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A TRULY LEVEL PLAYING FIELD FOR INTERNATIONAL BUSINESS: IMPROVING THE OECD CONVENTION ON COMBATING BRIBERY USING CLEAR STANDARDS

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Abstract: Combating bribery in international business has become increasingly important in a global economic environment in which deregulation and privatization are popular trends. The Organisation for Economic Co-Operation and Development's (OECD's) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is an important step towards leveling the playing field for foreign companies competing for business abroad. However, this Note concludes that, in order to improve the uniform application of the Convention, the Convention's signatory parties should: (1) adopt a minimum five-year statute of limitations requirement; (2) adopt a five-year maximum term of imprisonment for natural persons convicted of bribery; and (3) impose a fine of not less than \$175,000 U.S. dollars (USD) for individuals convicted of bribery.

INTRODUCTION

Bribery in the conduct of international business has been linked to a host of challenging international problems: causing long-term damage to economic development and the growth of democratic and transparent institutions, weakening global security, and contributing to worldwide poverty.¹ At a minimum, bribery of foreign officials distorts the competitive forces of market economies.² The bribery of

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¹ See Andrea Goldbarg, Note, *The Foreign Corrupt Practices Act and Structural Corruption*, 18 B.U. INT'L L.J. 273, 274 (2000); THE WORLD BANK GROUP, ANTI-CORRUPTION KNOWLEDGE CENTER: HELPING COUNTRIES REDUCE CORRUPTION, at <http://www1.worldbank.org/publicsector/anticorrupt/helping.htm> (last visited Nov. 6, 2002).

² See Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related Documents, Dec. 17, 1997, pmb. [hereinafter OECD Convention]; see generally THE WORLD BANK GROUP, *supra* note 1; S. REP. NO. 105-277, at 2

public officials has become increasingly important for a global economic environment in which deregulation and privatization are popular trends.³

The Organisation for Economic Co-Operation and Development (OECD) has attempted to level the playing field for foreign companies competing for business outside their home country by adopting the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) and the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions (the Recommendation).⁴ While these documents have provided a strong foundation for a coordinated effort to curb the economic impact of bribery in international business, the uniform and effective implementation of these documents is a serious, if not insurmountable, challenge.⁵ This Note addresses the numerous challenges associated with the effective implementation of the OECD Convention and suggests that clearer standards for the statute of limitations and sanction provisions should be adopted in order to improve the uniform application of the Convention's provisions.

Part I of this Note surveys the history and origins of the OECD Convention, paying particular attention to the influence of the U.S. and the Foreign Corrupt Practices Act (FCPA). Part II outlines the basic requirements of the Convention and details the Convention's current liability and sanction provisions. Part III explains the Convention's enforcement and evaluation mechanisms and describes the Phase 1 and Phase 2 evaluation programs. Finally, Part IV of this Note illustrates the problems with the multilateral application of the Convention and advocates for the adoption of a minimum five-year statute

(1998), available at <http://www.usdoj.gov/criminal/fraud/fcpa/senate1.htm> (last visited Nov. 6, 2002) [hereinafter SENATE REPORT].

³ See Wayne Hamra, *Bribery in International Business Transactions and the OECD Convention: Benefits and Limitations*, BUS. ECON., Oct. 1, 2000, available at 2000 WL 15294332; see generally *Doing Well by Doing Good*, THE ECONOMIST, Apr. 22, 2000 (U.S. ed.), available at 2000 WL 8141686.

⁴ Lisa Miller, Note, *No More "This For That"? The Effect of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 8 CARDOZO J. INT'L & COMP. L. 139, 140 (2000).

⁵ A number of other international organizations are also involved in the effort to curb international bribery, including the United Nations, the World Bank, the International Monetary Fund, the International Chamber of Commerce, the World Trade Organization, the Organization of American States, the Council of Europe and the European Union. See OECD Convention, *supra* note 2, at pmb1.; Alejandro Posadas, *Combating Corruption Under International Law*, 10 DUKE J. COMP. & INT'L L. 345, 346 (2000).

of limitations requirement, a five-year maximum term of imprisonment for natural persons convicted of bribery, and the possibility of imposing a fine of \$175,000 U.S. Dollars (USD) upon legal persons convicted of bribery.

I. HISTORY AND ORIGINS OF THE OECD CONVENTION

The OECD is a group of thirty countries sharing a commitment to democratic government and the market economy.⁶ Member countries are mostly large, industrialized nations.⁷ The OECD's primary focus is building strong economies in its member countries by improving efficiency, honing market systems, and expanding free trade.⁸ Given these objectives, it is not surprising that the OECD has recently dedicated its effort to combating bribery and corruption in international business transactions, which can undermine good governance and economic development, and distort international competitive conditions.⁹

The fight against international bribery and corruption began in the U.S. in the late 1970's.¹⁰ Against the backdrop of the numerous scandals uncovered by the Watergate hearings, investigators found many instances of U.S. companies bribing public officials in foreign countries.¹¹ In total, over 400 companies, including seventeen "Fortune 500" companies, admitted to paying bribes of some sort while transacting international business.¹² In 1977, Congress responded to these improprieties by passing the FCPA, which had two main tenets: accounting safeguards and anti-bribery provisions.¹³ The accounting

⁶ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ABOUT OECD, at <http://www.oecd.org/EN/about/0,,EN-about-0-nodirectorate-no-no-no-0,00.html> (last visited Nov. 6, 2002) [hereinafter ABOUT OECD].

