

INTERNATIONAL MONETARY FUND

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

Prepared by the Policy Development and Review Department

Approved by Jack Boorman

September 18, 2001

Contents		Page
I.	Introduction .....	2
II.	Historical Background and Context .....	3
III.	Principal Features of the Convention .....	6
IV.	Implementation and Monitoring Process .....	8
V.	Status of Implementation .....	10
	A. Issues with Implementing Legislation.....	12
	B. Accession and Scope .....	15
Text Boxes		
1.	Main Provisions of the Anti Foreign Bribery Convention.....	7
2.	Other OECD Initiatives to Combat Bribery.....	11
3.	Making the Convention Work Well.....	13
4.	Cooperation of the OECD with Regional Anti-Corruption Initiatives .....	16
Tables		
1.	OECD Anti Foreign Bribery Convention—Ratification Status.....	18
2.	OECD Anti Foreign Bribery Convention—Results of Phase 1 Country Examinations.....	19
Annexes		
I.	Revised Recommendation of the Council on Combating Bribery in International Business Transactions.....	23
II.	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.....	33

## I. INTRODUCTION

1. Bribery in international business transactions raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions. These considerations in 1997 prompted OECD member countries and a number of non-member countries to adopt the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (henceforth the *Convention*).<sup>1</sup> The *Convention* is an unusual international agreement in that it seeks to coordinate disparate legal systems in order to arrive at a minimum standard with respect to an important form of white collar crime. It obliges signatory countries—which now include all 30 OECD member countries plus a growing number of non-members—to make the bribery of a foreign public official a crime under their laws. The *Convention* is global in scope, with participating countries spread over five continents and accounting for over 70 percent of world exports and over 90 percent of foreign direct investment; its provisions are binding on the participants and call for serious sanctions; and its implementation is systematically monitored through the OECD’s peer review process. The *Convention* criminalizes acts of offering or giving bribes, but not of soliciting or receiving bribes; and it covers only bribery aimed at public officials, not bribery of private sector representatives or political party officials.

2. In their discussion of the Review of the Fund’s Experience with Governance Issues (February 14, 2001), Directors requested that in the area of international corruption “the staff (should) explore ways to pay more attention to the two-sided nature of (that) corruption, including by following up in Article IV discussions on the status of implementation of OECD-led initiatives to combat the bribery of foreign public officials, and in similar such initiatives” (PIN 01/20).<sup>2</sup> This was reaffirmed by the IMFC in its Communiqué of April 29, 2001. This paper provides information on the background and nature of the *Convention*, and the experience of the OECD so far with its implementation.

---

<sup>1</sup> Five non-OECD-member countries were associated with the *Convention* from the outset: Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic, which is now a member.

<sup>2</sup> The “two-sided nature” of corruption refers to the fact that in each instance of bribery there is a supplier (the payer of the bribe) and a demander (the recipient). Thus, emphasizing the two-sided nature of “international” corruption highlights that the suppliers of bribes paid in developing countries often reside in industrial countries.

## II. HISTORICAL BACKGROUND AND CONTEXT<sup>3</sup>

3. The OECD's work on the Anti-Bribery Convention dates back to 1989. At that time, the United States was the only country where firms faced criminal sanctions for bribes paid anywhere abroad, under its **Foreign Corrupt Practices Act** of 1977 (FCPA).<sup>4</sup> Business groups in the United States complained that the FCPA put them at a competitive disadvantage and petitioned for its weakening.<sup>5</sup> Instead, the Administration called on the OECD to internationalize this anti-corruption effort, an initiative that benefited from an improved international climate for addressing corruption.<sup>6</sup> Notably, the end of the Cold War allowed reformers around the world to raise the profile of corruption in their countries, and the Asian financial crisis further heightened sensitivity to corruption. There was also a growing awareness that unilateral measures were inadequate in addressing international corruption.

4. The OECD started by establishing in 1989 an *ad hoc* **working group** to carry out a **comparative review** of national legislations. The group explored among other things the concepts fundamental to the offense of corruption, and the exercise of national jurisdiction over offenses committed wholly or partially abroad. The review covered administrative, criminal, civil and commercial laws, accounting requirements, banking and financial provisions, and laws and regulations relating to public subsidies and contracts. The review revealed that in quite a few countries existing laws already applied in principle to the bribery of foreign public officials. Yet, it was clear that effective action required more specific efforts.

---

<sup>3</sup> A comprehensive overview of the genesis and principal features of the OECD Convention can be found in *No Longer Business as Usual—Fighting Bribery and Corruption, OECD, 2000*. This paper draws extensively from that volume, and from material on the OECD's website on the *Convention* and its other anti-corruption initiatives.

<sup>4</sup> In 1978 Sweden also criminalized foreign bribery but its law was limited in that it required perfect reciprocity in the country where the crime was committed. Other industrial countries continued to accept foreign bribes as legitimate tax deductions.

<sup>5</sup> The FCAP was conceived in the mid-1970s, when the serious negative economic effects of corruption had not yet been established, and its motivation was largely political and moral. Major amendments of the FCPA in 1988 responded to criticisms from the business community by narrowing some of the provisions and shifting the burden of proof. They also required the President to pursue negotiations of an international agreement against foreign bribery.

<sup>6</sup> A similar attempt by the UN only a decade before to establish an anti-corruption convention had to be abandoned after it ran into political problems.

5. The OECD's conventions are binding on its members and therefore their adoption must be unanimous, which usually involves protracted negotiations. In order to move ahead quickly with the criminalization of bribery of foreign officials, members agreed to aim in the first instance for a non-binding recommendation.<sup>7</sup> In 1994, the OECD Ministerial Council adopted the *Recommendation of the Council on Bribery in International Business Transactions* (C(94)75/Final), inviting members to take "effective measures to detect, prevent and combat bribery of foreign public officials in international business." Members were asked to take "concrete and meaningful steps" to meet this goal by amending their laws, tax system, accounting and record keeping requirements, and public procurement procedures. They were also urged to consult and otherwise cooperate with investigations of other members.

6. After the first *Recommendation*, the *ad hoc* working group was formalized as the *Working Group on Bribery in International Business Transactions (WGB)*. Authorized to "examine specific issues relating to bribery in international business transactions," the WGB set out to explore how best to "criminalize" this kind of bribery. Given that legal systems differ substantially across countries, the WGB recognized that it would not be possible to reach agreement on identical provisions to be included in all national legislations. Instead it aimed for **functional equivalence**, that is, differences in legislation should not matter as long as they led to equivalent results. On that basis, the working group developed key common elements of minimal uniformity that did not depend on whether the provisions would go into an OECD convention or serve as a model for national law.

7. In 1997, the OECD Ministerial Council adopted all of the recommendations of the WGB and issued its *Revised Recommendation of the Council on Combating Bribery in International Business Transactions* (DAFFE/IME/BR(97)20), to which the *Agreed Common Elements* were annexed (see Annex I). Compared to the first *Recommendation*, the *Revised Recommendation* was far more concrete and prescriptive, while covering the same broad areas, not just bribery of foreign public officials but also the tax deductibility of bribes;<sup>8</sup> accounting requirements, external audit and internal company controls; and public procurement. Most importantly, it instructed (in Article VIII) the WGB to carry out a program of systematic follow-up to monitor and promote the full implementation of its provisions.

---

<sup>7</sup> Within the OECD a distinction is made between "hard law" instruments that are binding, notably conventions, and "soft law" instruments that merely urge members to take certain actions, so called "recommendations."

<sup>8</sup>It specifically urges members to deny tax deductibility in line with the *Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials* (DAFFE/IME/BR(97)20), adopted April 11, 1996.

