

PUBLIC INTERNATIONAL LAW

Developments in U.S. and International Efforts to Prevent Corruption

KATHLEEN M HAMANN, PHILIP UROFSKY, NICOLE M. HEALY, ALEXANDRA WRAGE,
AND MARGARET AYRES*

I. Introduction

Both the international community and the United States continued to expand their policy and enforcement efforts globally in 2005, culminating with the entry into force of the United Nations Convention Against Corruption (UNCAC)¹ on December 14, 2005. The

*This report has previously been drafted by the Task Force on International Standards for Corrupt Practices. This year, the Task Force became the Committee. Due to the necessary brevity of this report, the Committee will be issuing a more comprehensive version that includes more in-depth analysis of U.S. cases and coverage of ongoing domestic and global policy initiatives. To view the complete report, please visit the Committee website at www.abanet.org/dch/committee.cfm?com=IC700600. Kathleen M Hamann, Philip Urofsky, Nicole M. Healy, Alexandra Wrage, and Margaret Ayres contributed to this summary.

Kathleen Hamann is an attorney in the Government Contracts, International, and White Collar Practice Groups at Powell Goldstein, LLP, specializing in international criminal laws and regulations. Prior to entering private practice, she was a foreign and civil service officer for the Department of State, where she developed international policy to combat international corruption and crime.

Philip Urofsky is Special Counsel in the Business Fraud & Complex Litigation Group at Cadwalader Wickersham & Taft LLP. He was previously a prosecutor in the Fraud Section at the Department of Justice, where he was responsible for supervising and conducting investigations and prosecutions of violations of the Foreign Corrupt Practices Act.

Nicole Healy is an attorney at Wilson Sonsini Goodrich & Rosati in Palo Alto, California. Her practice focuses on complex litigation, including the defense of securities class action and derivative cases, commercial litigation, white-collar crime, and technology-related matters. Prior to entering private practice, Ms. Healy was a trial attorney with the Department of Justice's Fraud Section in Washington, D.C., where she specialized in transnational complex criminal matters.

Alexandra Wrage is the President of TRACE, a non-profit business association that provides anti-bribery resources and compliance tools to companies operating internationally. Prior to joining TRACE, Ms. Wrage was Senior Counsel-International with Northrop Grumman Corporation. A Canadian, Ms. Wrage studied law at Cambridge University before coming to the United States.

Margaret M. Ayres is Counsel to Davis Polk & Wardwell, specializing in U.S. trade and investment laws applicable to cross border transactions, including the Foreign Corrupt Practices Act. Ms. Ayres has advised many companies around the world, including industrial, banking and investment banking clients, on the Foreign Corrupt Practices Act and other statutes.

1. United Nations Convention Against Corruption, Signatories, http://www.unodc.org/unodc/crime_signatures_corruption.html (last visited Feb. 13, 2006) [hereinafter U.N. Signatories].

U.S. Department of Justice (DOJ) showed a pattern of agreeing to defer the prosecution of companies that voluntarily reported violations of the Foreign Corrupt Practices Act (FCPA).² The Organization of American States, Council of Europe, and Organisation for Economic Co-operation and Development (OECD) all continued their monitoring efforts, issuing numerous reports.

II. U.S. Developments

A. OVERVIEW

In 2005, the DOJ and the Securities and Exchange Commission (SEC) filed a number of FCPA cases where the DOJ entered into deferred prosecution agreements, the SEC entered into consent orders, it seems, as a result of the companies' voluntary disclosures, their subsequent remedial efforts, and their agreement to continue cooperating with the government's investigations. These cases may mark a continuing trend toward rewarding voluntary disclosures and cooperation with less punitive resolutions. The settling companies, however, were required to: (1) make full disclosure of the wrongdoing; (2) disgorge illicitly obtained profits or benefits; (3) pay fines and penalties; (4) implement or strengthen compliance programs and internal controls; (5) actively cooperate in the prosecution of employees, agents, and possibly foreign government officials; and (6) take other remedial measures.

Unfortunately, even for companies that undertake to cooperate fully and to reform and improve their governance systems and controls, there are no guarantees that the government or the courts will not impose penalties that are more severe than expected. These companies may still face additional sanctions or enforcement actions from other federal or state agencies, as well as from foreign governments. The benefits from a negotiated resolution of a government investigation may be greatest in ancillary areas of a company's business. A company seen to be rectifying past mistakes may fare better with shareholders, consumers, lenders, regulators, and others. However, although voluntary disclosure and cooperation may assist in resolving matters with the government, companies should not discount the significant distractions and possible costs associated with shareholder class action and derivative lawsuits that may be filed once possible violations are disclosed.

In addition to the FCPA cases discussed below, it is clear from SEC filings that a number of other companies are under investigation or are conducting their own investigations into possible FCPA violations. Such companies include Baker Hughes, Lucent Technologies, Accenture, Ltd., Bristol Myers Squibb, Consumers Energy Co., Halliburton, Marathon Oil Corp., Offshore Logistics, Teleglobe, and United Defense Industries, Inc.

