goes beyond the scope of bribery of foreign public officials. Nonetheless, in considering further actions to explore the potential problems of solicitation and the role played by whistle blowing in the fight against corruption, the Working Group agreed to include questions related to both subjects in the Phase II questionnaire.

In addition, the Working Group has been examining private sector corruption in terms of the relationship between the Convention and related OECD anticorruption initiatives and the OECD Guidelines for Multinational Enterprises (the Guidelines). The OECD guidelines offer yet another vehicle for advancing the goals of the Convention. Originally adopted in 1976, the Guidelines are non-binding recommendations to enterprises, made by the thirty-three governments that adhere to them. Their aim is to help Multinational Enterprises (MNEs) operate in harmony with government policies and with societal expectations. In the most recent revision adopted by the OECD ministers on June 27, 2000, an entire chapter on combating bribery that tracks closely the key provisions of the Convention was inserted into the text of the Guidelines. While the Guidelines are voluntary and not legally enforceable, they draw attention to the pernicious effects of bribery and corruption and encourage companies to take a proactive approach to addressing the problems. The follow-up mechanism described in the Procedural Guidance details how the National Contact Points for the guidelines can assist parties in resolving issues pertaining to the Guidelines.



Antibribery Programs and Transparency in International Organizations

Congress directed that the annual report should include an assessment of antibribery programs and transparency with respect to international organizations covered by the International Anti-Bribery and Fair Competition Act (IAFCA). More than 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 well-known 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 Foreign Corrupt Practices Act (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.

U.S. agencies have selected for review several major international organizations that have the potential to

affect international bribery on a large scale through their policies and activities. International financial institutions—including the IMF, the World Bank, and regional development banks—are particularly important because they extend financial assistance or fund commercial contracts amounting to billions of dollars annually in countries around the world. These organizations 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), the OECD and the Organization for Security and Cooperation in Europe (OSCE) because of their active 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.

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), an international organization covered by the IAFCA. Chapter 10 of this report 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 on track to privatize by July 18, 2001, following a November 2000 decision by representatives of INTELSAT's 144 member governments to proceed with privatization. The privatized INTELSAT will consist of entirely new companies that will take over the operating assets and liabilities of the existing intergovernmental entity. The companies created will be ordinary national corporations. A small residual intergovernmental organization, to be known by the new acronym ITSO, will remain to monitor the company's performance of its public service obligations, but will not have the structure, procurement responsibilities, or other commercial decisionmaking functions of the current organization that are referenced below. What follows addresses the request for information on antibribery programs and transparency with respect to INTELSAT as it exists today, prior to privatization.

INTELSAT, as established under the terms of the Agreement Relating to the International Telecommunications Satellite Organization ("INTELSAT Agreement"), has four organs. These include: (1) the Assembly of Parties, the principal organ of INTELSAT composed of all INTELSAT Parties (national member governments); (2) the Meeting of Signatories, composed of all INTELSAT Signatories (the Parties or the telecommunications entities designated by each Party to invest in and participate in the commercial operations of INTELSAT); (3) the Board of Governors, composed of governors representing certain Signatories and groups of Signatories; and (4) INTELSAT management, the executive organ, responsible to the Board of Governors, which handles the day-to-day business operations of the organization. The following discussion focuses on the Board of Governors and 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 composed typically of just over twenty-five members representing Signatories that each hold more than a specified investment share in the organization, and groupings of a number of Signatories with smaller investments. In addition, mechanisms exist within the INTELSAT Agreement to promote representation of each of the geographic regions defined by the Plenipotentiary Conference of the International Telecommunication Union (Montreux, 1965). As of March 1, 2001, the Board was composed of twenty-eight members representing approximately 115 INTELSAT Signatories.¹

Decisions by the Board are generally made on the basis of consensus, without calling for a vote. If votes are necessary for a decision on a substantive question, decisions are taken either by an affirmative vote cast by at least four governors having two-thirds or more of the total voting participation of all Signatories and groups of Signatories represented on the Board, or by an affirmative vote by the total number of governors minus three, without regard to the amount of their voting participation. Through the U.S. Signatory COMSAT, a wholly owned subsidiary of Lockheed Martin, the United States has the largest investment share in INTELSAT (approximately 21.8 percent as of March 1, 2001) and the largest proportional voting share within the Board of Governors.²

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 Board and other INTELSAT meetings.)

INTELSAT Provisions Regarding Procurement

Procurements of telecommunications satellites and related assets are among INTELSAT's largest business transactions. The Board of Governors is required to adopt procurement procedures, regulations, and terms and conditions that are consistent with procurement provisions of the INTELSAT Agreement and Operating 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 that 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 set forth in the ADM, applies to all INTELSAT staff, including staff on regular, fixed-term, part-time, 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. INTELSAT employees may not accept cash gifts. 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 on conflicts of interest 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 CEO 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

There are three separate vehicles for auditing INTELSAT activities and/or records 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 INTEL-SAT accounts." In recent years, Arthur Andersen LLP has audited the balance sheet and related financial statements of INTELSAT.³

International Telecommunication Union

The International Telecommunication Union (ITU) facilitates cooperation among 189 member states 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 (i.e., governments that are party to the constituting instruments of the ITU) to advance ITU goals.

Structure of the ITU

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. Matters of particular concern to developing countries are studied by the Development Sector. The Radiocommunication Sector facilitates the rational, equitable, efficient and economical use of the radiofrequency spectrum. 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 Secretary General and the Deputy Secretary General are responsible for managing the ITU 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 respective sectors. The United States is generally satisfied with the services and support provided by the secretariat for ITU meetings.

Decision Making in the ITU

The ITU decision-making 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 global telecommunication systems and services. ITU staff serve as the secretariat for ITU meetings and have

responsibility for coordinating and publishing telecommunication service data needed for the operation of services. Important decisions, however, are made by the Member States themselves, not by the secretariat.

Member States meet approximately every four years at a Plenipotentiary Conference. At this conference, members elect the Secretary General, the Deputy Secretary General, and the Directors of the three sector Bureau (the Radiocommunication Bureau, the Telecommunication Standardization Bureau, and the Development Bureau). The Plenipotentiary Conference also elects the ITU Council, which meets annually, and the Radio Regulations Board. The Council is responsible for overseeing ITU activities between conferences. World Radiocommunication Conferences are held every two to three years to revise the Radio Regulations that allocate global frequencies and establish procedures for countries to assign frequencies and orbit positions. Radio Regulations are adopted in a transparent manner by a consensus of the Member States.

Tracking of Finances in the ITU

The Central Audit Office of the Swiss Confederation serves as the External Auditor of the ITU and these services are provided on a permanent basis in accordance with an agreement with the host country. The External Auditor conducts an annual audit of ITU accounts and the accounts of ITU Telecom Exhibitions. The findings are presented to the ITU Council in the form of a detailed report identifying problems uncovered in the course of the audit. In addition to inspecting and certifying the accounts, the reports of the External Auditor usually address issues related to the financial management practices and procedures of the General Secretariat.

The Joint Inspection Unit (JIU) and the Internal Auditor, who is in charge of auditing, inspecting and investigating, also provide external oversight. In particular, upon instructions from the Secretary General, the Internal Auditor may conduct investigations of allegations or the presumption of fraud or mismanagement. The Internal Auditor reports to the Secretary General, who submits the report to the ITU Council for information.

The reports of the External and Internal Auditors are available to any Member State upon request.

Policy on Conflict of Interest

The ITU's policy on conflict of interest is covered in Regulation 1.6 on "Outside Activities and Interests" in the Staff Regulations and Staff Rules. In particular, Regulation 1.6b clearly states that: "Apart from their

work in the service of the Union, staff members shall not participate in any manner nor have any financial interest whatsoever in any enterprise connected with telecommunications. They may not accept any gratuities or favors from firms or private individuals concerned with telecommunications or having commercial relations with the Union." There is also Service Order 69 prohibiting supplementary payments to staff by Member States or any other entity.

International Financial Institutions

Recognizing the importance of corruption as an international development and financial issue, the United States has, in cooperation with other shareholder countries, aggressively pressed the international financial institutions to implement anticorruption strategies, policies, and programs. As a result, major financial 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. While significant progress has been achieved, more needs to be done. The following sections, prepared by the Treasury Department, provide a summary of steps taken by the six major international financial institutions.

International Monetary Fund (IMF)

The IMF works to improve transparency and governance at the IMF itself; it strongly encourages member countries to enhance transparency, strengthen governance, and take other steps to combat corruption. It is important to note, however, that IMF financing is provided to central banks in the form of general support to address balance of payments difficulties. Therefore, the IMF does not fund specific projects in member countries such as improving transparency and anticorruption programs. The IMF has, however, taken a number of steps to ensure that the integrity of its resources is safeguarded; it actively promotes transparency, good governance, and sound government financial practices among member countries.

Building on the emphasis on governance issues in its 1996 Declaration on "Partnership for Sustainable Global Growth," the IMF has demonstrated a strong commitment to good governance. Guidelines published in August 1997, *inter alia*, instruct IMF staff to place a high priority on promoting good governance and outline ways this might be accomplished. A February 2001, IMF Executive Board discussion reaffirmed the impor-

tance of governance issues and the general appropriateness of the 1997 Guidance Note. Consistent with this guidance, attention to good governance is reflected throughout a range of IMF work, including (1) the promotion of codes and standards embodying good practices with respect to transparency and governance and (2) the use of conditions in lending programs to further objectives in specific countries.

The IMF's emphasis on transparency and free markets can reduce the opportunities for corruption and enhance good governance throughout its membership. The IMF's fiscal policy advice, embodied in surveillance and country programs, promotes transparency and stronger fiscal management systems. Measures to liberalize trade and exchange regimes and to eliminate price controls—which are among the key components of IMF reform programs—can also reduce opportunities for corruption. The establishment of central bank independence can help end directed credits, preferential lending, and inflationary quasi-fiscal financing. Private sector development can help build respect for contracts and transparent rules of the game.

Specific IMF efforts to encourage transparency and good governance among member countries include the promotion of codes and standards. Countries are encouraged by a number of international organizations to adopt codes and standards on a wide range of good governance, financial, and economic practices. The IMF focuses on three areas: (1) provision of high quality and reliable data through the Special Data Dissemination Standard (SDDS) and the General Data Dissemination Standard (GDDS); (2) openness in fiscal policy through its Code of Good Practices on Fiscal Transparency; and (3) openness in monetary and financial policy through its Code of Good Practices on Transparency in Monetary and Financial Policies.

In some cases, implementation of codes and standards by countries is aided by IMF technical assistance in the design and implementation of fiscal and monetary policies; the development of key domestic institutions such as central banks, treasuries, and statistical services; the development of economic and financial legislation; and the implementation of other structural reform measures. IMF technical assistance is funded both by the IMF itself and through contributions from individual IMF member countries.

To further enhance transparency, the IMF now allows and encourages countries to make public staff reports on regular surveillance ("Article IV") reports covering exchange rate, balance-of-payment, and overall macroeconomic developments. As of the end of

April 2001, 86 such reports had been released. In addition, Public Information Notices (PINs) on IMF surveillance of member country economies, summarizing both staff assessments and Executive Board discussions, were published for over three-quarters of the Fund membership in 2000.

Applying Principles to Country Cases

Consistent with the IMF's increased emphasis on promoting good governance, measures to strengthen governance and eliminate corruption are now regularly included as conditions for IMF programs. Recent examples include the following:

- Uganda has taken several steps on governance consistent with its Poverty Reduction and Growth Facility (PRGF) program with the IMF. These include increases in the budget for anticorruption, enabling the Office of the Inspector General of Government to increase its professional staff from 40 to 100 and to establish regional offices to investigate allegations of corruption at the district level. Going forward under its Fund program, Uganda is reforming its procurement policy, working to enact legislation requiring public officials to disclose their assets, and making further improvements in key areas.
- Kenya's previous IMF program was suspended in August 1997, primarily over governance/transparency issues. Prior to the establishment of a new program in July 2000, anticorruption efforts were the subject of significant discussion. Several steps toward implementing anticorruption measures were taken before the program was approved: the letter of intent (LOI) for the program includes strengthened governance measures. Subsequent failure on the part of the government to achieve the governance-related conditions of its IMF program has resulted in the cessation of further disbursements until the conditions are met.
- In Albania's January 2000 PRGF review, civil service reform, improved budgetary management, and customs reforms were discussed as areas crucial to a functioning market economy and to Albania's medium-term growth prospects. In its May 2000 LOI, the Albanian government committed to a number of steps (all were made prior actions, i.e., required conditions for commencing or continuing IMF financing) to strengthen governance and reduce opportunities for corruption, especially in the customs area.

World Bank

The World Bank has taken a high profile among development banks in elevating the corruption issue. At the 1996 annual meetings of the World Bank and the IMF, World Bank President James Wolfensohn highlighted the "cancer of corruption" and pledged to address corruption on all fronts. In September 1997, the Executive Board approved a multifaceted plan to:

- Prevent fraud and corruption within Bank-financed projects.
- Help countries that request Bank assistance to reduce corruption.
- Take corruption more explicitly into account in country lending strategies and project design.
- 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 detailed anticorruption action plan to build on previous efforts.

The action plan calls for:

- Assisting countries that request Bank support.
- Mainstreaming anticorruption in the Bank's operations.
- Increasing knowledge and awareness about corruption.
- Controlling corruption in Bank-financed projects.
- Making in-house improvements.
- Supporting international efforts and partnerships.

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

The World Bank participates with the regional development banks in the Multilateral Development Bank Coordinating Committee on Governance, Corruption, and Capacity Building.

Internal Staff Ethics

The Bank's Code of Professional Ethics addresses conflicts of interest, the use of Bank resources, and staff accountability. The Ethics Office has been strengthened, and the Bank has moved forward to investigate alleged staff corruption. In 1999, the Bank's Code of Professional Ethics was updated, and an ethics helpline and an ethics webpage were launched. New harassment guidelines were issued that include sections on retaliation and confidentiality. A new grievance policy/process that emphasizes the role of informal dispute resolution (including mediation) has been developed and was implemented in 1999-2000. A confidential telephone hotline with multi-

lingual capabilities and a call-collect number is available for use by Bank staff and the public (1-800-831-0463). The Bank is taking steps to make the hotline better known. The Bank has also established several additional mechanisms, e.g., an e-mail hotline address and a drop box to mail in allegations.

Monitoring and investigations have been enhanced, including the use of outside experts, in an attempt to locate any problem 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 include lawsuits and staff dismissals. In 2001, the newly created Department of Institutional Integrity, arising from the merger of the Anti-Corruption and Fraud Investigations Unit and the Office of Business Ethics and Integrity, will assume responsibility for conducting all investigations on behalf of the Bank Group into allegations of fraud or corruption. This new department reports directly to the President.