8. A debate took place within the WGB on what would be the fastest approach to achieving the effective criminalization of bribery of foreign public officials: to use the *Revised Recommendation* to urge countries to amend their national legislations, or to negotiate an international convention that would make criminalization a binding obligation. Some countries feared that negotiating a convention might cause considerable delays; others felt strongly that only a convention would guarantee compliance by all. The compromise solution was to draft the *Revised Recommendation* to do both: it urged members to enact national laws by end-1998, and at the same time announced the start of negotiations on an international convention to be open for signature at the end of 1997. Both activities had to be in conformity with the *Agreed Common Elements*. Thanks to the strong international support for anti-bribery initiatives, the negotiations on the convention were completed within this ambitious timetable. The *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (DAFFE/IME/BR(97)20) was signed on December 17, 1997, and came into effect on February 15, 1999 (see Annex II).<sup>9</sup>

9. Some difficult issues came up during the negotiations of the *Convention* that were partly due to different national traditions regarding, for instance, jurisdiction and the criminal responsibility of legal persons. These were resolved through the drafting of explanatory notes, later transformed into *Commentaries* (see Annex II). Although adopted by the negotiating conference together with the *Convention*, the *Commentaries* are not part of the *Convention* and therefore not binding. Their role is mainly to guide countries in drafting implementing legislation, and to guide the WGB in monitoring implementation.

10. As noted, the negotiations on the *Convention* benefited from a favorable international climate in which several other international anti-corruption initiatives came to fruition. The *Inter-American Convention Against Corruption* organized by the Organization of American States (OAS) was opened for ratification in 1996. A World Trade Organization (WTO) Ministerial Conference launched in 1996 a study on transparency in government procurement practices. The European Union (EU) approved a convention on combating corruption in 1997, and the Council of Europe (CoE) finalized a regional anti-corruption convention in 1999. The United Nations (UN) General Assembly adopted a resolution in 1997 requesting the Secretary General to assist member states in designing strategies to prevent and control corruption, which has since become a priority for the United Nations Development Program (UNDP). The World Bank in its *World Development Report 1997: The State in a Changing World* laid out an agenda for promoting good governance. In 1997, the Fund adopted a governance policy as set out in *The Role of the Fund in Governance Issues: Guidance Note*. Transparency International, the leading NGO in anti-corruption, was launched in 1994, and

---

<sup>9</sup> Countries were concerned that early ratification would expose them to a trade disadvantage. Therefore, it was decided that the *Convention* would go into effect only after ratification by five of the ten largest OECD exporters, accounting for at least 60 percent of this group's total exports.

in 1996 the International Chamber of Commerce adopted *Extortion and Bribery in International Business Transactions—Rules and Recommendations*.

### III. PRINCIPAL FEATURES OF THE CONVENTION

11. Whereas the *Revised Recommendation* contained measures in various areas, the *Convention* lifted to the status of legally binding only those measures that are intended to criminalize the bribery of foreign public officials in the conduct of international business. The WGB is charged with monitoring and promoting the implementation of the *Convention* as well as the non-criminal provisions of the *Revised Recommendation*. A description of the main provisions of the *Convention* is contained in Box 1.

12. The *Convention* requires countries to establish the bribery of foreign public officials as a **criminal offense** under their laws; and to ensure that the attempt and conspiracy to bribe foreign public officials shall be criminalized to the same extent as the bribery of national public officials.<sup>10</sup> **Sanctions** shall consist of “effective, proportionate and dissuasive criminal penalties,” comparable to those applicable to bribery of the country’s own public officials.

13. The *Convention* limits its definition of “**bribery**” to the offering or paying of bribes; it does not cover the soliciting or receiving of bribes.<sup>11</sup> It specifies that bribery of a foreign public official be criminalized regardless of whether the home country of that official is a signatory to the *Convention* and whether in that country accepting bribes is an enforced criminal offense. By not pursuing the bribed public official, the *Convention* avoids difficult jurisdictional problems and potential criticism for interfering with the sovereignty of non-signatory states.

14. The norms of the *Convention* are **not self-executing** and hence require reformulation before they can be introduced into the criminal legislation of the signatory countries. The provisions on the extent and type of sanctions, jurisdiction and statutes of limitations are not exhaustive but rather indicate the fundamental content which national implementing rules should have. In this way, the *Convention* seeks to assure a **functional equivalence** among the measures taken by the signatories, without requiring uniformity or changes in fundamental

---

<sup>10</sup> “Bribery” includes “complicity in, including incitement, aiding and abetting, or authorization of an act of bribery.” “Foreign public official” includes besides officials of national governments, “any official or agent of an international public organization,” such as the Fund.

<sup>11</sup> The *Convention* deals with what in the laws of some countries is called “active corruption” or “active bribery,” in contrast to “passive bribery.” The *Convention* avoids those terms for fear that “active bribery” might be interpreted as meaning that the briber has taken the initiative and the recipient is a passive victim. In fact, the soliciting of bribes can be much more active than their payment.

principles of their legal system. Different measures are acceptable as long as they adequately attain the prescribed result, namely effective prosecution and sanctions.

### **Box 1: Main Provisions of the Anti Foreign Bribery Convention**

The *Convention* includes the following main provisions:

- It defines a **foreign public official** as any person holding a legislative, administrative or judicial office of a foreign country, or exercising a public function for a foreign country, including for a public agency or enterprise, and any official or agent of an international organization (Article 10). A company is deemed “public” if the state can exercise a dominant influence on it through any of the different means available, and the responsible person in such a company is considered to exercise a public function.
- It recognizes the **responsibility of companies** that pay bribes or benefit from the bribing (Article 2). As only certain legal systems allow for the criminal responsibility of legal persons such as firms, the *Convention* does not impose on signatories an obligation to introduce such a concept. However it obliges them to nonetheless establish liability of legal persons in the sense that they are subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions.
- It permits signatory states to apply the legal criteria determining **jurisdiction** that are traditional to their own systems (Article 4). Civil-law countries generally have jurisdiction over “nationals,” even if the offense is committed abroad; common-law countries generally exercise jurisdiction on a purely territorial basis. Non-criminal penalties are to ensure the necessary balance between national treatments.
- It ensures that bribes paid to foreign public officials are covered by **money laundering** legislation in the same way as bribes to national public officials (Article 7). By imposing criminal responsibility on everyone involved in the handling of bribe money, it makes the hiding of such funds much more difficult.
- It contains a provision intended to reinforce the preventive function of **accounting requirements** and of controls on them, in order to avoid the diversion of large sums of money from company accounts for bribery abroad (Article 8). Its proper implementation requires the application of criminal sanctions for grave omissions, such as forgery, falsification and fraud.
- It lays down the obligation for signatory states to provide each other prompt and effective **legal assistance**, for criminal as well as non-criminal investigations and proceedings (Article 9). Signatories should facilitate mutual legal assistance and cannot invoke “bank secrecy” to deny such assistance.
- It requires signatories to cooperate in a program of **systematic follow-up** to monitor and promote the full implementation of the Convention (Article 12). This should be done in the context of the *OECD Working Group on Bribery in International Business Transactions* (WGB) through periodic examinations of measures adopted by the signatories and their concrete application. This mechanism replaces the dispute-settlement procedure often present in criminal conventions.
- It is open for **accession** by any non-OECD member that has joined the WGB (Article 13).

#### IV. IMPLEMENTATION AND MONITORING PROCESS

15. The monitoring of the implementation of the *Convention* will be crucial to its success. This task was assigned to the OECD Working Group on Bribery in International Business Transactions (WGB) whose terms of reference cover: receiving information from signatories; organizing regular reviews; examining specific issues; and providing regular information to the public.<sup>12</sup> The WGB reports annually to the OECD Council of Ministers.<sup>13</sup> All signatories of the *Convention* have to be member of, and actively participate in, the WGB, whose work is supported by staff from the OECD Secretariat.

16. The WGB country review process relies on complementary systems of self- and mutual-evaluation. These follow the **peer-review principles** that are applied throughout OECD fora to assure that countries carry out their commitments.<sup>14</sup> The WGB review of the implementation of the *Convention* plus *1997 Revised Recommendation* consists of two phases. In **Phase 1**, which began in April 1999 and is now nearly complete, each signatory country's implementing legislation (including case law) is evaluated to make sure it meets the standards set by the *Convention*. **Phase 2** is scheduled to start in November 2001, and its purpose is to study the structures put in place to enforce the laws and rules implementing the *Convention*, and to assess their application in practice. The monitoring will be broadened to cover more fully than in Phase 1 the provisions of the *1997 Revised Recommendation* that deal with accounting, external auditing and internal company controls, and public procurement. Phase 2 is further expected to serve an educational role as participants discuss problems and different approaches.