⁷ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD, MEMBER COUNTRIES, at <http://www.oecd.org/oecd/EN/countrylist/0,,EN-countrylist-0-nodirectorate-no-no-159-0,00.html> (last visited Nov. 6, 2002) [hereinafter OECD MEMBER COUNTRIES].

⁸ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HISTORY OF THE OECD, at <http://www.oecd.org/EN/document/0,,EN-document-0-nodirectorate-no21-9347-0,00.html> (last visited Nov. 6, 2002) [hereinafter HISTORY OF THE OECD].

⁹ See OECD Convention, *supra* note 2, at pmb1.

¹⁰ See Goldbarg, *supra* note 1, at 276.

¹¹ See *id.*; Posadas, *supra* note 5, at 348-50.

¹² See Goldbarg, *supra* note 1, at 276. In a particularly egregious case, Lockheed's Vice-Chairman admitted at a congressional hearing that the company had paid \$1.1 million to a "high government official of the Netherlands," who was later discovered to be Prince Bernhard, the husband of Queen Juliana. See Posadas, *supra* note 5, at 364.

¹³ *Id.*; Kari Lynn Diersen, *Foreign Corrupt Practices Act*, 36 AM. CRIM. L. REV. 753, 755-56 (1999).

safeguards of the FCPA required companies to establish internal accounting controls to prevent the covering-up of improper transactions.¹⁴ The anti-bribery provisions made it illegal to bribe a foreign official for the purpose of obtaining or retaining business or securing any improper advantage.¹⁵

Following the passage of the FCPA, U.S. businesses operated at a disadvantage, relative to foreign competitors who continued to pay bribes without fear of penalty, in the competition for international business.¹⁶ By 1988, Congress had directed the Executive Branch to seek a level playing field for U.S. businesses by encouraging U.S. trading partners to enact legislation similar to the FCPA.¹⁷ Consequently, in 1994, the OECD began officially coordinating an effort to combat the bribery of foreign public officials in international business transactions.¹⁸ Thirty-four countries, including twenty-nine OECD member countries and five non-member countries, signed the Convention on December 17, 1997.¹⁹ The Convention entered into force on February 15, 1999 with the chief aim of leveling the playing field for companies competing for business outside their home countries.²⁰

While many other organizations have addressed the problems of international corruption and bribery, the OECD Convention is one of the most recent and comprehensive global initiatives.²¹ Not surpris-

¹⁴ See Goldberg, *supra* note 1, at 276; Diersen, *supra* note 13, at 755–56.

¹⁵ See Goldberg, *supra* note 1, at 276; Diersen, *supra* note 13, at 758.

¹⁶ SENATE REPORT, *supra* note 2, at 2; see Goldberg, *supra* note 1, at 278.

¹⁷ SENATE REPORT, *supra* note 2, at 2.

¹⁸ Miller, *supra* note 4, at 139.

¹⁹ *Id.*; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, FIGHTING BRIBERY AND CORRUPTION: OECD CONVENTION, at <http://www.oecd.org/EN/about/0,,EN-about-86-nodirectorate-no-no-no-31,00.html> (last visited Nov. 8, 2002) [hereinafter FIGHTING BRIBERY AND CORRUPTION]. The twenty-nine member countries signing the Convention included: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, The Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom, and the United States. The five non-member countries signing the convention were Argentina, Brazil, Bulgaria, Chile, and Slovenia.

²⁰ Miller, *supra* note 4, at 139–40; see FIGHTING BRIBERY AND CORRUPTION, *supra* note 19.

²¹ See Miller, *supra* note 4, at 139; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ABOUT INTERNATIONAL INITIATIVES, at <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-about-87-nodirectorate-no-no-no-31,FF.html> (last visited Nov. 8, 2002) [hereinafter INTERNATIONAL INITIATIVES]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GLOBAL INITIATIVES, <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-87-nodirectorate-no-no-30613-31,00.html> (last visited Nov. 8, 2002) [hereinafter GLOBAL INITIATIVES].

ingly, given the strong influence of the United States, the OECD Convention incorporates many aspects of the FCPA.²² The Convention is only concerned with “active” corruption or bribery—the offense committed by the person who promises or gives the bribe, rather than the individual who receives the bribe.²³ To this end, the Convention seeks functional equivalence among the measures taken by signatory countries to sanction bribery of foreign public officials, without requiring complete uniformity or changes in fundamental principles of a state’s legal system.²⁴ While this approach makes it easier for countries to initially adopt the Convention, it makes the even-handed application of the Convention’s principles between nations very challenging, if not impossible.²⁵

II. BASIC REQUIREMENTS OF THE CONVENTION

The Convention requires signatory countries to establish criminal liability for the “active bribery” of foreign public officials, referring to the “offense committed by the person who promises or gives the bribe,” rather than the offense of the official accepting a bribe.²⁶ Article 1 of the Convention requires countries to criminalize the offering, promising, or giving of a bribe, either directly or through an intermediary, to a foreign public official in order to gain an improper advantage in the conduct of international business.²⁷ Signatory countries must also extend criminal liability to those who incite, aid, abet or authorize the bribery of a foreign public official.²⁸

²² See Posadas, *supra* note 5, at 383–84.

