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

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Mr. HELMS, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 105–43]

The Committee on Foreign Relations, to which was referred the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted at Paris on November 21, 1997, by a conference held under the auspices of the Organization for Economic Cooperation and Development (OECD), signed in Paris on December 17, 1997, by the United States and 32 other nations, having considered the same, reports favorably thereon with one understanding, one declaration and three provisos, and recommends that the Senate give its advice and consent to the ratification thereof as set forth in this report and the accompanying resolution of ratification.

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I. PURPOSE

The primary purpose of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention") is to require Parties to the Convention to criminalize bribery of foreign public officials in order to obtain or retain

business or other improper advantage in the conduct of international business.

II. BACKGROUND

On November 21, 1997, negotiators from thirty-three countries (the twenty-eight Organization for Economic Cooperation and Development ("OECD") member states plus Argentina, Brazil, Bulgaria, Chile and Slovakia) signed the Convention at the OECD in Paris.

At the urging of the United States, the OECD adopted in 1994 a Recommendation on Combating Bribery in International Business Transactions, and in 1996 adopted a Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials. A Revised Recommendation on Combating Bribery in International Business Transactions was approved at a May 1997 meeting of OECD Ministers. Included was an annex of agreed common elements, which was the basis for convention negotiations. Three rounds of negotiations were held in July, October, and November. The Convention was signed in Paris on December 17th, 1997, and was submitted to the Senate on May 4, 1998.

III. SUMMARY

A. GENERAL

The Convention obligates the Parties to criminalize bribery of foreign public officials. This is defined to include officials in all branches of government, whether appointed or elected; any person exercising a public function, including for a public agency or public enterprise; and any official or agent of a public international organization. A public function includes any activity in the public interest delegated by a foreign country. A public enterprise is any enterprise over which the government or governments may, directly or indirectly, exercise a dominant influence. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

The Convention does not specifically cover political parties. Some persons who are not formally designated as public officials but who may in fact perform a public function (e.g., political party officials in single party states) may, under the legal principles of some countries, be considered as foreign public officials. In addition, under the legal systems of some countries, an advantage promised or given to a person in anticipation of that person becoming a foreign public official may fall within the Convention's scope.

The negotiators agreed to apply "effective, proportionate and dissuasive criminal penalties" to those who bribe foreign public officials. Countries whose legal systems lack the concept of criminal corporate liability must provide for equivalent non-criminal sanctions, including monetary penalties. The Convention requires that countries be able to seize or confiscate the bribe and bribe proceeds

(e.g., net profit), or property of similar value, or apply monetary sanctions of comparable effect.

The Convention requires Parties to take necessary measures, within the framework of their relevant laws and regulations, that prohibit the establishment of off-the-books accounts and similar practices used to bribe foreign public officials or to hide such bribery. Parties shall make bribery of foreign public officials a predicate offense for purposes of money laundering legislation on the same terms as bribery of domestic public officials.

Parties are to establish jurisdiction over offenses that are committed in whole or in part in their territories. Parties may rely on the general jurisdictional principles—nationality or territoriality—recognized by their legal systems. The territorial basis for jurisdiction is to be interpreted broadly so that an extensive physical connection to the act of bribery is not required. The Convention provides that Parties will review their current bases for jurisdiction and take remedial steps if they are not effective in the fight against the bribery of foreign public officials. Parties shall consult when more than one party asserts jurisdiction. Participating governments pledged to work together to provide legal assistance relating to investigations and proceedings within the scope of the Convention and to make bribery of foreign public officials an extraditable offense.

At the May 1997 OECD Council meeting, Ministers recommended that member states submit to national legislatures by April 1, 1998, legislation to criminalize bribery of foreign public officials and seek the enactment of such laws by the end of 1998. The Convention requires the Parties cooperate in a follow-up program, within the framework of the OECD, to monitor and promote full implementation.

The Convention will enter into force when five of the ten largest OECD exporting counties, which by themselves represent 60 percent of the combined total exports of those ten countries, deposit their instruments of ratification. If this has not occurred by the end of 1998, the Convention will enter into force when at least two signatories have deposited their instruments of ratification and declare their willingness to be bound.

B. KEY PROVISIONS

The Offense. Article 1 of the Convention requires each Party to take measures to establish that it is a criminal offense under its law for any person intentionally to offer, promise, or give any undue pecuniary or other advantage to a foreign public official, for that public official, or for a third party, in order that the official act or refrain from acting in the performance of official duties so that an international business will obtain or retain business or any other improper advantage. Each Party to the Convention is also required to criminalize complicity in an act of bribery of a foreign public official.

"Foreign public official" is defined to include persons holding legislative, administrative, or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise, regardless of form, over which a government, or govern-

ments, may, directly or indirectly, exercise a dominant influence. This definition does not include foreign political parties, officials, or candidates. According to a summary prepared by the Departments of Commerce, State, and Justice, although political parties are not specifically covered, negotiators agreed that the Convention will cover business-related bribes to foreign public officials made through political parties and party officials.

Legal Persons. Article 2 of the Convention requires each Party, in accordance with its legal principles, to establish the liability of persons for the bribery of a foreign public official. The commentaries on the Convention state that if, under the legal system of a Party, criminal responsibility is not applicable to legal persons, the Party is not required to establish the criminal responsibility.