17. The **Phase 1 country examinations**<sup>15</sup> start with the OECD Secretariat collecting information through a detailed questionnaire. On that basis and other information it may have

---

<sup>12</sup> These terms were originally set out in the *Revised Recommendation*, and subsequently reaffirmed in the *Commentaries on the Convention*.

<sup>13</sup> It does so by way of the OECD's *Committee on International Investment and Multinational Enterprises* (CIME) of which it is formally a part.

<sup>14</sup> The review format chosen for the WGB is particularly close to that of the *Financial Action Task Force* (FATF). The activities of the FATF, and its relations with the IMF and the World Bank, were described in *Enhancing Contributions to Money Laundering: Policy Paper*, by the staffs of the IMF and the World Bank, April 26, 2001 (see IMF public website—[www.imf.org](http://www.imf.org)).

<sup>15</sup> The OECD calls these “vertical” examinations: each country is examined on its own merits, in the context of its overall juridical system, and without reference to the laws of other countries. Thus, issues may be raised differently in different countries. In the course of Phase One, the WGB has become aware of the need to address certain common issues with a “horizontal” comparative analysis.



requested, the OECD Secretariat prepares a “provisional review.” Two country members of the WGB are picked from a rotational list to serve as “lead examiners,” and their questions and comments complement the provisional review. The examined country is given the opportunity to comment on the provisional review, which is then sent to the WGB. Before the WGB meets, the lead examiners together with experts from the examined country decide on a main theme for the discussions. The consultation itself takes the form of two rounds of discussions by the WGB. It is concluded with the adoption of an “evaluation” which reflects the consensus views as to whether the national legislation complies with the standards of the *Convention*, and what specific issues need to be addressed immediately or will be taken up during Phase 2. “Final reports,” which consist of an updated provisional review plus the evaluation, are adopted by the WGB via a written procedure. After they have been reported to the next OECD Ministerial Conference, they are published on the OECD’s website. The WGB monitors the implementation of the remedial actions it has recommended, and will periodically organize brief **Phase 1 “Bis” reviews** (i.e., repeat reviews), in order to evaluate the adequacy of the actions taken.

18. The format for the **Phase 2 country examinations** will be much the same as that for Phase 1. The major difference is that, after processing the questionnaire reply, the OECD Secretariat staff and the lead examiners pay an **on-site visit** to the country that is being examined. The purpose is to obtain information on the practices of enforcement and prosecution, and to talk with magistrates, police, tax and other authorities responsible for applying the law. The team will have an informal exchange of views with representatives of the private sector and civil society, the form of which is subject to consultations with the country authorities. The discussions will cover all measures of the *Revised Recommendation* and not just the *Convention*. Next, the Secretariat prepares a preliminary report on country performance for discussion in the WGB. The final report, including the evaluation by the WGB, will be transmitted to the OECD Council. Given their broader scope and greater depth, the Phase 2 country examinations are expected to be considerably more demanding on OECD Secretariat staff resources than those of Phase 1. Consequently, at this time the OECD expects that it will take until 2007 before all current signatories have passed through a first review under Phase 2.<sup>16</sup>

19. The WGB’s monitoring responsibilities extend to other OECD initiatives to combat bribery and it is therefore required to collaborate with the relevant committees. In particular, it cooperates with the Committee on Fiscal Affairs (CFA) on the 1996 recommendation to deny tax deductibility for bribes to foreign public officials; with the Public Management Committee (PUMA) on promoting public service ethics; with the OECD Working Party on Export Credits and Credit Guarantees (ECG) on deterring bribery in officially-supported

---

<sup>16</sup> From the side of interested NGOs, concerns have been expressed over the resources the OECD has at its disposal for the Phase 2 reviews. The WGB has the support of only a handful of Secretariat staff and relies heavily on the cooperation of its members.

export credits; and with the Development Assistance Committee (DAC) on preventing corruption in aid-funded procurement (see Box 2 for an overview).

## V. STATUS OF IMPLEMENTATION

20. Since the *Convention* entered into force in February 1999, the WGB has reported twice on its implementation to the OECD Council at Ministerial Level, in June 2000 and May 2001.<sup>17</sup> The Council commended the countries for the speed with which they had ratified and enacted the implementing legislation.

21. The **ratification process** for OECD members is nearly complete. As of April 2001, all 30 OECD countries had signed the *Convention*, and as of July 2001 all of them except Ireland had deposited their instruments of ratification (see Table 1).<sup>18</sup> In addition, as of July 2001, four non-OECD members had signed and ratified, namely Argentina, Brazil, Bulgaria, and Chile.<sup>19</sup> Most of these countries already have adopted the necessary laws to implement the *Convention*: as of June 2001, **implementing legislation** had become effective in 26 OECD members and in 2 of the 4 non-member signatories.<sup>20</sup> Finally, the WGB has already reviewed most of the national implementing legislation: as of May 2001, it had completed and published **Phase 1 country reviews** for 26 of the 30 OECD member countries and 2 of the non-member signatories.<sup>21</sup>

---

<sup>17</sup> The reports (C/MIN(2001)5 of 11 May 2001 and C/MIN(2000)8 of 21 June 2000) were subsequently published on the OECD's website ([www.oecd.org](http://www.oecd.org)).

<sup>18</sup> In Ireland, the necessary bills have passed all the required stages in both Houses of Parliament.

<sup>19</sup> In fact, these four countries were among the original signatories. The next non-OECD member expected to sign is Slovenia, which in June 2001 was invited to become a full participant in the WGB, a prerequisite for joining the *Convention*.

<sup>20</sup> Several countries had implementing legislation in place before they even ratified. Signatories that have not yet adopted implementing legislation comprise OECD member Turkey and non-members Brazil and Chile.

<sup>21</sup> New Zealand was examined in June 2001 and Portugal will be in November 2001, and the other countries as soon as they have enacted implementing legislation.

## Box 2. Other OECD Initiatives to Combat Bribery

The OECD's **Committee on Fiscal Affairs (CFA)** regularly conducts a self-evaluation of countries' progress in implementing the 1996 OECD *Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials*. In 1996, 15 OECD members did not deny tax deductibility, but as of 2001 there are only two left which still have to enact appropriate legislation. The CFA continues to monitor the implementation, on which it exchanges information with the WGB since members of that Group have made a commitment to deny tax deductibility. The CFA recently finalized a manual to assist tax inspectors in distinguishing bribes from legitimate business expenses, the "Bribery Awareness Handbook." It also promotes the automatic exchange of information between tax authorities.

The work of the OECD's **Public Management Committee (PUMA)** led in 1998 to the adoption by the OECD Ministerial Council of a recommendation that members take action to promote ethical conduct in the public services, and to use as a reference the twelve *Principles for Managing Ethics in the Public Service*. PUMA was instructed to analyze the experiences, provide support, and present a report on actions and practices in member countries (see *Trust in Government: Ethics Measures in OECD Countries*, OECD 2000). Thus, PUMA addresses the corruption problem from the demand side. In addition to promoting ethics, it helps governments in detecting corruption through budgeting and financial controls.

The critical issue of corruption in public procurement is being pursued by the OECD's **Development Assistance Committee (DAC)**. The DAC adopted in 1996 a *Recommendation on Anti-corruption Proposals for Aid-Funded Procurement*. By 1997, all DAC donors reported that they had adopted the required anti-corruption provisions governing bilateral aid-funded procurement. The Recommendation subsequently became integrated in the Anti-Bribery Convention. Because they consider combating corruption an integral part of the broader development agenda, members have decided to develop the DAC's role as forum to exchange information and experiences to strengthen the effectiveness of donor approaches and their dialogue with other stakeholders.

The OECD's **Working Party on Export Credits and Credit Guarantees (ECG)** adopted in 2000 an *Action Statement on Bribery and Officially Supported Export Credits*. This commits members to take measures to deter bribery in officially supported export credits, and when there is sufficient evidence of bribery in a particular transaction, to refuse to approve credit, credit cover or other support.

