



International Enforcement of the OECD Antibribery Convention

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Introduction

The U.S. Department of Commerce has as part of its mission to promote U.S. and foreign commerce, including through strengthening international trade and investment rules. An important part of this mission is monitoring the trade agreements the United States has entered into with its trading partners to ensure that they are living up to their obligations and that U.S. exporters are gaining all the benefits of such agreements. Although not traditionally recognized as trade agreements, anticorruption instruments play an important role in supporting an open trading system, and creating conditions for sustained economic growth.

The United States has made real progress in building international coalitions to combat bribery and corruption. Bribery and corruption are now being addressed in a number of fora, with positive results. The focus of this article is the Organization for Economic Cooperation and Development (“OECD”) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Antibribery Convention”). However, there are several other important instruments containing antibribery provisions, including the new United Nations Convention Against Corruption (“U.N. Convention”), the Inter-American Convention Against Corruption (“Inter-American Convention”), the Council of Europe Criminal Law Convention on Corruption (“COE Convention”), and U.S. bilateral Free Trade Agreements (“FTAs”), which will also be briefly discussed.

Corruption as a Barrier to Trade and Competition

Corruption has long been a barrier to international trade and a competitive marketplace. The U.S.

Government has for years received reports that bribery of foreign public officials influenced the awarding of billions of dollars in contracts around the world. In the last Department of Commerce annual report to Congress under the International Anti-Bribery and Fair Competition Act of 1998, it is estimated that, between May 1, 2003 and April 30, 2004, the competition for 47 contracts worth U.S. \$18 billion may have been affected by bribery by foreign firms of foreign officials. Firms alleged to have offered such bribes won approximately 90 percent of the contracts in the deals for which information is available as to their outcome. The report also states that, although the overall bribery activity by OECD firms dropped substantially from the reporting years prior to 2002, firms from a few OECD countries continue to be involved in a disproportionate share of those allegations.² Prior reports indicated that bribery allegations were related to contracts in multiple sectors, including energy, telecommunications, construction, transportation and (primarily) military procurement. The Commerce Department has stressed that, while such bribery is harmful to all enterprises, it is particularly harmful to small and medium sized enterprises (“SMEs”), as they can least afford to compete in extensive bidding processes and are further dissuaded from doing so when the outcome of such transactions is not based on commercial merits.³

The OECD Antibribery Convention

One of the primary reasons for negotiating the OECD Antibribery Convention was to level the playing field for U.S. companies by requiring other major exporters to join the United States in criminalizing the bribery of foreign public officials under their own legal systems. The United States unilaterally prohibited such conduct in 1977 with the U.S. Foreign Corrupt Practices Act (“FCPA”). In 1988, Congress, recognizing that U.S. businesses were being negatively affected as a result of foreign bribery by their competitors, directed the

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Executive Branch to negotiate at the OECD an international convention prohibiting bribery of foreign public officials. After ten years of effort, the OECD Antibribery Convention was adopted in November 1997. In the absence of the OECD Antibribery Convention, not only did most major exporting countries allow their companies to bribe foreign officials to win international contracts, but many also provided an incentive for companies to do so by allowing such bribes to be tax deductible. Prior U.S. Government attempts at negotiating such an instrument in the United Nations in the mid-seventies and early eighties had not been successful. The entry into force of the OECD Antibribery Convention in February 1999 therefore represented a milestone in the multilateral fight against corruption.

The FCPA was amended in 1998 to conform the statute to the OECD Antibribery Convention. For example, the OECD Antibribery Convention, although primarily based on the FCPA, specifically covered bribes by “any person” to officials of public international organizations, and encouraged countries to adopt nationality jurisdiction if permissible under their legal systems. Although the FCPA already covered bribe payments “in order to obtain or retain business” the statute was amended to make explicit that payments made to secure “any improper advantage,” the language used in the OECD Convention, were prohibited by the FCPA. For more information on the 1998 amendments to the FCPA, see <http://www.usdoj.gov/criminal/fraud/fcpa/legindx.htm>

