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## **The Assault on International Bribery: Global Regulatory Expansion**

by

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**THE ASSAULT ON INTERNATIONAL BRIBERY: GLOBAL REGULATORY  
EXPANSION**

by

**Roy J. Girasa, Ph.D.**

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## **ABSTRACT**

For more than two decades, the United States has been acting virtually alone in combating international bribery of government officials by agents of domestic corporations. Twenty years after the enactment of the U.S. Foreign Corrupt Practices Act in 1977 (the “Act”), the Organization for Economic Cooperation and Development (the “OECD”), under pressure from the U.S. and other sources, adopted a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “OECD Convention”). In Latin America, the Inter-American Convention Against Corruption (the “IA Convention”) was adopted and opened for signature on March 29, 1996, in Caracas, Venezuela. In addition, there are also other efforts to combat international bribery. This paper will review: (1) the major elements of U.S. law concerning bribery for foreign public officials; (2) the provisions of the OECD Convention and the IA Convention; and (3) review the other efforts under way to counteract the climate of dishonesty inherent in the international marketplace.

## **THE FOREIGN CORRUPT PRACTICES ACT**

The passage of the Act in 1977<sup>1</sup> was the result of the major scandals that erupted during and arising from (i) a combination of the large illegal corporate contributions to President Nixon's reelection campaigns; (ii) the discovery of and the highly publicized Lockheed bribery of senior Japanese officials to obtain aircraft orders; and (iii) the election of a deeply religious President, Jimmy Carter. The Securities and Exchange Commission (the "SEC") discovered that over 400 corporations had acknowledged making illegal payments in excess of \$300 million to public officials of other countries and to domestic political candidates and parties.<sup>2</sup>

A subsidiary, albeit not unimportant aspect of U.S. concern, was the view of the SEC that shareholders of bribing corporations were uninformed about the accounting processes used by companies to conceal such illegal payments. There was no accountability of the "slush" funds that, in part, were monies allegedly paid to agents or "consultants."<sup>3</sup>

### ***The Act's Provisions***

A dual approach was taken by Congress to address the problem of international bribery. The Act makes it unlawful for a U.S. issuer of securities required to be registered with the SEC or any person acting for such issuer including shareholders, or any person acting personally or on behalf of a domestic entity, to bribe a foreign public official, a foreign political party, or political candidate for the purpose of inducing such person to do or omit doing any act or decision in his/her performance of any lawful duty or to induce such person to use such influence to assist the U.S. person to obtain or retain business with the foreign governmental entity.<sup>4</sup> The statute covers both direct bribes and bribes given through intermediaries, such as foreign agents. A bribe is any offer, gift, promise, or authorization to give anything of value to the foreign official, political party official, or political party candidate.

### ***Persons Covered by the Act***

The Act is divided into two main sections: (1) "prohibited foreign trade practices by issuer"; and (2) prohibited foreign trade practices by domestic concerns.<sup>5</sup> The first section of covered persons is any issuer of securities within the jurisdiction of the SEC, any person required to file reports under the Act, as well as any officer director, employee, or agent of such issuer or stockholder acting on behalf of the issuer. Each covered person is prohibited from using the mails or other instrumentality of interstate commerce in order to bribe foreign public officials as

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<sup>1</sup> The Act of 1977, P.L. No. 95-213, 91 Stat. 1494, 15 U.S.C. sections 78m(b), Id-1, Id-2, ff (1977), as amended 15 U.S.C. sections 78m, 78dd-1, 78dd-2, 78ff (1988).

<sup>2</sup> H. R. Rep. No. 640, 95<sup>th</sup> Cong., 1st Sess. 4 (1977).

<sup>3</sup> Timmeny, "An Overview of the FCPA," 9 Syracuse J. Int'l L & Com. 235 (1982) cited in Ralph H. Folsom, Michael Wallace Gordon and John A Spanogle, Jr., *International Business Transactions: A Problem-Oriented Coursebook*, 3d ed., (St. Paul: West Publishing Co., 1995), p.669.

<sup>4</sup> 15 U.S.C. sections 78dd-1(a)(b) and dd-2(a)(1)(2)(3).

<sup>5</sup> 15 U.S.C. sections 78dd-1 and dd-2.

discussed below.<sup>6</sup> The second section of covered persons is “domestic concerns” and their officers and directors.<sup>7</sup>

“Domestic concerns” refers to any U.S. person (citizen, national, or resident) and business entity with a principal place of business within the U.S. or organized in any U.S. territory, possession, or commonwealth.<sup>8</sup> The definition in effect clarifies the restrictive definition given to covered persons in *United States v. McLean*,<sup>9</sup> wherein the Court held that in order to convict an employee of a corporation for a violation of the Act, the U.S. must first convict the employer for violation of the Act. The prior plea of “guilty” by the employer (International Harvester Company) to a one-count bill of information charging “conspiracy” to violate the Act did not suffice.

Another clarification of covered persons was noted in *United States v. Blondek, Tull, Castle, and Lowry*.<sup>10</sup> Two of the defendants (Castle and Lowry), charged with violation of the Act were Canadian officials who allegedly received a \$50,000 bribe from defendants Blondek and Tull to assure the acceptance of a bid for the sale of buses. The issue was whether foreign officials could be prosecuted as conspirators to violate the Act, even though they could not be prosecuted for violation of the Act because the statute clearly intended to and did exclude prosecution of foreign officials. The Court held that the said officials could not be so held liable. In *Dooley v. United Technologies*,<sup>11</sup> the Court extended criminal liability to foreign persons by holding that foreign individuals acting as agents or in some other similar capacity for domestic concerns could be prosecuted under the Act even though the Act did not extend to foreign corporations per se.