Criminal/Civil Penalties. Article 3 requires parties to sanction bribery of a foreign public official with "effective, proportionate and dissuasive criminal penalties." If, under a Party's legal system, criminal responsibility is not applicable to legal persons, the Party shall make certain that legal persons are subject to dissuasive and effective non-criminal sanctions, including monetary sanctions. Effective measures shall be taken to provide that the proceeds of bribery of a foreign official or property corresponding to the value of the proceeds may be subject to seizure.

Paragraph 4 of Article 3 states that each Party may consider imposing additional civil or administrative sanctions upon a person for bribing a foreign public official. The commentaries on this paragraph provide that among the civil or administrative sanctions which might be imposed are exclusion from entitlement to public benefits or aid, disqualification from participation in public procurement, placing under judicial supervision, and a judicial winding-up order.

Jurisdiction. Article 4 requires each Party to establish its jurisdiction over the bribery of a foreign public official when the offense is committed in its territory. In addition, each Party is required to establish jurisdiction to prosecute its nationals for offenses committed abroad with respect to the bribing of a foreign public official.

Enforcement. Article 5 requires Parties to enforce its commitments under the Convention without regard to political or economic interests. Specifically, the investigation and prosecution of the bribery of a foreign public official shall not be influenced by considerations of national economic interest, the potential effect upon relations with another country, or the identity of the natural or legal persons involved.

Statute of Limitations. Article 6 requires Parties to apply a statute of limitations to the offense of bribery of a foreign public official that permits for an adequate amount of time to investigate and prosecute. The Commentaries are silent on this article, so it is not clear what such a time frame would be.

Money Laundering. Article 7 requires each Party, which has made bribery of its own public officials an offense for purposes of application of its own money laundering legislation, to do the same for the bribery of a foreign public official.

Accounting. Article 8 is an essential provision for carrying out the requirements of the Convention. It requires measures by each Party to prohibit off-the-books accounts, inadequately identified

transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents for the purpose of bribing foreign public officials or of hiding the bribery. Penalties for the violation of such accounting laws must be "effective, proportionate and dissuasive."

Mutual Legal Assistance. Article 9 requires each Party to provide prompt and effective legal assistance to another Party for the purpose of criminal and non-criminal investigations and proceedings. The provision assumes dual criminality for violations of the Convention, and prohibits any Party from asserting bank secrecy as a reason to deny legal assistance.

Extradition. Article 10 requires bribery of a foreign public official to be included as an extraditable offense under the Parties' laws and extradition treaties. The Convention permits, but does not require, each Party to use the Convention as a legal basis for extradition. The Convention requires a Party that denies extradition on the basis that the individual is a national, to submit the case for prosecution in its own jurisdiction. The provision assumes dual criminality for purposes of extradition.

Responsible Authorities. Article 11 requires that each Party establish a "responsible authority" for purposes of mutual legal assistance and extradition. Parties must inform the Secretary General of the OECD who the responsible authority will be.

Monitoring and Follow-up. Article 12 requires the Parties to follow-up on their commitments through a program that monitors enforcement and promotes full implementation. Unless otherwise agreed, the program will be carried out in the framework of the OECD Working Group on Bribery in International Business Transactions.

Final Clauses. Article 13, concerning signature and accession, opens the Convention to signature by non-members of the OECD which have become full participants in the OECD Working Group on Bribery in International Business Transactions. The Convention will enter into force on the sixtieth day following the date of deposit of instruments for such non-members. Article 14, concerning ratification and depositary of the Convention, requires ratification under each country's laws, and designates the OECD Secretary General as the depositary for instruments of ratification.

Article 15, regarding entry into force, requires that the Convention enter into force on the sixtieth day following the date on which five of the ten largest exporting countries have deposited their instruments of ratification. In the event that this has not occurred by the end of 1998, the Convention will enter into force when at least two signatories have deposited their instruments of ratification, and declared its readiness to be bound by the Convention.

Article 16, regarding amendments to the Convention, requires that amendments be submitted to the OECD Secretary General at least 60 days before he convenes a meeting of the Parties to consider the amendment. Amendments must be adopted by consensus, or by other means that the Parties determine by consensus. Amendments will enter into force 60 days after instruments of ratification are deposited with the OECD Secretary General, or as specified by the Parties when the amendment is adopted.

Article 17, regarding withdrawal, permits a Party to withdraw from the Convention upon written notification to the OECD Secretary General. The withdrawal will take place one year after submission of the written notification. Parties must cooperate even after withdrawal on requests for information or extradition made prior to withdrawal.

C. THE U.S. FOREIGN CORRUPT PRACTICES ACT

During the mid-1970's investigations and legal actions against numerous domestic corporations revealed the practice by some U.S. corporations of making questionable or illegal payments to foreign government officials. The legal and regulatory mechanisms for dealing with these payments had involved actions by the Securities and Exchange Commission (SEC) against public corporations for concealing from required public disclosure substantial payments made by the firm and the potential for an antitrust action for restraint of trade or fraud prosecutions by the Justice Department.

Government officials and administrators contended that more direct prohibitions on foreign bribery and more detailed requirements concerning corporate record-keeping and accountability were needed to deal effectively with the problem. The revelations of slush funds and secret payments by American corporations were stated to have affected adversely American foreign policy, damaged the image of American democracy, and impaired public confidence in the financial integrity of American corporations. Congress responded with the passage of the Foreign Corrupt Practices Act of 1977.