Procurement and Financial Management

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 goods and services and for selection and employment of consultants. The amendments require that all borrowers, 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 Bank-funded 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 "no-bribery undertaking," which could be included at a borrowing country's request and as part of a country's anti-corruption program on certain Bank-financed contracts. The Bank also 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 World 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.

The World Bank actively participates in a working group of procurement officials from all of the international financial institutions. This Group has completed a best-practice Multilateral Development Bank Master Bidding Document for the Procurement of Goods (which is available on the World Bank's website) and has made significant progress in other areas. Additional steps will be identified through the working group to achieve agreement on uniform best-practice procurement documents and rules among international financial institutions.

As part of the stepped-up campaign against corruption, 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. Numerous 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. It is Bank policy to publish the names of these firms and individuals on its external webpage (<http://www.worldbank.org/html/opr/procure/debarr.html>).

In November 2000, the corruption investigations' function was strengthened by the newly reorganized Corporate Committee on Fraud and Corruption Policy. This Committee has policy-level coordinative responsibility for all of the Bank's programs intended to address problems of fraud and corruption, with the objective of ensuring that the Bank develops anticorruption policies and implementation strategies that are well-designed, comprehensive, coordinated, and effective.

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. The Bank's 1992 Guidelines on the Treatment of Foreign Direct Investment call 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 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 grassroots commitment to transparency and the reform process. Many countries are engaged in serious empirical diagnostic exercises, and others have expressed to the World Bank an interest in pursuing such in-depth analysis as a prelude to mounting anticorruption strategies. Information on the Bank's anticorruption work may be found on the Bank's website (<http://www.worldbank.org/wbi/governance>; and <http://www.worldbank.org/publicsector/anticorrupt/>)

The Bank is enhancing its dialogue with borrowing countries about the importance of reforming the management of their public sectors. Public expenditure reviews, country procurement assessment reports (CPARs), country financial accountability assessments (CFAAs), and institutional reviews are fundamental building blocks in the Bank's efforts to strengthen good governance. These diagnostic reviews are essential for the formulation of borrowers' action plans to address weaknesses in public sector budgeting, financial management, purchasing, and auditing.

The CPAR procedure, which was broadened and strengthened in June 1998, focuses on evaluating the quality of the country's public procurement system, its weaknesses, and the actions needed to improve the system. An objective of the CPAR process is to promote dialogue with the borrowing country government on the reforms necessary to make the country's public procurement systems and general commercial environment more efficient and transparent and more in tune with international practice. The CPAR is intended to provide key inputs to the World Bank's Country Assistance Strategy for the Bank to aid in the reform process. Another objective is to review existing borrowing country legislation and its compatibility with Bank policies to detect practices not acceptable under Bank-financed projects. The CPAR seeks to assess actual compliance with the country laws and regulations.

The CFAA is designed to enhance the World Bank's knowledge of financial accountability arrangements in the public and private sectors in borrower countries. The CFAA documents existing laws and practices, and compares them against accepted international standards, such as the International Monetary Fund's

Code of Fiscal Transparency, International Accounting Standards Committee's (IASC) International Accounting Standards, or the International Standards of Auditing of the International Federation of Accountants. Guided by country circumstances, CFAAs focus on such public sector issues as budgeting, accounting and financial reporting, internal control, use of information technology, and auditing. Legislative scrutiny of public sector financial management as well as private sector financial accounting and auditing practices, corporate governance and financial accountability, public access to information on public sector financial management, and regulations and activities relating to non-governmental organizations are also addressed. The CFAA supports both the exercise of the Bank's fiduciary responsibilities and the achievement of its development objectives through assessing the strengths and weaknesses of accountability arrangements and identifying the risk that these may pose to the use of Bank funds.

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. Bank assistance to countries has expanded rapidly since 1998. The Bank is working with governments and/or civil society, at their invitation, to help understand and address problems of public sector performance and corruption systematically. Sometimes this is done under the rubric of a specific "anticorruption program" and sometimes under the more general umbrella of public sector institutional reform. As of late 1999, the Bank was engaged in ongoing assistance to implement credible, concrete reforms in about ninety-five countries. A June 2000 report entitled *Helping Countries to Combat Corruption—Progress at the World Bank Since 1997* is available on the World Bank Group's website and provides more detailed information on the program.

The Bank also has suspended or withheld assistance to certain countries where governments resisted implementing effective anticorruption programs. With the implementation of IDA-12, governance and social policies are factors in determining the amount of IDA lending. Poor governance led to the postponement of a large Heavily Indebted Poor Countries (HIPC) grant, a temporary halt in lending to a country, and no lending to another country.

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.

In 1999, the AFDB approved a formal policy on good governance. The new policy focuses on accountability, transparency, participation, as well as legal and judicial reform, and gives 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 through the country performance assessment process.

The AFDB participates with the World Bank and other regional development banks in the Multilateral Development Bank Coordinating Committee on Governance, Corruption, and Capacity Building.

Internal Staff Ethics

The Articles of Agreement of the AFDB require that the Bank ensures the efficient use of its resources and limits the use of those resources to the legitimate purposes of the institution and for projects and programs approved by the Board of Directors. The AFDB is mandated by its shareholders to 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.

Procurement and Financial Management

The AFDB has focused on the importance of an efficient and competitive procurement process, both in Bank-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. 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 improve monitoring.

In 1999, the AFDB Board approved explicit fraud and corruption amendments to the AFDB rules. The amendments require that all borrowers of Bank loans, bidders, suppliers, contractors, and concessionaires under AFDB contracts must "observe the highest standards of ethics during the procurement and execution of contracts." The AFDB requires that borrowers include provisions against corrupt practices in the bidding documents.

Under the strengthened rules, the AFDB will reject award proposals if it is determined that the bidder engaged in corrupt or fraudulent practices. The AFDB will also cancel the portion of a loan allocated to a contract that was involved in corrupt or fraudulent practices. Firms will be ineligible for future AFDB-funded contracts, if they are determined to have engaged in corrupt activities. Procurement contracts may include provisions allowing the AFDB to inspect accounts and records of suppliers and contractors. A "no-bribery undertaking" could be included at a borrowing country's request and as part of a country's anticorruption program, on certain AFDB-financed contracts. The AFDB requires that borrowers use AFDB standard bidding documents. The Bank has taken action to enforce its policies. As part of the accelerated campaign against corruption, seven firms have been declared ineligible to be awarded an AFDB-financed contract for specified periods because they were found to have violated the fraud and corruption provisions of the procurement guidelines or the consultant guidelines.

The AFDB actively participates in a working group of procurement officials from all the international financial institutions. The working group has completed a best-practice Multilateral Development Bank Master Bidding Document for the Procurement of Goods and has made significant progress on three other documents. However, additional steps 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.

Since 1999 the AFDB's Internal Audit Department has carried out assessments (known as country approach audits) of borrowing countries' public sector management systems. These assessments have addressed, as appropriate, the country's financial and budget management systems, procurement systems, auditing systems, and management capacity.

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. It is strengthening 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 that 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 other 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. To bring the issue of governance to the forefront of Africa's development agenda, the Bank plans to devote its 2001 "African Development Report" to the imperatives of good governance.

Assistance to Member Countries

The AFDB has been taking corruption and governance into account in its country strategy papers. This work is now 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, legal, 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.

Asian Development Bank

The 1998 annual report of the Asian Development Bank (ADB) states that corruption played "a central role in weakening governance institutions that contributed to the Asian financial crisis" and was "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 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.

The 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. 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. The Bank has drafted an action plan to deepen and broaden its work in promoting good governance.

The ADB created an Anticorruption Unit within the Office of the General Auditor in 1999. The unit is responsible for screening allegations of fraud and corruption and conducting investigations. The procedural guidelines for processing complaints and allegations and for conducting investigations were issued in July 2000. Since its establishment, the unit has received 114 allegations of fraud and corruption, resulting in 13 sanctions being imposed. The ADB also participates with the World Bank and other regional development banks in a Multilateral Development Bank Coordinating Committee on Governance, Corruption, and Capacity Building.

Internal Staff Ethics

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

Procurement and Financial Management

The ADB has strengthened its auditing functions and capacities. The Office of the General Auditor conducts

independent appraisals and audits of the Bank's financial, accounting, and administrative operations. The Bank is required to take necessary measures to ensure that the proceeds of any loan made, guaranteed, or participated in by the ADB are used only for the purposes for which the loan was granted. The loan documents require that the borrower furnish to the ADB certified copies of such audited accounts and financial statements no later than 12 months after the end of each fiscal year. The ADB will impose sanctions if this 12-month limit is surpassed.

The ADB also has strengthened its procurement rules. Amendments approved in 1998 and 1999 add specific language on fraud and corruption and no-bribery pledges and 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. 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.

The ADB also takes steps to analyze the procurement and audit capacities of its member countries. It does this through TA (technical assistance), through governance assessments, and through information obtained from other organizations, including the World Bank's Country Procurement Assessment Reports (CPARs), and Country Financial Accountability Assessments (CFAAs). In 2000, the Bank completed diagnostic studies of accounting and auditing issues in seven member countries (Cambodia, China, Mongolia, Pakistan, Papua New Guinea, Uzbekistan, and Vietnam). The studies provide benchmarks against which these participating countries could measure their progress in improving financial management and governance arrangements, and identify potential actions that these governments could take to rectify weaknesses.

The ADB actively participates in a working group of procurement officials from all of the international financial institutions. The working group has completed a best-practice Multilateral Development Bank Master Bidding Document for the Procurement of Goods and has made significant progress on three other documents. Additional steps will be identified through the working group to achieve agreement on uniform best-practice procurement documents and rules among international financial institutions.

Research and Analysis

The ADB's activist stance on corruption responds in part to new research showing that corruption has signifi-

cantly 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, 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 now made by all ADB members to prohibit the bribery of public officials.

The ADB's analytical priorities are 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. A governance reform program for Mongolia was approved in 1999. A series of public reform/civil service streamlining programs are taking place in several Pacific Island countries. Legal reform and training work are being carried out in China, Tajikistan, and Pakistan. Ongoing assistance to increase public accountability includes regional technical assistance to review the auditing and accounting practices in Cambodia, China, Mongolia, Pakistan, Papua New Guinea, Uzbekistan, Vietnam, Kyrgyz Republic, Marshall Islands, and Sri Lanka. In Indonesia, the ADB is assisting in professionalizing public sector procurement. The ADB also finances technical assistance projects aimed at strengthening supreme audit institutions in its borrowing countries.

The ADB's law and development activities continue to support operations such as energy regulation, promo-

tion of public participation in the reform of agriculture and forestry, reform of banking and capital market laws, and strengthening of bankruptcy and liquidation regulation.

Like the World Bank's International Development Association replenishment (IDA-12), the Asian Development Fund's Seventh Replenishment (referred to as ADF-8) incorporated good governance criteria for allocating its resources. The Donors' Report, agreed on September 7, 2000, included the introduction for the first time of a performance-based allocation system, including a 30 percent weighting for governance.

European Bank for Reconstruction and Development

The European Bank for Reconstruction and Development (EBRD) operates in Central and Eastern Europe, including the Newly Independent States. Unlike the other regional banks that concentrate on assistance to developing countries, the EBRD's recipient members are countries in transition from centrally planned to market-oriented economies. EBRD funds are used strictly to finance projects that meet sound banking criteria, would not be fully financed by the private sector on appropriate terms, and have transition impact. The EBRD does not do program or structural adjustment lending. It has no soft concessional window. The EBRD is aware that rapid political and economic change in these countries, including large-scale 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 its projects are carried out 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. In the aftermath of the Russian financial crisis, the EBRD intensified its effort to improve the soundness and application of corporate law in its countries of operations. The EBRD vigorously defends its investments and, on several occasions, has taken legal action against investee companies in cases where EBRD's investments have suffered from asset stripping or poor corporate governance. The EBRD has reinforced its court actions by strongly advocating sound and independent judicial, regulatory, and supervisory frameworks in its public statements and dialogue with national and local authorities. The EBRD has also increased its scrutiny of countries' legal codes and has made corporate governance a central priority in its coun-

try strategies and project documents. In response to the Russian crisis, the EBRD has completed a thorough review of its portfolio including due diligence on clients' management practices.

The EBRD participates with the World Bank and other regional development banks in the Multilateral Development Bank Coordinating Committee on Governance, Corruption, and Capacity Building.

Internal Staff Ethics

The EBRD has focused on encouraging a culture of ethical behavior within its own organization. In addition to educating its staff on how to recognize 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 for its staff. The code broadly defines corrupt practices. 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 forbidden. Fraud investigation and disciplinary procedures are also in place. Monitoring and enforcement of conduct-related matters involve certain senior Bank managers, including the general counsel, the vice president of personnel and administration, and the head of internal audit, with all matters ultimately going to the president of the EBRD. In 2000, the Bank appointed a chief compliance officer responsible for ensuring that the highest standards of integrity are applied throughout all Bank activities. The independence of the chief compliance officer is supported by his reporting directly to the Bank's President.

Procurement and Financial Management

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

The EBRD routinely performs due diligence on prospective private and public sector clients. Its due diligence process verifies that procurement and contracting are carried out with no conflict of interest and that purchasing methods that 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, and 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. New fraud and corruption language 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. 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. Furthermore, 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. In 1999, the EBRD strengthened the standard terms and conditions of loan agreements that govern the EBRD's legal options in cases of money laundering and poor corporate governance.

The working group of procurement officials from all of the multilateral development banks provides a good forum to achieve agreement on uniform best-practice procurement documents and rules among international financial institutions. The EBRD actively participates in this working group, which has completed a best-practice Multilateral Development Bank Master Bidding Document for the Procurement of Goods and has made significant progress on three other documents. Additional steps will be identified through the Working Group 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 law, bankruptcy law, company law, telecommunications 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 closely monitors the work of the OECD and FATF working groups on money laundering and tax evasion. 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

The Inter-American Development Bank (IDB) is aware of the effects of corruption on economic and social development and has addressed the issue in various ways through its lending program over the last several years. Its lending activities reflect the clear consensus that has formed among all its shareholders on the need for modernization and reform of the public sector and national economies, and on the role of a smaller, efficient government that operates with accountability and transparency. The activities funded by the Bank to implement this consensus are intended to reform those regulatory or institutional frameworks and governmental structures or mechanisms that are most susceptible to public corruption and fraud.

Over the last few years, the effort to combat corruption has been discussed more explicitly in the context of governance and state reform. The Bank has been focusing on the issue of corruption itself more explicitly through: (a) supporting activities in specific member countries or in specific sub-regions on a case by case basis; (b) ensuring that Bank-funded projects and programs and Bank staff maintain the highest standards; and (c) participating in the international dialogue on corruption, to ensure that the issue is highlighted and addressed internationally.