### ***Enforcement***

The responsibility for the enforcement of the anti-bribery provisions is given to the SEC with respect to issuers of securities and to the Department of Justice with respect to all other persons. Actual enforcement of the Act appears dependent upon the political party of the President. Enforcement was virtually ignored under Presidents Reagan and Bush and has been revived substantially under President Clinton. After a decade of ignoring the Act, the SEC instituted a civil enforcement action against a U.S. corporation (Triton Energy Corp.) for failure to maintain an adequate system of internal accounting controls to detect improper payments made to its business agent in Indonesia. These payments allegedly would be passed on to Indonesian government officials for favorable action in the award of contracts.<sup>12</sup>

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<sup>6</sup> 15 U.S.C. section 78dd-1(a).

<sup>7</sup> 15 U.S.C. section 78dd-2(a).

<sup>8</sup> 15 U.S.C. section 78dd-2(h)(1)(A)(B).

<sup>9</sup> 738 F. 2d 655, U.S.C.A. (5<sup>th</sup> Cir., 1984).

<sup>10</sup> 741 F. Supp. 116 (N.D. , 1990)

<sup>11</sup> 803 F. Supp. 428 (D.D.C., 1992).

<sup>12</sup> John F. X. Peloso, “SEC Rejuvenates Foreign Corrupt Practices Act,” *New York Law Journal*, May 2, 1997, [www.ljx.com/practice/intrade/0521fcpa.html](http://www.ljx.com/practice/intrade/0521fcpa.html).

### ***Penalties***

There are criminal and civil penalties for violation of the Act. Obviously, the more egregious the violation, the more likely criminal sanctions could be sought and imposed. For “willful violations,” wherein any person willfully and knowingly makes or causes to be made a false or misleading statement as to a material fact, the criminal sanction is up to a \$1 million fine or up to 10 years in prison or both and up to a \$2.5 million fine for a non-natural person (e.g., a corporation).<sup>13</sup> There is no liability if the accused is able to prove that she/he or it did not know of the Act or regulations thereto.<sup>14</sup> For a willful violation of Section 30A(a), the issuer may be fined up to \$2 million and is subject to a civil penalty of up to \$10,000. The fine for any officer, director, shareholder, employee, or agent acting on behalf of the issuer is a fine of up to \$100,000 and imprisonment of up to five years or both. A civil fine of up to \$10,000 may also be imposed by the SEC upon any officer, director, employee, agent of issuer, or shareholder acting on behalf of the issuer. The issuer may not pay all such fines to individuals.

Comparable penalties may also be imposed upon any domestic concerns that violate the Act. The fine is up to \$2 million and a civil penalty of up to \$10,000 may be imposed by the Attorney General.

It is difficult to determine if private litigation may be commenced against the violator of the Act by a person allegedly injured by the corrupt act. It appears that no private litigation may be commenced for violation of the accounting provisions of the Act.<sup>15</sup> On the contrary, it may be possible for a private person to sue an offender under the Racketeer Influenced and Corrupt Organization Act,<sup>16</sup> using the offense as a predicated act or under the Travel Act.<sup>17</sup>

### ***Exceptions***

Bribes for routine governmental actions do not come within the scope of the Act. The definition of such actions refers to a foreign official who engages in:

- “(1) Obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (2) Processing governmental papers, such as visas and work orders;

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<sup>13</sup> 15 U.S.C. section 78ff(a).

<sup>14</sup> 15 U.S.C. section 78ff(a).

<sup>15</sup> See *Eisenberger v. Spectex Industries, Inc.*, 644 F. Supp. 48 (E.D.N.Y., 1986) and *Lewis v. Sporck*, 612 F. Supp. 1316 (N.D.Cal., 1985).

<sup>16</sup> 18 U.S.C. section 1962-1968.

<sup>17</sup> 18 U.S.C. section 952(a)(3). See *United States v. Young & Rubicam, Inc.*, 741 F. Supp. 334 (D. Conn., 1990).

- (3) Providing police protection, mail pick-up, and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (4) Providing phone service, power, and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
- (5) Actions of a similar nature.”<sup>18</sup>

Not included within routine governmental action are decisions by a foreign official to award new business or continue to do business or any action by a foreign public official who has discretionary power to encourage such decision-making.<sup>19</sup>

Difficulty may arise when determining which acts constitute bribes. U.S. companies have become imaginative in their strategies to create good will without violating the statute. The vice chairman of Chubb Corp., desiring a license to enter China’s insurance market, instituted a \$1 million program at Shanghai University to teach insurance, placing government officials as board members who were deciding upon its application. Companies have offered junkets to Disney World and Las Vegas, use “facilitation” payments to speed application processing and customs clearance, hire public relations firms to pay journalists the equivalent of a week’s pay to attend a company’s conference, give allowances to visitors to its plants, and other inducements. All of the above, except possibly junkets, unless directly tied to a marketing effort, do not appear to be violative of the Act. On the contrary, hiring middlemen to bribe officials would come within the scope of the Act. A number of companies have resorted to buying contracts from purchasers of contracts who paid bribes to win the awards. This type of unlawful dealing is almost impossible to detect.<sup>20</sup> Due diligence is mandatory for U.S. firms who form contractual relationships abroad as, e.g., with agents, distributors, representatives, and consultants.<sup>21</sup>

### ***Affirmative Defenses***

The Act was amended in the 1988 Trade Act to permit payments which are lawful under local law, i.e., payments that are lawful under the laws and regulations (not merely practice) of the foreign country at issue.

Expenditures associated with product demonstrations or contract performance, i.e., payments that are reasonable and bona fide expenditures (travel, lodging expense etc. for a public official) connected to the execution or performance of a contract, promotion, demonstration, or

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<sup>18</sup> 15 U.S.C. section 78dd-1(f)(3)(A)(i-v) and 15 U.S.C. section 78dd-2(h)(4)(A)(i-v).

<sup>19</sup> 15 U.S.C. section 78dd-1(f)(3)(B) and 15 U.S.C. section 78dd-2(h)(4)(B).

<sup>20</sup> Dana Milbank and Marcus W. Brauchli, “Greasing Wheels: How U.S. Compete in Countries Where Bribes Flourish,” *The Wall Street Journal*, September 29, 1995, p. 1.