Role of the Commerce Department

Although the Commerce Department has no enforcement role with respect to the FCPA, it provides general guidance to exporters to assist them in understanding the FCPA in order to help them comply with its prohibitions. With the additional prohibitions by foreign countries pursuant to the OECD Antibribery Convention, it is even more important for U.S. exporters to be aware of such laws when engaging in international trade. As part of the Commerce Department, the U.S. and Foreign Commercial Service plays an important role in

counseling U.S. exporters in key markets. This requires that the Commercial Service be aware of and provide information to U.S. companies about the FCPA and other anticorruption initiatives. The U.S. Government provides training to both U.S. State Department Foreign Service Officers and U.S. Commerce Department Commercial Service Officers about the FCPA and other anticorruption efforts. Such overseas personnel are instructed to report to Washington when they learn of bribery allegations implicating the FCPA or another country’s laws implementing the OECD Antibribery Convention. Also, the U.S. Department of Commerce’s International Trade Administration maintains an internet “hotline” so that the public may report possible violations of the laws implementing the OECD Antibribery Convention by firms of other Parties at www.export.gov/tcc.

Commerce Department officials are core members of the U.S. delegation to the OECD Working Group on Bribery, which monitors the implementation of the OECD Antibribery Convention. For six years the Commerce Department issued a report to Congress on the implementation of the OECD Antibribery Convention (the 2004 report, the last in this series, and all prior reports are available on-line at www.export.gov/tcc). The Department of State has also produced similar reports, available at <http://www.state.gov/e/eb/rls/rpts/bib/>. Commerce officials also monitor developments under the Inter-American Convention as well as the COE Convention. In addition, Commerce participates in negotiations of other international instruments on corruption, including the recently concluded U.N. Convention, and recent U.S. Free Trade Agreements (“FTAs”), as it is now general U.S. policy to include in its FTAs anticorruption provisions prohibiting domestic and foreign bribery of public officials as it affects trade and investment.

The OECD Working Group on Bribery Monitoring Process

Article 12 of the OECD Antibribery Convention requires Parties to cooperate in carrying out a program of systematic follow-up to monitor and promote full implementation of the Convention. As a

result, the OECD Working Group on Bribery, consisting of representatives of all Parties to the Convention, has been steadily developing a growing body of research and analysis on its implementation. The process can be understood as a practical and productive way of measuring the Convention's success. It is in the interest of the Parties to the Convention to ensure that all Parties are upholding their obligations under the agreement, because if some countries continue to tolerate the bribery of foreign public officials while others do not, companies from the country that is not enforcing its obligations under the Convention will maintain an advantage. Besides having the will to ensure that other Parties to the Convention uphold their obligations, the Parties are also developing

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expertise in monitoring the instrument, as well as developing new investigatory and prosecutorial skills in applying their new laws.

Phase 1 Reviews

Overall, the U.S. Government believes that the OECD monitoring process under the Working Group on Bribery is strong and will continue to grow more rigorous as countries learn from each other's experiences under the OECD Antibribery Convention. The Working Group on Bribery has almost completed the Phase 1 monitoring reviews, which are intended to ensure that all Parties have domestic laws on the books that prohibit the bribery of foreign public officials.⁴ Generally, in the Phase 1 review, the OECD Secretariat provides a

basic questionnaire to the country being examined to answer concerning the implementation of the Convention's obligations into its law. The answers are then reviewed by two examining countries and the Secretariat, which drafts a summary report. The lead examiners present the report to the Working Group on Bribery, which then proposes recommendations to the reviewed country on how to correct defects in its implementing laws; these recommendations accompany the report at publication.

The U.S. Government has been an active participant in these reviews, and as the country with the most experience in prosecuting the foreign bribery offense, the United States has a lot to bring to the table to share with Working Group on Bribery mem-

bers concerning the issue. Overall, the results of the review have been positive: 36 countries now have laws on the books prohibiting the bribery of foreign public officials, and many have amended their laws pursuant to the Working Group on Bribery's recommendations.⁵ At the same time, some of the reviews have identified important shortcomings. In the Commerce Department's final report to Congress on the implementation of the OECD Antibri-

bery Convention, the U.S. Government listed several areas of concern with other Parties' laws implementing the Convention, including the following:⁶

Basic elements of the offense: laws that do not specifically cover certain basic elements of the offense of bribery of foreign public officials contained in Article 1 of the Convention, e.g., laws that do not specifically cover offering, promising, or giving a bribe; laws that do not cover bribes to third parties or through intermediaries; laws that do not use the Convention's autonomous definition of foreign official or require dual criminality.