B. CASES

1. *DPC (Tianjin) Ltd.*

On June 20, 2005, in the Central District of California, DPC (Tianjin) Ltd., a wholly owned Chinese subsidiary of Diagnostic Products Corporation, pled guilty to violating the FCPA's anti-bribery provisions by paying \$1.6 million in corrupt commissions to doctors and procurement officials of state-owned hospitals in China to induce them to purchase

2. 15 U.S.C. §§ 78m(b), 78dd-1 (2000).

medical products sold by DPC Tianjin. In connection with the guilty plea, the court ordered DPC Tianjin to pay a stipulated fine of \$2 million. Concurrently, Diagnostic Products entered into a consent order with the SEC in which the SEC found that Diagnostic Products had violated the FCPA's anti-bribery, books and records, and internal control provisions.³ Although the SEC took into account the subsidiary's agreement to pay the criminal fine, it nevertheless required the parent company to pay \$2.8 million, including disgorgement of just over \$2 million. Both agreements required the companies to retain an independent consultant or monitor charged with reviewing each company's FCPA compliance programs. Despite the fact that the SEC's order states that Diagnostic Products took remedial action once it learned of the payments, that action was too late to save the parent company from civil liability.⁴ The circumstances here, specifically that the payments had continued for eleven years before they were discovered, suggest that the SEC found that Diagnostic Products' internal controls, at least with respect to FCPA compliance, were wholly ineffective, perhaps to the extent that their absence established willful blindness.⁵

2. *GE/InVision*

On February 14, 2005, the SEC settled civil FCPA charges against GE InVision, Inc., a subsidiary of General Electric (GE).⁶ InVision, a California-based manufacturer of airport explosive detection devices, was acquired by GE after the conduct that led to the criminal and civil charges had occurred. Before completing the merger, InVision and GE made a voluntary disclosure to the government. According to the government's pleadings, on three separate occasions between June 2002 and June 2004, InVision personnel authorized payments to foreign sales agents and distributors, while aware of a high probability that those persons had offered or made payments of something of value or made payments to foreign government officials in order to obtain or retain business for InVision. InVision improperly recorded the payments to the agents and distributors in its books and records and failed to devise and maintain a system of internal controls sufficient to ensure FCPA compliance.

As a result of InVision's disclosures, the DOJ and SEC opened investigations focused upon InVision's apparent violations of the FCPA anti-bribery, books and records, and internal controls provisions. Eventually, the agencies entered into the following agreements with InVision:

3. The DOJ charged DPC Tianjin with acting as an agent of its parent, and its guilty plea was entered under 15 U.S.C. § 78dd-1, the provision of the FCPA applicable to issuers, rather than 15 U.S.C. § 78dd-3. Section 78dd-3 was added in 1998 and prohibits any foreign person from committing an act in violation of the FCPA while in the United States. This charging decision may reflect the government's perception that the subsidiary was acting on behalf of the parent or that the government may not have believed that DPC Tianjin engaged in sufficient violative activities in the United States and therefore proceeded on an agency theory. See, Press Release, U.S. Dep't of Justice, DPC(Tianjin) Ltd. Charged With Violating the Foreign Corrupt Practices Act (May 20, 2005), available at http://www.usdoj.gov/opa/pr/2005/May/05_crm_282.htm.

4. Under the FCPA, "[w]hen knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." 15 U.S.C. § 78dd-1(f)(2)(B) (2000).

5. *Id.*

6. Litigation Release No. 19078, U.S. Securities and Exchange Comm'n, SEC Settles Charges Against InVision Technologies for \$1.1 Million for Violations of the Foreign Corrupt Practices Act (Feb. 14, 2005), available at <http://www.sec.gov/litigation/litreleases/lr19078.htm>.

- **DOJ (criminal) agreement:** On December 3, 2004, in return for DOJ's agreement to defer prosecution, prior to the merger with GE,⁷ InVision agreed to accept responsibility for its misconduct; pay an \$800,000 fine; negotiate a settlement with the SEC; and cooperate with DOJ's investigation. Since the DOJ was aware of the pending acquisition by GE, the DOJ and GE entered into a separate agreement, in which GE agreed to ensure compliance with and enhance InVision's FCPA compliance programs and controls.⁸
- **SEC (civil) agreement:** In a civil action by the SEC⁹ on February 14, 2005, InVision, now a subsidiary of GE, without admitting or denying liability, agreed to disgorge \$589,000 in profits from the sale of explosive detection machines in China, plus interest and a \$500,000 civil penalty. InVision was ordered to cease-and-desist from future violations and to retain an independent consultant to ensure the effectiveness of its FCPA compliance program.

At first glance, the InVision matter appears somewhat atypical in that InVision admitted that it had violated the FCPA through the actions of a Chinese distributor. The government's pleadings disclose, however, that InVision was advised that the distributor intended to use funds provided by InVision to pay for foreign travel for Chinese officials, for the purpose of assisting InVision to avoid a threatened financial penalty from a Chinese government agency. Thus, InVision was at least a co-conspirator in, if not the principal behind, the distributor's misconduct. The matter is also somewhat unusual in that GE—which was not involved in the misconduct and only acquired InVision after it had settled all charges—entered into a separate agreement to develop and enforce an FCPA compliance program at InVision. This is a different mechanism than was used to resolve at least two prior FCPA matters involving a subsequent acquisition. In those matters, the acquirer obtained an FCPA Opinion providing it with a safe harbor if certain representations made to the DOJ, based on its pre-acquisition due diligence, were accurate.¹⁰ In other cases (see, e.g., Titan, below), where a potential acquirer discovered misconduct in the course of due diligence, the acquirer terminated acquisition efforts rather than acquire the FCPA liability.

3. *Micrus*

On March 2, 2005, the Department of Justice announced that Micrus Corporation, a privately-held company that develops and sells medical devices, had entered into a two-year deferred prosecution agreement to settle FCPA charges.¹¹ The investigation disclosed that Micrus had paid more than \$105,000 to doctors employed at public hospitals in France, Turkey, Spain, and Germany, in return for the hospitals' purchases of Micrus medical prod-

7. Press Release, U.S. Dep't of Justice, InVision Technologies, Inc. Enters into Agreement with the United States (Dec. 6, 2005), available at http://www.usdoj.gov/opa/pr/2004/December/04_crm_780.htm.