On February 28, 2001, the Bank's Board of Executive Directors adopted a strategy, "Strengthening A Systemic Framework Against Corruption for the IDB." The policy paper reiterates the IDB's commitment to address corruption comprehensively, dealing with three separate but closely linked areas:

- ensuring that Bank staff act in accordance with the highest levels of integrity and that the institution's internal policies and procedures are committed to this goal;
- ensuring that activities financed by the Bank are free of fraud and corruption and executed in a proper control environment; and
- supporting programs that will help the borrowing member countries of the Bank strengthen good governance, enforce the rule of law and combat corruption.

An action plan of activities is underway to implement this anticorruption framework. Concerning internal

administration, the Bank will update its Code of Ethics, take steps to make staff and consultants more familiar with the code, and review its current policies and procedures for internal procurement.

Regarding the Bank's project control environment, the strategy emphasizes the need to upstream preventive controls in Bank projects and to have proper risk controls during the project cycle. The anticorruption action plan incorporates implementation of assessments of borrowing country public sector fiduciary management—including financial management and procurement and corruption risk assessments. There will be more monitoring of fiduciary risk during the execution of Bank projects.

In its lending programs, the Bank will expand its focus on civil service reform, support of corporate governance structures, and upgrading of accounting and auditing standards. Increased support will also be emphasized for anti-money laundering programs of the borrowing country members. The Bank will continue its ongoing programs in support of modernization of the state, including justice systems, good governance, strengthening of civil society, and increased competitiveness.

To monitor anticorruption activities at the Bank, an independent Oversight Committee on Corruption and Fraud was established in March 2001. The committee consists of the Executive Vice President, the Vice President for Planning and Administration, the General Counsel and the Auditor General. The Committee will be responsible for handling allegations of fraud and corruption against bank staff or in the Bank's activities.

The Bank's strategy to strengthen its anticorruption efforts is available on the IDB's Internet Website: <http://www.iadb.org/LEG/corruption.pdf>

Internal Staff Ethics

The IDB has in place a code of ethics to ensure the integrity of its employees. Alleged impropriety is investigated by the Office of the Auditor General. Additional safeguards are provided through an ethics committee, a conduct review committee, and an independent investigation mechanism composed of a permanent roster of expert investigators. Cases of malfeasance are few but have resulted in forced terminations. As mentioned above, the February 2001 Anticorruption Strategy includes an update of the Code of Ethics, and steps to make staff and consultants more familiar with the code.

Procurement and Auditing

In January 1998, the IDB strengthened its basic procurement policies and procedures by adding specific fraud and corruption language. Under the new policy, if

it is demonstrated that there have been corrupt practices, the IDB will reject a proposal to award a contract, declare a firm ineligible for future contracts under IDB-financed 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 forum to achieve agreement on uniform best-practice procurement documents and rules among international financial institutions. The IDB actively participates in this working group which has completed a best-practice Multilateral Development Bank Master Bidding Document for the Procurement of Goods and has made significant progress on three other documents. Additional steps will be identified through the working group to achieve agreement on uniform best-practice procurement documents and rules among international financial institutions.

In April 2001, the IDB hosted a seminar on the Implementation of International Standards for Accounting and Auditing. Improving accounting and financial disclosure through the development and implementation of higher standards of accounting and auditing are key to enhanced transparency and will support development of a more stable global financial environment.

Research and Analysis

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

In May 2000, the IDB hosted a Conference on Transparency and Development in Latin America and the Caribbean. The conference covered a variety of topics, including the IDB's policy on corruption, regional anti-corruption initiatives, and the future of the Inter-American Convention Against Corruption.

Assistance to Borrowers

The Bank has financed programs, provided technical assistance, and sponsored other activities that have

assisted its borrowers in, *inter alia*, (a) reforming tax and budgetary systems; (b) modernizing the public sector; (c) redefining the state's role and involvement in the various sectors of the economy; (d) strengthening the institutions of the executive, judicial and legislative branches; and (e) establishing appropriate regulatory and governmental supervisory functions. As a result of this focus on programs linked to governance, state reform and capacity-building issues, the Bank has long been active in reducing the opportunities for corruption to flourish.

In addition, the Bank is funding specific anticorruption activities on a case-by-case basis, as requested by borrowing member countries. In Colombia, the Bank is actively involved in supporting the newly installed government's efforts to develop a national anticorruption strategy. In other countries, such as Argentina and the Dominican Republic, recently approved projects or upcoming projects that deal with public sector reform contain components explicitly addressing anticorruption activities. In Central America, the IDB is supporting efforts to maximize the integrity and transparency of the reconstruction efforts underway in the wake of Hurricane Mitch. Also on a regional basis, the Bank is proceeding with a program to support national general controllers' offices in detecting fraud and corruption. Another regional technical cooperation will support the use of information technology and communications for greater transparency in public procurement.

Special mention should be made of the Bank's efforts to address the serious problem of asset laundering in the region. In December 1994, the IDB was given a clear mandate by 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. During the Bank's 1998 Annual Meeting, it hosted a seminar on international money laundering, inviting representatives from various international entities, including the OECD's Financial Action Task Force (FATF), and academicians to speak on the issue. The Bank funded a training program for banking regulators and bank officials in the region, whose executing agency was the Organization of American States' (OAS) International Commission for the Control of Drug Abuse (CICAD). The Bank also funded a study with CICAD for judges and prosecutors in the region who supported training activities in prosecuting asset-laundering cases. There are ongoing discussions with various national governments regarding anti-asset laundering programs to be executed on a

national or subregional basis. The Bank also signed a letter-agreement with the Vienna-based United Nations Office for Drug Control for increased cooperation in various areas, including asset laundering.

The Inter-American Convention Against Corruption: OAS and IDB Cooperation

The Bank's shareholders have indicated their political will by jointly attacking corruption. Under the auspices of the OAS in 1996, the countries of the hemisphere signed the first regional convention specifically designed to attack corruption—the Inter-American Convention Against Corruption. The Convention calls for collective action in various areas, including transnational bribery, illicit enrichment, extradition, judicial cooperation, the exchange of evidence and the seizure and forfeiture of property, in relation to crimes of corruption. Furthermore, the Organization of American States General Assembly adopted in 1997 an inter-American program for the cooperation against corruption that lays out a common set of goals and activities for the member states of the institution.

The OAS and the Inter-American Development Bank signed a cooperative agreement on March 26, 1999, which led to the OAS/IDB project, "The State of Criminal Legislation vis-à-vis the Inter-American Convention Against Corruption." This project will support twelve OAS member countries in incorporating the Inter-American Convention Against Corruption into their domestic legislation, in particular, as regards the provisions of criminal law. This initiative will be carried out through technical investigations that will analyze the state of criminal law vis-à-vis the terms of the Inter-American Convention that will then be expanded upon at workshops organized for that purpose. Organizations representing civil society will be invited to participate both during the implementation of this project and in its followup. The intended result is the creation of an exchange network for information and cooperation which could, in turn, promote a broader debate on this issue.

On October 5-6, 2000, a follow-up workshop to the Implementation Program for the Inter-American Convention against Corruption was held in Santiago, Chile. Both the General Secretary of the OAS and the President of the IDB attended the meeting. The workshop marked the beginning of a new cycle of technical meetings that will analyze the adequacy of the penal laws in countries that have ratified the Inter-American Convention.

Major International Organizations

Organization of American States

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

Debate in the 1994 OAS General Assembly sparked a long-term commitment to address the problems of bribery and corruption in the hemisphere. Members called for stronger efforts to fight corruption, improve the efficiency of government operations, and promote transparency in the management of public funds. To advance these goals, the General Assembly adopted a resolution establishing the Probity and Public Ethics Working Group with a mandate to study issues related to good governance and ethics.

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 that, among other things, mandated negotiation of an Inter-American Convention Against Corruption (Inter-American Convention). The convention was successfully negotiated and signed by twenty-one countries on March 29, 1996. Eight additional countries later signed the Inter-American Convention, including the United States, which signed on June 2, 1996. The Convention entered into force on March 6, 1997. The United States has actively supported this OAS initiative. Twenty-two countries have deposited instruments of ratification with the OAS as of June 2001. The United States ratified the Inter-American Convention on September 15, 2000, and deposited its instrument of ratification on September 29, 2000.

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

Reflecting continued member interest in unethical practices, the OAS also adopted in 1997 an Inter-American Program for Cooperation in the Fight Against Corruption. The program called for several initiatives:

- 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.
- Formulating educational programs.

In June 2000, the OAS General Assembly approved Resolution AG/RES.1723 which instructed the Permanent Council:

to analyze existing regional and international follow-up mechanisms with a view to recommending, by the end of 2000, the most appropriate model that States Parties could use, if they think fit, to monitor implementation of the Convention. That recommendation will be transmitted to the States Parties to the Convention for them to choose the course of action they deem most appropriate.

This mandate was referred to the Working Group on Probity and Public Ethics which convened on September 7, 2000. By the end of the year the Working Group recommended the creation of a body of experts as the mechanism to promote the implementation of the Inter-American Convention and to “facilitate technical cooperation activities, the exchange of information, experience and best practices, and the harmonization of the anticorruption legislation of the States Parties.”

On January 18, 2001, the Permanent Council accepted the Working Group’s recommendations and transmitted them to the States Parties in Resolution CP/RES.783. The States Parties met on March 21-23, 2001 in Washington, D.C. to enhance and clarify the terms of the mechanism. At a meeting in Buenos Aires on May 2-4, 2001, the States Parties agreed upon a mechanism that their representatives formally agreed to establish on June 4, 2001, on the margins of the OAS General Assembly meeting in San Jose, Costa Rica.

The mechanism creates a Committee of Experts that will be responsible for several duties, including the selection of topics under the Inter-American Convention to be reviewed and the countries to be evaluated, and the issuance of a report on each State Party analyzed. These reports will be made public. The Conference of the States Parties that have ratified the Inter-American Convention will have the overall responsibility for the successful

implementation of the mechanism. The Committee will have the responsibility for adequate civil society participation in the monitoring process.

Organization for Economic Cooperation and Development

The OECD has been a leader in the global fight against bribery and corruption. It has served as a key forum for industrial countries in developing an international consensus on combating corruption. Through its activities, the OECD addresses corruption from the perspective of both the recipients of illicit payments, for example by promoting public ethics and good governance, and the providers of illicit payments, by promoting initiatives to stop the flow of such payments at their source. The OECD membership is currently composed of thirty countries (the Slovak Republic recently became a member), 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.

The OECD has achieved several important breakthroughs in the fight against corrupt practices. In 1996, its members adopted a recommendation that all members should prohibit the tax deductibility of bribes to foreign public officials. Prior to that, 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, closely follow the provisions of the FCPA.

On November 21, 1997, negotiators from thirty-four countries (all 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. In less than two and a half years, this important anticorruption instrument is nearing full ratification; thirty countries now have laws on the books that make it a crime to bribe foreign public officials in international business

transactions, and thirty-two have deposited instruments of ratification with the OECD Secretariat. 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. In addition, the U.S. Government has established a program to monitor implementation of the Convention, of which the preparation of this annual report to Congress is an integral part. For a complete report on implementation of the OECD Bribery Convention, including progress towards denying the tax deductibility of bribes, please refer to the relevant sections of this report.

OECD support for international anticorruption initiatives has gone beyond negotiating the Convention and monitoring its implementation. A number of these initiatives have been undertaken by the OECD Anti-Corruption Division, the OECD Development Center, and the Trade Committee.

The Anti-Corruption Division serves as the focal point within the OECD Secretariat to support the work of the OECD in the fight against bribery and corruption in international business transactions. Its work is directed by the Working Group on Bribery, which is made up of experts from signatory countries, and it is responsible for implementing a program of systematic followup to monitor and promote full implementation of the Convention and related instruments. (See Chapter 3, Monitoring Process for the Convention.) In addition, the Division provides extensive information on the Convention and anticorruption issues in general and engages in outreach activities with non-member countries.

The Division's Anticorruption Ring Online (AnCorR Web) offers access to more than 5,000 selected references to books, journals, papers, reports, and other documents dealing with corruption and bribery, as well as a large range of downloadable electronic resources. Its resources cover a wide range of topics, including studies on the nature, cause, and impact of corruption; corporate governance and business self-regulation; public ethics, governance and management; regional initiatives; and laws and legal studies. Documents include the text of antibribery laws in OECD and non-OECD countries, as well as international treaties and conventions dealing with bribery and corruption. AnCorR Web's goal is to disseminate information on all aspects of corrupt practices and efforts to address them. This information, available to governments, businesses, and civil society is made available to help them understand and effectively implement policies and practices in the area of anticorruption and to promote increased understanding and collaboration between these groups.

The purpose of the Division's outreach activities is to expand the range of countries that incorporate the standards of the Convention and other anticorruption instruments, to raise awareness of the problems of corruption, and to strengthen the cooperation between the various stakeholders involved in the fight against corruption. The activities rely on the development of partnerships among major anticorruption participants such as governments, the business community, NGOs and civil society, the media, and international organizations. In developing outreach programs, the Division has collaborated with many public and private sector groups, including the U.S. Agency for International Development, the Asian Development Bank (ADB), the European Union (EU), the Organization for Security and Cooperation in Europe (OSCE), and Transparency International. In addition to organizing its own workshops, conferences, and seminars, the Anti-Corruption Division participated in other international forums to disseminate information about the Convention and promote its objectives.

Initiatives included among the outreach are the Stability Pact Anticorruption Initiative for South East Europe (SPAI), the Anticorruption Network for Transition Economies, and the joint ADB/OECD Forum on Combating Corruption in the Asia-Pacific Region.

Several important outreach events took place in 2000-2001, including an informal meeting with Russian officials and civil society representatives on February 26-27, 2001, in Moscow to assess current efforts to fight corruption in the Russian Federation. The Anti-Corruption Network for Transition Economies, which focuses on strategies to reduce corruption in the public sector, was re-activated this year with a successful meeting in Istanbul on March 20-22, 2001. Participants agreed to pursue a more systematic approach to anticorruption efforts in four strategic areas including the rule of law and civic action. Two important anticorruption programs, the ADB/OECD Initiative for Asia-Pacific and the Stability Pact Initiative for South East Europe, continue to provide a framework for diagnosing regional corruption problems and identifying solutions. The Asia-Pacific Initiative was launched at a workshop held in Manila in October 1999, and was followed by a conference held in Seoul, Korea in December 2000, at which participants formally endorsed the initiative. On May 23-25, 2001, experts from nine Asian countries and officials of the ADB, the OECD, and other interested parties met in Manila, the Philippines, which resulted in a working draft of an Anti-Corruption Action Plan for the Asia-Pacific region. The proposed Action Plan contains legally non-binding principles and standards for strengthening

national and regional efforts to combat corruption. The draft text prepared by the experts will be proposed to interested countries of the region for their consideration and possible endorsement at the next annual conference, hosted by the government of Japan in Tokyo on November 28-30, 2001.