²³ See OECD Convention, *supra* note 2, at cmts., para. 1.

²⁴ See *id.* at para. 2.

²⁵ See Posadas, *supra* note 5, at 379–80.

²⁶ See OECD Convention, *supra* note 2, at cmts., para. 1; Miller, *supra* note 4, at 141.

²⁷ See *id.* at art. 1. Article 1, Paragraph 1 states: “Each Party shall take 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.”

²⁸ See *id.* at art. 1; Miller, *supra* note 4, at 141–42. Article 1, Paragraph 2 states: “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.”

Those found guilty of bribing or being involved in the bribery of a foreign public official (including "legal persons," if applicable under Article 2 of the Convention) must be punished in accordance with the principles of Article 3.²⁹ Article 3 requires that "[t]he bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties . . . comparable to that applicable to the bribery of the [country's] own public officials . . ."³⁰ For individuals, such punishment must "include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition."³¹ For legal persons to whom criminal liability does not extend, signatory countries must "ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary fines, for bribery of foreign public officials."³² In addition, signatory countries must seize and confiscate bribes, including the proceeds and property value corresponding to the bribery of foreign public officials, or impose monetary sanctions with similar effects.³³

III. THE CONVENTION'S EVALUATION MECHANISMS

Article 12 of the Convention calls for the OECD Working Group on Bribery in International Business Transactions (Working Group) to carry out a program of systematic follow-up to monitor and promote the full implementation of the Convention.³⁴ Monitoring of the implementation of the Convention is divided into two phases.³⁵ Phase 1, which began in April 1999 and was completed in late 2002, was

²⁹ See OECD Convention, *supra* note 2, at art. 3. In addition, liability for "legal persons" must be established in accordance with Article 2: "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." However, if a country's legal system does not extend criminal responsibility to legal persons, the country is not required to establish criminal liability for legal persons bribing foreign public officials. See *id.* at cmts., para. 20.

³⁰ See *id.* at art. 3.

³¹ See *id.*

³² See OECD Convention, *supra* note 2, at art. 3, para. 2. Other non-criminal sanctions may include, "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." See *id.*

³³ See *id.* at art. 3 para 3.

³⁴ See *id.* at art. 12.

³⁵ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, BRIBERY CONVENTION: PROCEDURE OF SELF- AND MUTUAL EVALUATION, at <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-88-nodirectorate-no-no-7218-31,00.html> (last visited Nov. 8, 2002) [hereinafter PHASE 1].

primarily aimed at “evaluat[ing] whether the legal texts through which participants have implemented the Convention meet the standard set by the Convention as well as initial actions to implement the Recommendation. It provided an opportunity for countries to learn from the experiences and approaches of others.”³⁶ The Phase 1 peer evaluations were “vertical,” or based on examinations country-by-country.³⁷ These initial evaluations consisted of each country’s replies to a Working Group questionnaire, consultation between the examined country’s officials and the Working Group, and adoption and publication of a report on the examined country’s performance.³⁸ Thus far, the Working Group has reviewed the implementing legislation of all signatory countries through Phase 1 evaluations.³⁹

Phase 2 evaluations will study the structures put in place to enforce the laws and rules implementing the Convention and will assess their application in practice.⁴⁰ This second round of evaluations will include “horizontal” analysis or country-to-country comparisons.⁴¹ The focus of Phase 2 evaluations will also be broader and include the non-criminal aspects of the 1997 Revised Recommendation dealing with the tax deductibility of bribes.⁴² Phase 2 evaluations began at the end of 2001 and will continue through 2005.⁴³

Like Phase 1, the Phase 2 evaluations will include country replies to a common questionnaire, consultation between the examined country’s officials and the Working Group, and evaluative reports on each country’s performance.⁴⁴ However, Phase 2 will also include two to three day on-site visits to each country examined, providing an effective way to obtain information on enforcement and prosecution.⁴⁵

³⁶ *Id.*; see ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, BRIBERY CONVENTION: PROCEDURE OF SELF- AND MUTUAL EVALUATION, PHASE 2, at <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-88-nodirectorate-no-no-7223-31,00.html> (last visited Nov. 8, 2002) [hereinafter PHASE 2].

³⁷ See PHASE 1, *supra* note 35.