8. InVision also agreed that, if the merger with GE was not completed by a date certain, it would retain an independent, outside law firm to serve as a compliance monitor. Because the merger was completed by the target date, GE retained the compliance monitor. *Id.*

9. Litigation Release No. 19078, *supra* note 6.

10. See, U.S. Dep't of Justice, FCPA Opinion Procedure Release 2003-01, (Jan. 15, 2003), available at <http://www.usdoj.gov/criminal/fraud/fcpa/o0301.htm>; U.S. Dep't of Justice, FCPA Opinion Procedure Release 2004-02 (July 12, 2004) available at <http://www.usdoj.gov/criminal/fraud/fcpa/o0402.htm>.

11. Press Release, U.S. Dep't of Justice, Micrus Corporation Enters Into Agreement to Resolve Potential Foreign Corrupt Practices Act Liability (Mar. 2, 2005), available at http://www.usdoj.gov/opa/pr/2005/March/05_crm_090.htm.

ucts. The payments were concealed as stock options, honoraria, and commissions. Additionally, Micrus had made \$250,000 in payments that were not authorized under the laws of the various foreign states.

As part of its agreement, Micrus and its Swiss subsidiary, Micrus, S.A., agreed to: (1) accept responsibility for their misconduct; (2) fully disclose all actual or suspected FCPA violations to the DOJ; (3) agree to a statement of facts setting forth the violations; (4) pay a \$450,000 penalty; and (5) adopt an FCPA compliance program. Further, Micrus, which is not an issuer and therefore is not subject to the “books and records” and “internal controls” provisions of the FCPA, was required to implement such controls and to retain an independent monitor to review its controls.

4. *Monsanto Company*

On January 6, 2005, the DOJ filed a criminal information in the District of Columbia charging the Monsanto Company with one count of bribery and one count of falsifying its books and records.¹² The DOJ and Monsanto entered into a three-year deferred prosecution agreement and Monsanto entered into a consent order with the SEC.¹³ Monsanto agreed to pay a \$1 million penalty to the DOJ and a \$500,000 civil penalty to the SEC. According to the pleadings, throughout 2001 Monsanto had unsuccessfully sought the repeal of an Indonesian regulation that required environmental impact studies for a variety of genetically-modified crops. In late 2001, a senior Monsanto manager authorized an Indonesian consultant company to submit false invoices and made false representations to other Monsanto employees to justify payment of those invoices. Thereafter, the consultant company withdrew \$50,000 in cash and delivered it to an Indonesian official in return for a promise to repeal the regulation.¹⁴

5. *Titan Corporation*

On March 1, 2005, Titan Corporation, a San Diego-based military intelligence and communications company, pled guilty¹⁵ to one count of FCPA bribery, one count of falsifying its books and records, and one count of aiding or assisting in the filing of a false tax return, in violation of 26 U.S.C. § 7206(2). Titan was sentenced to pay a criminal fine of \$13 million on the FCPA bribery count and was ordered to serve three years of supervised probation. As a condition of its probation, Titan was ordered to institute a strict compliance program and to implement a system of internal controls designed to prevent future FCPA violations. Titan also entered into a consent decree with the SEC,¹⁶ agreeing to cease-and-desist from future FCPA violations, enter into a financial settlement comprised of disgorgement and prejudgment interest of \$15,479,000, and retain an independent consultant to review Ti-

12. Press Release, U.S. Dep't of Justice, *Monsanto Company Charged with Bribing Indonesian Government Official: Prosecution Deferred for Three Years* (Jan. 6, 2005), available at http://www.usdoj.gov/opa/pr/2005/January/05_crm_008.htm.

13. *Id.*

14. According to the SEC's Order, Monsanto's Indonesian management team also created a secret fund from which to finance over \$700,000 in illicit payments to at least 140 Indonesian officials and their family members by over-invoicing transactions and creating ghost invoices. *Id.*

15. News Release, Office of U.S. Attorney, S. Dist. of Cal., (Mar. 1, 2005), available at <http://www.usdoj.gov/usao/cas/pr/cas50301.1.pdf>.

16. *Id.*

tan's FCPA policies and procedures. The aggregate penalty of over \$28 million is the largest FCPA penalty imposed to date.

According to the pleadings, beginning in 1998, Titan and its subsidiaries entered into an agreement with the government of Benin to build and operate a wireless telephone network, which included a substantial management fee. To secure and retain this business, Titan engaged an agent who claimed to have close ties to the then-president of Benin. Titan paid the agent hundreds of thousands of dollars for consulting services that were not documented and do not appear to have been performed. In January 2001, Titan began making improper payments, totaling over \$3.5 million, to the Benin agent for the purpose of influencing the upcoming election in Benin and ensuring the continued support of the then-president for Titan's contract. At Titan's request, the agent submitted over \$2 million in false invoices to Titan. Titan knowingly falsified its books and records to conceal the illicit payments.