**Support for Improvement in Governance and Management in Central and Eastern European Countries (SIGMA)** is a joint initiative of the OECD and the European Union, principally financed by the EU. SIGMA, which works within the OECD's PUMA, aims to assist beneficiary countries in their search for good governance to improve administrative efficiency and promote adherence of public sector staff to democratic values, ethics and respect of the rule of law. One expert team counsels the ten countries that are candidates for the EU, and another the countries in the western Balkans, on issues such as financial controls, external audit, budget, treasury, taxes, and civil service and administrative reform. It publishes on its website *Public Management Profiles* of all participating countries.

In 1998, the OECD created the **Anti-Corruption Network for Transition Economies in Europe (ACN)** in cooperation with, among others, USAID, the World Bank, the Council of Europe, and the European Commission. The ACN is a forum for knowledge and experience sharing among donors, government officials, and non-governmental actors, encouraging regional ownership and cooperation. It focuses on strategies to reduce public sector corruption through support for the implementation of appropriate political, institutional, and economic reforms. The more systematic approach agreed in 2001 will address the promotion of the rule of law, including an examination of legal instruments and enforcement mechanisms, improving the quality of public administration and management, and the role of civic action.

The **Financial Action Task Force on Money Laundering (FATF)** created by the 1989 G-7 Summit, is an inter-governmental body which develops and promotes policies, both nationally and internationally, to combat money laundering. Although an independent international body—currently consisting of 29 member countries plus the European Commission and the Gulf Cooperation Council—its work is supported by a Secretariat based at the OECD with funding from all its members. The FATF has issued *Forty Recommendations* which form a complete set of counter-measures against money laundering covering the criminal justice system and law enforcement, the financial system and its regulation and international coordination. It has carried out annual self-assessment exercises and two rounds of mutual evaluations, and its 2000/2001 Annual Report indicates that some members were in full compliance with the *Forty Recommendations* while the vast majority complied with more than 80 percent of them.

22. Based on the Phase 1 country reviews, the WGB has expressed satisfaction with the degree of overall compliance with the *Convention*'s standards. Nonetheless, it also identified **significant deficiencies** in a number of implementing legislations and recommended remedial action (see Table 2 for an overview of the summary evaluations and the specific issues identified). Some countries have already amended their legislation in light of those recommendations. However, the WGB in its report to the May 2001 meeting of the Council of Ministers noted that not all countries had been diligent in implementing these recommendations, especially regarding major areas of concern, and it urged greater efforts to comply with the *Convention*. For some of the issues identified in the reviews, the WGB did not require immediate remedial action. Instead, it announced that they would be taken up during the Phase 2 reviews, or would initially be explored further, for instance through a "horizontal" review of country practices. The status of remedial actions is discussed during regular WGB meetings, and the WGB has started to carry out **Phase 1 Bis reviews** to evaluate amendments to the legislation. Signatory countries report regularly to the WGB on the progress they have made with their legislation, and the OECD publishes this information on its website under *Steps Taken and Planned Future Actions*. The effectiveness of the *Convention* will depend not only on legislative action, but also on other factors, such as political will, effective enforcement, and support from the private sector and civil society. Some initial observations in this regard are discussed in Box 3.

#### A. Issues with Implementing Legislation

23. Most of the **specific issues of concern** that the WGB identified during the reviews of implementing legislation stem from the complexities of harmonizing differing legal systems and criminal laws, and are related to the first six articles of the *Convention*. These articles deal with, respectively, the offense of bribery; responsibility of legal persons; sanctions; jurisdiction; enforcement; and statute of limitations.

##### *The Offense of Bribery*

24. Article I of the *Convention* establishes a standard to be met in defining the different **elements of the offense**. In certain countries the definitions at the time of the Phase 1 reviews left loopholes or a potential for misuse. For instance, the legislation of a number of countries contains specific allowable defenses that go beyond the general defenses which are part of the penal code and which could be used by a defendant to circumvent liability (examples are: effective repentance, effective regret, reasonable expenses incurred in good faith, payments made for acts of routine nature). In other countries, the act of offering or promising a bribe is not adequately criminalized. Whereas the *Convention* defines a bribe as "any undue pecuniary or other advantage," the legislation in some countries has a narrower focus. Some countries' legislation did not incorporate the specific definition of a foreign public official stipulated by the *Convention*. In a number of countries it is not clear whether the legislation also applies if the advantages were received by a third party.

### Box 3—Making the Convention Work Well

There is considerable anecdotal **evidence that transnational corruption involving public officials is widespread**, as well as some systematic evidence. According to a World Bank/EBRD survey conducted in 22 transition countries in mid-1999, about 30 percent of foreign firms engaged in procurement kickbacks, compared with 25 percent of domestic firms.<sup>1</sup> Also, 13 percent of foreign firms headquartered in the country (and 5 percent of those headquartered abroad) engaged in “state capture,” i.e., corruption with the intent of influencing public laws, rules and regulations. A survey among business executives and professionals in leading emerging market countries by Transparency International (TI) found that international bribe-paying was greatest in public works contracts and construction, followed by the arms and defense industry.<sup>2</sup> Because of the importance it attaches to the phenomenon, TI has started to compile a Bribe Payers Index. It measures the perception by business people in a dozen emerging market economies of the likelihood that in their country companies from particular leading exporter countries are willing to pay bribes to win or retain business.

The criminalization of the bribery of foreign public officials should act principally as a **deterrent**. While several factors can influence the ability to deter, for this deterrent to be effective a number of cases must be brought to trial. In the United States some 80 cases have been prosecuted under the 1977 *Foreign Corrupt Practices Act* (FCPA). Nonetheless, according to both the World Bank/EBRD and the TI surveys, the likelihood of firms from the United States engaging in bribery abroad is about average compared to firms from other industrialized countries.

A hypothetical case can illustrate the **potential effect** of the criminalization of foreign bribery.<sup>3</sup> A large public contract in a country that is not a signatory to the *Convention* has been awarded to a company from country A that is a signatory, over a company from another signatory country, B. International press reports suggest that the bribery of an official was involved. Thanks to the *Convention*, the losing company could ask the law enforcement authorities in either country A or country B to investigate. Alternatively, the law enforcement authorities in these countries could decide to investigate at their own initiative. Country B authorities could investigate and ask country A authorities for mutual assistance or vice versa, or they could refer the case to each other after an initial investigation. If it is suspected that the proceeds were deposited in or have passed through a third signatory country, then those authorities can be asked to cooperate.

Most important is that the **evidence gathering**—the digging out of documents from corporate files and accounts, as well as from OECD-based banks, and the gathering of oral testimony—which would be very onerous for a claimant, becomes the task of the investigating authorities, who can resort to compulsory legal process to obtain evidence.

In the majority of the cases prosecuted under the FCPA, whistleblowers were the source of evidence.<sup>4</sup> Hence, it has been proposed that legislation protecting **whistleblowers** would help in uncovering cases, as would transparency in **procurement practices**. Evidence might also surface as a result of unrelated investigations, the exchange of tax information between country authorities, and the work of the auditors to the extent that they are required to report illegal activities.

<sup>1</sup> “Are Foreign Investors and Multinationals Engaging in Corrupt Practices in Transition Economies?”, by Joel Hellman, Geraint Jones, and Daniel Kaufmann, *Transition*, World Bank, May-June-July 2000.

<sup>2</sup> See *The Transparency International Bribe Payers Survey* ([www.transparency.org/documents/cpi/bps.html](http://www.transparency.org/documents/cpi/bps.html)).

<sup>3</sup> From “To Bribe or Not to Bribe” by Giorgio Sacerdoti in *No Longer Business as Usual*, OECD 2000.

<sup>4</sup> See *Implementation of the OECD Convention: The Conditions for Success* by Laurence Cockcroft ([www.transparency.org/documents/work-papers/lc\\_oecd.html](http://www.transparency.org/documents/work-papers/lc_oecd.html)).

### ***Responsibility of Legal Persons***

25. The *Convention* stipulates that signatories must establish the **liability of legal—as well as natural—persons**. Thus, corporations and other legal entities should be held responsible to the same extent as corporate officials or other individual business persons. When a country's domestic law does not subject legal persons to criminal responsibility, the *Convention* does not require that this be changed. However, it does require the establishment of “effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions.” Quite a few countries were found to fall short in this regard. Several still have to define either criminal or non-criminal liability for legal persons.