³⁸ See *id.*

³⁹ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ABOUT THE OECD CONVENTION AND OTHER INSTRUMENTS, at <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-about-88-nodirectorate-no-no-no-31,FF.html> (last visited Nov. 8, 2002) [hereinafter OECD CONVENTION AND OTHER INSTRUMENTS].

⁴⁰ See PHASE 2, *supra* note 36.

⁴¹ See *id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See PHASE 2, *supra* note 36; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, BRIBERY CONVENTION: PROCEDURE OF SELF- AND MUTUAL EVALUATION FOR IMPLEMENTATION OF THE CONVENTION AND THE REVISED RECOMMENDATION—PHASE 2:

The on-site visits also offer the possibility of meetings with magistrates, police, tax officials, and other authorities responsible for applying the law, as well as representatives from the private sector or civil society to ascertain their views.⁴⁶ The Phase 2 on-site evaluations will be conducted by one or two members of the Secretariat and up to three experts from each lead examining country chosen in consultation with the country examined.⁴⁷

While the Convention's evaluation mechanisms profess and demonstrate a strong commitment to the full implementation of the Convention through a rigorous and systematic program of multilateral monitoring and evaluation,⁴⁸ there are a number of systemic problems that the Convention does not adequately address.

IV. THE PROBLEMS OF MULTILATERAL ENFORCEMENT AND RECOMMENDATIONS FOR MORE UNIFORM COMPLIANCE

With the Phase 1 evaluations complete, the Working Group has already reviewed and reported on all countries' compliance with the Convention and Recommendation.⁴⁹ Taken together, the definition of the offense of bribing a foreign public official (Article 1) and the associated sanctions (Article 3) were intended to create an effective deterrent to the bribery of foreign public officials by combining threats of criminal prosecution, monetary sanctions, seizure of bribes or associated property, as well as the public stigma from a conviction for bribery.⁵⁰ Yet, one of the chief failings of the Convention is that it does not set forth concrete standards to which signatory countries will be held.⁵¹ In implementing the Convention, member countries can

ANNEX, TERMS OF REFERENCE FOR ON-SITE VISITS, at <http://www.oecd.org/pdf/M00007000/M00007237.pdf> (last visited Nov. 8, 2002) [hereinafter ON-SITE VISITS].

⁴⁶ See PHASE 2, *supra* note 36; ON-SITE VISITS, *supra* note 45.

⁴⁷ The composition of the on-site evaluation team shall ensure adequate expertise in the areas to be examined. Lead examiners shall be chosen from countries for which a Phase 1 evaluation has been completed by the Working Group. ON-SITE VISITS, *supra* note 45.

⁴⁸ See OECD Convention, *supra* note 2, at art. 12 & cmts., para. 34.

⁴⁹ See OECD CONVENTION AND OTHER INSTRUMENTS, *supra* note 39; PHASE 1, *supra* note 35.

⁵⁰ See OECD Convention, *supra* note 2, at arts. 1, 3; Miller, *supra* note 4, at 144.

⁵¹ A number of other shortcomings of the Convention have also been identified. The Convention has been criticized for not addressing "passive bribery" and allowing small "facilitation payments." See Miller, *supra* note 4, at 141, 143. Others have pointed out that the Convention fails to address illegal contributions and payments to foreign political parties and candidates, and may not apply to bribing family members of foreign public

pass legislation at different ends of a rather broad spectrum as great deference is given to individual countries' legal systems.⁵² Member countries are not required to incorporate any precise terms or language when drafting legislation, which has led to some countries enacting more stringent or lenient standards than others.⁵³ While this flexible framework undoubtedly was helpful in gaining the ascension of a large number and variety of countries,⁵⁴ it also presents a challenge to the uniform implementation and application of the Convention.

In fact, the Phase 1 reports have identified numerous problems such as inadequacies in the definitions of "foreign public officials," missing elements of the offense of bribing a public foreign official, and insufficient liability for legal persons.⁵⁵ The Working Group has informed a number of signatory countries that these definitional deficiencies have prevented their successful implementation of the Convention.⁵⁶ For instance, the Working Group determined that Argentina had not satisfied the requirements of the Convention because it had not criminalized the bribery of agents or representatives of international organizations and public officials of organized foreign areas or entities.⁵⁷ While these definitional deficiencies can easily be

officials. See Posadas, *supra* note 5, at 381. While there are clearly a number of areas in which the Convention can be improved, this Note focuses on two areas where stricter standards can be utilized in order to aid the uniform implementation of the Convention.

⁵² See Miller, *supra* note 4, at 142; OECD Convention, *supra* note 2, at cmts. para. 2.

⁵³ See *id.* In fact, the intention of the Convention and Article 1 is to establish a lowest common denominator for the implementation or interpretation measures, if any, to be taken by the signatories. Posadas, *supra* note 5, at 386.

⁵⁴ See generally OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status, at <http://www.oecd.org/pdf/M00017000/M00017037.pdf> (last visited Nov. 8, 2002) [hereinafter Ratification Status].