The investigation into Titan's FCPA violations terminated a potential \$1.6 billion merger between Titan and Lockheed Corporation—Lockheed withdrew its offer when Titan was unable to timely resolve the government's investigation. Both the SEC and the DOJ pleadings noted that Titan and its subsidiaries had an almost complete lack of FCPA controls. The SEC's report highlighted its view that Titan's false representations in its proxy statements concerning its purported compliance with the FCPA, as well as its failure to correct these disclosures, affected the "total mix of information" available to investors, and the failure to correct could be deemed to have violated sections 10(b) and 14(a) of the Securities Exchange Act of 1934.¹⁷

6. *Yaw Osei Amoako*

On September 1, 2005, the SEC filed a complaint against Yaw Osei Amoako,¹⁸ the former Regional Director for Africa of ITXC Corp. (now part of Teleglobe International Holdings Ltd.), alleging that he had bribed a senior official of Nigerian Telecommunications Ltd. (Nitel), an instrumentality of the Nigerian government.¹⁹ The Complaint alleges that in mid-2002, Amoako offered to make a Nitel official an agent of ITXC, paying him a retainer and a portion of profits, if Nitel obtained a license to place telephone calls to individuals and businesses in Nigeria. After ITXC received the license, it allegedly paid the Nitel official approximately \$167,000. As of the date of publication, Amoako has not settled with the SEC, and trial is pending. Teleglobe, the new owner of ITXC, which previously disclosed an internal investigation involving FCPA allegations, has recently announced a definitive agreement to be acquired by another company. As in the other merger cases discussed herein, the acquirer will presumably either demand that Teleglobe resolve this issue prior to the closing or the SEC's complaint will scuttle the merger.

17. Exchange Act Release No. 51283, Securities and Exchange Comm'n, Report of Investigation Pursuant to Section 21(a) of the Securities and Exchange Act of 1934 and Commission Statement on Potential Exchange Act Section 10(b) and Section 14(a) liability (Mar. 1, 2005), available at <http://www.sec.gov/litigation/investreport/34-51238.htm>.

18. Litigation Release No. 19356, U.S. Securities and Exchange Comm'n, SEC Sues Former Regional Director of ITXC Corp. for Violations of the Anti-Bribery Provisions of the Foreign Corrupt Practices Act (Sept. 1, 2005), available at <http://www.sec.gov/litigation/litreleases/lr19356.htm>.

19. Allegations that bribes were paid to officials of Nitel are also the focus of a highly-publicized investigation involving another company. To date, no charges have been brought in that matter, although the authorities have conducted searches of the homes of both a U.S. congressman and a Nigerian diplomat. *Id.*

7. *United States v. Kozeny*

On October 6, 2005, the Southern District of New York unsealed a twenty-seven-count indictment alleging that Viktor Kozeny, Frederic Bourke, Jr., and David Pinkerton had conspired to violate and violated the FCPA, the Travel Act, and federal money laundering statutes as part of a scheme to bribe senior government officials in Azerbaijan in an unsuccessful attempt to induce that government to privatize its oil industry.²⁰ The indictment further alleges that Bourke and Pinkerton made false statements to the FBI. Three other individuals have already pled guilty to conspiracy, FCPA, and money laundering offenses relating to this scheme.²¹

According to the indictment, from mid-1997 through 1999, Kozeny devised a scheme to gain control of the State Oil Company of the Azerbaijan Republic (SOCAR) by illicitly investing in privatization vouchers and options issued by the Azeri government through an entity called Oily Rock Group, Inc. The bribes allegedly included payments of millions of dollars in cash, gifts, travel, and a promise to provide Azeri officials with two-thirds of Oily Rock's profits. According to the indictment, Bourke had invested \$8 million, and Pinkerton had caused AIG to invest \$15 million in Oily Rock. Bourke and Pinkerton each allegedly knew of the bribes and believed that Kozeny had obtained non-public information concerning SOCAR, including information regarding the timing of the privatization.

The government charged all three defendants as domestic concerns or, in Kozeny's case, as an agent of Bourke, Pinkerton, and Oily Rock's or Minaret's other shareholders and investors who were U.S. citizens or entities.²² Kozeny was arrested by the Bahamian government, and the U.S. government is seeking Kozeny's extradition.

III. Enforcement Actions Abroad

A. ANTI-BRIBERY

1. *Costa Rica*

The Costa Rican Attorney General and National Congress are investigating allegations that a local subsidiary of communications solutions provider Alcatel made payments to state and local officials in Costa Rica and representatives of the state-owned telephone company, ICE, in order to secure contracts.²³ The Costa Rican Attorney General's Office and ICE have also filed lawsuits against Alcatel CIT, seeking compensation for damages caused by

20. Press Release, Office of the U.S. Attorney, S. Dist. of N.Y., U.S. Announces Charges in Massive Scheme to Bribe Senior Government Officials in the Republic of Azerbaijan (Oct. 6, 2005), available at <http://www.usdoj.gov/usao/nys/Press%20Releases/October%2005/Kozeny%20et%20al.%20Indictment%20PR.pdf>.

21. *Id.*

22. *Id.* The government did not charge Kozeny (a Czech national and Irish citizen, residing in the Bahamas) under 15 U.S.C. § 78dd-3 that permits the U.S. government to prosecute foreign nationals who cause an act to be done in violation of the FCPA while in the territory of the United States, perhaps because the only acts alleged in the indictment involving acts in the United States occurred prior to the November 10, 1998 effective date of the enactment of § 78dd-3.

23. See generally, *Former Costa Rican President Freed Pending Trial*, EFE WORLD NEWS SERVICE, Oct. 14, 2005; Alcatel, Report of a Foreign Issuer (Form 6-K), Sept. 30, 2003, available at http://www.alcatel.es/finance/reports/2003/june2003_6K.pdf (last visited Feb. 13, 2006); *Former Costa Rica's President Figueres Says He is Victim of a Political Game*, LA NACION, Feb. 10, 2005; *Costa Rica: Scandals Hit the PLN*, CARIBBEAN & CENT. AM. REP., RC-04-11, Nov. 16, 2004.

the alleged payments.²⁴ Former Costa Rican Presidents Jose Maria Figueres and Miguel Angel Rodríguez have been summoned or jailed as a result of the investigation. Rodriguez was recently released from house arrest but must remain in the country while the criminal case remains pending. Figueres, who lives in Switzerland, admits that he accepted more than \$900,000 in payments from Alcatel, but maintains the funds were received for legitimate advice that he provided to the French company. As a result of its own investigation into the matter, Alcatel fired Edgar Valverde, the president of Alcatel de Costa Rica, and an executive of a French subsidiary. The company has also announced it is pursuing criminal actions against Valverde and local consultants and employees believed to be involved in the scheme.