### ***Effectiveness of Sanctions***

26. The **sanctions** meted out for the bribery of foreign public officials must be “effective, proportionate and dissuasive.” In several countries the WGB found that the sanctions were considerably less severe than those that apply to bribery of a domestic public official. In other countries, the WGB found that the sanctions for bribery of public officials, although equal for domestic and foreign officials, were too weak to be an effective deterrent. In those cases, the WGB argued that sanctions should also be comparable to those for similar offenses such as theft, fraud, and embezzlement. In addition, some countries' national legislation does not allow for the seizure and confiscation of the bribe and the proceeds of the bribery, or of property of equal value, as required by the *Convention*.

### ***Effectiveness of Jurisdiction***

27. The *Convention* requires signatories to establish **jurisdiction** for all bribery of foreign officials which takes place within their broadly defined territory, so called “territorial jurisdiction.” In addition, if it is consistent with their legal principles, countries should claim jurisdiction whenever one of their nationals—legal or natural persons—is implicated, so called “nationality jurisdiction.” In practice, this is what most such countries have done. Nonetheless, the WGB identified several instances where nationality jurisdiction was possible but had not been established for bribery of foreign officials, or was unduly restricted (for example, by requirements of dual criminality and/or reciprocity on the part of the host country). There were other cases where territorial jurisdiction was not sufficiently broad.

### ***Enforcement***

28. According to the *Convention*, signatory countries should investigate and prosecute bribery of foreign public officials in accordance with their rules and principles. Given that institutional latitude for **prosecutorial discretion** differs fundamentally across countries, the WGB has expressed concerns that such discretion should not be subject to improper influence or considerations of a political nature. The fear is that this might lead to unduly aggressive, passive or selective prosecution. On the other hand, in a few countries prosecutorial discretion appears potentially limited by the requirement that prosecutions must be “in the public interest.”

### *Statute of Limitations*

29. The **statute of limitations** applicable to foreign bribery offense should allow for an adequate period of time for investigation and prosecution. The length of the statutes varies from two years to no limit, with a concentration around five years, and in many cases the possibility of extensions. In a number of cases the WGB found the period covered too short.

### **B. Accession and Scope**

30. The *Convention* is attracting increasing attention from countries outside the OECD that want to associate themselves with it. In principle **accession to the *Convention*** is open to every country that participates fully in the WGB, a requirement that underlines the importance attached to the monitoring process. The WGB has established three criteria for membership: the country should be a major participant in regional or international trade and investment; it should be willing and able to live up to the obligations of WGB membership (including a willingness to respond to peer pressure); and it should, through its accession, create a mutual benefit—for the country itself as well as for the other members of the WGB. Recently, Slovenia was the first such country to be offered the opportunity to participate in the WGB based on these criteria.

31. It is recognized that accession to the *Convention* may not be practical or even useful for many countries. The OECD has therefore made **outreach activities** an important component of its approach to combating bribery around the world, and a specific part of the mandate of the WGB. In this connection, the WGB cooperates actively with a number of regional anti-corruption initiatives (Box 4). The OECD's WGB is currently most closely associated with initiatives in Europe, including South Eastern Europe and the European transition economies, Latin America, and the Asia-Pacific region. The WGB has also held a couple of round-table discussions with representatives from the Russian Federation's private sector, civil society and government.

32. At the request of the OECD Council of Ministers the WGB has been examining **five issues** that might expand the scope of the *Convention*, namely: bribery acts in relation to foreign political parties; advantages promised or given to any person in anticipation of that person becoming a foreign public official; bribery of foreign public officials as a predicate offense for money-laundering legislation; the role of foreign subsidiaries in bribery transactions; and the role of offshore centers in bribery transactions.

#### **Box 4: Cooperation of the OECD with Regional Anti-Corruption Initiatives**

The OECD has launched an outreach program to broaden the discussion on international anti-corruption instruments, including the *Convention*, and to promote their adoption and implementation. Its Anti-Corruption Division, which is responsible for this program, cooperates with other international key players in the fight against corruption as well as civil society groups, the private sector and trade unions, to develop concrete activities in different parts of the world. Within the OECD, the division works closely together with CFA, PUMA and DAC (see Box 2), and the Centre for Co-operation with Non-Members (CCNM).

##### ***Europe***

The OECD's WGB has an on-going close cooperation with the **Council of Europe (CoE) 's Multidisciplinary Group against Corruption (GMC)**. The work of the GMC, created in 1994, led to the adoption in 1999 of the Council of Europe's **Criminal Law Convention on Corruption**, which sets out to harmonize national laws on the definition of corruption offenses, to set up complementary penal measures, and to improve international cooperation in bringing offenders to justice. This convention has been signed by 36 of the 43 CoE members; it will come into force after 14 members have ratified—so far only 10 have. Also adopted by the CoE in 1999 was the **Civil Law Convention on Corruption**, which covers the definition of corruption, compensation for damage, liability, contributory negligence, limitation periods, validity of contract, protection of employees, accounts and audits, interim measures and international cooperation. As of 2001, this convention has been signed by 26 CoE members and ratified by 3. The CoE has also adopted twenty guiding principles to fight corruption, including a model code of conduct for public officials. Furthermore, the Group of States against Corruption (GRECO) was established in 1999 in order to monitor through mutual evaluation and peer pressure the observance and implementation of these codes and conventions. Some 20 CoE members participate in GRECO.

The centerpiece of the OECD's cooperation with **European transition economies** in fighting corruption is the **Anti-Corruption Network for Transition Economies (ACN)** but its cooperation also includes the work of SIGMA and PUMA (see Box 2 for a description).

The Stability Pact for South Eastern Europe, an initiative in 1999 of the EU, combines 40 partner countries and international organizations to help the countries of south eastern Europe move towards stability in the whole region. Because it considers the fight against corruption a top priority, the Stability Pact adopted in 2000 the **Stability Pact Anti-Corruption Initiative for South Eastern Europe (SPAI)**, on which the Council of Europe, the European Commission, the OECD, the Stability Pact Office, the World Bank and the United States had worked together. The Initiative consists of five pillars: adoption and implementation of European and other international legal standards; promotion of transparency and good governance and reliable public administrations; strengthening the rule of law; promotion of integrity in business operations; and promotion of an active civil society. Monitoring is ensured by peer review through a Steering Group that meets several times a year. The OECD together with the Council of Europe plays a leading role in the overall management and implementation of the Initiative.

##### ***Latin America***

The **Inter-American Convention Against Corruption** was negotiated in 1996 by delegates to a Specialized Conference of the Organization of American States (OAS). It entered into force in March 1997, and represents the first international treaty dealing with the issue of transnational bribery and the leading example of regional action in the developing world. As of 2001, 24 out of 29 OAS members have ratified but only 5 have provided the information on their legal regimes required by the treaty. At the Third Summit of the Americas in April 2001, OAS members were urged to promote the effective implementation of the Convention by means of, *inter alia*, the Inter-American Program for Cooperation in the Fight Against Corruption and associated technical cooperation programs and activities. At the General Assembly (June 2001) it was decided to establish a follow-up mechanism for the implementation of the Convention, a project with which the OECD will assist.

##### ***Asia-Pacific Region***

At a workshop in Manila in 1999, participants from over 30 economies in Asia and the Pacific region called on the Asian Development Bank (ADB) and OECD to support national and regional anti-corruption efforts. This request was formally endorsed at a conference in Seoul in 2000. Thus, the **ADB OECD Anti-Corruption Initiative for Asia-Pacific** helps participating countries in their fight against corruption by facilitating the exchange of experiences on policies and institutions, national and regional cooperation, and partnerships among key stakeholders. The papers presented at the 1999 workshop and 2000 conference were published on the OECD's anti-corruption website.



33. Already OECD Ministers have taken up the issue of money laundering, and they recommended that bribery of foreign public officials should be made a serious crime that would automatically trigger the application of the country's anti-**money-laundering** laws (and the full scrutiny of the Financial Action Task Force). The *Convention* requires this only if the same is true for bribery of a local public official. The issue the WGB is currently examining with priority is that of bribery in relation to **political parties and candidates**, which has been identified as a potentially serious problem—it has been highlighted by the press in recent alleged scandals in Europe and Asia; and such bribery is already covered by the United States legislation. Another priority area for the WGB is the application of the *Convention* to the **role of subsidiaries**. In principle, the reference to “complicity” in Article 1 of the *Convention* already implicates corporations in corrupt activities by their subsidiaries, but some observers consider that this may have to be made explicit.