⁵⁵ See, e.g., ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, BELGIUM: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 20, at <http://www.oecd.org/pdf/M00007000/M00007820.pdf> (last visited Nov. 8, 2002); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ARGENTINA: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 27, at <http://www.oecd.org/pdf/M00007000/M00007183.pdf> (last visited Nov. 8, 2002) [hereinafter ARGENTINA COUNTRY REPORT]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, BULGARIA: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 19, at <http://www.oecd.org/pdf/M00007000/M00007825.pdf> (last visited Nov. 8, 2002).

⁵⁶ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REPORT BY THE CIME: IMPLEMENTATION OF THE CONVENTION ON BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATIONS 3 (May 2001), at <http://www.oecd.org/pdf/M00007000/M00007214.pdf> (last visited Nov. 8, 2002) [hereinafter IMPLEMENTATION OF THE CONVENTION].

⁵⁷ See ARGENTINA COUNTRY REPORT, *supra* note 55, at 27.

identified and remedied, there are other inconsistencies that require unilateral action. In order to ensure that the Convention is implemented in a way that honors its aim of achieving functional equivalence among the measures taken by member countries,⁵⁸ there are two particular areas in which more concrete standards should be adopted in order to facilitate the uniform application of the Convention.

A. *Adopting a Minimum Five-year Statute of Limitations Standard*

To begin with, a more precise standard should be utilized in defining the statute of limitations requirement. Article 6 of the Convention requires that any statute of limitations applicable to the offense of bribing a foreign public official, "shall allow an adequate period of time for the investigation and prosecution of this offence."⁵⁹ Signatory countries are left to decide what constitutes an "adequate period of time" with no further guidance from the text or Commentaries of the Convention.⁶⁰ The Working Group has noted in several Phase I country reports that the question of what length statute of limitations is required by the Convention is a general problem calling for a comparative analysis in Phase 2.⁶¹

However, the Working Group has expressed concern that the three-year statutes of limitations enacted by a number of countries, such as France, Hungary, Japan, and the Slovak Republic, may not provide an adequate period of time for the investigation and prosecu-

⁵⁸ See OECD Convention, *supra* note 2, at cmts. para. 2.

⁵⁹ *Id.* at art. 6.

⁶⁰ See *id.* at art. 6 & cmts., para. 27-28.

⁶¹ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DENMARK: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 27, at <http://www.oecd.org/pdf/M00007000/M00007201.pdf> (last visited Nov. 8, 2002) [hereinafter DENMARK COUNTRY REPORT]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, FRANCE: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 31, at <http://www.oecd.org/pdf/M00007000/M00007204.pdf> (last visited Nov. 8, 2002) [hereinafter FRANCE COUNTRY REPORT]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, GERMANY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 19, at <http://www.oecd.org/pdf/M00007000/M00007830.pdf> (last visited Nov. 8, 2002); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HUNGARY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 20, at <http://www.oecd.org/pdf/M00007000/M00007833.pdf> (last visited Nov. 8, 2002) [hereinafter HUNGARY COUNTRY REPORT]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, SLOVAK REPUBLIC: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 23, at <http://www.oecd.org/pdf/M00007000/M00007841.pdf> (last visited Nov. 8, 2002) [hereinafter SLOVAK REPUBLIC COUNTRY REPORT].

tion of bribery of a foreign public official.⁶² Australia, Canada, and the United Kingdom, on the other hand, have no time limitation on the prosecution of either natural or legal persons.⁶³ In particular, the Working Group expressed serious doubts about the effectiveness of Denmark's two-year statute of limitations for legal persons.⁶⁴ Given the secretive nature of acts of corruption, offenses are often not discovered until several years after being committed.⁶⁵ Thus, the Working Group is concerned that shorter statutes of limitations will make the coherent and effective implementation of the Convention's sanctions difficult and may also pose an obstacle to the provision of mutual legal assistance.⁶⁶

While the Working Group has suggested that the statute of limitations issue should be reevaluated in Phase 2, the same dormant nature of bribery offenses that makes necessary a longer statute of limitations may also limit the effectiveness of Phase 2 comparative

⁶² See FRANCE COUNTRY REPORT, *supra* note 61, at 31; HUNGARY COUNTRY REPORT, *supra* note 61, at 20; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, JAPAN: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 27, at <http://www.oecd.org/pdf/M00007000/M00007835.pdf> (last visited Nov. 8, 2002) [hereinafter JAPAN COUNTRY REPORT]; SLOVAK REPUBLIC COUNTRY REPORT, *supra* note 61, at 23. In addition, Mexico's statute of limitation is three years where the offense is punishable by between two months and two years of imprisonment but the statute of limitations is eight years where the offense is punishable by between two and fourteen years of imprisonment. Moreover, the Mexico legislation provides for the doubling of the limitations period where the suspect is abroad and due to his/her absence it is not possible to prepare the pre-trial investigation, conclude a process or execute a sanction. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, MEXICO: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 14, at <http://www.oecd.org/pdf/M00007000/M00007838.pdf> (last visited Nov. 8, 2002) [hereinafter MEXICO COUNTRY REPORT].