2. *France*

French authorities are investigating a consortium consisting of Technip, a French company, Kellogg, Brown & Root, a subsidiary of Halliburton, and Italian and Japanese companies, for allegedly paying bribes to Nigerian government officials in connection with the construction of a natural gas liquefaction complex on Bonny Island.²⁵ The consortium, through a separate entity, retained Tristar, a Gibraltar company, to assist with the project and, allegedly, paid it approximately \$180 million in fees and commissions. Tristar is reportedly owned by Jeffrey Tesler, an English lawyer with ties to the late former Nigerian leader General Sani Abacha. Tesler is also reportedly quite close to Olusegun Obasanjo, the current leader of Nigeria. Published reports suggest that a significant part of the funds allegedly paid to Tristar may have found its way to various Nigerian government officials. In 2004, Nigeria's House of Representatives Committee on Public Petition launched its own investigation into the alleged payment of bribes by the joint venture.

3. *Germany*

German federal authorities reportedly have joined U.S. criminal and civil investigations of DaimlerChrysler regarding alleged violations of the FCPA and Germany's own transnational bribery law by the auto giant's Mercedes business unit.²⁶ Press reports indicate that Mercedes may have maintained numerous slush funds used to make payments to foreign government officials, and that these funds were not properly recorded on DaimlerChrysler's financial statements. Some of these payments are reported to have been made in 2002 to Cotecna, the Geneva-based company that was retained by the United Nations (U.N.) to inspect and process shipments to Iraq under the U.N.'s Oil-For-Food program. DaimlerChrysler allegedly paid Cotecna representatives to process DaimlerChrysler shipments to Iraq ahead of other shippers. Munich prosecutors are also reportedly investigating German subsidiaries of pharmaceutical giant Bristol Myers-Squibb. The company disclosed late last year that the SEC had launched an informal inquiry into the activities of its German sub-

24. Alcatel, Report of a Foreign Issuer, *supra* note 23.

25. Mike Oduniji, *Halliburton: Court Orders Access to Suspects' Account*, ALL AFRICA, Jan. 13, 2005, <http://www.allafrica.com>; Julio Godoy, *France: Former Public Officials Accused of Corruption*, INTER PRESS SERVICE, Oct. 20, 2005.

26. Press Release, U.S. Securities & Exchange Comm'n, Bristol-Myers Squibb Company Agrees to Pay \$150 Million to Settle Fraud Charges (Aug. 4, 2004), *available at* <http://www.sec.gov/news/press/2004-105.htm>; U.S. Justice Department investigates Mercedes corruption, AGENCE FRANCE PRESSE, Aug. 5, 2005, *available at* <http://www.afp.com/english/home>; U.S. Probes Mercedes Over Bribery Allegation, DATAMONITOR, Aug. 8, 2005, <http://www.datamonitor.com>.

subsidiaries and employees—an inquiry that the company believes may involve potential FCPA violations and violations of German law.

4. *India*

Xerox recently disclosed that an independent investigator appointed by the Indian Ministry of Company Affairs has completed an investigation into allegations that its Indian subsidiary, Xerox Modicorp Ltd. (now known as Xerox India Ltd.), misappropriated funds, inaccurately recorded payments on company books, and made improper payments “in connection with sales to government customers.”²⁷ According to Xerox, the investigator’s report alleges that Xerox Modicorp’s senior officials were aware of the misappropriation of funds and improper payments and stresses the need for further inquiry into potential criminal acts. Copies of the findings have been forwarded to the DOJ and the SEC.

5. *Indonesia*

Indonesia’s Corruption Eradication Commission (KPK) announced in January that it would begin an investigation into allegations that Monsanto made improper payments to Indonesian government officials, as described above.²⁸ The KPK announcement came just days after Monsanto settled the DOJ and the SEC enforcement proceedings.

6. *Italy*

Immucor, Inc., a U.S. publicly held global in vitro diagnostics company, reported that authorities in Milan are conducting a criminal investigation of the company’s president and Italian subsidiary based on allegations that Immucor and other companies made improper payments to an Italian doctor, and possibly other doctors, in exchange for favorable contract awards by the hospital.²⁹ An Immucor internal investigation found that payments were made to the Italian doctor in question for his services, but were not improper. However, the payments were not properly recorded and therefore constituted a violation of the FCPA books and records provisions. Immucor voluntarily reported the violation to the SEC in 2004. The same internal investigation also found that payments had been made to another doctor and that the payments may have led to the introduction of equipment into that doctor’s hospital and possibly other hospitals.

7. *Lesotho*

Lesotho began the trial in its sixth corruption prosecution arising from the Lesotho Highlands Water Project (one of the largest dam projects in the world) against Impregilo, Italy’s largest construction company, on five charges of bribery for allegedly paying over \$1 million in bribes to the head of the project.³⁰ Two individuals and three companies have already been convicted for their participation in the scandal.

8. *Thailand*

The Thai government announced the results of its investigation regarding bribes allegedly paid to Thai officials in connection with the sale of baggage screening machines in-

27. Xerox Corp., Quarterly Report (Form 10-Q), at 31 (Oct. 28, 2005).

28. Muninggar Sri Saraswati, KPK to Investigate Monsanto Bribery Case, *THE JAKARTA POST*, Jan. 10, 2005, <http://www.thejakartapost.com/yesterdaydetail.asp?fileid=20050110.B02>.