Other important anticorruption work has been undertaken in the OECD outside the Division. With a view to taking measures to deter bribery in officially supported export credits, the OECD Working Party on Export Credits and Credit Guarantees agreed in November 2000 on an Action Statement on Bribery and Officially Supported Export Credits. Among other things, such action may include informing applicants requesting support about the legal consequences of bribery in international business transactions, having an applicant provide an antibribery undertaking or declaration, and refusal to approve credit, cover or other support if there is sufficient evidence that bribery was involved in the award of the export contract. The Action Statement can be viewed on the OECD website at <http://www.oecd.org/ech/docs/bribery-en.pdf>.

The OECD Development Center has conducted policy-oriented research on corruption in developing countries since 1996. Recognizing that in many developing countries customs efficiency is hampered by widespread corruption, which creates a major disincentive and obstacle to trade expansion among other consequences, the Development Center examined the nature of customs corruption and released a Technical Paper in April 2001 that suggests some practical paths to integrity. The Paper was based on fact-finding studies of recent experience of customs reform in Bolivia, Pakistan, and the Philippines.

Seeking to build on the experience in the OECD, and given the deep-seated relationship of bribery and corruption to the entire global trading system, the U.S. government has strongly supported work in the OECD Trade Committee on corruption as it relates to trade. An objective of such work is to identify the practices or characteristics of a trade regime that may be susceptible to bribery and corruption. To move forward on this issue, the Trade Committee has undertaken an inspection of the available data sources regarding to corruption in customs processing, import licensing, pre-shipment inspection, and government procurement. This inventory of data should help the Trade Committee decide whether further trade-related analysis is desirable and, if so, in which particular fields.

The OECD Guidelines for Multinational Enterprises (the Guidelines) offer yet another vehicle for advancing the goals of the Convention. Originally adopted in 1976,

the Guidelines are non-binding recommendations to enterprises made by the thirty-three governments that adhere to them. Their aim is to help multinational enterprises (MNEs) operate in harmony with government policies and with societal expectations. In the most recent revision adopted by the OECD ministers on June 27, 2000, an entire chapter on combating bribery that tracks closely the key provisions of the Convention was inserted into the text of the Guidelines. While the Guidelines are voluntary and not legally enforceable, they draw attention to the pernicious effects of bribery and corruption and encourage companies to take a proactive approach to addressing the problems. The follow-up mechanism described in the Procedural Guidance details how the National Contact Points for the guidelines can assist parties in resolving issues pertaining to the Guidelines.

The OECD has also collaborated with the World Bank on a series of public/private sector roundtables aimed at improving corporate governance and identifying possible assistance needs. Roundtables have been established in Asia, Eurasia, Latin America, and Russia; the 2001 meetings will take place in Argentina, Singapore, Tbilisi (Georgia), and Russia.

The OECD and the European Union (EU) established the Support for Improvement in Governance and Management in Central and Eastern European Countries (SIGMA) program to help thirteen countries in the region reform public administration and strengthen the integrity of state institutions. The SIGMA program was established to provide assistance to 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 government service to the public and businesses; and enhancing the effectiveness of laws and regulations. The SIGMA program has been "reinvented" to strengthen its approach to EU candidate countries and change the management of technical assistance to others, but the programs will retain their anticorruption focus.

The Organization for Security and Cooperation in Europe

The Organization for Security and Cooperation in Europe (OSCE) is a regional security organization whose fifty-five participating states are in Europe, the former Soviet Union, and North America. The United States is one of the organization's founding members. Established under the authority of Chapter VIII of the United Nations Charter, the OSCE serves as a primary instrument for early warning, conflict prevention, crisis management,

and post-conflict rehabilitation in the European and Eurasian region. The OSCE addresses a wide range of security-related issues, including arms control, preventive diplomacy, confidence-building and security-building measures, human rights, election monitoring, and economic and environmental security.

The OSCE has established as one of its priorities consolidating the participating states' common values and helping build fully democratic civil societies based on the rule of law. The OSCE continues to provide active support for promoting democracy, the rule of law, and respect for human rights throughout the OSCE area.

Over the past two years, the United States has sought to focus attention to the threats posed by organized crime and corruption in OSCE participating states, particularly those in economic and political transition. At the annual meeting of the OSCE Parliamentary Assembly in 1999, the U.S. delegation called for convening an OSCE Ministerial meeting to develop a strategy to address these threats. In November 1999, at the initiative of the United States, the OSCE Istanbul Summit Charter on European Security identified corruption as a significant challenge to stability of the region. The Summit requested the OSCE Permanent Council to review activities against corruption in other global and regional forums, and determine what steps the OSCE should take in response to this problem. In addition, the OSCE Parliamentary Assembly focused on "OSCE Challenges in the 21st Century-Good Governance: Regional Cooperation, Strengthening Democratic Institutions, Promoting Transparency, Enforcing the Rule of Law and Combating Corruption" at its annual meeting in Bucharest on July 6-10, 2000. In November 2000, the Permanent Council approved a report by the chairman-in-office that identified OSCE activities and its missions in member states to promote measures against corruption. Governance and corruption were the subjects of the OSCE Economic Forum held in Prague in May 2001, after three preparatory seminars in Almaty, Brussels and Bucharest. The U.S. Government has announced that it will provide financial support to OSCE anticorruption projects proposed by OSCE Missions. In addition, the U.S. Department of Commerce has offered to cooperate with OSCE Missions in implementing bilateral programs to promote business ethics.

The U.S. Commission on Security and Cooperation in Europe, the Congressional-Executive Branch body that monitors U.S. participation in the OSCE (commonly known as the "Helsinki Commission"), has supported the organization's initiatives to combat corruption. The Commission, created by Congress in 1976, consists of nine members from the United States Senate, nine mem-

bers from the U.S. House of Representatives, and one member each from the Departments of State, Defense, and Commerce. At a hearing of the Commission held on March 23, 2000, Commission Chairman Rep. Christopher H. Smith testified that widespread corruption in the countries of the OSCE "threatens their ability to provide strong independent legal regimes, market-based economies and social well-being for their citizens." The full text of the testimony is available at www.house.gov/csce/.

United Nations

As an international organization with broad membership, the United Nations can play 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 adherence to international agreements, such as the OECD Antibribery Convention and the Inter-American Convention Against Corruption.

Over the past decade, the United Nations has undertaken a variety of initiatives to promote discussion of corruption and its damaging effects and to assist member states in their efforts to address the problem. Both the General Assembly and the Economic and Social Commission have debated these issues at length and endorsed a number of resolutions in support of corrective action. Corruption and bribery have also been the subject of specialized meetings, such as the 2001 UN Crime Commission.

In 1996, the General Assembly adopted an International Code of Conduct for Public Officials and recommended that member states use the code as a tool to guide their efforts against corruption. That same year, the General Assembly approved 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. Acting in parallel with the OECD, the General Assembly 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 General Assembly reiterated its interest in promoting business integrity in 1998 with the adoption of a new resolution calling for international cooperation against corruption and bribery in international commer-

cial 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. On December 22, 1999, the General Assembly adopted the U.S.-sponsored "Business and Development" resolution (54/204) calling upon governments to undertake anticorruption and antibribery efforts in order to create an enabling environment for business. At the same session, the General Assembly also adopted a complementary Guyana resolution (54/205) that supports strengthening national and international capacities to combat corrupt practices and bribery in international transactions.

The United States led a successful effort in 1999 to include a provision on official bribery in the Convention on Transnational Organized Crime. The provision obligates parties to the convention to establish as criminal offenses acts of bribery involving domestic public officials. The Convention also addresses bribery of foreign public officials, but this provision is not mandatory.

In addition, the General Assembly approved a resolution in December 2000, recommended by the Crime Commission in April 2000, to negotiate under UN auspices a global instrument against corruption. The Crime Commission Secretariat analyzed existing international instruments, recommendations, and discussions relating to corruption; it also prepared a study for the Crime Commission's regular session in May 2001. At that session, the Commission issued a report that comprises recommendations and guidance for an experts group that will meet at the end of July to develop the terms of reference for the future instrument against corruption. An ad hoc committee to begin negotiations, open to all UN members, will meet in Vienna in early 2002.

The Center for International Crime Prevention (CICP), the UN secretariat for crime matters, has developed a Global Program Against Corruption that is now being implemented in several countries. This program begins with detailed studies as to the extent of the corruption problem in each participating country, and uses CICP experts to help participating governments create detailed action plans for addressing identified problems.

The United Nations Commission on International Trade Law (UNCITRAL) continues to provide 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. Several countries have based their procurement laws or standards on provisions of the UNCITRAL Model Law. Many of the new democracies in Eastern Europe and the Newly Independent States have benefitted from UNCITRAL projects. Albania and Poland, for example, have already enacted legislation based on the UNCITRAL model law.

World Trade Organization

Bribery and corruption can affect international trade in many different ways. If left unchecked, they can negate market access gained through trade negotiations, undermine the foundations of the rules-based international trading system, and frustrate broader economic reforms and stabilization programs. U.S. firms report a variety of problems, but two key issues involve customs and government procurement. Bribes or "facilitation fees" from foreign customs officials can be an every day element of the customs importation process in many countries. Another consistent complaint is that U.S. firms' experiences in bidding for foreign government procurement contracts suggest that corruption frequently plays a significant role in determining how and to whom those contracts are awarded.

The United States has pressed the World Trade Organization (WTO) to take action to help prevent corruption in both these areas. With strong U.S. leadership, the WTO Working Party on Preshipment Inspection issued a report in 1999 that included several immediate actions to be undertaken by members to strengthen the operation of the Agreement on Preshipment Inspection. The United States has also led an initiative to ensure full and timely implementation of the WTO Agreement on Customs Valuation. At the WTO Import Licensing Committee, the United States continues to promote transparency and openness by urging all members of the WTO to implement the Agreement on Import Licensing Procedures by notifying any and all import licensing regimes as well as their intended purpose. Finally, as part of the followup to the 1996 WTO Singapore Ministerial decision to undertake exploratory and analytical work on the simplification of trade and customs procedures, the United States has identified customs integrity as a priority item.

At the WTO Ministerial Conference in Singapore, the United States succeeded in securing agreement to initiate work on transparency in government procurement. The focus on transparency offers many potential benefits. One in particular is that corruption cannot survive in an environment of openness and accountability where individual decisions are made in accordance

with a predictable set of rules. Since the Singapore Ministerial Conference, the WTO Working Group on Transparency in Government Procurement has made great progress on its mandate to study how WTO members can ensure transparency in government procurement, and to develop elements for inclusion in a potential multilateral agreement.

¹See BG138-2, "List of Participants and Composition of the Board of Governors, International Telecommunications Satellite Organization, One Hundred Thirty Eighth Meeting, 2-9 March 2001."

²See MS-32-17, "1 March 2001 Determination of Investment Shares."

³See INTELSAT Annual Reports of 1997, 1998, 1999.

Private Sector Involvement in Monitoring and Implementation

The U.S. government has actively sought to involve the private sector in efforts to combat the bribery of foreign public officials and support the Convention and effective antibribery policy and legislation. The U.S. private sector played a key advisory role throughout the negotiation of the Convention. Private sector support proved to be of great importance in achieving international agreement on the Convention and encouraging signatories to pass implementing legislation. This productive collaboration has continued since the Convention came into force. The private sector has helped to publicize the Convention, bring attention to the problem of corruption and bribery in international business, and to provide useful information on progress that signatories are making in combating corrupt practices. We will continue to encourage the private sector and nongovernmental organizations play an active role in monitoring and implementation of the Convention as we move to Phase II, the enforcement phase of monitoring the Bribery Convention. The Bush Administration values input from the private sector, and will make every effort to inform the private sector of its anticorruption policies, particularly concerning the implementation and enforcement of the Bribery Convention. The active participation of the private sector and nongovernmental organizations will be instrumental in the effectiveness of the Convention.

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 sought to involve the private sector in antibribery initiatives. For the past thirteen years, U.S. officials have met frequently with the private sector about international bribery and have both sponsored and participated in anticorruption conferences around the world. U.S. officials have also hosted and attended many government-private sector informational meetings on anticorruption matters. They have also solicited the views of many individual private sector entities regarding international anticorruption strategies in the OECD and other international forums, including 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 private sector plays an active role in shaping U.S. anticorruption strategy.

Efforts to Engage the Private Sector on the Convention

The Bush Administration has already spoken out and initiated an active dialogue with the private sector on how

to address the problem of bribery of foreign public officials and support effective implementation of the Convention.

Secretary Donald L. Evans, Secretary Colin L. Powell and Attorney General John Ashcroft have raised the Convention and bribery issues in different contacts with private sector groups. At the May 2001, OECD Ministerial, Secretary Evans made it clear that the Bush Administration is determined to fight bribery and corruption in international business transactions. Recognizing that the OECD Antibribery Convention was a significant step to eliminate these activities, the Secretary in meetings with business and labor representatives committed the Commerce Department to continue to promote efforts to have the Convention implemented and enforced by every signatory and urged the groups' support on this and other issues.

In May 2001, at the Council of the Americas 31st Washington Conference, Secretary Colin L. Powell urged participants to fight corruption, noting that corruption can destroy the strongest democracy if it is not dealt with effectively. Also, in May 2001, in a speech delivered during the Second Global Forum held in the Netherlands, which many private sector representatives attended, U.S. Attorney General John Ashcroft urged countries not to wait for further anticorruption studies or additional international agreements before implementing their existing treaty obligations. In addition, he recommended widespread adoption of mutual evaluations of a country's anticorruption regimes.

On separate occasions, other senior Commerce, State, and Justice officials have also engaged private sector representatives in discussions on the Convention and the need for strong enforcement of antibribery legislation. In addition to these senior-level contacts, officials of the Commerce, Justice, State, and Treasury departments have been communicating with the private sector on Convention-related issues in a variety of other channels.

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. In addition, U.S. officials 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 are also making 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, Industry Functional Advisory Committees, and the President's Export Council. 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 governments. TABD members continue to stress the importance of fighting corruption and bribery at their annual conferences. The State Department receives input on bribery issues through its Advisory Committee on International Economic Policy.

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

The U.S. government greatly values its ongoing working relationship with the private sector and non-governmental organizations, like Transparency International, and will seek to include other organizations in its dialogue on corruption issues. The International Trade Administration's Trade Compliance Center has used 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. Importantly, the business community and nongovernmental organizations can help our anticorruption efforts by reporting instances of alleged bribery and possible violations of Convention obligations directly on the Trade Compliance Center's Trade Complaint Hotline at mac.doc.gov/tcc.