⁶³ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, AUSTRALIA: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 13-14, at <http://www.oecd.org/pdf/M00007000/M00007713.pdf> (last visited Nov. 8, 2002) [hereinafter AUSTRALIA COUNTRY REPORT]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, CANADA: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 15, at <http://www.oecd.org/pdf/M00007000/M00007826.pdf> (last visited Nov. 8, 2002) [hereinafter CANADA COUNTRY REPORT]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, UNITED KINGDOM: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 15, at <http://www.oecd.org/pdf/M00013000/M00013351.pdf> (last visited Nov. 8, 2002) [hereinafter U.K. COUNTRY REPORT].

⁶⁴ See DENMARK COUNTRY REPORT, *supra* note 61, at 27. The statute of limitations for natural persons in Denmark is five years. The Working Group recommended that the statute of limitations for legal persons should be equivalent to the statute of limitations for natural persons.

⁶⁵ See *id.* at 27.

⁶⁶ See FRANCE COUNTRY REPORT, *supra* note 61, at 31; DENMARK COUNTRY REPORT, *supra* note 61, at 27.

analysis. For instance, it will be difficult for the Working Group to determine whether statutes of limitations of varying lengths have achieved a functional equivalence in their application because most Phase 2 evaluations will take place only four to six years after the Convention entered into force in particular countries, making it likely that a large number of offenses will not yet have been prosecuted.⁶⁷ Rather than relying on an ill-timed attempt to determine whether statutes of limitations of varying lengths have achieved functional equivalence, it may be wiser for the Working Group to survey the signatory countries' implementing legislation and find an acceptable, but concrete, minimum length requirement for all statutes of limitations. In fact, a majority of countries have adopted a five-year statute of limitations, pointing to a strong consensus among signatory countries that a statute of limitations of no less than five years is an adequate period of time for the investigation and prosecution of bribery offenses.⁶⁸ Moreover, the adoption of a minimum five-year statute of limitations requirement is not only consistent with the Convention's "functional equivalence" principle,⁶⁹ but also does not require fundamental changes in any states' legal system.⁷⁰

B. *Adopting Minimum Sanctions for the Punishment of Natural and Legal Persons*

Another area in which the Convention would benefit from a clearer standard is the sanctioning of natural and legal persons. Article 2 of the Convention requires that parties establish liability of legal

⁶⁷ The Working Group has called for Phase 2 evaluations of all participants to be completed by 2005. See PHASE 2, *supra* note 36. However, the Convention's entry into force varies by country from February 15, 1999 (Canada, France, Germany, Hungary, Iceland, the United Kingdom and the United States) to August 24, 2001 (New Zealand). See Ratification Status, *supra* note 54.

⁶⁸ Of the twenty-eight countries evaluated by November 13, 2001, nineteen have adopted a statute of limitations of at least five years and three countries have no statute of limitations. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COUNTRY REPORTS ON THE IMPLEMENTATION OF THE CONVENTION, at <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-document-88-nodirectorate-no-3-16889-31,FF.html> (last visited Nov. 8, 2002) [hereinafter COUNTRY REPORTS ON THE IMPLEMENTATION OF THE CONVENTION]. In fact, Iceland increased the statute of limitations where the offense only subjects the offender to fines (which generally applies to legal persons) from two years to five years following the Working Group's examination. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, ICELAND: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 20 & n.6, at <http://www.oecd.org/pdf/M00007000/M00007834.pdf> (last visited Nov. 8, 2002).

⁶⁹ See OECD Convention, *supra* note 2, at cmts. para. 2.

⁷⁰ See *id.*

persons for the bribery of a foreign public official but, in the event that criminal liability is not applicable to legal persons under the party's legal system, the party is not required to establish such criminal responsibility.⁷¹ The Working Group has noted that a number of countries have passed sanctions that vary a great deal from one another and that these disparities should be monitored through the Phase 2 evaluations.⁷² For instance, several countries, including Austria, Mexico, The Slovak Republic, Spain, and Sweden, enacted relatively weak sanctions for legal persons committing bribery offenses.⁷³ Most of these countries enacted sanctions that call for less than three years of imprisonment and/or a relatively small fine.⁷⁴ In fact, Sweden's maximum term of imprisonment for bribing a foreign public official is two years; Mexico's maximum fine for the same offense is \$1,800 USD.⁷⁵ At the other end of this spectrum are a number of countries that have enacted comparatively strong punishments for natural persons convicted of bribing a foreign public official. Luxembourg, for example, imprisons bribery offenders for between five and fifteen years while the United States imposes a fine of up to \$100,000 USD.⁷⁶

⁷¹ See *id.* at art. 2 & cmts. para. 20.

⁷² See IMPLEMENTATION OF THE CONVENTION, *supra* note 56, at 8.