Liability of legal persons: a lack of corporate liability, or the addition of inappropriate requirements

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for the conviction of a natural person holding a management or other position within the corporation in order to trigger corporate liability.

Sanctions: fines and prison terms that either do not rise to the level of being effective, dissuasive, and proportionate, or are not at least equal to penalties for domestic bribery.

Enforcement: statutes of limitation that are too short, require dual criminality to bring an action or require a complaint from the “victim” (e.g., the government of the corrupt official) to commence an investigation.

Jurisdiction: limitations on jurisdiction; in particular, a lack of nationality jurisdiction where available under the country’s jurisdictional principles, or extremely limited territoriality jurisdiction.

Extradition/mutual legal assistance: laws that do not provide for adequate extradition or mutual legal assistance as required by the Convention or are contingent on dual criminality requirements.

Inappropriate defenses and exceptions: for example, if the bribe was solicited by the foreign public official instead of being initiated by the bribe payor, or if the bribe agreement was cancelled and reported to authorities before its completion (e.g., “effective regret” and “effective repentance”).

Potential conflict with other instruments: differences between laws implementing European Union (“EU”) or other anticorruption instruments and the OECD Antibribery Convention.

The OECD Working Group on Bribery is following up on these issues with the relevant Parties during the Phase 2 review process. Also, the U.S. Government, where appropriate, may engage its trading partners bilaterally concerning the full implementation of their Convention obligations.⁷

Phase 2 Reviews

The objective of Phase 2 reviews is to assess each Party’s enforcement regime, specifically the struc-

tures and methods established by the Party to enforce the application of its laws implementing the Convention. The Phase 2 review is a crucial part of the monitoring process and the U.S. Government is firmly committed to ensuring that it is carried out in a rigorous and timely manner.

The Phase 2 process generally begins with the examined country answering a questionnaire tailored to its situation and prepared by the OECD Secretariat and lead examiners. The examined country’s responses are forwarded to the lead examiners for their review prior to an on-site visit to the examined country, which is usually about a week long, where meetings are arranged with relevant government agencies, civil society and business. The examiners and the Secretariat then draft a Phase 2 report, which is presented and reviewed by the entire Working Group on Bribery before its adoption and eventual publication on the OECD website. The final version of the report contains recommendations by the Working Group on Bribery which will be followed-up on in future monitoring efforts, including follow-up reports by the examined country. This review process is continuing to evolve, and the Working Group on Bribery is constantly reevaluating it to ensure that it maintains high standards while remaining flexible so as to better address the specific issues raised by the particular situation of the country under examination.

The Phase 2 process began in late 2001 with the review of Finland, followed by the United States. Fifteen countries have now been reviewed. Although the process is still in its relatively early stages, some common themes, or issues of concern for the enforcement of Parties’ laws implementing the OECD Antibribery Convention are becoming evident, such as:

Resources, awareness, training & communication in government: although Parties to the Convention now have laws on the books, not all relevant government officials are actually aware of such laws, and many do not have sufficient training and resources to carry them out. In particular, police and prosecutors obviously need adequate training and resources; officials in foreign posts need to be made aware of new antibribery prohibitions. Also, the rel-

evant government agencies involved need to be better coordinated in sharing information.

Public awareness, particularly among SMEs (compliance programs): many companies, particularly SMEs, do not appear to be aware of the anti-bribery prohibitions, and need to be encouraged to adopt corporate compliance policies to raise employee awareness.

Technical cooperation, mutual legal assistance: although for most Parties the Convention will serve as the basis for international cooperation, and, as mentioned below, some countries are taking advantage of this new channel, others still need to do so.