The U.S. government, for its part, will continue to share as much information as possible about the monitoring process with the private sector. We are of the firm opinion that private sector participation in Phase II of the monitoring process is crucial and will continue to advocate for openness and transparency in the process. U.S. officials respond to public inquiries on the

Convention and the status of its implementation on a daily basis. The Commerce, Justice, and State departments 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 also 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. Commerce has provided detailed information on the status of the implementation of the Convention by our trading partners. Commerce's Trade Compliance Center has included on its website an Exporters' Guide to help businesses understand key provisions of the Convention. In addition, the U.S. Office of Government Ethics has a website with information on anticorruption issues. The Department of State has issued a new 2001-03 edition of *Fighting Global Corruption: Business Risk Management*. This publication is designed to assist businesses and organizations in navigating the international anticorruption environment.

The U.S. government has strived over the years to build a strong working relationship with the U.S. private sector in order to combat international bribery and corruption. U.S. officials are committed to maintaining this valuable relationship as they seek to ensure effective implementation and enforcement of the Convention.

Additional Information on Enlarging the Scope of the Convention

The International Anti-Bribery and Fair Competition Act (IAFCA) directs the Department of Commerce to review additional means to enlarge the scope of the Convention or otherwise increase its effectiveness, while 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 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 Foreign Corrupt Practices Act (FCPA.)

Additional Individuals and Organizations and Other Means of Enlarging the Convention

Chapter 6 reviewed U.S. efforts to strengthen the Convention by broadening its 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 public office as in the FCPA. Failure to cover such bribes may prove to be a significant loophole. The OECD Working Group on Bribery is charged with examining these issues

as it reviews the five outstanding issues on the Convention: 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; and the role of off-shore centers in bribery transactions. In successive ministerial communiqués, OECD ministers have called for attention to these issues and indicated in the 2001 communiqué that the "OECD will move ahead on" these issues. In the context of these discussions, the issue of payments to immediate family members has also been raised by the United States informally with Working Group 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. Nonetheless, over the past year important work advancing some of these issues—primarily work towards the issuance of questionnaires to review the potential scope of the problems—has been undertaken by the Working Group. (*See* Chapter 6.)

In the year ahead, we will continue to work to advance the outstanding issues on the Working Group's agenda of key concern to the United States. Particularly

now that the Working Group is going to review country responses to a questionnaire specifically concerning the issue of bribe payments to political parties and candidates, we will make further efforts to convince other signatory countries that there is at least a potential loophole which should be explored and addressed.

After we have more experience with monitoring implementation and enforcement 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 Revised Recommendation of the Council on Combating Bribery in International Business Transactions (Revised Recommendation). Article 8 directs signatories to take certain measures regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards in order to prohibit certain practices that might facilitate the bribing of foreign public officials or of hiding such bribery. The Revised Recommendation, however, 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 Revised Recommendation. OECD members had previously accepted the Revised Recommendation, and the United States will continue to encourage them to institute those practices without delay. Article X of the 1997 recommendation instructs the OECD's Committee on International Investment and Multinational Enterprises (CIME), through the Working Group, to review the Revised Recommendation within three years of its adoption. The Working Group will consider proposals for carrying out such a review at its June 2001 meeting. As part of the process, the Working Group will consult informally with representatives of the private sector, the OECD's Business and Industry Advisory Council (BIAC), the Trade Union Advisory Council (TUAC), and civil society to examine ways to strengthen the monitoring of accounting and auditing related commitments under the Convention and the Revised Recommendation. To contribute to the process, a task force organized by Transparency International (TI) has

analyzed data in the areas of books and records, internal controls, and auditing practices and documented current practices in 16 countries, including the 11 largest exporters. The task TI force has developed country-specific observations which are included in a report entitled, *Country Analysis and Observations*. In addition, certain overall observations developed by the task force are included in the report. The Working Group will consider the findings of this report when it addresses this issue at the June 2001 Working Group meeting. The report can be found on the TI-USA website at http://www.transparency_usa.org/Overall%20Obser.htm

Impact on U.S. Business

The U.S. government has long been aware of the problems that the bribery of foreign public officials poses for international business and good governance. In the 1970s, widely publicized incidents of bribery by U.S. companies damaged the reputation of U.S. business. It was because of such problems that 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 left U.S. firms at a disadvantage relative to their foreign competitors who were able to bribe foreign officials without fear of penalty and even benefitted 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.

Over the past several years, the U.S. government has received reports indicating that the bribery of foreign public officials influenced the awarding of billions of dollars in contracts around the world. While it is not possible to verify the accuracy or completeness of all these reports, we believe that they are indicative of how widespread the bribery of foreign public officials has been in recent years. Based on information available from a variety of sources, we estimate that in the period from May 1994 through April 2001, the competition for 414 contracts valued at \$202 billion may have been affected by

bribery involving foreign firms. U.S. firms are believed to have lost at least 101 of these contracts, worth approximately \$30 billion, to foreign competitors offering bribes. In just the last year, from May 1, 2000 to April 30, 2001, the competition for 61 contracts worth \$37 billion may have been affected by bribery of foreign officials, and of these U.S. firms are believed to have lost at least nine contracts, worth approximately \$4 billion. Firms, from Convention signatory countries continue to account for about 70 percent of these allegations. In other cases, we understand that U.S. firms withdrew from contract competitions because foreign officials demanded bribes or do not even seek business in countries where bribery is prevalent. Rampant bribery in some countries is particularly dissuasive to small and medium-sized exporters. These exporters can least afford to expend the extensive resources often required to make bids, if they must take the chance that the outcome of their efforts will not be determined entirely by commercial considerations. Bribery allegations were connected to contracts in several sectors, including energy, telecommunications, construction, transportation, and military procurement.

According to available information, firms from fifty-three countries are alleged to have offered bribes, and officials in 112 countries are alleged to have received them in the period from May 1994 through April 2001. The largest number of incidents, about 30 percent of the total, was reported to have occurred in Asia. Among the alleged bribe recipients in other regions, 24 percent were in Latin America; 19 percent in Europe; 14 percent in Sub-Saharan Africa; and 13 percent in the Middle East.

The amount of reported bribe offers was worth up to 30 percent of a contract's value. Firms alleged to have offered bribes won nearly all the contracts in the deals for which we have information on the outcome. When companies alleged to have offered bribes lost a competition for a contract, it usually was to other firms alleged to have offered bribes.

We are disturbed by the continuing reports of alleged bribery of foreign public officials by firms based in countries for which the Convention is in force. Therefore, in the coming year we will redouble our efforts to encourage the relevant authorities in each Party to address all credible allegations of bribery of foreign public officials. In addition, the Phase II monitoring reviews of national enforcement mechanisms and practices will provide further opportunities for the United States to emphasize the importance of making the Convention a truly effective instrument in the battle against international bribery.

We recognize that governments can also take preventive actions when we learn bribes are being unlaw-

fully solicited in an international tender. We will seek to engage other signatory governments to take coordinated action to approach the tendering governments to let them know our companies cannot pay bribes, will not pay bribes, and that such tenders must be decided based on the commercial merits of the proposal.

In his statement on corruption submitted to the Second Global Forum on Fighting Corruption at The Hague on May 28-31, 2001, President Bush emphasized that recent anticorruption efforts are exposing corrupt practices to the light of day where they cannot survive. Increasing accountability and transparency in governance around the world is an important foreign policy objective for the Bush Administration—as is creating a level playing field for lawful business activities.

U.S. agencies will continue to take measures to help U.S. business deal with the problem of international bribery. As noted elsewhere in this report, U.S. officials are 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 is being given to the needs of small and medium-size exporters, which face an especially difficult challenge in dealing with international bribery and corruption.

The Commerce Department offers several services to aid U.S. businesses seeking to address transnational business related corruption issues. For example, the Commercial Service of the Commerce Department has several programs to assist U.S. companies in conducting due diligence when choosing business partners or agents overseas. The U.S. Commercial Service can be reached directly through its offices in every major U.S. and foreign city, or through its Website at www.usatrade.gov. Also, the Departments of Commerce and State provide worldwide support for qualified U.S. companies bidding on foreign government contracts. Problems, including corruption by foreign governments or competitors, encountered by U.S. companies in seeking such foreign business opportunities can be brought to the attention of appropriate U.S. government officials. The Commerce Department Advocacy Center can be reached through the Department of Commerce International Trade Administration in Washington (202-482-3896), or its main website at www.doc.gov. Advice on business advocacy is also available at the Department of State through the Office of Commercial and Business Affairs (202-647-1625) and on the business page of the Department's web site at www.state.gov.

The U.S. Government also regularly publishes information to help keep the private sector informed about

anticorruption activities. For example, in May 2001, the State Department, in cooperation with the Commerce and Justice Departments, re-published a brochure for businesses titled *Fighting Global Corruption: Business Risk Management* that contains information about the benefits of good governance and strong corporate anti-bribery programs and policies, the requirements of the FCPA and the Convention, and the various international initiatives underway to combat business bribery and official public corruption. In an introductory message to this brochure, Secretary of State Powell enlists the support of the private sector and nongovernmental organizations to work with governments in public-private partnerships to find solutions to the common challenges in our fight against corruption.

There is also a joint Commerce-Justice brochure summarizing the antibribery provisions of the FCPA, which is reprinted in Appendix C of this report. This joint FCPA brochure was updated after the 1998 amendments to the FCPA implementing the OECD Bribery Convention. This handbook has been useful to many companies, especially small firms and those that are new to exporting. Another Commerce Department publication is the *Anti-Corruption Review*, an internet document located on the Office of the Chief Counsel for International Commerce website at the Department of Commerce at www.ita.doc.gov/legal. Most of the material in the Review does not relate to the FCPA but to international developments, such as those in the OECD, Organization of American States, the Council of Europe, and by nongovernmental organizations such as Transparency International.

Furthermore, individuals and companies are encouraged to report problems with bribery directly to the Commerce Department on the Trade Complaint Hotline of the Trade Compliance Center (<http://www.mac.-doc.gov/tcc>). Only through enhanced reporting of credible allegations of bribery will the proper authorities become aware and able to pursue many cases of bribery. We urge other signatory countries to establish similar mechanisms for reporting and encourage companies, trade unions, and other interested parties to take advantage of them.

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 specific 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. The opinion procedure is set forth at 28 C.F.R. Part 80. It

is also available on the Fraud Section website at <http://www.usdoj.gov/criminal/fraud/fcpa.html>. Recipients of a favorable opinion are entitled to a presumption of compliance in any subsequent enforcement action under the FCPA.

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. Promoting political and economic stability, upholding core democratic values, ending the reign of dictators, and creating a level playing field for lawful business activities are important objectives of the Bush Administration.



Advantages to International Satellite Organizations

This chapter responds to the reporting requirements in Section 6(7) of the International Anti-Bribery and Fair Competition Act (IAFCA) which requests information on the 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. The first report in July 1999 provided a historical perspective of the ISOs and the advantages that they have enjoyed. The second report issued in July 2000 updated the findings of the July 1999 report. This report is likewise intended to update the findings of previous reports.

This chapter was prepared by the National Telecommunications and Information Administration (NTIA) of the U.S. Department of Commerce. As in previous years, NTIA issued a Request for Comments (RFC) in the *Federal Register* to assist in the preparation of this report.¹ NTIA sought the views of interested parties through this notice. The RFC as well as the comments received in response are posted on NTIA's website.² The State Department also sent requests to U.S. embassies for information regarding any favorable treatment to INTELSAT or its signatories in foreign countries. In

preparing its analysis, NTIA considered the comments received from its *Federal Register* notice, responses to the State Department's request, and filings at the Federal Communications Commission (Commission).

INTELSAT is a treaty-based global communications satellite cooperative with 144 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 (mostly national telephone companies). 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, a wholly owned subsidiary of Lockheed Martin Corporation, is the U.S. signatory to INTELSAT and formerly to Inmarsat. Signatories³—entities designated by member governments to participate in the commercial operations of the ISOs—can be private companies, the government, or an agency within the government. While the majority of signatories are private companies, in some instances, the government owns a significant share in the telecommunications company that is the signatory to INTELSAT. It is difficult to determine the advantages that government ownership may provide when certain advantages are not obvious or readily apparent.

We note that separate legislation passed in 2000 enti-

tled the Open-Market Reorganization for the Betterment of International Telecommunications Act ("ORBIT Act")⁴ also addresses the ISOs. The ORBIT Act seeks to "promote a fully competitive global market for satellite communications services...by fully privatizing...INTELSAT [and Inmarsat]"⁵ and to "secure a pro-competitive privatization of INTELSAT [and Inmarsat]."⁶ The ORBIT Act contains a number of criteria for the timely pro-competitive privatization of INTELSAT and Inmarsat.⁷ The ORBIT Act requires the President and the Commission to provide annual reports to Congress on the progress of privatization in relation to the objectives, purposes, and provisions of that Act including the "[v]iews of the industry and consumers on privatization" and the "[i]mpact privatization has had on United States industry, United States jobs, and United States industry's access to the global marketplace."⁸

It was noted in the July 1999 report that since the passage of the IAFCA, Inmarsat completed its privatization, and as a result, there is no intergovernmental participation, including by the U.S. Executive Branch, in the Inmarsat private company. Consequently, past reports have focused on INTELSAT. This year, however, Motient Services, Inc. (Motient) filed comments stating that Inmarsat has not met its privatization criteria because it has not conducted an Initial Public Offering (IPO), and because officers or managers of Inmarsat still have direct financial interests in former Inmarsat signatories.⁹ Motient's comments, however, fail to address any advantages, in terms of immunities, market access, or otherwise, enjoyed by Inmarsat. Thus, this report will continue to focus primarily on INTELSAT and its signatories.

INTELSAT plans to be fully privatized by July 18, 2001. In comments filed in response to NTIA's RFC, INTELSAT states that it has made several filings to the Commission with respect to its plans and progress towards privatization.¹⁰ Specifically, INTELSAT incorporates by reference a December 18, 2000 filing in which INTELSAT describes the commitments made by the 25th Assembly of Parties to privatize by July 18, 2001. Significant work has been completed to prepare the organization for privatization, and INTELSAT remains on schedule to meet the planned July 18 transition date.

It is anticipated that full privatization of INTELSAT will eliminate any of the advantages that ordinarily attach to intergovernmental organizations. The privatized INTELSAT (the company is to be known by the lower cased acronym "Intelsat") will not have any privileges or immunities. Reports from U.S. embassies abroad indicate that governments are overwhelmingly supportive of INTELSAT privatization; once INTEL-

SAT has been privatized, Intelsat will be treated the same as other private companies, with no advantages in terms of immunities, market access, or otherwise.