After passage, Congress for a number of years considered amending the 1977 Foreign Corrupt Practices Act. After a great deal of debate through at least three Congresses, the Foreign Corrupt Practices Act Amendments were signed into law as Title V of the Omnibus Trade and Competitiveness Act of 1988 on August 23, 1988. One provision of the 1988 Amendments encouraged the Administration to negotiate a treaty at the OECD that would require other countries to enact similar laws prohibiting bribery of foreign government officials.

In many ways the OECD Convention on Bribery is very similar to the Foreign Corrupt Practices Act (FCPA). However, there are several differences which, if the OECD Convention is approved, will necessitate changes in the FCPA in order for U.S. law to conform with the OECD Agreement.

First, the FCPA currently criminalizes payments made to influence any decision of a foreign official or to induce that official to do or omit to do any act, in order to obtain or retain business. An amendment will expand the scope to include payments made to secure "any improper advantage," the language used in the OECD Convention.

Second, the OECD Convention requires Parties to cover prohibited acts by "any person." The current FCPA covers only the issuers as defined in the 1934 Securities Exchange Act and "domestic concerns." An amendment will expand the scope of the FCPA to cover acts prohibited by the Convention of persons other than the issuers or domestic concerns (i.e., foreign natural and legal persons), committed while in the territory of the United States, re-

gardless of whether the mails or a means or instrumentality of interstate commerce are used in furtherance of the prohibited acts.

Third, the OECD Convention includes officials of international agencies within the definition of foreign public official. Accordingly, an amendment will expand the FCPA definition of foreign public official to include officials of public international organizations.

Fourth, the OECD Convention calls on Parties with jurisdiction to prosecute their nationals for offenses committed abroad to assert nationality jurisdiction over the bribery of foreign public officials, consistent with national legal and constitutional principles. Accordingly, an amendment will provide for jurisdiction over the acts of U.S. businesses and nationals, in furtherance of unlawful payments, that take place wholly outside the United States.

Finally, an amendment to the penalty sections relating to issuers and domestic concerns will ensure that penalties for non-U.S. citizen employees and agents of issuers and domestic concerns accord with those of U.S. citizen employees and agents. (Under the current FCPA, non-U.S. citizen and agents of issuers and domestic concerns are subject only to civil, rather than criminal, penalties.)

IV. Entry into Force and Termination

A. ENTRY INTO FORCE

The Convention enters into force on the sixtieth day after five of the ten largest exporting countries, as set out in the Convention annex, have deposited instruments of ratification. These countries must also represent 60 percent of exports of those ten countries. For Parties that deposit instruments of ratification after that date, the Convention shall enter into force 60 days after deposit of instruments.

In the event that the Convention has not entered into force by December 31, 1998, Parties may declare their willingness to accept entry into force notwithstanding the failure to meet the requirements set forth above. If two Parties make such declarations, the Convention shall enter into force on the sixtieth day following deposit of such declarations. For Parties that deposit instruments of ratification after that date, the Convention shall enter into force 60 days after deposit of instruments.

B. TERMINATION

Parties may withdraw from the Convention by submitting written notification to the Depositary. Withdrawal shall be effective one year after the date of such notification. The Convention requires that Parties continue to cooperate on requests for assistance and extradition made before the date of withdrawal.

V. Committee Action

The Committee on Foreign Relations held a public hearing on the proposed Convention on June 9, 1998 (a transcript of the hearing and questions for the record can be found in the annex to this report). The Committee considered the proposed Convention on June 23, 1998, and ordered it favorably reported by voice vote, with the recommendation that the Senate give its advice and consent to the

ratification of the proposed Convention subject to one understanding, one declaration, and three provisos.

VI. COMMITTEE COMMENTS

The Committee on Foreign Relations recommends favorably the proposed Convention. On balance, the Committee believes that the proposed Convention is in the interest of the United States and urges the Senate to act promptly to give its advice and consent to ratification. Several issues did arise in the course of the Committee's consideration of the treaties, and the Committee believes that the following comments may be useful to the Senate in its consideration of the proposed Convention and to the State Department.

A. IMPLEMENTATION AND ENFORCEMENT

According to Under Secretary of State Stuart Eizenstat, during his testimony before the Committee in support of this Convention, the U.S. Government is aware of allegations of bribery by foreign firms in the last year affecting international contracts worth almost $30 billion. Such bribes are not currently prohibited by criminal laws in their home jurisdictions.

The Committee believes that simply ratifying this Convention will not reverse this trend. Of primary import in curbing bribery of foreign officials under the Convention will be the commitment of Parties to implement and enforce fully their obligations under the Convention. This will not be an easy task, and in some cases may be politically difficult—particularly in instances where corporations are owned by or associated with the government of a Party. The Committee therefore supports ratification of the Convention, but cautions that it will be a hollow exercise if Parties to the Convention view ratification simply as a political exercise to inoculate them from criticism related to corrupt practices by their companies. The Convention requires not only a political commitment to oppose bribery of foreign public officials, but requires that Parties take the next step to enact and enforce tough laws prohibiting such activities.

Article 3(1) of the Convention requires each Party to the Convention to provide for "effective, proportionate and dissuasive" criminal penalties. In response to a question for the record, the State Department defined such penalties as those that:

> "clearly apply to the offense of bribery of a foreign public official; are proportionate (in the amount of fine and/or length of imprisonment) to the seriousness of the offense; are comparable to the penalties that apply to bribery of a party's own public officials; and provide a deterrent to such conduct."