Accounting provisions: although most Parties have accounting provisions on the books that generally satisfy the Convention's obligations, they are not being routinely enforced. Accounting issues are key for alerting officials to potential bribes, so poor enforcement of accounting rules could have a negative impact on the number of potential bribery investigations. These issues generally need to be given more attention.

Statutes of limitation: many of the Parties' statutes of limitations may be too short to allow for adequate time for the investigation and prosecution of foreign bribery cases, and the Working Group on Bribery needs to examine the effect these short limitations periods have in actual practice.

Sanctions: one of the main problems across the board for many Parties is the lack of corporate criminal liability or civil sanctions that are equally effective, proportionate and dissuasive. Until cases with dissuasive corporate fines emerge in countries other than the United States, laws other than the FCPA risk not having a strong deterrent effect.

Jurisdiction: although the Convention encourages countries to exercise broad jurisdiction over foreign bribery offenses in accordance with national legal principles, not all Parties have provided for effective territorial jurisdiction or nationality jurisdiction, even though possible under domestic legal principles.

For the United States, the Phase 2 enforcement reviews are a long term commitment. The U.S.

Government sees great value in the peer review process and believes that public scrutiny and transparency will eventually lead to more investigations, prosecutions, and convictions.

Report Card on International Enforcement

Although the number of cases is still small among other Parties to the OECD Antibribery Convention, Parties are reporting an increased level of investigations. Authorities in Canada, Korea, Norway and Sweden have obtained convictions under their respective implementing laws for bribery of a foreign public official. A number of other Parties have initiated investigations or legal proceedings, including France, Italy, Switzerland and the U.K. As of February 2005, all of the Group of Seven (G-7) countries, with the notable exception of Japan, report active or ongoing investigations into foreign bribery cases. In the recent Phase 2 evaluation of Japan, conducted in December 2004 and January 2005, the lead examiners from the United States and Italy were highly critical of the lack of filed foreign bribery cases. On a more positive note, Japan's law has recently been amended so that it now includes nationality jurisdiction, effective January 1, 2005, so its ability to investigate and prosecute the bribery of foreign public officials should presumably improve.

The Future of the OECD Monitoring Process

The Working Group on Bribery should now have sufficient resources to complete the more rigorous Phase 2 process for all countries by 2007. As the Working Group on Bribery becomes more experienced in conducting its Phase 2 enforcement reviews and Parties to the Antibribery Convention bring more cases, the examiners will have more factual scenarios to work with upon which to judge whether an investigation should have been taken, or whether changes to the Convention or a Party's implementing legislation are needed. (The recent Japanese and U.K. reviews provide good examples of this trend. See http://www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1,00.

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html) Of course, the Working Group on Bribery cannot interfere with prosecutorial discretion. Moreover, there are obvious reasons why sometimes relevant facts may not be given to the Working Group on Bribery, at least initially, including because the divulging of such facts prematurely could jeopardize an ongoing investigation.

The Working Group on Bribery offers a forum where the Working Group's Chairman or any Party can bring publicly available information to the table and ask whether an investigation on the matter has been or will be initiated (the "Tour de Table.") This mechanism complements and supports the Phase 2 review process. The Tour de Table is becoming more effective as more countries participate and bring their own questions to the table, although Parties recognize that publicly available assertions may not always be accurate. The success of the Tour de Table will of course depend on the will of the Parties to the Convention to take it seriously. Given countries continued attention to the Convention, at least within the context of the Working Group on Bribery, there is reason to be optimistic.

Another serious challenge facing the Working Group on Bribery is the importance of ensuring that prosecutors attend Working Group meetings, not just foreign or trade ministry officials. The U.S. Government persists in encouraging other countries to bring their prosecutors to the table, and has led by example, including a Department of Justice prosecutor as a core U.S. delegation member at every Working Group on Bribery meeting, who also serves as the lead examiner for the U.S. Government in the context of the monitoring process.