<sup>21</sup> Schmidt and Frank, *op. cit.*, and Carl A. Valenstein and Rebecca S. Hartley, “The Foreign Corrupt Practices Act: International Due Diligence,” *Arent Fox*, [www.arentfox.com/features/international/duedil.html](http://www.arentfox.com/features/international/duedil.html).



explanation of products or services to execute a contract of a foreign government. The burden of proving such defense falls on the person claiming such defense.

### ***Statute of Limitations***

The statute of limitations for both criminal and civil actions is five years.

### ***1998 Amendments to the Act***

As a result of the signing of the OECD Convention by the U.S., it became necessary to incorporate amendments to the Act to expand its scope. They are as follows:<sup>22</sup>

It is illegal not only to give bribes for the purpose or doing or omitting to do any act “in order to obtain or retain business” but now also extends the prohibition to the attempt by the supplier to obtain “any improper advantage.” The language is somewhat broader than the prior prohibitions.

It is illegal to bribe foreign public officials defined as “any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.”<sup>23</sup> The 1998 Act expands covered persons to “public international organization” such as the World Bank, the U.N., and the I.M.F.<sup>24</sup>

The Act extended jurisdiction of its prohibitions over issuers of securities as stated above and over “domestic concerns” or their officers, directors, employees, agents, or shareholders acting on their behalf.<sup>25</sup> The amendments to the statute extend jurisdiction beyond domestic concerns to foreign companies and nationals engaged in foreign bribery some aspect of which took place within the U.S.<sup>26</sup>

Foreign nations in the past have been wary of the U.S. extending its jurisdiction to acts committed by foreign nationals abroad but having an effect within the U.S. These countries, particularly Western European states, not only refused to cooperate with the U.S. in investigative activities abroad but also prohibited its nationals from obeying U.S. court mandates. The OECD Convention, however, mandates that each member states shall “to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance” to the other states which have signed the Convention. This assistance includes the furnishing of documents and information requested as well as the status and results of the

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<sup>22</sup> Stanley S. Arkin, “Amendments to Foreign Corrupt Practices Act,” *New York Law Journal*, February 11, 1999, pp. 3, 7; and Reed Smith Bulletin 98-45, “*International Anti-Bribery and Fair Competition Act of 1998*”, December 1998, [www.rssm.com/pubs/client/bull9845.html](http://www.rssm.com/pubs/client/bull9845.html).

<sup>23</sup> 15 U.S.C. sections 78dd-1(f)(1) and 15 U.S.C. section 78dd-2(h)(2).

<sup>24</sup> 15 U.S.C. sections 78dd-1(f)(1)(A) 2(h)(2)(A), 78dd-3(f)(2)(A).

<sup>25</sup> 15 U.S.C. sections 78dd-1(a) and 78dd-2(a).

<sup>26</sup> 15 U.S.C. section 78dd-3(a).

request.<sup>27</sup> In addition, the OECD Convention provides the legal basis for the extradition of both nationals and foreign nationals from a member state to another requesting member state for prosecution under the agreement, having made the act of bribery of a foreign official an extraditable offense.<sup>28</sup> If a member state refuses to extradite its own national to a foreign member state, then it must take steps to prosecute the individual/business entity within its own country for the said violations.<sup>29</sup>

Amendments to the Act removed the unequal penalties assessed against U.S. nationals that were substantially greater than those assessed against foreign nationals acting as employees or agents of an U.S. concern. Before the amendments, only civil penalties could be asserted against such foreign nations, now all employees (foreign or U.S. citizens) become subject to the criminal and civil penalties of the statute.<sup>30</sup>

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

### ***Pre-Adoption Considerations***

The U.S. assault on international bribery expanded to a global confrontation for a number of reasons: (1) The U.S., aware of the loss of domestic jobs brought about by its unilateral legislative efforts, sought to “level the playing field”<sup>31</sup>; (2) Bribery undermines the integrity of governments, causing political leaders to make decisions based upon self-interest rather than the good of the populace; (3) Causes harm to business entities that seek contracts on the merits of the goods or services rather than based upon unlawful bribes; (4) Harms the interests of the consumer and the poor by bringing about inferior goods at higher prices, as well as increasing unemployment for workers who would have otherwise gained employment from the lawful contracts; (5) The efforts of private international organizations increased awareness of the problem of illegal payments.

One such major private international organization is Transparency International that began in Germany and spread globally. Its mission is to create international coalitions against corrupt practices.<sup>32</sup> A major feature is the annual issuance of “The Corruption Perception Index” which ranks the degree of corruption as perceived by business people. Based on a 1-10 score, with 10 being the least degree of perceived corruption, the 1996 Index shows the Scandinavian countries as achieving an almost perfect score and various poor third world states having the

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<sup>27</sup> OECD Convention, Article 9.

<sup>28</sup> OECD Convention, Article 10.

<sup>29</sup> OECD Convention, Article 10 (3).

<sup>30</sup> 15 U.S.C. section 78dd-3(a).

<sup>31</sup> “Foreigners Use Bribes to Beat U.S. Rivals in Many Deals, New Report Concludes, *Wall Street Journal*. October 12, 1995. Also, “Statement by the AFL-CIO Executive Council on Bribery in International Transactions,” February 20, 1995, [www.aflcio.org/public/estatemts/feb95/bribe.htm](http://www.aflcio.org/public/estatemts/feb95/bribe.htm).

<sup>32</sup> [www.transparency.de/mission.html](http://www.transparency.de/mission.html).

lowest scores.<sup>33</sup> The U.S., virtually alone in legislating against international bribery, began applying pressure on the world community to adopt comparable measures against bribery. It strongly urged the OECD<sup>34</sup> to recommend legislation against foreign bribery. All countries have anti-bribery statutes but none apparently prohibited bribery to foreign officials to influence contract selections and other official acts within their countries. In fact, payment of bribes most often was a deductible expenditure for tax purposes, adding incentive for national companies to engage in illicit activities abroad. Although U.S. commentators were pessimistic that a global anti-bribery commitment could be achieved,<sup>35</sup> significant steps are being taken to legislate against such activity.