⁷³ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, AUSTRIA: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 9, at <http://www.oecd.org/pdf/M00007000/M00007769.pdf> (last visited Nov. 8, 2002) [hereinafter AUSTRIA COUNTRY REPORT]; MEXICO COUNTRY REPORT, *supra* note 62, at 8; SLOVAK REPUBLIC COUNTRY REPORT, *supra* note 61, at 8; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, SPAIN: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 9, at <http://www.oecd.org/pdf/M00007000/M00007842.pdf> (last visited Nov. 8, 2002) [hereinafter SPAIN COUNTRY REPORT]; ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, SWEDEN: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 8, at <http://www.oecd.org/pdf/M00007000/M00007844.pdf> (last visited Nov. 8, 2002) [hereinafter SWEDEN COUNTRY REPORT].

⁷⁴ See AUSTRIA COUNTRY REPORT, *supra* note 73, at 9; MEXICO COUNTRY REPORT, *supra* note 62, at 8; SLOVAK REPUBLIC COUNTRY REPORT, *supra* note 61, at 8; SPAIN COUNTRY REPORT, *supra* note 73, at 9; SWEDEN COUNTRY REPORT, *supra* note 73, at 8.

⁷⁵ See SWEDEN COUNTRY REPORT, *supra* note 73, at 8; MEXICO COUNTRY REPORT, *supra* note 62, at 8.

⁷⁶ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, LUXEMBOURG: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 13, at <http://www.oecd.org/pdf/M00007000/M00007208.pdf> (last visited Nov. 8, 2002); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, UNITED STATES: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 11, at <http://www.oecd.org/pdf/M00007000/M00007849.pdf> (last visited Nov. 8, 2002) [hereinafter U.S. COUNTRY REPORT].

The Phase 1 evaluations have also uncovered a number of problems with the sanctioning of legal persons.⁷⁷ Japan, for instance, was cited by the Working Group as adopting fines for legal persons that may not be sufficiently “effective, proportionate and dissuasive.”⁷⁸ While Japan provides for fines up to 300 million yen (approximately \$2.7 million USD), the Working Group felt that these sanctions were not proportionate to the massive size of many large Japanese companies.⁷⁹ Yet, the Working Group found Australia’s sanctions for legal persons acceptable although they only call for a maximum fine of \$330,000 Australian Dollars (AUD) (approximately \$175,000 USD).⁸⁰

The broad range of sanctions enacted by signatory countries is particularly problematic because the standard set by the Convention is itself amorphous and provides minimal guidance.⁸¹ Article 3 merely provides that bribery by natural or legal persons be punishable by “effective, proportionate and dissuasive” penalties comparable to those applicable to the bribery of the country’s own public officials.⁸² In the case of natural persons, penalties must include the deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.⁸³ This is a difficult standard to measure because it provides no point of reference for determining whether measures enacted by signatory countries satisfy the Convention’s minimum requirements.⁸⁴ And, even assuming all in the broad range of sanctions and penalties adopted by the signatory countries do prove to be sufficiently “effective, proportionate and dissuasive,” the wide variance of penalties imposed for similar offenses contradicts one of the Convention’s main goals: achieving functional equivalence among the measures taken by signatory countries.⁸⁵

⁷⁷ See, e.g., SLOVAK REPUBLIC COUNTRY REPORT, *supra* note 61, at 23; CANADA COUNTRY REPORT, *supra* note 63, at 24.

⁷⁸ See JAPAN COUNTRY REPORT, *supra* note 62, at 26; OECD Convention, *supra* note 2, art. 3.

⁷⁹ See JAPAN COUNTRY REPORT, *supra* note 62, at 26.

⁸⁰ See AUSTRALIA COUNTRY REPORT, *supra* note 63, at 10, 24. Australian authorities have noted that a conviction for bribery would disqualify the company from a number of business activities (e.g., casinos, broadcasting). AUSTRALIA COUNTRY REPORT, *supra* note 63, at 24.

⁸¹ See OECD Convention, *supra* note 2, at art. 3, para. 1.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See *id.* at art. 3. In addition, the Commentaries on the OECD Convention provide little additional guidance. See OECD Convention, *supra* note 2, at cmts., paras. 21–24.

⁸⁵ See OECD Convention, *supra* note 2, at cmts. para. 2.

However, a standard-less approach was not acceptable to the Working Group who, in their review of Canada, expressed concern that Canada's failure to establish either minimum or maximum fines for either natural or legal persons may make the sanctions insufficiently dissuasive.⁸⁶ Thus, not only do the current provisions of the Convention fail to adequately define what sanctions are considered "effective, proportionate and dissuasive," but the Working Group has been critical of countries who have left the provision to judicial interpretation.⁸⁷

In addition to requiring that sanctions be effective, proportionate and dissuasive, the Convention or its Commentaries should include minimum standards for punishing both natural and legal persons. For instance, the Working Group has suggested that a maximum three-year term of imprisonment may be too weak a punishment for natural persons convicted of bribery.⁸⁸ The maximum five-year term of imprisonment adopted by Korea, Switzerland, and the U.S. is the shortest maximum standard meeting the approval of the Working Group and should be adopted as the minimum standard for signatory countries.⁸⁹ Although twelve signatory countries currently fall below this standard,⁹⁰ several countries have already recognized the need to increase their maximum term of imprisonment to at least five years in order to meet the requirements of the Convention.⁹¹ Since monetary fines are generally imposed in addition to imprisonment, and because the level of the fines is closely related to the relative economic pros-

⁸⁶ See CANADA COUNTRY REPORT, *supra* note 63, at 24.