Market Access

Market access continues to be the area in which it appears that INTELSAT and its signatories hold the most advantaged position *vis-a-vis* private competitors. Although global and national trends in telecommunications liberalization and privatization and commitments made under the WTO/Group on Basic Telecom Agreement have improved market access conditions in many countries, competitors continue to voice concerns regarding market access. Market access advantages historically may have resulted from other advantages addressed in this report such as privileges and immunities, preferential tax treatment, national contracts, and access to spectrum and orbital slots. Barriers to market access may take many forms such as exclusivity contracts, legislative barriers to market entry, or government-owned telecommunications providers that will not permit private companies to provide service. PanAmSat, for example, argues that both obvious and subtle forms of market entry barriers exist in countries that will only authorize INTELSAT to provide fixed-satellite services.¹¹

We note that PanAmSat was the only entity that filed comments this year alleging an advantaged position of INTELSAT and its signatories in terms of market access. In fact, PanAmSat argues that market access remains one of the primary issues facing U.S. satellite operators.¹² PanAmSat states that contrary to ostensible policy in certain countries, customers that have requested authority to uplink to PanAmSat satellites have been told that INTELSAT is the only authorized provider of fixed-satellite service.¹³ PanAmSat also argues that even if the national law sets out conditions for competitive telecommunications entry, the reality is that the license granted to the monopoly national operator often predates the new competitive law.¹⁴ Thus, according to PanAmSat, in many cases the licenses held by the national operator "are grandfathered under the new laws."¹⁵

PanAmSat proposes an approach to gathering information on market access that includes a survey to be conducted by the International Telecommunications Union (ITU) of its Member states to assess market access.¹⁶ PanAmSat also recommends that NTIA and the Commission work with the ITU and the Departments of Commerce and State to gather information on market access for satellite providers.¹⁷ Finally, PanAmSat "proposes the creation of an organization comprised of indus-

try representatives, satellite user groups, and national and international regulatory authorities from the [sic] around the world to help foster the development of open and competitive satellite markets."¹⁸

The reports received from U.S. embassies abroad show that in at least 17 countries, the monopoly telecommunications operators, which are also INTELSAT signatories, continue to favor INTELSAT in the provision of certain satellite services. It is reported in some countries, however, that signatories are nearing the end of periods of exclusivity for the provision of services and consequently market access barriers are likely to dissolve.

Privileges and Immunities

The July 1999 report provides a historical perspective of the necessity for privileges and immunities for ISOs. Briefly restated here, when INTELSAT was created, there was no experience with international satellite communications. Because of the commercial risk associated with international satellite communications, and because of the public service obligations to be undertaken by INTELSAT,¹⁹ privileges and immunities were provided to give INTELSAT protection and to increase its chances of success. Thus, as reported in prior years, INTELSAT and its signatories, when acting in their capacity as Signatories to INTELSAT, benefit from privileges and immunities not otherwise available to private companies. While it is expected that INTELSAT, the intergovernmental organization, will continue to enjoy privileges and immunities, Intelsat, the private entity, will not enjoy any privileges or immunities and will operate as a normal commercial company.

The ORBIT Act establishes a list of licensing criteria to be applied by the Commission in the licensing of, among others, Intelsat. One of those licensing criteria stipulates that the privileged and immune treatment currently enjoyed by INTELSAT shall not be extended to Intelsat.²⁰ The ORBIT Act also makes it clear that COMSAT is not entitled, under U.S. law, to any privileges or immunities that derive from its status as U.S. signatory to INTELSAT or Inmarsat (except when carrying out written instructions from the U.S. government).²¹ Moreover, INTELSAT states that the privatized entity will be organized under national law and subject to the requirements and obligations of the jurisdictions in which it organizes and operates—"just like any other private company."²² Thus, the successor entity will not enjoy international governmental organization (IGO) based privileges or immunities.²³ A residual IGO that will not have any commercial functions will retain its status as an IGO, but

only for the limited purpose of supervising performance of public service obligations.²⁴

Preferential Tax Treatment

In the United States, INTELSAT, as an intergovernmental organization, is presently exempt from federal, state, and local taxation. INTELSAT's U.S. Signatory, COMSAT, does not enjoy similar tax treatment.

In other countries, tax treatment varies according to the laws of the particular country. Accordingly, the reports from U.S. embassies show that while some signatories receive no preferential tax treatment, others enjoy various forms of preferential tax treatment depending on national law. State-owned post, telephone, and telegraph (PTT) operating companies are generally tax exempt. There is still no evidence suggesting preferential or advantageous national tax treatment for ISO signatories simply because of their status as ISO signatories. Moreover, no private company filed comments asserting that signatories enjoy preferential tax treatment because of their status as ISO signatories.

In the last report, we noted the unresolved issue as to whether the FCC could collect regulatory fees from COMSAT pursuant to Section 9(a) of the Communications Act, as amended.²⁵ At that time, COMSAT challenged the Commission's authority to impose the fee, and argued that Section 9 space station fees may only be assessed to recover costs expended in regulating stations as "radio facilities" pursuant to 47 CFR Part 25.²⁶ COMSAT also argued that INTELSAT satellites are neither licensed nor regulated by the Commission pursuant to 47 CFR Part 25, thus the Commission bears no costs in regulating INTELSAT space stations as "radio facilities."²⁷ Since that time, the Commission released a Report and Order making it clear that COMSAT was subject to Section 9 space station fees because "costs attributable to space station oversight include costs directly related to INTELSAT signatory activities."²⁸ Moreover, the ORBIT Act gives the Commission authority to impose regulatory fees on COMSAT which it imposes on other entities providing similar service.²⁹

National Contracts—Preference for ISOs

Neither comments received nor embassy reports revealed any indication of improper preference given to INTELSAT or its signatories for national contracts.³⁰ It may be assumed, however, that where state-owned or monopoly providers exist, they are more likely to be the recipients of such contracts.

There is also no evidence that the ISOs or their signatories have received undue preference in the award of contracts from the U.S. government.

Access to Spectrum and Orbital Slots

Access to certain spectrum and orbital slots has been easier for the ISOs because they were the original market entrants and, therefore, had first choice of available resources. In last year's report, we noted that two private competitors raised concerns about INTELSAT using its status to expand its satellites and orbital slots, and to warehouse orbital locations.³¹ The concern was that INTELSAT was using this strategy for the benefit of its privatized successor. We note that this issue was not addressed by commenters this year. It may be assumed that this issue is less of a concern this year because of INTELSAT's progress toward privatization. With respect to signatories, we may assume that they enjoy various levels of advantaged access to spectrum and orbital slots.

Conclusion

There were no significant findings or changes in this year's report. We note that there were fewer comments filed, and that there were fewer issues raised as to the advantages of INTELSAT or its signatories. As recognized in last year's report, advantages continue to diminish as the forces of privatization and globalization increase. This is a result of the combined forces of ISO privatization, global and national trends in telecommunications liberalization and privatization, the WTO/Group on Basic Telecom Agreement, and the on-going attention of U.S. industry and government. The ORBIT Act has also offered another vehicle to monitor the extent to which privatization reduces the advantages traditionally accorded ISOs. Following INTELSAT privatization scheduled for July 18, 2001, we can expect to see an even greater reduction in these advantages reflected in next year's report, and an increasingly level playing field for satellite service providers.

¹*Market for Satellite Communications and the Role of Intergovernmental Satellite Organizations*, Notice and Request for Comments, Docket No. 000410098-1077-02, 66 Fed. Reg. 17686 (April 3, 2001).

²<http://www.ntia.doc.gov>

³In the case of INTELSAT, "[e]ach Signatory contributes capital to INTELSAT and receives capital repayments and compensation for the use of capital in proportion to its invest-

ment share. The investment share of a Signatory is approximately equal to its usage of capacity on the system. Signatories also have certain opportunities to invest beyond their percentage of their usage of INTELSAT system capacity." In the Matter of *Lockheed Martin Corporation, Comsat Government Systems, LLC and Comsat Corporation Application for Transfer of Control of COMSAT Corporation and Its Subsidiaries, Licensees of Various Satellite, Earth Station Private Land Mobile Radio and Experimental Licenses, and Holders of International Section 214 Authorizations*, File Nos. SAT-T/C -20000323-00078, SAT-STA-20000323-00073, Order and Authorization (rel. July 31, 2000).

⁴Pub. L. No. 106-180, 114 Stat. 48 (2000).

⁵ORBIT Act at § 2.

⁶*Id.* at § 621.

⁷Privatization, as used herein, means that the entity no longer exists as an international governmental organization. It does not necessarily mean that the entity is wholly owned by private parties.

⁸ORBIT Act at § 646(b)(3) and (4).

⁹Motient Comments at 3.

¹⁰INTELSAT Comments at 2.

¹¹PanAmSat Comments at 1-2.

¹²*Id.* at 1.

¹³*Id.* at 1-2 (PanAmSat identifies Bolivia, the Central African Republic, Madagascar, Senegal, and Uruguay as countries where this practice has occurred).

¹⁴*Id.* at 2 (PanAmSat notes that Kenya employs this barrier to market access).

¹⁵*Id.*

¹⁶*Id.* at 4.

¹⁷*Id.*

¹⁸*Id.* at 4-5.

¹⁹INTELSAT is obligated to provide global connectivity on a non-discriminatory basis to all parts of the world, and to pay particular attention to less developed countries. See Agreement Relating to the International Satellite Organization, Aug. 20, 1971, 23 U.S.T. 3813; see also 47 U.S.C. 701.

²⁰ORBIT Act at § 621(3)(A).

²¹ORBIT Act at § 642(b).

²²Application of Intelsat LLC for Authority to Operate, and to Further Construct, Launch and Operate C-Band and Ku-Band Satellites That Form a Global Communications System in Geostationary Orbit, Supplemental Information at 19 (filed December 18, 2000).

²³*Id.* at 20.

²⁴*Id.*

²⁵See *Notice of Proposed Rulemaking, In re Assessment and Collection of Regulatory Fees for Fiscal Year 2000*, FCC 00-117, MD Docket No. 00-58, para. 1 (rel. April 3, 2000)(NPRM); see 47 U.S.C. § 159(a)(Commission authorized to assess these fees to recover the costs it incurs in carrying out enforcement, policy and rulemaking, international, and user information activity).

²⁶See *Addressing the Challenges of International Bribery and Fair Competition 2000: The Second Annual Report Under Section 6 of the International Anti-Bribery and Fair Competition Act of 1998* at 98, U.S. Department of Commerce, International Trade Administration, July 2000.

²⁷*Id.*

²⁸See *Report and Order, In re Assessment and Collection of Regulatory Fees for Fiscal Year 2000*, FCC 00-240, MD Docket No. 00-58, para . 24 (rel. July 10, 2000). The Commission's decision was consistent with the decision of the U.S. Circuit Court for the District of Columbia which ruled that Comsat was not exempt from Section 9 regulatory fees. See *PanAmSat Corp. v. F.C.C.*, 198 F.3d 890 (D.C. Cir. 1999).

²⁹Section 642(c) of the ORBIT Act provides that "[n]otwithstanding any other law or executive agreement, the Commission shall have the authority to impose similar regulatory fees on the United States signatory which it imposes on other entities providing similar services." (codified at 47 U.S.C. § 765a(c)).

³⁰Certain signatories enjoy exclusive contracts for the provision of telecommunications services. That issue is discussed in the market access section of this report.

³¹See note 24 *supra* at 99.



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 PROVIDING COMMERCIAL 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 authoriz-

ing 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 sta-

tus 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.

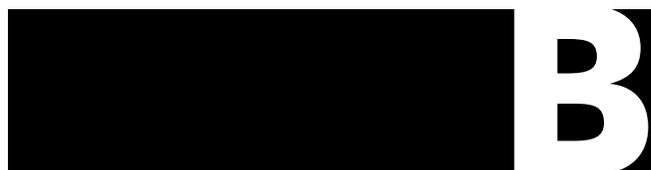
(7) ADVANTAGES.—Advantages, in terms of immunities, market access, or otherwise, in the countries or regions served by the organizations described in section 5(a), the reason for such advantages, and an assessment of progress toward fulfilling the policy described in that section.

(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.



Anti-Bribery and Books and Records Provisions of the Foreign Corrupt Practices Act¹

UNITED STATES CODE
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B—SECURITIES EXCHANGES

* * *

§ 78m. Periodical and other reports

(a) Reports by issuer of security; contents

Every issuer of a security registered pursuant to section 78l of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 78l of this title, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.

(b) Form of report; books, records, and internal accounting; directives

(2) Every issuer which has a class of securities registered pursuant to section 78l of this title and every issuer which is required to file reports pursuant to section 78o(d) of this title shall—

(A) 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; and

(B) devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

(i) transactions are executed in accordance with management's general or specific authorization;

(ii) transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;

(iii) access to assets is permitted only in accordance with management's general or specific authorization; and

(iv) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(3) (A) With respect to matters concerning the national security of the United States, no duty or liability under paragraph (2) of this subsection shall be imposed upon any person acting in cooperation with the head of any Federal department or agency responsible for such matters if such act in cooperation with such head of a department or agency was done upon the specific, written directive of the head of such department or agency pursuant to Presidential authority to issue such directives. Each directive issued under this paragraph shall set forth the specific facts and circumstances with respect to which the provisions of this paragraph are to be invoked. Each such directive shall, unless renewed in writing, expire one year after the date of issuance.

(B) Each head of a Federal department or agency of the United States who issues a directive pursuant to this paragraph shall maintain a complete file of all such directives and shall, on October 1 of each year, transmit a summary of matters covered by such directives in force at any time during the previous year to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection except as provided in paragraph (5) of this subsection.

(5) No person shall knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account described in paragraph (2).

(6) Where an issuer which has a class of securities registered pursuant to section 781 of this title or an issuer which is required to file reports pursuant to section 780(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).

(7) For the purpose of paragraph (2) of this subsection, the terms "reasonable assurances" and "reasonable detail" mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs.

* * *

§ 78dd-1. Prohibited foreign trade practices by issuers

(a) Prohibition

It shall be unlawful for any issuer which has a class of securities registered pursuant to section 781 of this title or which is required to file reports under section 780(d) of this title, or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, to make use of the mails or any means or instrumentality of interstate commerce corruptly 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 issuer 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 issuer 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 issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (g) 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) or (g) 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) Guidelines by Attorney General

Not later than one year after August 23, 1988, the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(e) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weight all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any

other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) Definitions

For purposes of this section:

(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.

(2) (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.

(3) (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.

(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 this 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.

§ 78dd-2. Prohibited foreign trade practices by domestic concerns

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd-1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly 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 domestic concern 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 domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(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 domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) 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) or (i) 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 domestic concern 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) or (i) 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 prac-

tice, 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.

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) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

- (1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and
- (2) general precautionary procedures which domestic con-

cerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of Title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of Title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of Title 5 and shall not, except with the consent of the domestic concern, be made publicly available, regardless of whether the Attorney General response to such a request or the domestic concern with-

draws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(g) Penalties

(1) (A) 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.

(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.

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

(h) Definitions

For purposes of this section:

(1) The term "domestic concern" means—

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(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 has been 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.