The Committee believes that a failure to fully apply such penalties would in fact erode the deterrent quality of these penalties. As such, the Committee has included in the recommended resolution of ratification a requirement that the Executive submit a detailed report to the Congress annually regarding each Party's enforcement of its domestic laws implementing the obligations of the Convention. Included in the report will be a detailed account of each Party's efforts to investigate and prosecute cases of bribery of foreign public officials, including cases involving its own citizens. In

addition, the Executive must assess whether sufficient resources have been provided to enforce a Party's obligations under the Convention and whether each Party has shared information relating to natural and legal persons prosecuted or subjected to civil or administrative proceedings.

In the annual report's assessment of compliance with the obligations of the Convention, the Committee anticipates that the President will place an emphasis on the accounting of business transactions, as required by Article 8 of the Convention. Specifically, the Committee expects the President to assess whether Parties are prohibiting off-the-book accounts, inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents for the purpose of bribing foreign officials or hiding bribery of foreign or domestic officials.

The need for full and detailed reporting cannot be overstated. In order to ensure this Convention has an impact in reducing bribery in international business, increased transparency will be required. The Committee was accommodating in requiring the Executive to prepare a report on an annual basis, rather than biannually, so as to ensure thorough and detailed reporting. The Committee expects that the Administration will take this reporting requirement seriously and respond to each provision of the reporting requirement directly.

Finally, the Convention places the obligation of implementation and enforcement of the Convention's requirements on each Party. The Committee supports this construct, and would be concerned should there be an effort in the future to transfer these responsibilities to the OECD or any other international body. This should not, however, leave Parties under the assumption that they may interpret provisions broadly so as to undermine the intent of the Convention: to criminalize, and thereby deter, the bribery of foreign public officials in order to obtain or retain business or other improper advantage in the conduct of international business.

B. DEFINING "FOREIGN PUBLIC OFFICIAL"

The legal definition given to the term "foreign public official" by each Party will be pivotal in ensuring that the obligations of the Convention have an impact on current practices. According to the State Department, in response to a question for the record:

> The term "foreign public official" is meant to apply to all persons in the legislative, administrative, or judicial branch of government. "Administrative" as used in this context is synonymous with our Executive Branch. The term "foreign public official" also includes any person exercising a public function for a foreign country, including for a public agency or public enterprise, and any official or agent of a public international organization.

The Committee expects that the Executive will ensure this broad understanding is shared by other Parties to the Convention. The annual report required of the Executive in the resolution of ratification requires a description of the domestic laws enacted by each Party to the Convention, and an assessment of the compatibility of

the laws with the obligations of the Convention. The Committee anticipates that the Executive will assess each country's laws in relation its assertions to the Committee regarding the broad definition of "foreign public official."

One shortcoming of the proposed Convention is the failure to include in the definition of "foreign public official" foreign political parties or party officials, and candidates for foreign political office. The Administration has assured the Committee, in response to a question for the record, that it will work to include these officials in the definition:

> U.S. negotiators made a concerted effort to have political parties and party officials covered under the Convention. Other delegations, however, were not prepared to accept this, arguing that political parties and party officials could not be considered "public officials" as the term is generally understood.
>
> At the Conclusion of the negotiations on the text of the Convention in November 1997, United States representatives insisted upon formal agreement on a program of accelerated work on a number of issues not adequately addressed in the Convention text. These issues included bribery of political parties and political party officials in international business transactions, bribery of candidates for political office, and aspects of the use of money laundering legislation in the fight against illicit payments. Accordingly, the OECD Council on December 11, 1997, in approving the Convention text and recommending its adoption by Ministers representing participating countries, adopted a Decision committing member countries to examining these issues and reporting results to Ministers by the Spring 1999 annual OECD Ministerial meeting. At the suggestion of France, two additional issues were added to this accelerated work plan on issues related to bribery of foreign public officials: (a) the role of foreign subsidiaries and (b) the role of offshore money centers.
>
> Work on these issues will begin with the June 29–July 1 meeting of the OECD Working Group on Bribery. It is expected that an experts group of representatives of participating governments will be formed to outline possible recommendations over the late summer and early autumn, with formal Working Group discussions to begin in earnest in November 1998. On political parties, party officials, and candidates for political office, the U.S. objective will be to secure member country agreement to amend the Convention to include such entities/individuals among those to whom payment of bribes to obtain or retain business will be prohibited, as is the case under the U.S. Foreign Corrupt Practices Act. As in the negotiation of the Convention itself, multilateral, bilateral and public diplomacy will be required to achieve these objectives.

The Committee supports the Executive's efforts to include political party officials and candidates in the definition. The annual report required of the Executive emphasizes the importance of U.S. leadership in negotiating an amendment to the Convention by requiring the President to describe efforts by the United States to amend the Convention to require countries to expand the definition of "for-

eign public official," so as to make illegal the bribery of foreign political parties or party officials, and candidates for foreign political office.

Finally, the Committee is concerned by a potential loophole in the definition of foreign public officials that would allow individuals or corporations to bribe family members of foreign public officials without penalty. In a response to a question for the record, the State Department described the reach of the Convention to family members:

> The Convention, like the U.S. Foreign Corrupt Practices Act, covers bribes offered or paid to a foreign public official so that the official will take certain action, or refrain from acting, in the performance of official duties. Bribes to a family member of a foreign public official are covered in circumstances where (1) a bribe is paid to a family member as a conduit or intermediary, who in turn passes it to the foreign public official, the intended recipient; or (2) a foreign public official directs that a bribe, intended to induce that official to take certain action or refrain from acting, be paid to a family member.