The drive for reform in the OECD followed the G7 Summit statement which called for (i) an end of the tax deductibility of bribes; (ii) for the introduction of legislation to criminalize foreign bribery by corporations; and (iii) for an agreement on an anti-corruption Convention.<sup>36</sup> In a report by the OECD Committee on International Investment and Multinational Enterprises, recommendations were made to and adopted by the Council of the OECD for the criminalization of bribery of foreign public officials.<sup>37</sup> In May 1996, in a Communiqué of the OECD Ministerial Council Meeting, it stated its commitment to criminalize bribery in international business transactions. A report by CIME, entitled “Revised Recommendation on Combating Bribery in International Business Transactions,” was given to the Council of the OECD, which were adopted on May 23, 1997. Its recommendations resulted in the adoption of the OECD Convention on November 21, 1997 by the OECD member countries and five non-member countries (Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic). The OECD Convention was opened for signature on December 17, 1997.<sup>38</sup> Implementation of the OECD Convention was to be accomplished by April 1, 1998, and was to be in full force and effect by the end of 1998.

### ***Ratification***

Article 15 of the OECD Convention stated that it would come into force 60 days after the date that five of the ten countries with the ten largest shares of OECD exports ratified it. Canada became the fifth signatory nation among the ten largest exporting countries to ratify the Convention in accordance with Article 15 in December 1998.<sup>39</sup> As a result, the OECD

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<sup>33</sup> For the 1998 index, see [www.transparency.de/documents/cpi/index/html](http://www.transparency.de/documents/cpi/index/html). The list contains 85 countries and is based on a minimum of three sources for each country.

<sup>34</sup> The OECD was established in 1961. Currently, there are 24 members. Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, U.S.A.

<sup>35</sup> See, for example, Rubin, “International Aspects of the Control of Illicit Payments,” *Syracuse J. Int’l L. & Com.* 315 (1982), taken from Ralph H. Folsom, Michael Wallace Gordon and John A. Spanogle, Jr., *International Business Transactions*.

<sup>36</sup> Transparency International Press Release, <http://www.transparency.de/press/1997.11.3.oecd-convention.html>.

<sup>37</sup> The Council adopted the Recommendation on Bribery in May 1994. For a text of the Report, see [www.oecd.org/daf/cmisis/bribery/briminrp.htm](http://www.oecd.org/daf/cmisis/bribery/briminrp.htm).

<sup>38</sup> For a text of the Convention, see [www.oecd.org/daf/cmisis/bribery/20nov1e.htm](http://www.oecd.org/daf/cmisis/bribery/20nov1e.htm). The Convention was signed on behalf of the U.S.A. by Secretary of State Madeline Albright.

<sup>39</sup> For a list of all OECD members and the statistics on OECD exports for the years 1990-1996, see [www.oecd.org/daf/cmisis/bribery/20nov1e.htm](http://www.oecd.org/daf/cmisis/bribery/20nov1e.htm).

convention came into effect on February 15, 1999.<sup>40</sup> Other countries that had ratified the OECD Convention, as of February 12, 1999, were Iceland, Japan, Germany, Hungary, the U.S., Finland, the United Kingdom,<sup>41</sup> Norway, Bulgaria, and South Korea. Noticeably absent from the list is France which was one of the major benefactors of the passage of the U.S. statute when it was able to successfully conclude contracts as a result of corruptive practices. A major example is the sale of airbuses to countries, under other circumstances that would have purchased planes from U.S. manufacturers.

### ***U.S. Ratification of the OECD Convention***

The U.S. signed the OECD Convention on December 17, 1997, when the Secretary of State, Madeleine K. Albright, signed the OECD Convention in a ceremony in Paris, France. As a result of U.S. membership in the OECD and its agreement to adhere to the OECD Convention, legislation was proposed in Congress to amend the Act to implement the OECD Convention. Accordingly, on November 10, 1998, President Clinton signed the International Anti-Bribery and Fair Competition Act of 1998.<sup>42</sup> The U.S. Senate consented to the ratification of the OECD Convention on July 31, 1998. The legislation implemented the OECD Convention by making certain amendments to the existing Act.

### ***Provisions of the OECD Convention***

The Preamble to the OECD Convention makes it clear that bribery is a moral and political phenomenon that undermines economic development and good government and causes distortions in international competition.

*Article 1. The Offense of Bribery of Public Officials.* Article 1 of the OECD Convention sets forth the prohibited conduct. It provides that each Party to the OECD Convention (“Party”) is to make it a criminal offense under its laws for any person to bribe, directly or indirectly, a public official<sup>43</sup> or a third party in order to cause an official to act or refrain from acting in an official capacity with respect to obtaining or retaining business or “other improper advantage” in international business transactions. The Parties are also to make it a crime to aid, abet, authorize, incite, attempt, or conspire to commit such acts.<sup>44</sup> A “Foreign Public Official” is a person who possesses a legislative, executive, judicial, or administrative office in a foreign country<sup>45</sup> or is

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<sup>40</sup> For a text of the ratification of legislation known as the *Corruption of Foreign Public Officials Act*, see [www.canada.justice.gc.ca/News/Communiqués/1999/corlaw\\_en](http://www.canada.justice.gc.ca/News/Communiqués/1999/corlaw_en)

<sup>41</sup> The British Minister of Trade, Brian Wilson, in a press release dated December 11, 1998, noted that Great Britain was one of the first countries in the OECD to ratify the Convention after having played a major role in ensuring the completion of the negotiations which led to the adoption of the Convention. [www.britain-inf.org/bis/fordom/trade/11de98-4.stm](http://www.britain-inf.org/bis/fordom/trade/11de98-4.stm).

<sup>42</sup> Pub. Law 105-366, 112 Stat. 3302.