(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, a “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.

§ 78dd-3. 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 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 has been 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.

§ 78ff. Penalties

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than \$1,000,000, or imprisoned not more than 10 years, or both, except that when such person is a person other than a natural person, a fine not exceeding \$2,500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78o of this title or any rule or regulation thereunder shall forfeit to the United States the sum of \$100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1) (A) Any issuer that violates subsection (a) or (g) of section 30A of this title shall be fined not more than \$2,000,000.

(B) Any issuer that 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.

(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.

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

¹As posted on <http://www.usdoj.gov/criminal/fraud/fcpa/fcpastat.htm>, accessed June 15, 2000.



Text of Brochure on the Anti-Bribery Provisions of the Foreign Corrupt Practices Act

INTRODUCTION

The 1988 Trade Act directed the Attorney General to provide guidance concerning the Department of Justice's enforcement policy with respect to the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. sec. 78dd-1, et seq., to potential exporters and small businesses that are unable to obtain specialized counseling on issues related to FCPA. The guidance is limited to responses to requests under the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure and to general explanations of compliance responsibilities and potential liabilities under the FCPA. This brochure constitutes the Department of Justice's general explanation of the FCPA.

U.S. firms seeking to do business in foreign markets must be familiar with the FCPA. In general, the FCPA prohibits corrupt payments to foreign officials for the purpose of obtaining or keeping business. The Department of Justice is the chief enforcement agency, with a coordinate role played by the Securities and Exchange Commission (SEC). The Office of General Counsel of the Department of Commerce also answers general questions from U.S. exporters concerning the FCPA's basic requirements and constraints.

BACKGROUND

As a result of SEC investigations in the mid-1970's, over 400 U.S. companies admitted making questionable or illegal pay-

ments in excess of \$300 million to foreign government officials, politicians, and political parties. The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that allegedly were made to ensure that government functionaries discharged certain ministerial or clerical duties. 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.

The FCPA was intended to have and has had an enormous impact on the way American firms do business. Several firms that paid bribes to foreign officials have been the subject of criminal and civil enforcement actions, resulting in large fines and suspension and debarment from federal procurement contracting, and their employees and officers have gone to jail. To avoid such consequences, many firms have implemented detailed compliance programs intended to prevent and to detect any improper payments by employees and agents.

Following the passage of the FCPA, the Congress became concerned that American companies were operating at a disadvantage compared to foreign companies who routinely paid

This brochure is intended to provide a general description of the FCPA and is not intended to substitute for the advice of private counsel on specific issues related to the FCPA.

bribes and, in some countries, were permitted to deduct the cost of such bribes as business expenses on their taxes. Accordingly, in 1988, the Congress directed the Executive Branch to commence negotiations in the Organization of Economic Cooperation and Development (OECD) to obtain the agreement of the United States' major trading partners to enact legislation similar to the FCPA. In 1997, almost ten years later, the United States and thirty-three other countries signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States ratified this Convention and enacted implementing legislation in 1998. (See Convention and Commentaries on the DOJ web site.)

The antibribery provisions of the FCPA make it unlawful for a U.S. person, and certain foreign issuers of securities, to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person. Since 1998, they also apply to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.

The FCPA also requires companies whose securities are listed in the United States to meet its accounting provisions. (See 15 U.S.C. sec. 78m.) These accounting provisions, which were designed to operate in tandem with the antibribery provisions of the FCPA, require corporations covered by the provisions to make and keep books and records that accurately and fairly reflect the transactions of the corporation and to devise and maintain an adequate system of internal accounting controls. This brochure discusses only the antibribery provisions.

ENFORCEMENT

The Department of Justice is responsible for all criminal enforcement and for civil enforcement of the antibribery provisions with respect to domestic concerns and foreign companies and nationals. The SEC is responsible for civil enforcement of the antibribery provisions with respect to issuers.

ANTIBRIBERY PROVISIONS

BASIC PROHIBITION

The FCPA makes it unlawful to bribe foreign government officials to obtain or retain business. With respect to the basic prohibition, there are five elements which must be met to constitute a violation of the Act:

1. Who—The FCPA potentially applies to *any* individual, firm, officer, director, employee, or agent of a firm and any stockholder acting on behalf of a firm. Individuals and firms may also be penalized if they order, authorize, or assist someone else to violate the antibribery provisions or if they conspire to violate those provisions.

Under the FCPA, U.S. jurisdiction over corrupt payments to foreign officials depends upon whether the violator is an “issuer,” a “domestic concern,” or a foreign national or business.

An “issuer” is a corporation that has issued securities that have been registered in the United States or who is required to file periodic reports with the SEC. A “domestic concern” is any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States.

Issuers and domestic concerns may be held liable under the FCPA under *either* territorial or nationality jurisdiction principles. For acts taken within the territory of the United States, issuers and domestic concerns are liable if they take an act in furtherance of a corrupt payment to a foreign official using the U.S. mails or other means or instrumentalities of interstate commerce. Such means or instrumentalities include telephone calls, facsimile transmissions, wire transfers, and interstate or international travel. In addition, issuers and domestic concerns may be held liable for any act in furtherance of a corrupt payment taken *outside* the United States. Thus, a U.S. company or national may be held liable for a corrupt payment authorized by employees or agents operating entirely outside the United States, using money from foreign bank accounts, and without any involvement by personnel located within the United States.

Prior to 1998, foreign companies, with the exception of those who qualified as “issuers,” and foreign nationals were not covered by the FCPA. The 1998 amendments expanded the FCPA to assert territorial jurisdiction over foreign companies and nationals. A foreign company or person is now subject to the FCPA if it causes, directly or through agents, an act in furtherance of the corrupt payment to take place within the territory of the United States. There is, however, no requirement that such act make use of the U.S. mails or other means or instrumentalities of interstate commerce.

Finally, U.S. parent corporations may be held liable for the acts of foreign subsidiaries where they authorized, directed, or controlled the activity in question, as can U.S. citizens or residents, themselves “domestic concerns,” who were employed by or acting on behalf of such foreign-incorporated subsidiaries.

2. Corrupt intent—The person making or authorizing the payment must have a corrupt intent, and the payment must be intended to induce the recipient to misuse his official position to direct business wrongfully to the payer or to any other person. You should note that the FCPA does not require that a corrupt act succeed in its purpose. The *offer or promise* of a corrupt payment can constitute a violation of the statute. The

FCPA prohibits any corrupt payment intended to *influence* any act or decision of a foreign official in his or her official capacity, to *induce* the official to do or omit to do any act in violation of his or her lawful duty, to *obtain* any improper advantage, or to *induce* a foreign official to use his or her influence improperly to affect or influence any act or decision.

3. Payment—The FCPA prohibits paying, offering, promising to pay (or authorizing to pay or offer) money or anything of value.

4. Recipient—The prohibition extends only to corrupt payments to a foreign official, a *foreign political party or party official*, or any *candidate* for foreign political office. A “foreign official” means any officer or employee of a foreign government, a public international organization, or any department or agency thereof, or any person acting in an official capacity. You should consider utilizing the Department of Justice’s Foreign Corrupt Practices Act Opinion Procedure for particular questions as to the definition of a “foreign official,” such as whether a member of a royal family, a member of a legislative body, or an official of a state-owned business enterprise would be considered a “foreign official.”

The FCPA applies to payments to *any* public official, regardless of rank or position. The FCPA focuses on the *purpose* of the payment instead of the particular duties of the official receiving the payment, offer, or promise of payment, and there are exceptions to the antibribery provision for “facilitating payments for routine governmental action” (See below).

5. Business Purpose Test—The FCPA prohibits payments made in order to assist the firm in *obtaining or retaining business* for or with, or *directing business* to, any person. The Department of Justice interprets “obtaining or retaining business” broadly, such that the term encompasses more than the mere award or renewal of a contract. It should be noted that the business to be obtained or retained does not need to be with a foreign government or foreign government instrumentality.

THIRD PARTY PAYMENTS

The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official. *The term “knowing” includes conscious disregard and deliberate ignorance.* The elements of an offense are essentially the same as described above, except that in this case the “recipient” is the intermediary who is making the payment to the requisite “foreign official.”

Intermediaries may include joint venture partners or agents. To avoid being held liable for corrupt third party payments, U.S. companies are encouraged to exercise due diligence and to take all necessary precautions to ensure that they have formed a business relationship with reputable and qualified

partners and representatives. Such due diligence may include investigating potential foreign representatives and joint venture partners to determine if they are in fact qualified for the position, whether they have personal or professional ties to the government, the number and reputation of their clientele, and their reputation with the U.S. Embassy or Consulate and with local bankers, clients, and other business associates. In addition, in negotiating a business relationship, the U.S. firm should be aware of so-called “red flags,” i.e., unusual payment patterns or financial arrangements, a history of corruption in the country, a refusal by the foreign joint venture partner or representative to provide a certification that it will not take any action in furtherance of an unlawful offer, promise, or payment to a foreign public official and not take any act that would cause the U.S. firm to be in violation of the FCPA, unusually high commissions, lack of transparency in expenses and accounting records, apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.

You should seek the advice of counsel and consider utilizing the Department of Justice’s Foreign Corrupt Practices Act Opinion Procedure for particular questions relating to third party payments.

PERMISSIBLE PAYMENTS AND AFFIRMATIVE DEFENSES

The FCPA contains an explicit exception to the bribery prohibition for “facilitating payments” for “routine governmental action” and provides affirmative defenses which can be used to defend against alleged violations of the FCPA.

FACILITATING PAYMENTS FOR ROUTINE GOVERNMENTAL ACTIONS

There is an exception to the antibribery prohibition for payments to facilitate or expedite performance of a “routine governmental action.” The statute lists the following examples: obtaining permits, licenses, or other official documents; processing governmental papers, such as visas and work orders; providing police protection, mail pick-up and delivery; providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products; and scheduling inspections associated with contract performance or transit of goods across country.

Actions “similar” to these are also covered by this exception. If you have a question about whether a payment falls within the exception, you should consult with counsel. You should also consider whether to utilize the Justice Department’s Foreign Corrupt Practices Opinion Procedure, described below.

“Routine governmental action” does not include any decision by a foreign official to award new business or to continue business with a particular party.

AFFIRMATIVE DEFENSES

A person charged with a violation of the FCPA's antibribery provisions may assert as a defense that the payment was lawful under the written laws of the foreign country or that the money was spent as part of demonstrating a product or performing a contractual obligation.

Whether a payment was lawful under the written laws of the foreign country may be difficult to determine. You should consider seeking the advice of counsel or utilizing the Department of Justice's Foreign Corrupt Practices Act Opinion Procedure when faced with an issue of the legality of such a payment.

Moreover, because these defenses are “affirmative defenses,” the defendant is required to show in the first instance that the payment met these requirements. The prosecution does not bear the burden of demonstrating in the first instance that the payments did not constitute this type of payment.

SANCTIONS AGAINST BRIBERY

CRIMINAL

The following criminal penalties may be imposed for violations of the FCPA's antibribery provisions: corporations and other business entities are subject to a fine of up to \$2,000,000; officers, directors, stockholders, employees, and agents are subject to a fine of up to \$100,000 and imprisonment for up to five years. Moreover, under the Alternative Fines Act, these fines may be actually quite higher—the actual fine may be up to twice the benefit that the defendant sought to obtain by making the corrupt payment. You should also be aware that fines imposed on individuals may not be paid by their employer or principal.

CIVIL

The Attorney General or the SEC, as appropriate, may bring a civil action for a fine of up to \$10,000 against any firm *as well* as any officer, director, employee, or agent of a firm, or stockholder acting on behalf of the firm, who violates the antibribery provisions. In addition, in an SEC enforcement action, the court may impose an additional fine not to exceed the greater of (i) the gross amount of the pecuniary gain to the defendant as a result of the violation, or (ii) a specified dollar limitation. The specified dollar limitations are based on the egregiousness of the violation, ranging from \$5,000 to \$100,000 for a natural person and \$50,000 to \$500,000 for any other person.

The Attorney General or the SEC, as appropriate, may also

bring a civil action to enjoin any act or practice of a firm whenever it appears that the firm (or an officer, director, employee, agent, or stockholder acting on behalf of the firm) is in violation (or about to be) of the antibribery provisions.

OTHER GOVERNMENTAL ACTION

Under guidelines issued by the Office of Management and Budget, a person or firm found in violation of the FCPA may be barred from doing business with the Federal government. *Indictment alone can lead to suspension of the right to do business with the government.* The President has directed that no executive agency shall allow any party to participate in any procurement or nonprocurement activity if any agency has debarred, suspended, or otherwise excluded that party from participation in a procurement or nonprocurement activity.

In addition, a person or firm found guilty of violating the FCPA may be ruled ineligible to receive export licenses; the SEC may suspend or bar persons from the securities business and impose civil penalties on persons in the securities business for violations of the FCPA; the Commodity Futures Trading Commission and the Overseas Private Investment Corporation both provide for possible suspension or debarment from agency programs for violation of the FCPA; and a payment made to a foreign government official that is unlawful under the FCPA cannot be deducted under the tax laws as a business expense.

PRIVATE CAUSE OF ACTION

Conduct that violates the antibribery provisions of the FCPA may also give rise to a private cause of action for treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), or to actions under other federal or state laws. For example, an action might be brought under RICO by a competitor who alleges that the bribery caused the defendant to win a foreign contract.

GUIDANCE FROM THE GOVERNMENT

The Department of Justice has established a Foreign Corrupt Practices Act Opinion Procedure by which any U.S. company or national may request a statement of the Justice Department's present enforcement intentions under the antibribery provisions of the FCPA regarding any proposed business conduct. The details of the opinion procedure may be found at 28 CFR Part 80. Under this procedure, the Attorney General will issue an opinion in response to a specific inquiry from a person or firm within thirty days of the request. (The thirty-day period does not run until the Department of Justice has received all the information it requires to issue the opinion.) Conduct for which the Department of Justice has issued an opinion stating that the conduct conforms with current enforcement policy will be entitled to a presumption, in any subsequent enforcement action, of conformity with the

FCPA. Copies of releases issued regarding previous opinions are available on the Department of Justice's FCPA web site.

For further information from the Department of Justice about the FCPA and the Foreign Corrupt Practices Act Opinion Procedure, contact Peter B. Clark, Deputy Chief, or Philip Urofsky, Senior Trial Attorney, Fraud Section, Criminal Division, U.S. Department of Justice, P.O. Box. 28188, McPherson Square, Washington, D.C. 20038 (202) 514-7023.

Although the Department of Commerce has no enforcement role with respect to the FCPA, it supplies general guidance to U.S. exporters who have questions about the FCPA and about international developments concerning the FCPA. For further information from the Department of Commerce about the FCPA contact Eleanor Roberts Lewis, Chief Counsel for International Commerce, or Arthur Aronoff, Senior Counsel, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce, Room 5882, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230 (202) 482-0937.