The Committee is concerned that in many instances the connection between the payment to immediate family members and the influence on a foreign public official will not be evident. Payments to a family member who does not pass it on to a family member who is a public official, yet enriches the family, would not be covered under the proposed Convention. The Committee directs the President to describe efforts by the United States to amend the Convention to expand the definition of "foreign public official," so as to make illegal the bribery of immediate family members of foreign public officials.

C. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

Ratification of a bilateral extradition treaty granting the authority to extradite individuals in the United States to other nations generally reflects an endorsement of the judicial system, and the level of respect for human rights in the nation with which the United States enters into an extradition relationship. Although the proposed Convention provides the authority for extradition and legal assistance (should Parties choose to use the Convention for such authority), the Committee is concerned that nations may seek extradition of individuals in the United States under the Convention even in situations where there is no bilateral extradition treaty with the United States authorizing extradition.

In order to ensure that this possibility does not arise, the Committee's recommended resolution of ratification includes an understanding that the United States will not use the proposed Convention as the legal basis for extradition to any country with which the United States has no bilateral extradition treaty in force. In addition, the understanding makes clear that even when the United States has a bilateral extradition treaty in force, that bilateral extradition treaty, not the Convention, will serve as the legal basis for extradition of individuals for offenses covered under the Convention.

This understanding thereby ensures that the crime of bribery of foreign public officials will be a basis for extradition—even in the case of "list treaties" that enumerate the kinds of crimes upon which the United States may extradite. At the same time, all of the provisions of the relevant bilateral extradition treaty, including any Senate conditions to ratification, will also apply so that it can be assured that the normal extradition processes can be followed. No legal basis for extradition of individuals in the United States will exist when a Party to the Convention requesting extradition is not also a Party to a bilateral extradition treaty with the United States.

In the case of mutual legal assistance, the Committee's recommended resolution of ratification includes a proviso that ensures that any information shared under the proposed Convention will be subject to the same Senate proviso that typically is included in bilateral mutual legal assistance treaties. Specifically, this proviso requires the United States to deny assistance when essential public policy interests would be violated. Essential public policy interests include when the United States has specific information that a senior government official who would have access to the information is engaged in a felony. The proviso also makes clear that in cases where the United States has a bilateral mutual legal assistance treaty in force, that treaty will serve as the basis for sharing information.

D. TAX DEDUCTION OF BRIBES TO FOREIGN PUBLIC OFFICIALS

Certain countries permit corporations and individuals to deduct bribes paid to foreign officials as a legitimate business expense. According to the State Department's response to questions for the record, the following countries continue to allow such deductions: Australia, Austria, Belgium, France, Germany, Luxembourg, New Zealand, Sweden, and Switzerland.

In 1996, OECD Council members agreed to a Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials. The Recommendation requires nations to "re-examine [tax measures which may indirectly favor bribery] with the intention of denying this deductibility." Despite this recommendation, the aforementioned countries continue to permit tax deduction for bribes. Many countries are quick to talk about the need to end corruption and to apply the rule of law in developing countries. Yet, these efforts are undermined when tax laws in developed countries encourage the very behavior they criticize.

The Committee is concerned that the slow pace in which OECD members have implemented this Recommendation may be an indication of the lack of commitment to make real changes in law and practice with regard to bribes paid by their businessmen and women to foreign public officials. Ending the tax deduction of bribes seems to be a clear first step, and the Committee is somewhat astounded that this change in law has been so difficult to attain. The Committee anticipates that the Department of Treasury will continue to make this issue a priority in its discussions in the OECD, particularly in the OECD Working Group on Bribery in International Business Transactions.

E. EXPANDED EFFORTS TO COMBAT BRIBERY

The Convention was adopted and signed by 28 OECD Member States and five non-OECD Members who are participants in the OECD's Working Group on Bribery in International Business Transactions. Australia, an OECD Member State, has initialed the Convention, but has not yet signed it. The non-OECD Member signatories include Argentina, Brazil, Bulgaria, Chile and Slovakia.

The Committee recognizes that the OECD, a forum for the highly industrialized nations, represents the ideal forum for negotiating a Convention of this nature in part because most major international companies are based in OECD Member States. That said, the Committee commends the OECD's Working Group on Bribery in International Business Transactions for involving the five non-OECD Members, and encouraging their full participation in the Convention. Such participation underscores the potential for full globalization of the provisions of the Convention.

As Secretary of State Madeleine Albright stated at the December 17, 1997, signing ceremony for the Convention:

> We recognize that supplier nations have a special responsibility to stop this destructive practice.* * * Indifference in the developed world legitimized corruption in the developing world. It encouraged the patronizing belief that the problem was cultural and that we couldn't do anything about it.* * * At the same time, as supplier nations in the OECD take these steps, it is vital that nations in the developing world meet their responsibility to act.

The Committee agrees with this assessment and notes that becoming a Party to the Convention and fully implementing its provisions would expand the Convention's goal of reducing bribery in international business transactions worldwide. The Committee therefore expects the Executive to work through bilateral and multilateral fora to encourage other non-OECD Members not only to become signatories to the Convention but to fully implement and enforce the provisions of the Convention. The annual report required of the Executive in the Committee's recommended resolution of ratification requires a description of U.S. efforts in this regard.