34. Two issues not covered by the *Convention* that are of particular concern to the private sector, civil society, international trade unions and employers organizations, and non-governmental organizations are **solicitation and whistle-blowing**. The business community contends that foreign bribery often is the result of active solicitation by the bribe recipient, which can in some circumstances amount to extortion. Therefore, they are urging that more governmental action be directed at dealing with the demand side.<sup>22</sup> International trade unions and NGOs like Transparency International stress that legal protection of employees who expose corruption in their organizations is an essential component of an anti-corruption framework. The WGB has agreed to include questions relating to both topics in the context of the general issues part of the Phase 2 questionnaire, but made it clear that doing so does not imply that these are obligations under the *Convention* or the *Recommendation*.

---

<sup>22</sup> For instance, the Business and Industry Advisory Committee (BIAC), which represents businesses at the OECD, has developed a full program on how to combat solicitation. The issue of “extortion” features prominently in the International Chamber of Commerce (ICC) 1996 *Extortion and Bribery in International Business Transactions—Rules and Recommendations*.

**Table 1. OECD Anti Foreign Bribery Convention—Ratification Status**  
Information as of June 25, 2001

Country	Deposit of Instrument of Ratification/Acceptance	Entry into Force of the Convention	Enactment of Implementing Legislation	Entry into Force of Implementing Legislation
<i>OECD Members</i>				
Australia	Oct. 18, 1999	Dec. 17, 1999	Jun. 17, 1999	Dec. 17, 1999
Austria	May 20, 1999	Jul. 19, 1999	Jul. 17, 1998	Oct. 1, 1998
Belgium	Jul. 27, 1999	Sep. 25, 1999	Apr. 3, 1999 and Aug. 3, 1999	Apr. 3, 1999
Canada	Dec. 17, 1998	Feb. 15, 1999	Dec. 10, 1998	Feb. 14, 1999
Czech Republic	Jan. 21, 2000	Mar. 21, 2000	Apr. 29, 1999	Jun. 9, 1999
Denmark	Sep. 5, 2000	Nov. 4, 2000	Mar. 30, 2000	May 1, 2000
Finland	Dec. 10, 1998	Feb. 15, 1999	Nov. 1998	Jan. 1, 1999
France	Jul. 31, 2000	Sep. 29, 2000	--	Sep. 29, 2000
Germany	Nov. 10, 1998	Feb. 15, 1999	Sep. 10, 1998	Feb. 15, 1999
Greece	Feb. 5, 1999	Apr. 6, 1999	Nov. 5, 1998	Dec. 1, 1998
Hungary	Dec. 4, 1998	Feb. 15, 1999	Dec. 22, 1998	Mar. 1, 1999
Iceland	Aug. 17, 1998	Feb. 15, 1999	Dec. 22, 1998	Dec. 30, 1998
Ireland	--	--	--	--
Italy	Dec. 15, 2000	Feb. 13, 2001	Sep. 29, 2000	Oct. 26, 2000
Japan	Oct. 13, 1998	Feb. 15, 1999	Sep. 8, 1998	Feb. 15, 1999
Korea	Jan. 4, 1999	Mar. 5, 1999	Dec. 28, 1998	Feb. 15, 1999
Luxembourg	Mar. 21, 2001	May 20, 2001	--	Feb. 11, 2001
Mexico	May 27, 1999	Jul. 26, 1999	May 17, 1999	May 18, 1999
Netherlands	Jan. 12, 2001	Mar. 13, 2001	--	Feb. 1, 2001
New Zealand	Jun. 25, 2001	Aug. 24, 2001	May 2, 2001	May 3, 2001
Norway	Dec. 18, 1998	Feb. 16, 1999	Oct. 27, 1998	Jan. 1, 1999
Poland	Sep. 8, 2000	Nov. 7, 2000	Sep. 9, 2000	Feb. 4, 2001
Portugal	Nov. 23, 2000	Jan. 22, 2001	May 23, 2001	--
Slovak Republic	Sep. 24, 1999	Nov. 23, 1999	Jul. 6, 1999 and Sep. 16, 1999	Nov. 1, 1999
Spain	Jan. 4, 2000	Mar. 4, 2000	Feb. 2, 2000	Feb. 2, 2000
Sweden	Jun. 8, 1999	Aug. 7, 1999	Mar. 25, 1999	Jul. 1, 1999
Switzerland	May 31, 2000	Jul. 30, 2000	Dec. 22, 1999	May 1, 2000
Turkey <sup>1</sup>	Jul. 26, 2000	Sep. 24, 2000	--	--
United Kingdom	Dec. 14, 1998	Feb. 15, 1999	--	--
United States	Dec. 8, 1998	Feb. 15, 1999	Oct. 21, 1998	Nov. 10, 1998
<i>Non-OECD Members</i>				
Argentina	Feb. 8, 2001	Apr. 9, 2001	Nov. 1, 1999	Nov. 10, 1999
Brazil <sup>1</sup>	Aug. 24, 2000	Oct. 23, 2000	--	--
Bulgaria	Dec. 22, 1998	Feb. 20, 1999	Jan. 15, 1999	Jan. 29, 1999
Chile <sup>1</sup>	Apr. 18, 2001	--	--	--

Source: OECD website (<http://www.oecd.org>) under the theme “corruption”.

<sup>1</sup> These countries have not yet adopted implementing legislation.

**Table 2. OECD Anti Foreign Bribery Convention--Results of Phase 1 Country Examinations**  
As of June 25, 2001

	<b>Date</b>	<b>Summary Evaluation 1/</b>	<b>Specific Issues Raised 2/</b>
<b>OECD countries</b>			
Australia	12/01/99	The Australian legislation conforms to the standards set by the Convention.	The offence of bribery of foreign public officials Sanctions
Austria	12/01/99	The Austrian legislation, with one important exception related to criminal responsibility of legal persons, conforms to the standards of the Convention.	Definition of "foreign public officials" Responsibility of legal persons Sanctions Small facilitation payments
Belgium	10/01/99	Belgium's implementing legislation meets most of the requirements set by the Convention.	The offence of bribery of foreign public officials Jurisdiction
Canada	07/01/99	Overall, the Canadian Act meets the requirements set by the Convention.	Elements of the offence Corporate criminal liability Sanctions Nationality jurisdiction
Czech Republic	03/01/00	The Czech legislation overall conforms to the standards of the Convention.	Non-punishability in case of "effective repentance" Responsibility of legal persons
Denmark	12/01/00	Overall the relevant Danish laws, including the implementing legislation, conform to the standards under the Convention.	Term "Unlawfully" Definition of Foreign Public Official Third Parties Legal Persons Sanctions Confiscation Nationality jurisdiction Statute of Limitations for Legal Persons
Finland	07/01/99	Finnish legislation conforms to the standards of the Convention.	Actions in relation to the performance of official duties Forfeiture of bribe Jurisdiction Sanctions against a corporation Accounting
France	12/01/00	The Act adopted by France generally conforms to the requirements of the Convention.	The definition of foreign public officials Elements of the offence Criminal responsibility of legal persons Jurisdiction Rules for instituting prosecutions Statute of limitations
Germany	04/01/99	German legislation conforms to the standards of the Convention.	Performance of official duties Responsibility of legal person Enforcement Statute of limitations
Greece	07/01/99	Overall, Greece's implementing legislation meets the requirements set by the Convention.	The Convention as a whole The definition of foreign public official Responsibility of legal persons Confiscation Jurisdiction Enforcement