29. Immucor, Annual Report (Form 10-K) (Oct. 19, 2005).

30. Thabo Thakalekoala, *Italian Construction Company Charged with Bribery in Lesotho Highlands Water Project*, *ASSOCIATED PRESS*, Mar. 2, 2005.

tended for the new Bangkok airport.³¹ The bribery allegations were related to the InVision Technologies FCPA investigation that was settled in the United States at the end of 2004. The government-appointed investigation committee cleared Thai politicians and officials of the charges, claiming it had found no evidence to support the allegation that the officials accepted bribes or kickbacks in connection with the purchase of the baggage equipment. However, a Thai Senate investigation committee has accused executives of the New Bangkok International Airport Co. of breaking Thai procurement and anti-corruption laws by accepting bribes in connection with the purchase of baggage-handling equipment. The head of the Senate investigation committee announced that its findings would be sent to the president.

9. United Kingdom

The Times (U.K.) reported in August 2005, that seventeen cases of potential bribery and corruption had been referred to the Serious Fraud Office (SFO), the independent arm of the U.K. government responsible for investigating and prosecuting acts of fraud, since April 2004.³² Four of the seventeen cases actively being investigated by the SFO involve allegations that British companies paid bribes to foreign public officials. BAE Systems is one of the companies currently under scrutiny by the Ministry of Defence Police and the SFO. Investigators are looking into allegations that BAE paid millions of dollars in bribes to Saudi government officials in connection with lucrative defense contracts.

B. ANTI-CORRUPTION

1. Nigeria

The Government of Nigeria achieved a major success in its efforts to recover the estimated \$2.2 billion³³ in public funds stolen by the late General Sani Abacha during his rule. In July 2005, the Nigerian Court of Appeal dismissed a suit³⁴ by Abacha's family to halt efforts to recover the stolen funds. Abacha had challenged the forfeitures on the grounds that the family had been denied due process by the international mutual legal assistance process used to freeze and seize assets overseas. Liechtenstein, Luxembourg, Switzerland, the United States, and the United Kingdom have all been participating in the global effort to recover the Abacha funds, with the assistance of the U.N. Office on Drugs and Crime.³⁵

31. Sutin Wannabovorn, *Thai Government Probe Finds No Payoffs to Officials in Airport Scanner Deal*, AP ALERT—BUSINESS, June 8, 2005; *Thai Government Investigation Reveals No Bribes to Officials*, AIRLINE INDUSTRY INFO., June 9, 2005, available at <http://www.allbusiness.com/periodicals/article/442950-1.html>; *US Court Postpones Hearing on Shareholders Suit Against InVision*, THAI PRESS REP., Aug. 1, 2005; *Thai Panel Says Officials Violated Anti-Corruption Laws in Purchase of Scanners*, WORLD NEWS CONNECTION, Oct. 16, 2005.

32. Frances Gibb, *Companies Face Investigation Into 'Bribery' Abroad*, THE TIMES (U.K.), Aug. 1, 2005, available at <http://www.business.timesonline.co.uk/article/0,,9063-1716713,00.html>; Michael Harrison, *Hole in BAE Pension Fund Grows by Pounds 1.2bn*, THE INDEPENDENT (U.K.), Feb. 25, 2005, http://www.findarticles.com/p/articles/mi_qn4158/is_20050225/ai_n11054925; Robert Winnett & David Leppard, *The Defence Firm and the Slush Fund*, SUNDAY TIMES (U.K.), July 25, 2004, at 5.

33. This estimate, one of the lowest, is from the U.N. Office on Drugs and Crime. U.N. Office on Drugs and Crime, *Asset Recovery Project in Nigeria*, Feb. 12, 2006, available at http://www.unodc.org/unodc/en/corruption_projects_nigeria_project2.html (other sources estimate Abacha may have stolen as much as \$5 billion).

34. Ise-Oluwa Ige, *Abacha Tackles FG Over \$800m at Supreme Court*, ALL AFRICA, Aug. 10, 2005, <http://www.allafrica.com>.

35. *Id.*

Switzerland, Nigeria, and the World Bank signed a Memorandum of Understanding for the repatriation of an additional \$290 million on September 27, 2005.³⁶

2. *UN Oil-for-Food Scandal*

The Independent Inquiry Committee into the Iraq Oil-for-Food Program (IIC) released its final report on October 27, 2005.³⁷ The IIC concluded that 2253 companies participated in the fraud, totaling around \$1.8 billion dollars. Because the IIC has no judicial power, the report lists the names of companies and individuals involved and leaves the process of investigating and prosecuting participants up to their respective nations. Prosecutions in the United States are already underway and investigations are starting around the world, particularly in France and India. The IIC stressed, however, that the Hussein regime earned far more revenue—\$11 billion—from illegal oil sales to neighboring countries than through the kickback schemes.

IV. International Anti-Corruption Treaties and Public International Organizations

There were several developments in ongoing efforts in treaty development, international policy, and public international organizations, particularly in the Group of 8, the Asia-Pacific Economic Cooperation forum, the Summit of the Americas, and the Global Forum on Fighting Corruption. Below are some brief highlights that are covered in more detail on the Committee's website.

A. THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

The UNCAC entered into force on December 14, 2005.³⁸ The United States has not yet ratified the convention, although the package has been transmitted to the Senate.³⁹

B. MUTUAL EVALUATION MECHANISMS

1. *The Inter-American Convention Against Corruption*

The Committee of Experts of the Follow-Up Mechanism for the Inter-American Convention Against Corruption⁴⁰ accelerated its review efforts this year, issuing eleven first-round compliance reports on the Bahamas, Canada, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Jamaica, St. Vincent & the Grenadines, Trinidad & Tobago, and the United States.⁴¹ The Committee also held meetings in March 2005 to discuss

36. *Id.*

37. Press Release, Independent Inquiry Committee into the United Nations Oil-for-Food Programme, Illicit Oil-for-Food Programme Payments of Nearly \$2 Billion to Saddam Hussein; IIC Urges UN Reform, Oct. 27, 2005, available at <http://www.iic-offp.org/documents/PressRelease27Oct05.pdf>.

38. U.N. Signatories, *supra* note 1.

39. For the ABA Report and Recommendations on the Convention, see SECTION OF INTERNATIONAL LAW, AMERICAN BAR ASSOCIATION, REPORT TO THE HOUSE DELEGATES, available at <http://www.abanet.org/leadership/2005/annual/summaryofrecommendations/110.doc>.

40. U.N. Signatories, *supra* note 1.

41. All the reports except those concerning the Bahamas, El Salvador, and St. Vincent & the Grenadines, which are not yet public, are available from the Organization of American States, http://www.oas.org/juridico/english/mec_ron1_rep.htm.

implementation of the No Safe Haven initiative, an agreement from the Special Summit of the Americas in 2004, where all nations committed to deny safe haven to corrupt officials, those who corrupt them, and their assets.⁴²

2. *The Group of States Against Corruption*

The Group of States Against Corruption (GRECO) monitors observance of the Council of Europe's Guiding Principles for the Fight against Corruption and implementation of the Criminal Law Convention on Corruption, the Civil Law Convention on Corruption, and Recommendation R (2000) 10 on codes of conduct for public officials. In 2005, GRECO issued reports on Albania, Bulgaria, Denmark, the Former Yugoslav Republic of Macedonia, Germany, Lithuania, Malta, the Netherlands, Romania, Spain, and Sweden.⁴³

3. *The OECD Working Group on Bribery*

The OECD Working Group on Bribery monitors implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The OECD Working Group issued one report on the adequacy of legislation, for Slovenia, and reports on implementation of legislation for Belgium, Greece, Hungary, Japan, Sweden, Switzerland, the United Kingdom, and the United States.⁴⁴

V. Non-Governmental Organizations and Business Associations

A. CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE

The Center for International Private Enterprises (CIPE) is a non-profit affiliate of the U.S. Chamber of Commerce and one of the four core institutes of the National Endowment for Democracy. CIPE's overall focus is on institutional reform on both the supply and demand sides of corruption. CIPE partners work to create incentive structures that reward ethical behavior and punish those who engage in corruption. Under CIPE's auspices, local organizations abroad have been working to address corruption issues in their respective countries. In Russia, the INDEM Foundation (Information Science for Democracy) conducted extensive studies on sources of corruption and, in conjunction with the business sector, developed the *Business Owner's Guide: How to Oppose Corruption*. In Colombia, the Confederation of Colombian Chambers of Commerce is working to reduce private sector corruption through the adoption of ethical standards and corporate governance mechanisms.⁴⁵ In the Philippines, the Institute for Solidarity in Asia worked with local governments in eight major cities to improve governance mechanisms, increasing transparency and reducing opportunities for public officials' discretion.⁴⁶ In Mozambique, the Commer-

42. *Id.*

43. All the reports except that on the Former Yugoslav Republic of Macedonia, which is not public, are available from GRECO, www.greco.coe.int/evaluations/Default.htm.

44. See generally, Organisation for Economic Co-operation & Development, Directorate for Financial & Enterprise Affairs, Bribery in International Business, Anti-Bribery Convention, available at http://www.oecd.org/department/0,2688,en_2649_34859_1_1_1_1_1,00.html (last visited Feb. 13, 2006).

45. CIPE Global Partners and Results, Colombian Confederation of Chambers of Commerce (Confecámar), <http://www.cipe.org/programs/global/partners/dispPartner.php?id=121> (last visited Feb. 13, 2005).

46. Institute for Solidarity in Asia, Work with Cities: Public Governance System (PGS), <http://www.isa.center.org/publicgovernancesystem.htm> (last visited Feb. 13, 2006).

cial and Industrial Association of Sofala is raising awareness of widespread corruption, evaluating its causes and costs, and is working with the private sector to design concrete legal and regulatory recommendations that tackle corruption at its roots.⁴⁷ CIPE is also working with Transparency International (TI) to develop an anti-bribery toolkit for small and medium enterprises and compliance mechanisms for companies that have voluntarily subscribed to TI's Business Principles for Countering Bribery.⁴⁸

B. THE CORNER HOUSE

The Corner House is a United Kingdom-based research and advocacy group that focuses on addressing how the U.K. government can combat corruption. It also monitors particular cases of corruption involving U.K. companies and individuals. Early in 2005, the Corner House uncovered information indicating that the U.K.'s Export Credits Guarantee Department (ECGD) had weakened its anti-corruption procedures following extensive lobbying by particular U.K. exporters. The Corner House took the ECGD to court and won a settlement, whereby the ECGD agreed to full consultation on its anti-corruption procedures.⁴⁹

C. GLOBAL WITNESS

Global Witness, a non-governmental organization (NGO) that operates through a combination of covert investigations and in-depth research, works to expose links between the exploitation of natural resources, environmental destruction, and human rights abuses, particularly where such resources are used to fund and perpetuate conflict and corruption.⁵⁰ In 2005, Global Witness continued to press for revenues from natural resource extraction in resource-rich developing countries to be managed in a transparent and equitable manner in order to combat misappropriation of revenues from oil, gas, mining, and logging through the Publish What You Pay Coalition; effective implementation of the Extractive Industries Transparency Initiative, a multi-stakeholder initiative to deliver resource revenue transparency; and the Kimberley Process Certification Scheme, the international agreement aimed at preventing the trade in conflict diamonds. Global Witness also worked to expose corruption and illegal logging in the timber trade in Cambodia and other countries and to coordinate ongoing campaigns to tackle corruption in the timber trade.