<sup>43</sup> The Article says: “offer, promise or give any undue pecuniary or other advantage.”

<sup>44</sup> Article 1(1)(2) of the Convention.

<sup>45</sup> A “foreign country” includes all levels of government ranging from the national level to the local level. Also included in the definition of a foreign country is “any organized foreign area or entity, such as an autonomous territory or a separate customs territory.” The definition herein is taken from the Official Commentaries, adopted by the Negotiating Conference on November 21, 1997, which can be found in [www.ita.doc.gov/legal/occdct.html](http://www.ita.doc.gov/legal/occdct.html).

official or agent of a public agency, public enterprise, public international organization, and whether such person is appointed or elected.<sup>46</sup>

Official Commentaries on the Convention made it clear that the Convention is concerned with “active corruption” or “active bribery” (“the offense committed by the person who promises or gives the bribe” rather than “passive bribery” or the person who is the recipient of the bribe). Even if the recipient coerced the giver to make the payment, it is still considered “active bribery.”<sup>47</sup>

It is sufficient if a country makes it a criminal offense to prohibit bribes in general provided the bribe of public officials is included. It is unlawful even if the giver was the best-qualified bidder of a contract or gave a bribe in some other form other than money.<sup>48</sup> It is unlawful irrespective of the value of the advantage, the permissive nature of local customs, or the tolerance by local authorities.

Like the U.S. Act, it is not unlawful if the bribe or advantage is allowed by written law or regulation or the case law in the foreign state or if the payment is deemed to be a small “facilitation” payment for menial administrative functions such as the issuance of licenses or permits.<sup>49</sup>

*Article 2. Responsibility of Legal Persons.* Each Party is obliged to pass such laws or regulations creating liability for bribery of a foreign public official, although such Party may exclude liability for attempts or incitements that do not result in the act of bribery.

*Article 3. Sanctions.* Each Party must make the forbidden conduct proportionately punishable as if a domestic person were to bribe that country’s own public officials. Punishment shall include jail for natural persons and extradition. If a Party’s laws do not attach criminal responsibility to legal persons (e.g., companies or corporations not held criminally liable in some countries), then non-criminal sanctions such as fines are to be imposed. The bribe and proceeds of the bribery (profit or other benefit received) or property of comparable value are made subject to seizure, confiscation, or other comparable result. Other administrative sanctions may also be included by a Party such as disqualification from public procurement contracts, judicial supervision, and the like.<sup>50</sup>

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<sup>46</sup> Article 1(4)(a). A “public enterprise” includes one in which a government has a dominant influence, such as having a majority interest in the subscribed capital of the enterprise or controls a majority of the votes or appoints a majority of the Board. A “public international organization” is one organized by countries and includes a regional economic integration such as the European Community’s, *Commentaries*, p. 2.

<sup>47</sup> *Commentaries*, p. 1, “General: (1).”

<sup>48</sup> In a recent scandal concerning the award of a site for the Olympic Games, bribes consisted of free tuition for children of the Olympic Committee, free trips, and other gifts. The International Olympic Committee does not fall under the Convention because it is not a “public international organization.” For a discussion of the topic see Stanley S. Arkin, “Amendments to Foreign Practices Act,” *New York Law Journal*, February 11, 1999, p. 3.

<sup>49</sup> *Id.*, pp. 1-2(8-9). Compare the FCPA provisions that have similar exceptions.

<sup>50</sup> See p. 3 of *Commentaries*.

*Article 4. Jurisdiction.* Each Party is to assert jurisdiction over the bribery offense whenever it takes place wholly or in part within its territory.<sup>51</sup> The territorial basis for such jurisdiction is to be interpreted broadly (presumably, any connection with the supplier nation will suffice).<sup>52</sup> If several countries wish to assert jurisdiction, then they are to consult with one another as to which Party is most appropriate for the said assertion.<sup>53</sup> The Article is clear that each Party is to define its jurisdiction in such a manner as to carry out the intent of the OECD Convention.<sup>54</sup>

*Article 5. Enforcement.* The Convention addresses the issue of “national economic interest.” Many countries previously refused to punish international bribery because such acts provided benefits, such as jobs and other benefits resulting from the successful award of contracts. The Convention makes it clear that such consideration, as well as the consideration of the potential effect of such punishment upon relations with the recipient country, or the identity of the bribe offeror, are not to influence the prosecution of such acts.<sup>55</sup> Complaints of bribery are to be taken seriously by prosecutors of the Party and adequate resources are to be provided to such prosecutors.<sup>56</sup>

*Article 6. Statute of Limitations.* Each Party is to enact a time limitation statute for enforcement of the anti-bribery requirements to allow sufficient time to enable appropriate investigation and prosecution.

*Article 7. Money Laundering.* Each Party is required to treat foreign bribery in the same manner as bribery of one of its own public officials with respect to money laundering legislation.

*Article 8. Accounting.* The provision of accounting is comparable to the Act requirements.<sup>57</sup> It provides that each Party is to take such necessary measures so as ensure financial disclosures; prohibit “off-the-books” expenditures, incorrect identification of expenditures and use of false documents; and ensure that criminal, civil, and administrative penalties are imposed for non compliance.

*Article 9. Mutual Legal Assistance.* Each Party is to “provide prompt and effective legal assistance to another Party for the purpose of criminal investigation and proceedings brought by a Party” concerning the prohibitions in the Convention. Information, documents, and other requests for assistance are to be given attention. Denial of such assistance cannot be made on the

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<sup>51</sup> Article 4(1).

<sup>52</sup> See *Commentaries*, p. 3.

<sup>53</sup> Article 4(3).

<sup>54</sup> Article 4(3).

<sup>55</sup> Article 5.

<sup>56</sup> *Commentaries*, p. 4.