In addition, the Committee notes the importance of combating bribery through multilateral fora outside the OECD, and in the activities of these institutions. The Preamble of the Convention welcomes actions taken by international organizations such as the United Nations, the World Bank, the International Monetary Fund, the World Trade Organization, the Organization of American States, the Council of Europe and the European Union. These organizations have begun to institute, often at U.S. urging, policies to strengthen their anti-bribery disciplines, such as: taking corruption into account in lending practices; undertaking measures to ensure the rule of law and promote good governance; establishing uniform procurement rules; and enacting practices that promote transparency and openness. The Committee recognizes that there is further work to be done in these areas and expects that the Administration will continue to make such efforts a priority.

Under Secretary of State Stuart Eizenstat, during his testimony before the Committee in support of this Convention, noted that the

Administration is working in the World Trade Organization and in regional fora in Asia and Latin America "to encourage increased transparency in government procurement." The Committee believes that efforts to adopt aggressive anti-corruption strategies under the auspices of such institutions represent important and complementary efforts to the Convention, and should be continued. The Committee also recommends that the Administration make a concerted effort to pursue such goals through regional fora in Africa, where corruption has represented a significant deterrent to U.S. companies and to the development of the rule of law.

VII. Explanation of Proposed Convention

For a detailed article-by-article analysis of the proposed Convention, see the letter of submittal from the Secretary of State, which is set forth at pages V–X of Treaty Doc. 105–43.

VIII. Text of the Resolution of Ratification

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted at Paris on November 21, 1997, by a conference held under the auspices of the Organization for Economic Cooperation and Development (OECD), signed in Paris on December 17, 1997, by the United States and 32 other nations (Treaty Doc. 105–43), subject to the understanding of subsection (a), the declaration of subsection (b), and the provisos of subsection (c).

(a) UNDERSTANDING.—The advice and consent of the Senate is subject to the following understanding, which shall be included in the instrument of ratification and shall be binding on the President:

> EXTRADITION.—The United States shall not consider this Convention as the legal basis for extradition to any country with which the United States has no bilateral extradition treaty in force. In such cases where the United States does have a bilateral extradition treaty in force, that treaty shall serve as the legal basis for extradition for offenses covered under this Convention.

(b) DECLARATION.—The advice and consent of the Senate is subject to the following declaration:

> TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties to the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(c) PROVISOS.—The advice and consent of the Senate is subject to the following provisos:

> (1) ENFORCEMENT AND MONITORING.—On July 1, 1999, and annually thereafter for five years, unless ex-

tended by an Act of Congress, the President shall submit to the Committee on Foreign Relations of the Senate, and the Speaker of the House of Representatives, a report that sets out:

(A) RATIFICATION.—a list of the countries that have ratified the Convention, the dates of ratification and entry into force for each country, and a detailed account of U.S. efforts to encourage other nations that are signatories to the Convention to ratify and implement it.

(B) DOMESTIC LEGISLATION IMPLEMENTING THE CONVENTION.—a description of the domestic laws enacted by each Party to the Convention that implement commitments under the Convention, and an assessment of the compatibility of the laws of each country with the requirements of the Convention.

(C) ENFORCEMENT.—an assessment of the measures taken by each Party to fulfill its obligations under this Convention, and to advance its object and purpose, during the previous year. This shall include:

(1) an assessment of the enforcement by each Party of its domestic laws implementing the obligations of the Convention, including its efforts to:

(i) investigate and prosecute cases of bribery of foreign public officials, including cases involving its own citizens;

(ii) provide sufficient resources to enforce its obligations under the Convention;

(iii) share information among the Parties to the Convention relating to natural and legal persons prosecuted or subjected to civil or administrative proceedings pursuant to enforcement of the Convention; and

(iv) respond to requests for mutual legal assistance or extradition relating to bribery of foreign public officials.

(2) an assessment of the efforts of each Party to:

(i) extradite its own nationals for bribery of foreign public officials;

(ii) make public the names of natural and legal persons that have been found to violate its domestic laws implementing this Convention; and

(iii) make public pronouncements, particularly to affected businesses, in support of obligations under this Convention.

(3) an assessment of the effectiveness, transparency, and viability of the OECD monitoring process, including its inclusion of input from the private sector and non-governmental organizations.

(D) LAWS PROHIBITING TAX DEDUCTION OF BRIBES.—an explanation of the domestic laws enacted by each signatory to the Convention that would prohibit the deduction of bribes in the computation of domestic taxes. This shall include:

(i) the jurisdictional reach of the country's judicial system;

(ii) the definition of "bribery" in the tax code;

(iii) the definition of "foreign public official" in the tax code; and

(iv) the legal standard used to disallow such a deduction.

(E) FUTURE NEGOTIATIONS.—a description of the future work of the Parties to the Convention to expand the definition of "foreign public official" and to assess other areas where the Convention could be amended to decrease bribery and other corrupt activities. This shall include:

(1) a description of efforts by the United States to amend the Convention to require countries to expand the definition of "foreign public official," so as to make illegal the bribery of:

(i) foreign political parties or party officials,

(ii) candidates for foreign political office, and

(iii) immediate family members of foreign public officials.

(2) an assessment of the likelihood of successfully negotiating the amendments set out in paragraph (1), including progress made by the Parties during the most recent annual meeting of the OECD Ministers; and

(3) an assessment of the potential for expanding the Convention in the following areas:

(i) bribery of foreign public officials as a predicate offense for money laundering legislation;

(ii) the role of foreign subsidiaries and offshore centers in bribery transactions; and

(iii) private sector corruption and corruption of officials for purposes other than to obtain or retain business.

(F) EXPANDED MEMBERSHIP.—a description of U.S. efforts to encourage other non-OECD member to sign, ratify, implement, and enforce the Convention.