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OECD Documents

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

OECD 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 Transactions

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

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

Article 11 - Responsible Authorities

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

Article 12 - Monitoring and Follow-up

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

the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the program in accordance with the rules applicable to that body.

Article 13 - Signature and Accession

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

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

Article 14 - Ratification and Depositary

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

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

Article 15 - Entry into Force

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

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

Article 16 - Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depository 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 Depository. 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:

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

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

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

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilize its precise terms in defining the offense under their domestic laws. A Party may use various approaches to 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.

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

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

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

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

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

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

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

Re paragraph 2:

11. The offenses set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorization, incitement, or one of the other listed acts,

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

Re paragraph 4:

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

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

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

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

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

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

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

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

Article 2. Responsibility of Legal Persons:

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

Article 3. Sanctions:

Re paragraph 3:

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

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

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

Re paragraph 4:

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

Article 4. Jurisdiction:

Re paragraph 1:

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

Re paragraph 2:

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

Article 5. Enforcement:

27. Article 5 recognizes the fundamental nature of national

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

Article 7. Money Laundering:

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

Article 8. Accounting:

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

Article 9. Mutual Legal Assistance:

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

Re paragraph 1:

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

Re paragraph 2:

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

Article 10. Extradition

Re paragraph 2:

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

Article 12. Monitoring and Follow-up:

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

- i) receipt of notifications and other information submitted to it by the [participating] countries;
- ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as

appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:

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

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

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

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

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

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

Article 13. Signature and Accession:

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

Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

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

Adopted by the Council on May 23, 1997

THE COUNCIL

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

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

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

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

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

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

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

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

Considering the consensus which has developed on the measures which should be taken to implement the 1994

Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalization of bribery of foreign public officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

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

General

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

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

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

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

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

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

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

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

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

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

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

Tax Deductibility

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

Accounting Requirements, External Audit and Internal Company Controls

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

A. Adequate accounting requirements

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

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

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

B. Independent External Audit

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

ii) Member countries and professional associations should main-

tain 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 institu-

tions, and work closely with development partners to combat corruption in all development co-operation efforts.(2)

International Cooperation

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

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

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

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

Follow-up and Institutional Arrangements

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

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

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

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

iv) examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include

private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;

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

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

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

Cooperation with Nonmembers

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

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

Relations with International Governmental and Nongovernmental Organizations

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

Notes.

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

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

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

Adopted by the Council on April 11, 1996

The Council

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

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

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

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

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

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

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



Websites Relevant to the Convention, Anticorruption, Ethics, Transparency, and Corporate Compliance Programs

United States Government

Department of Commerce—Commerce Home Page: (www.doc.gov). Market Access and Compliance/Trade Compliance Center: Annual Reports to Congress on Implementation of the OECD Bribery Convention, Trade Complaint Hotline, Trade and Related Agreements Database (TARA), Exporter's Guides, Market Access Reports, Market Monitor, and "Market Access and Compliance-Rule of Law for Business Initiatives" (www.mac.doc.gov/tcc). Also, Country Commercial reports and guides, trade and export-related information (www.ita.doc.gov/ita_home/itacnreg.htm); trade counseling and other services in other countries (*1-800-USA-TRADE*); Office of the Chief Counsel for International Commerce, Information on Legal Aspects of International Trade and Investment, The Anti-Corruption Review, the FCPA, and other anticorruption materials (www.ita.doc.gov/legal).

Department of State—Information on the OECD Bribery Convention and First Global Forum on Fighting Corruption Materials; documents related to the OECD Bribery Convention (www.state.gov/www/issues/economic/bribery.html); First Global Forum on Fighting Corruption and Safeguarding Integrity, Washington, D.C., February 1999 (www.state.gov) and Second Global

Forum, The Hague, The Netherlands, May 28-31, 2001 (www.gfcorruption.org). A copy of the First Global Forum Final Conference Report and *Guiding Principles for Fighting Corruption and Safeguarding Integrity among Justice and Security Officials* can also be purchased from the U.S. Government Printing Office (*ISBN 0-16-050150-4*); Country Reports, Economic Practices and Trade Practices (www.state.gov).

Department of Justice, Fraud Section—Comprehensive information on the FCPA, legislative history of FCPA, 1998 amendments, opinion procedures, and international agreements (www.usdoj.gov/criminal/fraud.html).

Office of Government Ethics (OGE)—Information on ethics, latest developments in ethics, ethics programs, and informational and educational materials including OECD Public Service Management (PUMA) (www.usoge.gov/).

Department of the Treasury—Information on money laundering, customs, and international financial institutions (www.treas.gov).

Securities and Exchange Commission (SEC)—Information about SEC enforcement, actions, Complaint

Center, and further information for accountants and auditors (www.sec.gov).

Agency for International Development (USAID)—Center for Democracy and Governance, USAID's Efforts on Anticorruption, Handbook on Fighting Corruption (www.info.usaid.gov/democracy-anticorruption).

Inter-Governmental Organizations

Organization for Economic Cooperation and Development (OECD)—Anticorruption-OECD Bribery Convention. Country compliance assessment reports (www.oecd.org/daf/nocorruption); ANCORSEB, the OECD Anticorruption Ring Online, a collection of materials on effective policies and practices (<http://www.oecd.org/daf/nocorruptionweb/index.htm>).

Financial Action Task Force on Money Laundering (FATF)—(www.oecd.org/fatf/).

International Criminal Police Organization (INTERPOL)—(www.interpol.int).

Council of Europe (COE)—COE Anticorruption Convention, related programs, and resources (www.coe.fr).

Organization for Security and Cooperation in Europe (OSCE)—Charter for European Security, Rule of Law and Fight Against Corruption (www.osce.org).

Stability Pact for South Eastern Europe—Special Coordinator of the Stability Pact for South Eastern Europe, Anticorruption Initiative and Compact of the Stability Pact (<http://www.stabilitypact.org>).

Organization of American States (OAS)—The Fight Against Corruption in the Americas; Inter-American Convention Against Corruption; resolutions of the General Assembly, studies, and supporting documents (www.oas.org).

Middle East and North Africa (MENA)—The World Bank Group (<http://wbln0018.worldbank.org/mna/mena.nsf>), World Bank Institute, Anticorruption (<http://www.worldbank.org/wbi/governance/links.htm>).

Asia-Pacific Economic Cooperation (APEC)—Information on the Transparency Initiative, investment,

government procurement, and customs (www.apecsec.org).

Association of Southeast Asian Nations (ASEAN)—(www.aseansec.org).

United Nations—Centre for International Crime Prevention (CICP), Global Program Against Corruption (www.UNCJIN.org/CICP/cicp.html); UN Development Program (UNDP), Management Development and Governance Division (www.magnet.undp.org).

World Trade Organization (WTO)—Working Group on Transparency in Government Procurement Practices (www.wto.org).

The Global Corporate Governance Forum—An OECD and World Bank Initiative to help countries improve corporate governance standards and corporate ethics (www.worldbank.org/html/extdr/extme/2217.htm); OECD Principles of Corporate Governance (www.oecd.org/daf/governance/principles.htm).

World Customs Organization (WCO)—(www.wcoomd.org).

International Financial Institutions

The World Bank—Public Sector Group, World Bank Anticorruption Strategy, information on preventing corruption in WB projects, helping countries reduce corruption, and supporting international efforts (www.worldbank.org/publicsector/anticorrupt/); Economic Development Institute (EDI), World Bank Anticorruption Diagnostic Surveys (www.worldbank.org/wbi/governance).

International Monetary Fund (IMF)—Codes of Good Practices in Monetary and Financial Policies (www.imf.org/external/np/mae/mft/index.htm).

Inter-American Development Bank (IDB)—(www.iadb.org).

Asian Development Bank (ADB)—(www.adb.org).

African Development Bank (AfDB)—(www.afdb.org).

European Bank for Reconstruction and Development (EBRD)—(www.ebrd.com).

Other Organizations

U.S. Chamber of Commerce (USCOC)—Center for International Private Enterprise (CIPE), an affiliate of the USCOC, information on corporate governance and anticorruption (www.cipe.org).

International Chamber of Commerce (ICC)—Rules of Conduct and Bribery, ICC Commercial Crime Services, and due diligence (www.iccwbo.org).

Transparency International (TI)—TI Corruption Index and Bribe Propensity Index; TI Source Book on anticorruption strategies and other international initiatives by governments, NGOs, and the private sector (www.transparency.de) and TI-USA (www.transparency-usa.org). 10TH IACC (www.10iacc.org).

U.S. International Council for Business—(www.uscib.org).

The Conference Board—Information on corporate ethics (www.conference-board.org).

American Bar Association (ABA)—Taskforce on International Standards on Corrupt Practices (www.abanet.org/intlaw/divisions/public/corrupt.html); ABA-Central and East European Law Initiative (CEELI) (www.abanet.org/ceeli/).

Ethics Resource Center—(www.ethics.org).

COSO—The Committee of Sponsoring Organizations of the Treadway Commission (www.coso.org). The COSO ("Treadway Commission") is a volunteer private sector organization consisting of the five major financial professional associations dedicated to improving the quality of financial reporting through business ethics, effective internal controls, and corporate governance. The five associations are: the American Accounting Association (AAA) (www.AAA-edu.org); the American Institute of Certified Public Accountants (AICPA) (www.aicpa.org); the Financial Executives Institute (FEI) (www.fei.org); the Institute of Internal Auditors (IIA) (www.theiia.org); and the Institute of Management Accountants (IMA) (www.imanet.org).

The Association of Government Accountants (AGA)—(www.agacgfm.org); Sites Directory for U.S. and International Accounting Associations and State CPA Societies (taxsites.com/associations2.html).

International Organization of Supreme Audit Organizations (INTOSAI)—(www.intosai.org).

Global Coalition for Africa (GCA)—Principles to Combat Corruption in Africa Countries; Collaborative Frameworks to Address Corruption (www.gca-cma.org/ecorrtion.htm).

South Asian Association for Regional Cooperation—(www.saarc.org).

Pacific Basin Economic Council (PBEC)—An association of senior business leaders, which represents more than 1,200 businesses in 20 economies in the Pacific Basin region (www.pbec.org).

Americas' Accountability/Anti-Corruption (AAA) Project—(www.respondanet.com).

Anti-Corruption Network for Transition Economies—(www.nobribes.org).

Inter-Parliamentary Union—(www.ipu.org).

World Forum on Democracy—(www.fordemocracy.net).

National Democratic Institute for International Affairs (NDI)—(www.ndi.org).

The International Republican Institute (IRI)—(www.iri.org).

International Center for Journalists—(www.icjf.org); World Association of Newspapers (www.fiej.org).

The Carter Center—(www.cartercenter.org).

The Asia Foundation—(www.asiafoundation.com).

The National Endowment for Democracy (NED)—(www.ned.org).

Websites with Country-Specific Convention-Related Legislation

Implementing legislation of many Parties can be down-loaded directly from the OECD website (www.oecd.org/daf/nocorruption/links1.htm). Several countries also have posted legislation on their govern-

ment websites. Legislation of the following countries is available from one or more of these sources.

Australia

The government response (tabled in the Senate on March 11, 1999) to the Treaties Committee Report on the OECD Convention and the Draft Implementing Legislation may be found at <http://www.aph.gov.au/hansard/hanssen.htm> (Select March 11, 1999 and go to p.2634). The Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999 is at <http://www.aph.gov.au/parlinfo/billsnet/main.htm>. (Search "current bills.") The Bill's Explanatory Memorandum is also on that site.

Austria

The German text of the Austrian implementing legislation (*Strafrechtsanderungsgesetz* 1998 BGBl No. I 153) is available in pdf format on the OECD website.

Belgium

The text of the law passed on February 10, 1999, is available in pdf format on the OECD website.

Brazil

The English text of two relevant legal documents (Law no. 9.613, passed on March 3, 1998, and Decree 1171 of June 1994) is available in pdf format on the OECD website.

Canada

Access to the legislation can be obtained through the website for the Department of Justice/Ministère de la Justice (http://canada.justice.gc.ca/Loireg/index_en.html). Alternatively, the Act concerning the Corruption of Foreign Public Officials is located at http://www.parl.gc.ca/36/1/parlbus/chambus/house/bills/government/S-21/S-21_4/S-21_cover-E.html. The English text is also available in pdf format on the OECD website.

Denmark

Implementing legislation can be found on the Department of Justice web site (in Danish only) at <http://www.jm.dk/forslag/>.

Finland

Implementing legislation can be found on the government web site (in Finnish and Swedish) at <http://www.vn.fi/vn/english/index.htm> Excerpts showing amendments to the Finnish Penal Code are also available in pdf format on the OECD website.

France

The draft law modifying the penal code and the penal procedure code relating to combating bribery and corruption can be found on the website of Legifrance (in French only) at <http://www.legifrance.gouv.fr/citoyen/index.ov>. The French text of the legislation is also available in pdf format on the OECD website.

Germany

The English and German texts of the implementing legislation dated September 10, 1998, the relevant criminal code, and the Administrative Offence Act are available in pdf format on the OECD website.

Greece

The French text of the implementing legislation dated November 11, 1998, and the English text of the Greek law No. 2331 on money laundering of August 1995 are both available in pdf format on the OECD website.

Hungary

The English text of the relevant implementing legislation is available in pdf format the the OECD website.

Iceland

The English text of the Icelandic Extradition and other Assistance in Criminal Proceedings Act (Law no. 3 of April 17, 1984, and relevant articles of the Icelandic Penal Code are available in pdf format on the OECD website.

Japan

An unofficial English translation of the Japanese implementing legislation (the amended Unfair Competition Act, adopted on September 18, 1998, is available in pdf format on the OECD website.

Korea

An English translation of the Korean implementing legislation (The Act on Preventing Bribery of Foreign Public Officials in International Business Transactions) is available in pdf format on the OECD website.

Norway

The implementing legislation (Amendments to the Norwegian Penal Code of May 22, 1902, chapter 2, para. 128) is available in pdf format at the OECD website and also on the Norwegian government website: (www.lovdato.no/all/).

Spain

The provisions to the Spanish Penal Code, implementing the Convention, is available in pdf format on the OECD website.

Sweden

The Swedish implementing legislation is available in pdf format on the OECD website.

Switzerland

Swiss laws can be found on *Recueil Systématique du Droit Fédéral* (available in French, German and Italian only) at (<http://www.admin.ch/ch/f/rs/rs.html>). Search for the Swiss Penal Code of December 21, 1937, which will soon be amended to comply with the Convention. The following legislation is available in French on the OECD website: modification of the Swiss Penal Code and the Amendments to the Swiss Penal Code; the Law of April 19, 1999, authorizing the ratification of the Convention; and *Recueil Systématique du Droit Fédéral*.