<sup>57</sup> See 15 U.S.C. section 78m(b)(2).

basis of bank secrecy. Assistance includes the temporary transfer of a person in custody to the requesting Party.<sup>58</sup>

This Article is very important to the U.S. because U.S. law applies extraterritorially. As previously stated, confrontations between the U.S. and Western European countries surfaced because of U.S. attempts to punish companies doing business abroad legally in contravention of U.S. law.

*Article 10. Extradition.* The prohibited conduct under the OECD Convention constitutes an extraditable offense irrespective of whether or not extradition treaties between member Parties exist. If a Party refuses extradition of its own nationals, it must submit the matter for prosecution within its own country.<sup>59</sup> Requests for mutual legal assistance, consultation and extradition shall include notification to the Secretary-General of the OECD who shall act as a channel of communication between Parties, although the Parties may consult directly with each other in such matters.<sup>60</sup>

*Other Articles. Article 11.* Responsible Authorities require each party to the convention to name the persons or agencies which will act as a channel of communication concerning issues of consultation, extradition, and legal assistant. *Article 12. Monitoring and Follow-Up* pertains to the monitoring and promotion of the implementation of the Convention. *Article 13. Signature and Accession; Article 14. Ratification and Depository; Article 15. Entry into Force;* were discussed above. *Article 16. Amendment,* permits the submission of an amendment to the Convention by a Party, and *Article 17. Withdrawal,* permits a Party to withdraw from the Convention one year after receipt of notification by the OECD.

### ***Possible Loopholes***

In a commentary on the then proposed OECD Convention, U.S. Secretary of Commerce, William Daley, noted some flaws in the proposed document. He indicated that the OECD Convention did not cover the bribery of political parties and party officials in international business transactions.<sup>61</sup> Article 1(1) makes it a criminal offense to bribe a Foreign Public Official either directly or through intermediaries for the purposes previously stated.

It appears that Daley's comments and proposals for change may not have been implemented. As he stated: "Imagine the effectiveness of a convention, which failed to prohibit bribes to the political machines of Zaire's Mobutu or the Philippines' Ferdinand Marcos."<sup>62</sup> Nevertheless, his requests for inclusion in the definition of "public officials" of "legislators" and "public enterprises" were finally accomplished. It appears that the inclusion of "political parties" or "party officials" into the definition will be left to the courts and/or the legislative branch of

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<sup>58</sup> *Commentaries*, p. 4.

<sup>59</sup> See Article 10(3).

<sup>60</sup> See Article 11.

<sup>61</sup> William Daley, "Let's Develop a Tough Agreement on Criminalizing Bribery," November 17, 1997, [www.usia.gov/regional/nea/econmena/eznc111/html](http://www.usia.gov/regional/nea/econmena/eznc111/html).

<sup>62</sup> *Id.*

each member state to determine the scope of the OECD Convention or clarified by amendments to the OECD Convention.<sup>63</sup>

Another loophole addressed by Daley is the range of enterprises owned or controlled by governments that are covered by the OECD Convention. He fears that there are many such enterprises in underdeveloped countries that may escape the scope of the OECD Convention. It appears that the definition of “Foreign Public Official” may not cover such enterprises. Daley’s other concern is that the methodology and timing of the effective date of the Convention appears to have been overcome in practical terms. Daley worried that restricting the effective date to a date when a “critical mass of large nations sign on” would prolong the date of entry into force of the Convention. In practice, however, it did not prevent its commencement.<sup>64</sup>

Other problems which have been raised, especially by Transparency International, include:

- (1) The possibility that legislatures of the states adopting the OECD Convention will use vague language to enable those persons prosecuted to use the lack of clarity of the legislation to their advantage;
- (2) If the deductibility of bribes are not made illegal, then the OECD Convention will not be effective;
- (3) Some countries or certain political parties who are in control of the government may refuse to enforce the sanctions even if the violations were clearly established;<sup>65</sup>
- (4) The lack of clarity as to whether officials of a “parastatal organization” are covered by the OECD Convention. With mass privatization, the distinction between the public and private sectors has been blurred; and
- (5) Article 4(2) states: “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.”

The problem is that certain countries, such as Germany and Japan, provide that companies cannot be held criminally liable for their acts although individuals within the companies may be held liable. It will be up to the legislatures within these countries to assure extension of liability to such companies.<sup>66</sup>

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<sup>63</sup> For a text of the process for amending the Convention, see Article 16 of the Convention.

<sup>64</sup> *Id.*

<sup>65</sup> The Reagan and Bush Administrations in the U.S. rarely prosecuted violators of the FCPA. This may have been due to the unilateral U.S. approach that caused many U.S. companies to lose contracts abroad.

<sup>66</sup> Transparency International, “OECD Anti-Corruption Convention leaves critical questions still open. Aim to curb foreign bribery by international firms.” Press Release, November 5, 1997.  
[www.transparency.de/press/1997.11.3.oecd-convention.html](http://www.transparency.de/press/1997.11.3.oecd-convention.html).



Australia interpreted the Convention to mean that it was not obliged to apply its own general criminal law to acts by Australian citizens outside the country because its laws do not apply to such conduct.<sup>67</sup> The OECD Commentaries appears to concur in Australia's view. Nevertheless, Article 4(4) appears to require a Party to make foreign bribery illegal irrespective of a Party's existing legislation. It states:

Article 4(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."