D. INTERNATIONAL CHAMBER OF COMMERCE ANTI-CORRUPTION COMMISSION

The International Chamber of Commerce (ICC) is a world business organization with thousands of member companies and associations in around 130 countries. The ICC Anti-Corruption Commission encourages self-regulation by enterprises in confronting issues of extortion and bribery and provides business input into international initiatives to fight cor-

47. Commercial & Industrial Association of Sofala, About ACIS, http://www.acisofala.com/about_acis1.htm (last visited Feb. 13, 2006).

48. CIPE, *supra* note 45; TRANSPARENCY INTERNATIONAL, BUSINESS PRINCIPLES FOR COUNTERING BRIBERY (2002), available at <http://www.transparency.org> or <http://www.sa-ind.org>.

49. Susan Hawley, *Submission to the ECGD Interim Response to the Public Consultation on the ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004*, THE CORNER HOUSE, <http://www.thecornerhouse.org.uk/item.shtml?x=471570.s>.

50. See generally, Global Witness, <http://www.globalwitness.org> (last visited Feb. 13, 2006).

ruption.⁵¹ The ICC issued a revised version of its Rules of Conduct and Recommendations to Combat Extortion and Bribery in October 2005.⁵² The 2005 Rules form the cornerstone of the ICC's anti-corruption work, serving both as a tool for self-regulation by business and as a plan of action for ICC cooperation with international organizations and governments to combat extortion and bribery.

E. TRACE

TRACE is a non-profit business association that works with companies to improve their anti-bribery programs while lowering the cost associated with compliance. TRACE undertakes benchmarking research and disseminates the results to assist its member companies to ensure that their policies are squarely within best practices. In 2005, TRACE initiated a compliance library of anti-bribery policies for dissemination to small companies and companies in emerging markets.⁵³ The library enables these companies to benefit from the expertise of multinationals with longstanding and tested programs. Due diligence reports were made available at no cost to non-profit organizations working with third parties with a goal of increasing transparency and enhancing anti-bribery compliance among NGOs. TRACE also established a scholarship program, scheduled to take effect in 2006-2007 that will enable students in emerging markets to undertake degree-level studies in the United States with a strong corporate governance component. Finally, TRACE continued its anti-bribery workshop series by holding half-day workshops that are open to the public and cover topics such as the FCPA, international conventions, and local law.

F. TRANSPARENCY INTERNATIONAL

TI, with its network of almost ninety national chapters around the world, works with governments, civil society, and the private sector to address domestic and international corruption.⁵⁴ TI has developed assessment tools, including National Integrity Surveys, a Corruption Barometer, and the 2005 TI Corruption Perceptions Index, which ranked a record 159 countries according to perceived levels of corruption in the public sector. The 2005 edition of the annual TI Global Corruption Report⁵⁵ provided an overview of the state of corruption around the world with a particular focus on the construction industry. TI Advocacy efforts led the World Bank to implement an anti-bribery certification requirement for companies bidding for large public works projects. TI continues to press the multilateral banks to require stronger transparency, audit, and other accountability requirements in bank-financed procurement and to harmonize their sanction and debarment mechanisms. TI has developed tools specifically for the private sector, including the Business Principles for Countering Bribery. TI is also working to reduce extortion and bribery through anti-corruption agreements and has contributed to the creation of follow-up mech-

51. See generally, ICC Anti-Corruption Commission, <http://www.iccwbo.org/policy/anticorruption/?cookies=no> (last visited Feb. 13, 2006).

52. INT'L CHAMBER OF COMMERCE, COMM'N ON ANTI-CORRUPTION, COMBATING EXTORTION AND BRIBERY: ICC RULES OF CONDUCT AND RECOMMENDATIONS (2005), available at <http://www.iccwbo.org/policy/anti-corruption/id4730/index.html>.

53. See generally, TRACE International, <http://www.traceinternational.org> (last visited Feb. 13, 2006).

54. See generally, Transparency International, <http://www.transparency.org> (last visited Feb. 13, 2006).

55. TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT (2006).

anisms that promote enforcement. It is currently developing recommendations for the UN-CAC State Parties and promoting transparency requirements in trade agreements and arrangements such as APEC.

G. UNITED NATIONS GLOBAL COMPACT

The U.N. Global Compact is an international multi-stakeholder initiative that brings companies together with U.N. agencies, labor, and civil society to promote responsible corporate citizenship.⁵⁶ More than 2500 companies from all regions of the world, international labor, and civil society organizations are engaged in the Global Compact, working to advance ten voluntary universal principles in the areas of human rights, labor, the environment, and anti-corruption. The Global Compact Office has issued a first set of guidelines⁵⁷ advising on company action and plans to detail these recommendations, together with the International Business Leaders Forum and TI, in a publication, *Framework for Action*, which was released in December 2005. The Global Compact also facilitated and initiated collective action by setting up a global multi-stakeholder working group. Regional events were held jointly with the OECD, TI, and the New Partnership for Africa's Development.

56. See generally, The United Nations Global Compact, <http://www.un.org/Depts/ptd/global.htm> (last visited Feb. 13, 2006).

57. United Nations Global Compact, About the United Nations Global Compact, <http://www.unglobalcompact.org/AboutTheGC/index.html> (last visited Feb. 13, 2006).