Enhanced mutual legal assistance is another benefit resulting from the OECD Antibribery Convention that should continue to improve enforcement by all Parties to the Convention. The ability of Parties to the OECD Antibribery Convention to gather foreign evidence, particularly evidence from other Parties, is facilitating efforts to prosecute violations of the FCPA and other countries' laws implementing the Convention. The good relationships which have been developed among pros-

ecutors and investigating magistrates have been extremely useful in enabling prosecutors to obtain information and to share information with their counterparts. Enhanced mutual legal assistance between prosecutors and more frequent contacts among them may also increase their interest and level of representation at meetings of the Working Group on Bribery.

Beyond OECD Convention Enforcement: Other Government Education Efforts

From the Department of Commerce perspective, leveling the playing field in international business by reducing bribery of foreign public officials is crucial. U.S. business has made it clear that this should be a continued goal of the U.S. Government.

Enforcing obligations under the OECD Antibribery Convention is just one way of drawing attention to and lessening the problem. As mentioned above, the U.S. Department of Commerce Foreign Commercial Service Officers and State Department Foreign Service Officers receive training on the FCPA and other international anticorruption instruments, and provide general information to U.S. exporters on international corruption issues. The U.S. Government is also engaged in numerous other initiatives to encourage awareness of and compliance with the FCPA and other relevant anticorruption laws.

Encouraging companies to adopt compliance programs is another key factor in reducing international corruption. Although many of the larger U.S. companies routinely educate and train their employees about the importance of good corporate behavior and stewardship through such compliance programs, the OECD Phase 2 review of the United States noted in 2002 (see <http://www.oecd.org/dataoecd/52/19/1962084.pdf>) that many SMEs apparently did not. As a result, the U.S. Government is taking steps to ensure that more such businesses are aware of such programs and the importance of adopting similar ones. While recognizing that no one program will suffice for all companies, even small exporters should at least have a policy on the subject of not giving bribes or otherwise violating

U.S. and domestic law while engaging in international business.

To assist such SMEs, the Department of Commerce has produced a practical guide for businesses involved in international trade, entitled *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies*, available on-line at www.ita.doc.gov/goodgovernance. This manual is intended to aid enterprises in designing and implementing a business ethics program that meets emerging global standards of responsible business conduct. This manual provides a wealth of information on the subject of ethics and corporate compliance for all enterprises, and is particularly helpful to the SMEs and those new to international trade. Included among the subjects in the manual is practical information on the FCPA, other international corruption instruments as well as the value of corporate compliance programs.

The U.S. Government is also taking steps to ensure that its trading partners encourage their companies to adopt compliance programs. In June 2004 at Sea Island Georgia, the U.S. Government joined its Group of Eight (G-8) partners in launching an anticorruption and transparency initiative. The initiative recognizes the importance of governments encouraging their companies to establish corporate compliance programs to combat bribery. As one step to implement both the U.S. Government commitments made at Sea Island and the recommendations of the OECD Working Group on Bribery, in November 2004 Secretary of Commerce Donald L. Evans sent a letter to 160 U.S. exporters concerning the prohibitions of the FCPA, the OECD Antibribery Convention and the importance of corporate awareness and compliance programs in combating bribery and corruption. These important messages were also posted on the Department's website in an effort to reach the broadest audience possible, including SMEs. They were also circulated to our trading partners at the December 2004 Working Group on Bribery meeting, as an example for other countries to follow in educating their companies on the issue.

The Departments of Commerce and Justice and staff from the Securities and Exchange Commis-

sion also participate in numerous seminars and conferences on the FCPA and related corporate compliance issues sponsored by professional associations and industry groups, many of which are attended by outside and in-house counsel representing SMEs. In addition, the Department of Justice has required companies to implement rigorous compliance programs as part of plea agreements and consent judgments in FCPA matters. (For example, see the Consent and Undertaking in the *Metcalf & Eddy* case, at, <http://www.usdoj.gov/criminal/fraud/fcpa/Appendices/Appendix%20E.htm#Appendix%20E>)

The Inter-American and COE Conventions

Although the OECD Antibribery Convention is generally viewed as having the most rigorous monitoring mechanism of any of the several anti-corruption conventions, there are important differences between the OECD Convention and other instruments. The OECD Convention focuses primarily on bribery of foreign public officials in international business transactions and its Parties are generally major exporting countries. The Inter-American Convention and the COE Convention cover much broader subject areas but are regional in nature. As a result, their respective monitoring systems and goals differ.