### **INTER-AMERICAN CONVENTION AGAINST CORRUPTION**

The Inter-American Convention Against Corruption (the "IA Convention") was adopted at the third plenary session of the Organization of American States ("OAS") held on March 29, 1996. It was negotiated under the auspices of the OAS and was mandated by agreement of 34 heads of state at the Summit of the Americas in 1994. On March 29, 1996, it was adopted in Caracas, Venezuela, and signed by 21 states. The U.S. signed the IA Convention on June 2, 1996 at the OAS General Assembly in Panama City.<sup>68</sup>

The IA Convention is similar to the OECD Convention and will be merely summarized here and highlighted by some features peculiar to it. The preamble to the IA Convention recognizes that corruption is destructive to society's moral order and justice, distorts the economy, undermines the moral fiber of a nation, is often a tool of organized crime, is often linked to drug trafficking and other ills.<sup>69</sup>

Each member state is required to create, maintain, and strengthen its standards for proper conduct in the fulfillment of public functions. Conflicts of interest are to be avoided. Government officials are required to use the resources given to them to report acts of corruption in the performance of their official duties.<sup>70</sup> In addition, mechanisms are to be established to enforce standards of conduct; provide for the proper registering of income, assets, and liabilities of persons performing such functions; and provide for openness, equity, and efficiency in government hiring and procurement.<sup>71</sup> Other requirements are government revenue collection and control systems which will deter corruption; denial of favorable tax treatment for violation of anticorruption laws; oversight bodies and systems to oversee the prevention of corruption; accounting procedures which would deter corrupt acts; and mechanisms to encourage society to prevent corruption.<sup>72</sup>

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<sup>67</sup> See [www.law.gov.au/publications/foreign\\_bribery/NIA.html](http://www.law.gov.au/publications/foreign_bribery/NIA.html).

<sup>68</sup> As of May 1998, Argentina, Bolivia, Equator, Paraguay, Peru, Mexico, Venezuela and Costa Rica ratified the Convention that had been signed by 23 of 35 members of the OAS. Like the OECD Convention, it may be ratified by any country, including non-members of the OAS. The Convention was submitted to the U.S. Senate for its advice and consent on April 1998.

<sup>69</sup> For a transcript of the Convention see [www.ita.doc.gov/legal/corrupt.html](http://www.ita.doc.gov/legal/corrupt.html).

<sup>70</sup> Article III(1).

<sup>71</sup> Article III(2)-(5).

<sup>72</sup> Article III(6)-(12).

The IA Convention, like the OECD Convention, mandates each Party to establish jurisdiction over nationals who commit corrupt acts within its territory; over persons who reside or nationals who violate the IA Convention; and provide for jurisdiction if it does not allow extradition of nationals.<sup>73</sup> The acts of corruption are again similar to those in the OECD Convention and include the solicitation or acceptance by a government person of money or any other benefit in exchange for an act or omission in the performance of his public function. Any person making such offer shall fall within the IA Convention. Also covered are persons who participate as principals, accomplices, instigators, and the like.<sup>74</sup> Transnational bribery by a Party national is forbidden.<sup>75</sup>

A major difference from the OECD Convention is found in *Article IX: Unjust Enrichment*. It provides that each Party is to take measures to create as an offense “a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions.” It is common knowledge that there have been numerous government officials in Latin America who were able to amass substantial wealth while earning only a very modest government salary.

In *Article XI: Progressive Development*, the Parties are to consider establishing the following acts as offenses:

- (1) The improper use by a government official or a person performing public functions, of classified or confidential information for his own benefit, or that of a third party;
- (2) The conversion of government property for improper use by a government official and any act or omission by any person, personally or through a third party, or acting as an intermediary, seeking to obtain a favorable decision from a public authority;
- (3) Any illicit act or omission by any individual, personally or through a third party, seeking to obtain a favorable decision from a public authority; and
- (4) Embezzlement of government property by a government official.

*Article XII: Effect on State Property* states that it is irrelevant that the wrongful acts do injury to state property. *Article XXX: Extradition* is comparable to the OECD Convention. It is a controversial provision because the U.S. has sought extradition of Latin American nationals (including the seizure of a President of Panama for trial in the U.S.) charged with the commission of U.S. crimes. As stated in the OECD Convention and in the above Article, the offenses recited in the IA Convention are extraditable offenses and are part of any extradition treaty between Parties to the IA Convention. If a Party refuses to extradite, it must make the said offenses punishable and triable under its laws.

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<sup>73</sup> Article V.

<sup>74</sup> Article VI.

<sup>75</sup> Article VIII.

In *Article XIV: Assistance and Cooperation*, each Party is to accord to the other Parties full cooperation with respect to the obtaining of evidence and other measures concerning the prosecution of offenses under the Convention. In *Article XV: Measures Regarding Property*, each of the Parties are to provide “the broadest possible measure of assistance in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses established in accordance with this IA Convention.” No Party can use the excuse of bank secrecy for refusing to provide the assistance requested by another Party.<sup>76</sup>

The remaining Articles, *VIII* through *XXVIII*, are the standard provisions for signature, ratification, and accession by any other country, date of entry into force, and the right of a Party to withdraw from the IA Convention.

### **OTHER EFFORTS MADE INTERNATIONALLY TO LESSEN CORRUPTION**

There are significant reforms taking place internationally within nations to reduce corruption. As reported by Transparency International,<sup>77</sup> reforms include those of a number of governments and agencies.

Bolivia, upset by its low rating among nations in the Transparency International's Corruption Index, invited leaders from the organization and from the World Bank to visit the country and make proposals for change. After the visit in 1997, Bolivia instituted a dialogue with opposition groups as well as with industry and labor to change its “culture of corruption” by enacting measures of reform of the judiciary and other areas of the public sector, as well as engaging in a massive media campaign against corruption. Chile endorsed the IA Convention in 1998 and instituted legal reforms in accordance with the IA Convention. China closed down more than 300 accounting firms and revoked the licenses of 10 percent of its certified public accountants for their participation in fraudulent auditing reports and unprofessional accounting practices.

Ecuador introduced an Anti-Corruption Commission, headed by a director of a major newspaper with the support of the President of the country, whose mission was to investigate corruption in government. It also set up a Carter Center lead by the U.S. former President to introduce reforms within the country. Berlin, Germany set up anti-corruption inspection units in all government departments to investigate such practices and to end tax deductibility of bribes by businesses. Germanwatch, a development policy watchdog, is working to strengthen social responsibility including the issues relating to foreign bribe-offerings.

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<sup>76</sup> Article XVI.

<sup>77</sup> [www.transparency.de/documents/newsletter/98.4/reforms.html](http://www.transparency.de/documents/newsletter/98.4/reforms.html).