(G) CLASSIFIED ANNEX.—a classified annex to the report, listing those foreign corporations or entities the President has credible national security information indicating they are engaging in activities prohibited by the Convention.

(2) MUTUAL LEGAL ASSISTANCE.—When the United States receives a request for assistance under Article 9

from a country with which it has in force a bilateral treaty for mutual legal assistance in criminal matters, the bilateral treaty will provide the legal basis for responding to that request. In any case of assistance sought from the United States under Article 9, the United States shall, consistent with U.S. laws, relevant treaties and arrangements, deny assistance where granting the assistance sought would prejudice its essential public policy interests, including cases where the Responsible Authority, after consultation with all appropriate intelligence, anti-narcotic, and foreign policy agencies, has specific information that a senior government official who will have access to information to be provided under this Convention is engaged in a felony, including the facilitation of the production or distribution of illegal drugs.

(3) SUPREMACY OF THE CONSTITUTION.—Nothing in the Convention requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.

APPENDIX

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

C O N T E N T S

CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS (TREATY DOC 105–43)

TUESDAY, JUNE 9, 1998

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met at 10:43 a.m., in room SD–419, Dirksen Senate Office Building, Hon. Jesse Helms (chairman of the committee), presiding.

Present: Senators Helms, Hagel, Sarbanes, Robb, and Feingold.

Senator HAGEL. Good morning. One point of clarification. I am not Chairman Helms. I am Senator Hagel and because I ran into my friend Senator Sarbanes who suggested maybe I could handle the gavel for 5 or 10 minutes as we are getting Senator Helms here—there was, I understand some miscommunication between Senator Helms and the keys to his car.

But nonetheless, he is on his way and I have been asked to see if we can kick this off and get right to business. With that, I welcome the Under Secretary of State, Mr. Eizenstat. Secretary Eizenstat, nice to see you again.

I would now ask our friend and colleague, Senator Sarbanes, for his statement.

Senator SARBANES. Well, thank you very much, Mr. Chairman.

I am very pleased to welcome Stu Eizenstat back before the committee. It is always a pleasure to see him. I have to say I think he is one of the most effective people in our Government, and anytime he is given an assignment, I always sort of breathe a sigh of relief because I figure it is going to get worked through to a successful conclusion.

I just might make reference to the incredible work he has been doing with respect to Nazi gold, which is a very difficult and sensitive issue. I would just note for the record there was a very strong editorial in this morning's *Washington Post* with respect to his efforts in that regard.

On the subject for today, this Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, I think this is an extremely important measure and one that we ought to welcome with open arms and try to move through the Congress as quickly as we can.

Most governments consider bribery of their own public officials a serious offense for both the payor and the recipient. Except for the

United States, however, bribery of foreign officials has generally been treated in a more ambiguous manner.

Now, the United States more than 2 decades ago passed the Foreign Corrupt Practices Act. We in effect said to our business people, well, you cannot go overseas and bribe people. We had some instances of that occurring, and then we had very serious political ramifications and consequences. So, we enacted that legislation.

But other governments have refrained from imposing legal sanctions on such activity which occurs outside of their own country. They impose sanctions if people try to bribe their own officials, but then they go abroad and bribe other officials, and they just kind of shrug their shoulders about it. In fact, some of those governments have even allowed tax deductions for their corporations who bribe foreign officials.

Now, I am very much heartened by the fact that we have been able to secure a treaty among OECD members that helps combat the unacceptable practice of corporate bribery of foreign public officials.

The impetus to move on this issue came from the Congress which called on the executive branch in the Omnibus Trade bill of 1988 to work through the OECD to arrive at a common anti-bribery position. Now, some have asserted that the treaty does not go as far as it was hoped, but nevertheless it sets us on a course to pursue similar actions and efforts and other international arena and to broaden anti-corruption efforts in cooperation with our competitors.

Implementation will also help U.S. corporations enjoy a more level playing field in their international business transactions, something that is very important in increasing globalization of the world's economy. Apparently what moved some other countries was their businesses finally came to them and said, well, we are getting shaken down everywhere we go and we need this kind of protection. The American companies say, well, we cannot do that because we have a law against it. So, that was an impetus. Out of that very negative situation has come a positive, so to speak.

I am sure that we all on this committee share a deep interest in these international efforts to combat corruption. In addition to dealing with this convention, we will have to amend, in some small respects, the Foreign Corrupt Practices Act that we enacted in order to conform it with the treaty's provisions. That will be handled in the Banking Committee which has jurisdiction over that legislation. I serve on that committee. I think there is strong bipartisan support in that committee for making the changes. I think the orderly way to proceed is to move this convention and then move the legislation either parallel or right behind it. So, I am very hopeful that this committee and the Banking Committee can move forward expeditiously to approve this treaty and then to enact the legislation that is required to implement it.

I know Secretary Daley was very much involved in those negotiations, some very tough negotiations. I think he did a very good job, and I know Secretary Eizenstat has been very intimately involved with this issue as well.

So, Mr. Chairman, this is a very important hearing. I would hope from the perspective of all the members of the committee, this is

a very positive development, and I hope we can move it through promptly, as we stand only to benefit from it.

Senator HAGEL. Senator Sarbanes, thank you. Senator Robb?

Senator ROBB. Thank you, Mr. Chairman.

I have no formal opening statement. I would just like to associate myself with the remarks made by the Senator from Maryland. I share both the frustrations that he articulated and the goals that he has laid out, and I think that this is an important hearing and I appreciate your holding it. I thank you.