**Table 2. OECD Anti Foreign Bribery Convention--Results of Phase 1 Country Examinations**  
As of June 25, 2001

	<b>Date</b>	<b>Summary Evaluation</b> 1/	<b>Specific Issues Raised</b> 2/
Hungary	10/01/99	(No summary evaluation provided.)	Elements of the offence Responsibility of legal persons Sanctions Statute of limitations
Iceland	10/01/99	Icelandic legislation conforms to the standards of the Convention.	Level of sanctions vis-à-vis legal persons Statute of limitations
Ireland	..	..	..
Italy	04/01/01	Italy's legislation conforms to the requirements of the Convention	Third party Payments after performance of duty Exception: abuse of power by the public official (concussione) Responsibility of legal persons Sanctions Overlapping jurisdictions
Japan	10/01/99	Japan implemented the Convention by establishing the offence of bribing a foreign public official through an amendment to the Unfair Competition Prevention Law (UCPL).	The offence of bribing a foreign public official Sanctions Nationality jurisdiction Statute of limitations
Korea	07/01/99	The Foreign Bribery Prevention Act (FBPA) generally conforms to the requirements of the Convention.	Terms used for describing the subject of the bribe Small payments Third parties Seizure and confiscation Jurisdiction
Luxembourg	02/01/01	Luxembourg's implementing legislation generally meets the requirements set by the Convention, and on some important points, even goes beyond the requirement of the Convention. However, there is a serious loophole in the legislation concerning the liability of legal persons.	Liability of legal persons Confiscation Rules for instituting prosecutions
Mexico	02/01/00	Relevant Mexican laws conform generally to the standards under the Convention.	Autonomous definition of "foreign public official" Third Parties Level of monetary sanctions Criminal liability of legal persons Unavailability of sanctions for state-owned and state-controlled companies
Netherlands	02/01/01	The Dutch implementing legislation conforms to the standards under the Convention.	Small Facilitation Payments Definition of Foreign Public Official Third Parties Level of Monetary Sanctions for Legal Persons
New Zealand	06/01/01	(Report not yet published.)	Nationality Jurisdiction (Report not yet published.)

**Table 2. OECD Anti Foreign Bribery Convention--Results of Phase 1 Country Examinations**  
As of June 25, 2001

	<b>Date</b>	<b>Summary Evaluation</b> 1/	<b>Specific Issues Raised</b> 2/
Norway	04/01/99	As soon as the issues related to the maximum sanction and statute of limitation have been addressed, Norway would satisfy the requirements of the Convention.	Definition of foreign public official Third persons Corporate liability Sanctions and statute of limitations
Poland	02/01/01	Overall, the relevant Polish laws, conform generally to the standards under the Convention.	Third parties Administrative responsibility of legal persons Forfeiture of the Bribes and its Proceeds
Portugal	11/01/01	(Country examination scheduled.)	(Country examination scheduled.)
Slovak Republic	02/01/00	Slovak legislation does not yet fully conform to the standards of the Convention.	"For that official or for a third party" Non-punishability in case of "effective regret" Responsibility of legal persons Sanctions for bribery of domestic versus foreign public officials Statute of limitations Money laundering Accounting/Auditing
Spain	03/01/00	The Spanish implementing legislation, with the exception of some deficiencies, is in conformity with the legislation.	Definition of the Offence Responsibility of legal persons Sanctions
Sweden	10/01/99	The Swedish legislation conforms to the standards of the Convention.	Definition of "foreign public officials" Public interest in prosecuting international bribery cases Effectiveness of sanctions Forfeiture of bribe and pecuniary damages Jurisdiction
Switzerland	02/01/00	Switzerland's legislation conforms to the Convention except in respect of liability of legal persons for bribery.	Any undue pecuniary or other advantage Performance of official duties Liability of legal persons Seizure and confiscation of the bribe and its proceeds Jurisdiction Accounting
Turkey	..	..	..
United Kingdom	12/01/99	The Working Group is not in a position to determine that the UK laws are in compliance with the standards under the Convention.	Article 1: the offence and related issues Applicability of U.K. law to foreign Members of Parliament and foreign members of the judiciary.  Application of the Convention to U.K. Crown dependencies and overseas territories  Nationality jurisdiction Enforcement
United States	04/01/99	Generally, the FCPA implements the standards set by the Convention in a detailed and comprehensive manner.	The offence of bribery of foreign public officials Sanctions Statute of limitations Accounting

**Table 2. OECD Anti Foreign Bribery Convention--Results of Phase 1 Country Examinations**  
As of June 25, 2001

	<b>Date</b>	<b>Summary Evaluation</b> 1/	<b>Specific Issues Raised</b> 2/
<b>Non-OECD members</b>			
Argentina	04/01/01	The Working Group considered that the existing law as concerns certain specific elements, in particular liability of legal persons, does not fully conform to the standards of the Convention.	Elements of the offence Responsibility of legal persons Imprisonment sanctions for natural persons Jurisdiction
Brazil	..	..	..
Bulgaria	07/01/99	Legislation does not yet fully meet the standards of the Convention	Elements of the offence The defences Responsibility of legal persons Seizure and confiscation of the bribe and its proceeds
Chile	..	..	..

Source: OECD Country Reports as published on OECD anti-corruption website ([www.oecd.org/daf/nocorruption/report.htm](http://www.oecd.org/daf/nocorruption/report.htm))

1/ Quotes from evaluation sections of Country Reports. Language used is not always standardized.

2/ Headings of sections in Country Reports describing specific issues raised with implementing legislation.

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

**Adopted by the Council on 23 May 1997**

**THE COUNCIL,**

**Having regard** to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

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

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

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

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

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

**Having regard to** the commitment made at the meeting of the Council at Ministerial level in May 1996, to criminalise the bribery of foreign public officials in an effective and co-ordinated manner;

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

**Considering** the consensus which has developed on the measures which should be taken to implement the 1994 Recommendation, in particular, with respect to the modalities and international instruments to facilitate criminalisation of bribery of foreign public

officials; tax deductibility of bribes to foreign public officials; accounting requirements, external audit and internal company controls; and rules and regulations on public procurement;

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

### **General**

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

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

- i)* criminal laws and their application, in accordance with section III and the Annex to this Recommendation;
- ii)* tax legislation, regulations and practice, to eliminate any indirect support of bribery, in accordance with section IV;
- iii)* company and business accounting, external audit and internal control requirements and practices, in accordance with section V;
- iv)* banking, financial and other relevant provisions, to ensure that adequate records would be kept and made available for inspection and investigation;
- v)* public subsidies, licences, government procurement contracts or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with section VI for procurement contracts and aid procurement;
- vi)* civil, commercial, and administrative laws and regulations, so that such bribery would be illegal;
- vii)* international co-operation in investigations and other legal proceedings, in accordance with section VII.

### **Criminalisation of Bribery of Foreign Public Officials**

III. **RECOMMENDS** that Member countries should criminalise the bribery of foreign public officials in an effective and co-ordinated manner by submitting proposals to their



legislative bodies by 1 April 1998, in conformity with the agreed common elements set forth in the Annex, and seeking their enactment by the end of 1998.

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

### **Tax Deductibility**

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

### **Accounting Requirements, External Audit and Internal Company Controls**

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

#### A. Adequate accounting requirements

- i)* Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.
- ii)* Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.
- iii)* Member countries should adequately sanction accounting omissions, falsifications and fraud.

#### B. Independent External Audit

- i)* Member countries should consider whether requirements to submit to external audit are adequate.
- ii)* Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors

which permits them to provide an objective assessment of company accounts, financial statements and internal controls.

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

#### C. Internal company controls

- i)* Member countries should encourage the development and adoption of adequate internal company controls, including standards of conduct.
- ii)* Member countries should encourage company management to make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery.
- iii)* Member countries should encourage the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards.
- iv)* Member countries should encourage companies to provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

#### **Public procurement**

#### **VI. RECOMMENDS:**

- i)* Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement;
- ii)* Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that Member's national laws and, to the extent a Member

applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.

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

### **International Co-operation**

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

- i)* consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;
- ii)* make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;
- iii)* ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.

### **Follow-up and institutional arrangements**

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

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

- ii)* regular reviews of steps taken by Member countries to implement the Recommendation and to make proposals, as appropriate, to assist Member countries in its implementation; these reviews will be based on the following complementary systems:
  - a system of self-evaluation, where Member countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
  - a system of mutual evaluation, where each Member country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the Member country in implementing the Recommendation.
- iii)* examination of specific issues relating to bribery in international business transactions;
- iv)* examination of the feasibility of broadening the scope of the work of the OECD to combat international bribery to include private sector bribery and bribery of foreign officials for reasons other than to obtain or retain business;
- v)* provision of regular information to the public on its work and activities and on implementation of the Recommendation.