The Inter-American Convention

The Inter-American Convention was negotiated under the auspices of the Organization of American States following a mandate agreed to by the 34 heads of state that participated in the Summit of the Americas in 1994. The Inter-American Convention was adopted and opened for signature on March 29, 1996, in Caracas, Venezuela. The United States signed the Inter-American Convention on June 2, 1996 at the OAS General Assembly in Panama City, and deposited its instrument of ratification with the OAS Secretariat on September 29, 2000. Thirty-three of the 34 OAS member countries have now ratified. For a current list of signatories and ratifications of the Inter-American Convention, see, <http://www.oas.org/>.

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The Inter-American Convention identifies acts of corruption to which the Convention will apply and contains articles that create binding obligations under international law as well as hortatory principles to fight corruption. The Inter-American Convention also provides for institutional development and enforcement of anti-corruption measures, requirements for the criminalization of specified acts of corruption and articles on extradition, seizure of assets, mutual legal assistance and technical assistance where acts of corruption occur or have effect in one of the Parties. In addition, subject to each Party's constitution and the fundamental principles of its legal system, the Inter-American Convention requires Parties to criminalize bribery of domestic and foreign government officials and illicit enrichment. The Inter-American Convention also contains a series of preventive measures that the Parties agree to consider establishing to prevent corruption including systems of government procurement that assure the openness, equity, and efficiency of such systems and prohibiting the tax deductibility of bribes.

A monitoring mechanism for the Inter-American Convention was established in 2001, and consists of two bodies: the Conference of States Parties to the Mechanism, the political arm which provides oversight, and the Committee of Experts, which assesses the progress made by Parties in implementing their obligations of the Inter-American Convention. Evaluations of twelve countries have now been completed and the resulting reports may be viewed on the OAS website, at www.oas.org/juridico/english/mec_ron1_rep.htm. The focus thus far has been on preventive measures (Articles III, XIV, and XVIII) of the Inter-American Convention. Transnational bribery (Article VIII) may be covered in the next round that begins in 2006.

The State Department has produced annual reports to Congress monitoring the Inter-American Convention, which may be viewed at: <http://www.state.gov/g/inl/rls/rpt/31190.htm>

According to the April 2004 report, Brazil, Nicaragua, and Suriname obtained convictions of officials for corruption. Chile, Mexico, Nicaragua,

Paraguay, and Peru punished or removed high-level officials. Supreme Court justices were impeached in Argentina and Paraguay. Brazil, the Dominican Republic, Ecuador, Honduras, Jamaica and Nicaragua brought corruption charges against high-level officials. The Bahamas, Costa Rica, Guatemala and Paraguay brought investigations into high-level official corruption and Mexico fined a political party for campaign financing violations.

The COE Convention

The COE Convention entered into force in September 2002. The United States has signed but not ratified the COE Convention. The COE Convention obligates Parties to criminalize all bribes paid to domestic, foreign, and international public officials and parliamentarians. The COE Convention differs from the OECD Antibribery Convention in that it covers passive bribery (solicitation) as well as active bribery, and commercial (or "private sector") bribery. It is not limited to bribes in order to obtain or retain business. The COE Convention also outlaws trading in influence, and provides for cooperation in assets seizures and investigations. In addition, unlike the OECD Antibribery Convention, the COE Convention contains provisions allowing for reservations to several of the Convention's prohibitions.

In May 1998, the Council of Europe adopted an Agreement Establishing the Group of States Against Corruption ("GRECO"), of which the United States is a member. The GRECO has been evaluating the implementation of the COE Twenty Guiding Principles for the Fight Against Corruption since 2000 and in 2003 began evaluating certain provisions of the COE Convention as well. More about GRECO and the results of this evaluation process may be viewed at: <http://www.greco.coe.int/>