Nigeria, which has one of the worst reputations for corruption, ordered all senior government officials to disclose their personal assets, and established an independent commission to regulate and monitor the oil industry and lessen bribe taking within the various sectors of the economy. Sierra Leone, through its Finance Minister, revealed the extent of corruption within the country and its steps to appoint a new Accounting General and professional accountants to handle the country's finances. Other efforts include those by countries such as Mexico, the Philippines, South Korea, Thailand, and a number of initiatives in South Africa.<sup>78</sup>

The United Nations, in December 1996, adopted a Declaration against Corruption and Bribery in International Commercial Transactions. Though such declarations have no legal force and effect, nevertheless, they do commit member states to take the recommended action.<sup>79</sup>

The Office of the Chief Counsel of the U.S. Department of Commerce prepared and published an impressive 42-page review of U.S. and international anti-corruption initiatives.<sup>80</sup> There are many other U.S. efforts, in addition to the Act, to attack bribery and other corruption practices. The Department of Commerce provides advocacy assistance to U.S. companies seeking to compete with respect to foreign government procurement projects. Its advocacy is conditioned upon the assisted company signing an agreement with the U.S. that it has not and will not bribe foreign officials and will maintain a policy prohibiting such acts. Similar provisions are required in order to participate in a Department of Commerce trade mission.<sup>81</sup> There are U.S. efforts to work with the Russian Business Development committee's Business Facilitation Group to counteract commercial crimes and corruption within Russia.<sup>82</sup>

The U.S. Agency for International Development ("U.S. Aid") also pioneered the role of integrated financial management to improve government transparency in its Americas' Accountability/Anti-Corruption workshop as well as engaging in comparable activities in U.S. Aid/Europe and Newly Independent States Bureau.<sup>83</sup> Other U.S. government initiatives include the foreign outreach program of the U.S. Office of Government Ethics; the broadcast of anti-bribery programs through the U.S. Information Agency; the requirement by the Import-Export Bank of a Supplier's Certificate as a prerequisite of a loan or guarantee which compels disclosure of atypical discounts, rebates, commissions, and the like; and the denial of compensation for losses by the Overseas Private Investment Corporation if losses occurred from corrupt practices.<sup>84</sup>

The European Union passed a Resolution on Combating Corruption in Europe on December 15, 1995, making recommendations to combat fraud and corruption as well as

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<sup>78</sup> *Id.*

<sup>79</sup> [www.law.gov.au/publications/foreign\\_bribery/NIA.html](http://www.law.gov.au/publications/foreign_bribery/NIA.html).

<sup>80</sup> 'The Anti-Corruption Review,' May 5, 1998. [www.ita.doc.gov/legal/corr-rev.html](http://www.ita.doc.gov/legal/corr-rev.html).

<sup>81</sup> *Id.*, pp. 4-6.

<sup>82</sup> *Id.*, Examples of such programs are: "Integrity Programs" sponsored with Transparency International in Mozambique, Ghana, Benin, Bulgaria, Ukraine, Dominican Republic, and Columbia.

<sup>83</sup> *Id.*, pp. 6-10. Initiatives were commenced in partnership with the World Bank in the Ukraine, Georgia, and Albania.

<sup>84</sup> *Id.*, pp.10-15.

abolishing tax legislation which encouraged corruption through tax deduction and blacklisting any firm from government contracts which have acted corruptly.<sup>85</sup>

There are many other anti-bribery, anti-corruption efforts that have been taken by many government units. For a listing, the reader is referred to the cited Anti-corruption Review in the footnotes. The list includes efforts by the Council of Europe; the Summit of the Americas of 1994 and 1998; the Asian Pacific Economic Cooperation Forum; the G-7 Finance Ministers and Heads of State; the World Trade Organization, particularly, the WTO Agreement on Government Procurement which became effective on January 1, 1996; the U.N. Commission on International Trade Law; the U.N. Economic and Social Commission and the General Assembly; and the Council of Securities Regulators of the Americas.

There are also many private efforts initiated to combat corruption; they include the International Chamber of Commerce; the International Bar Association; the Institute for Democratic Studies; the Pacific Basin Economic Council; the Transatlantic Business Dialogue; and the American Bar Association.

In addition, financial institutions, such as the World Bank; the Inter-American Development Bank; the International Monetary Fund; the African Development Bank; and the North American Development Bank, have joined the fight against corruption.<sup>86</sup>

## CONCLUSION

The passage of the Act by the U.S. in 1977 was accompanied by significant losses of income for U.S. companies, as well as the loss of jobs by American workers. Idealists and cynics alike observed the injustice of the U.S. being the only nation to make the bribing of foreign public officials illegal. Companies from major competing nations, such as Germany and France, took advantage of U.S. law to procure large contracts which they otherwise would not have been able to gain. The U.S. governmental response under Presidents Reagan and Bush was to ignore violations of the Act except in egregious and highly publicized unlawful conduct.

The Clinton Administration did serve notice that the Act would be enforced; however, it coupled the announcement with efforts to convince other nations to promulgate laws that would also proscribe such conduct. Thus, the OECD, with some reluctance, finally decided to adopt a Convention that paralleled U.S. law. There are similar efforts in the Western Hemisphere by the OAS and by other international organizations and bodies to address the problems arising from international bribery. In part, the excesses of President Marcos of the Philippines and President Suharto of Indonesia contributed to the new outlook of supplier nations. The beneficiaries of contracts arising out of bribery by outsiders are leaders of government rather than the citizens thereof.

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<sup>85</sup> *Id.*, p. 17-19. O.J. No. C17.22.11996,

<sup>86</sup> *Id.*, pp. 20-42.

It would be foolish to believe that any number of laws and treaties will end corruption, but the degree and extent of corruption can be greatly minimized. The new initiatives and world outlook lend credence to the aspirations of idealists who desire a world in which business is conducted in accordance with a globally recognized ethical code of conduct.