IX. **NOTES** the obligation of Member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the OECD Convention.

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

#### **Co-operation with non members**

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

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

**Relations with international governmental and non-governmental organisations**

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

## **Agreed Common Elements of Criminal Legislation and Related Action<sup>1</sup>**

### *1) Elements of the offence of active bribery*

- i) Bribery* is understood as the promise or giving of any undue payment or other advantages, whether directly or through intermediaries to a public official, for himself or for a third party, to influence the official to act or refrain from acting in the performance of his or her official duties in order to obtain or retain business.
- ii) Foreign public official* means any person holding a legislative, administrative or judicial office of a foreign country or in an international organisation, whether appointed or elected or, any person exercising a public function or task in a foreign country.
- iii) The offeror* is any person, on his own behalf or on the behalf of any other natural person or legal entity.

### *2) Ancillary elements or offences*

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state are recognised as applicable to the offence of bribery of a foreign public official.

### *3) Excuses and defences*

Bribery of foreign public officials in order to obtain or retain business is an offence irrespective of the value or the outcome of the bribe, of perceptions of local custom or of the tolerance of bribery by local authorities.

### *4) Jurisdiction*

Jurisdiction over the offence of bribery of foreign public officials should in any case be established when the offence is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

States which prosecute their nationals for offences committed abroad should do so in respect of the bribery of foreign public officials according to the same principles.

---

<sup>1</sup> This is an annex to the *Revised Recommendation of the Council on Combating Bribery in International Business Transactions*, adopted by the Council on May 23, 1997.

States which do not prosecute on the basis of the nationality principle should be prepared to extradite their nationals in respect of the bribery of foreign public officials.

All countries should review whether their current basis for jurisdiction is effective in the fight against bribery of foreign public officials and, if not, should take appropriate remedial steps.

5) *Sanctions*

The offence of bribery of foreign public officials should be sanctioned/punishable by effective, proportionate and dissuasive criminal penalties, sufficient to secure effective mutual legal assistance and extradition, comparable to those applicable to the bribers in cases of corruption of domestic public officials.

Monetary or other civil, administrative or criminal penalties on any legal person involved, should be provided, taking into account the amounts of the bribe and of the profits derived from the transaction obtained through the bribe.

Forfeiture or confiscation of instrumentalities and of the bribe benefits and the profits derived from the transactions obtained through the bribe should be provided, or comparable fines or damages imposed.

6) *Enforcement*

In view of the seriousness of the offence of bribery of foreign public officials, public prosecutors should exercise their discretion independently, based on professional motives. They should not be influenced by considerations of national economic interest, fostering good political relations or the identity of the victim.

Complaints of victims should be seriously investigated by the competent authorities. The statute of limitations should allow adequate time to address this complex offence.

National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

7) *Connected provisions (criminal and non-criminal)*

– *Accounting, recordkeeping and disclosure requirements*

In order to combat bribery of foreign public officials effectively, states should also adequately sanction accounting omissions, falsifications and fraud.

– *Money laundering*

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official

is a money laundering predicate offence, without regard to the place where the bribery occurs.

8) *International co-operation*

Effective mutual legal assistance is critical to be able to investigate and obtain evidence in order to prosecute cases of bribery of foreign public officials.

Adoption of laws criminalising the bribery of foreign public officials would remove obstacles to mutual legal assistance created by dual criminality requirements.

Countries should tailor their laws on mutual legal assistance to permit co-operation with countries investigating cases of bribery of foreign public officials even including third countries (country of the offeror; country where the act occurred) and countries applying different types of criminalisation legislation to reach such cases.

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.



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

**Adopted by the Negotiating Conference on 21 November 1997**

**Preamble**

**The Parties,**

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

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

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

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

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

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

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

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

**Have agreed as follows:**

*Article 1*

**The Offence of Bribery of Foreign Public Officials**

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".
4. For the purpose of this Convention:
  - a. "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
  - b. "foreign country" includes all levels and subdivisions of government, from national to local;
  - c. "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

*Article 2*

**Responsibility of Legal Persons**

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

*Article 3*

**Sanctions**

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

*Article 4*

**Jurisdiction**

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

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

*Article 5*

**Enforcement**

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

*Article 6*

**Statute of Limitations**

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

*Article 7*

**Money Laundering**

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

*Article 8*

**Accounting**

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.
2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

*Article 9*

**Mutual Legal Assistance**

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.
2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.
3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

*Article 10*

**Extradition**

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.
2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.
3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.
4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

*Article 11*

**Responsible Authorities**

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

*Article 12*

**Monitoring and Follow-up**

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

*Article 13*

**Signature and Accession**

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

*Article 14*

**Ratification and Depositary**

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.
2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

*Article 15*

**Entry into Force**

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares (see annex), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.
2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

*Article 16*

**Amendment**

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

*Article 17*

**Withdrawal**

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

### Statistics on OECD Exports<sup>1</sup>

	OECD Exports		
	1990-1996 US\$ million	1990-1996 % of Total OECD	1990-1996 % of 10 largest
United States	287 118	15.9	19.7
Germany	254 746	14.1	17.5
Japan	212 665	11.8	14.6
France	138 471	7.7	9.5
United Kingdom	121 258	6.7	8.3
Italy	112 449	6.2	7.7
Canada	91 215	5.1	6.3
Korea (1)	81 364	4.5	5.6
Netherlands	81 264	4.5	5.6
Belgium-Luxembourg	78 598	4.4	5.4
<b>Total 10 Largest</b>	<b>1 459 148</b>	<b>81.0</b>	<b>100</b>
Spain	42 469	2.4	
Switzerland	40 395	2.2	
Sweden	36 710	2.0	
Mexico (1)	34 233	1.9	
Australia	27 194	1.5	
Denmark	24 145	1.3	
Austria*	22 432	1.2	
Norway	21 666	1.2	
Ireland	19 217	1.1	
Finland	17 296	1.0	
Poland (1)*	12 652	0.7	
Portugal	10 801	0.6	
Turkey*	8 027	0.4	
Hungary**	6 795	0.4	
New Zealand	6 663	0.4	
Czech Republic***	6 263	0.3	
Greece*	4 606	0.3	
Iceland	949	0.1	
<b>Total</b>	<b>1 801 661</b>	<b>100</b>	

Notes: \*1990-1995; \*\*1991-1996; \*\*\*1993-1996.

Source: OECD, (1) IMF

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

<sup>1</sup> This table is an annex to the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.



**Commentaries on the Convention on Combating Bribery of Foreign  
Public Officials in International Business Transactions<sup>2</sup>**

**Adopted by the Negotiating Conference on 21 November 1997**

**General:**

1. This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery," meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery," the offence committed by the official who receives the bribe. The Convention does not utilise the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.
2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.

**Article 1. The Offence of Bribery of Foreign Public Officials:**

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.
4. It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.

---

<sup>2</sup> This is an appendix to the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

5. "Other improper advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

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

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

9. Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12. "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.

14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.*, on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

16. In special circumstances, public authority may in fact be held by persons (*e.g.*, political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

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

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

19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office -- though acting outside his competence -- to make another official award a contract to that company.

## **Article 2. Responsibility of Legal Persons:**

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

### **Article 3. Sanctions:**

Re paragraph 3:

21. The "proceeds" of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.
22. The term "confiscation" includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.
23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

### **Article 4. Jurisdiction:**

Re paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to "principles" includes the principles upon which such selection is based.

### **Article 5. Enforcement:**

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD

Recommendation"), which recommends, inter alia, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

**Article 7. Money Laundering:**

28. In Article 7, "bribery of its own public official" is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

**Article 8. Accounting:**

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

**Article 9. Mutual Legal Assistance:**

30. Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31. Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to

a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

### **Article 10. Extradition**

Re paragraph 2:

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

### **Article 12. Monitoring and Follow-up:**

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

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

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

..

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

35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

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

#### **Article 13. Signature and Accession:**

37. The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.