The U. N. Convention

Signed in December 2003 by over 100 countries, including the United States, the U.N. Convention is the first global instrument against corruption. It requires Parties to criminalize fundamental anti-corruption offenses, such as domestic bribery and bribery of foreign public officials, and mandates measures to prevent corruption. In several

respects, the U.N. Convention goes further than existing regional instruments: its accounting provisions are applicable to more offenses, it obligates Parties to disallow the tax deductibility of bribes, and it contains language on transparency in government procurement. It also has new provisions on international cooperation, particularly concerning extradition, mutual legal assistance,

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asset recovery and the disposition of illicitly obtained assets. For more information on the U.N. Convention, see http://www.unodc.org/unodc/en/crime_convention_corruption.html

The Convention requires 30 ratifications before it will enter into force: at the time of this writing there were 118 signatories and 15 Parties. The United States has signed but not yet ratified the U.N. Convention. For the latest list of signatories and ratifications, see http://www.unodc.org/unodc/en/crime_signatures_corruption.html

At present, the U.N. Convention does not have a formal mechanism for monitoring its implementation and enforcement as the above-mentioned instruments do. However, the U.N. Convention does establish a Conference of States Parties to promote and review its implementation, and further provides that the Conference of States Parties shall establish, if it deems necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention. The extent of such a potential monitoring mechanism remains to be determined, but in doing so the Parties will have to take into account the existence of regional monitoring mechanisms and the obvious potential for redundancy, as well as the limited resources of governments to participate in numerous such mechanisms.

U.S. Free Trade Agreements

Pursuant to Congressional mandate via Trade Promotion Authority (“TPA”) legislation, it is now U.S. policy to seek and obtain binding commitments in trade agreements that promote transparency and specifically address corruption of foreign and domestic officials. Generally, the United States seeks to

have its trading partners apply high standards prohibiting corrupt practices affecting international trade and to enforce such prohibitions. Most of the recently concluded FTAs therefore contain antibribery provisions. This is yet another avenue for the United States to pursue in combating bribery of foreign public officials. For more in-

formation on U.S. FTAs, see: http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html

Conclusion

The Department of Commerce is committed to monitoring trade agreements for compliance, including anticorruption instruments, particularly the OECD Antibribery Convention. The United States passed the FCPA criminalizing the bribery of foreign public officials in 1977. As a result of the entry into force of the OECD Antibribery Convention, the Inter-American Convention, and the COE Convention, several dozen countries now have domestic laws prohibiting the bribery of foreign public officials in international business transactions. The U.N. Convention, once it enters into force, should eventually result in many more countries criminalizing the bribery of foreign public officials. Although there have not been numerous foreign bribery convictions yet under other countries’ laws implementing the OECD Antibribery Convention (or the Inter-American Convention or the COE Convention), there have been several and more investigations are underway. The monitoring process at the OECD is yielding results: the first round of Phase 1 reviews, an evaluation of countries’ laws on the books, has been completed for all Parties

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but one, and the Working Group on Bribery is making steady progress on Phase 2, enforcement reviews. The OECD Working Group on Bribery is also taking other steps to ensure compliance with the Convention and to strengthen its monitoring mechanism, including reviewing press articles for potential cases and bringing them to the attention of OECD Antibribery Convention Parties and encouraging greater attendance by prosecutors at meetings of the Working Group on Bribery. The U.S. Government is also taking other steps to combat bribery and corruption, including in the G-8, the OAS, the COE, the U.N. and in U.S. FTAs. ■

Endnotes

- ¹ Senior Counsel, Office of the Chief Counsel for International Commerce, U.S. Department of Commerce. The opinions expressed in this article are those of the author and not necessarily those of any U.S. Government agency.
- ² *U.S. Department of Commerce Report to Congress Addressing the Challenges of International Bribery and Fair Competition*, July 2004, at 52.
- ³ *U.S. Department of Commerce Report to Congress*, July 2001, at 121.
- ⁴ Phase 1 reviews have been completed for all Parties except Estonia, which deposited its accession instrument in November 2004.
- ⁵ See Information Note: *The OECD Anti-Bribery Convention: Does it Work?* at <http://www.oecd.org/dataoecd/43/8/34107314.pdf>, last updated January 28, 2005.
- ⁶ *U.S. Department of Commerce Report to Congress*, July 2004, at 11-12.
- ⁷ *Ibid.*, at 12.

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