⁸⁷ See *id.*

⁸⁸ See DENMARK COUNTRY REPORT, *supra* note 61, at 26.

⁸⁹ See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, KOREA: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 9, at <http://www.oecd.org/pdf/M00007000/M00007837.pdf> (last visited Nov. 8, 2002); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, SWITZERLAND: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 8, at <http://www.oecd.org/pdf/M00007000/M00007846.pdf> (last visited Nov. 8, 2002); U.S. COUNTRY REPORT, *supra* note 76, at 11.

⁹⁰ The twelve signatory countries having less than a five-year maximum term of imprisonment for natural persons convicted of bribery are Austria, Bulgaria, Denmark, Finland, Hungary, Iceland, Italy, Japan, Norway, Slovak Republic, Spain, and Sweden. See COUNTRY REPORTS ON THE IMPLEMENTATION OF THE CONVENTION, *supra* note 68.

⁹¹ See, e.g., ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, NORWAY: REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION 6, at <http://www.oecd.org/pdf/M00007000/M00007839.pdf> (last visited Nov. 8, 2002) [hereinafter NORWAY COUNTRY REPORT].

perity of the signatory nation,⁹² the level of monetary sanctions imposed on natural persons could safely be left to the discretion of the signatory countries so as not to require fundamental changes to countries' legal systems.⁹³

Finally, for legal persons convicted of bribery, the Convention should require that signatory countries could impose a fine of at least \$175,000 USD. Again, this is the smallest maximum fine meeting the approval of the Working Group in their Phase 1 country evaluations.⁹⁴ While this amount is relatively low compared with several countries that may impose fines of greater than \$2 million USD, twelve countries do not currently meet this proposed standard.⁹⁵ In addition, countries remain free to supplement fines with civil and administrative sanctions.⁹⁶ This proposed standard strikes a balance between the Convention's two chief aims: it improves the likelihood that the measures adopted by signatory countries will be functionally equivalent without requiring fundamental changes to countries' legal systems, which might be the case if specific administrative sanctions were required.⁹⁷

Once standard, minimum sanctions for legal and natural persons are established, Phase 2 evaluations will be useful in determining whether signatory countries have enacted provisions that are truly functionally equivalent. However, without standard, minimum sanctions, signatory countries will invariably punish similar offenses with materially different sanctions, thwarting the Convention's functional equivalence cornerstone.

CONCLUSION

Bribery is an expensive and injurious problem that properly demands comprehensive, worldwide attention. While a number of or-

⁹² See, e.g., MEXICO COUNTRY REPORT, *supra* note 62, at 8; U.S. COUNTRY REPORT, *supra* note 76, at 11.

⁹³ See OECD Convention, *supra* note 2, at cmts., para. 2.

⁹⁴ See, e.g., AUSTRALIA COUNTRY REPORT, *supra* note 63, at 10. In addition, many countries have left fines to the discretion of their judicial system. See, e.g., CANADA COUNTRY REPORT, *supra* note 63, at 9; NORWAY COUNTRY REPORT, *supra* note 91, at 6.

⁹⁵ See, e.g., JAPAN COUNTRY REPORT, *supra* note 63, at 9; U.S. COUNTRY REPORT, *supra* note 76, at 11. Countries currently not meeting this standard include Argentina, Austria, Bulgaria, Czech Republic, Denmark, Greece, Hungary, Italy, Luxembourg, Slovak Republic, Spain, and Switzerland. See COUNTRY REPORTS ON THE IMPLEMENTATION OF THE CONVENTION, *supra* note 68.

⁹⁶ See OECD Convention, *supra* note 2, at art. 3.

⁹⁷ See *id.* at cmts. para. 2.

ganizations have attempted to combat this problem, the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is the most comprehensive attempt to curb the effects of international bribery. Though the current Convention is a strong first step toward achieving functional equivalence between the measures adopted by the Convention's signatory countries, more precise standards should be adopted for the statute of limitations and sanction requirements in order to ensure the uniform implementation of the Convention. The Convention's signatory parties should: adopt a minimum five-year statute of limitations requirement, adopt a five-year maximum term of imprisonment for natural persons convicted of bribery, and impose a fine of not less than \$175,000 USD for individuals convicted of bribery. These amendments to the Convention will aid the consistent application of the Convention's principles and promote functional equivalency between the measures enacted by signatory countries, without requiring perfect uniformity or fundamental changes in parties' legal systems.