Senator HAGEL. Senator Feingold?

Senator FEINGOLD. Mr. Chairman, I do have a few remarks about this very important subject. Mr. Eizenstat.

I appreciate the opportunity to be here today to consider the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The convention seeks to establish worldwide standards beginning with most of the major industrialized countries for the criminalization of the bribery of foreign officials to influence or retain business.

Mr. Chairman, the fact that the committee is poised to provide its advice and consent to this convention I think is an exceptional event.

It was just 20 years ago that Congress passed the Foreign Corrupt Practices Act, the FCPA. This landmark legislation, which I am proud to say was sponsored by one of Wisconsin's most respected public officials, Senator William Proxmire, was enacted after it was discovered that some American companies were actually keeping slush funds for making questionable and/or illegal payments to foreign officials to help land certain business deals.

For these 20 years, the FCPA has succeeded at curbing U.S. corporate bribery of foreign officials by establishing extensive bookkeeping requirements to ensure transparency and by criminalizing the bribery of foreign officials.

Now, these very important principles do not simply define an American sense of morality in business. I think they actually strengthen America's trade policy, foster a faith in American democracy, and protect our interests in requiring an open environment for U.S. investment.

Certainly these are principles and guidelines that will serve everyone's best interest, and as such are well worth promoting worldwide.

But there has been, as I have been told by a number of business people, a price for taking such a high ethical road. U.S. companies that are trying to pursue opportunities in the global marketplace are forced to compete with firms from countries whose national laws take a more essentially laissez-faire approach to this issue, and they turn a blind eye to corruption and graft evident in many business transactions. Even in some countries—and this is an example that I cite all the time. In Germany, they even allow companies to take a tax deduction for bribes paid to foreign officials as a business expense. My business people in Wisconsin are always a little horrified when they hear that.

Mr. Chairman, I would call such practices a corporate welfare of the worst kind. These laws and practices by our closest trading partners clearly put our businesses at a disadvantage. I have heard

from more than one Wisconsin company about international contracts lost as a result of some non-American company paying a bribe to a foreign official. These lost contracts represent lost employment and revenue opportunities for my State, as I am sure they do in other States. A 1997 report by the Trade Promotion Coordinating Committee estimates that U.S. firms lost at least 50 international commercial contracts valued at more than $15 billion in a single year.

But fortunately, with the signing of the OECD convention last December, the rest of the industrialized world, along with several key lesser developed countries, is finally beginning to follow America's lead. What this convention does is initiate several significant steps to raise the standards of our major trading partners to the level established by the FCPA.

Mr. Chairman, I have longer remarks that I do not want to trouble you with except to say that this is a subject that I have been greatly interested in and have introduced legislation on for years. So, I am just delighted that not only that the administration is working hard on this, but I also want to thank the chairman of the full committee and the chairman today for giving this quick consideration. I think it is a very important treaty for the business people in our country.

Thank you, Mr. Chairman.

Senator HAGEL. Senator Sarbanes?

Senator SARBANES. Mr. Chairman, could I just have a unanimous consent to insert a *Washington Post* editorial, a Treaty Against Bribes, discussing this convention, and also an article in the *Wall Street Journal* by Secretary Daley, the Battle Against Bribery, in the record?

Senator HAGEL. Without objection, so ordered.

[The *Washington Post* and *Wall Street Journal* articles follow:]

A TREATY AGAINST BRIBES

[Printed in the *Washington Post,* 5/10/98]

How's this for a level playing field? U.S. law bans the bribery of foreign officials to win business contracts; French law makes such bribes tax-deductible. For years, the United States has been urging other industrialized countries to erase this discrepancy—to outlaw foreign bribery, as has U.S. law for more than two decades. Now Congress has a chance to help make that happen.

The instrument at hand is the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials, which 33 leading developed nations signed last December. Once the treaty goes into effect, every participating country will criminalize bribery of foreign officials. in some ways, the treaty doesn't go as far as the U.S. negotiators would have liked. It doesn't ban payments to political parties or candidates, for example. But it's a huge first step, and other nations have agreed to discuss extending its reach once this treaty goes into effect.

The United Sates has nothing to lose by ratifying the covenant; it essentially confirms U.S. law. Exactly 10 years ago Congress instructed the executive branch to seek just such a treaty. The only question is whether the Senate will find time to vote on it, and whether both houses of Congress will find time to pass the necessary implementing legislation before everyone goes home to campaign. But timing is urgent. The signatories promised maximum effort to ratify by the end of this year. Any delay here would only give other countries an excuse to deviate from that schedule.

Corruption exists in all countries, and no doubt always will. But in developing nations, and those making a transition from communism to free market, corruption can have an especially debilitating effect. Such countries often lack established

courts and law enforcement institutions to keep bribery in check. When ruling elites skim huge portions of incoming investment, they impoverish everyone else while fostering cynicism and a sense that anyone who is honest is also a sap. It's important that all developed countries recognize, as the United States has since 1997, that they have a responsibility to help fight such destructive dishonesty. And once the treaty comes into force, European bribes will not only no longer be legal—they won't be tax-deductibe, either. That's one more reason for Congress to act fast.

THE BATTLE AGAINST BRIBERY

By William M. Daley

[Printed in the *Wall Street Journal,* 12/17/97]

Today, representatives of 34 countries will meet in Paris at the Organization for Economic Cooperation and Development to sign a binding agreement outlawing bribery of foreign public officials. This is a watershed accord, designed to ensure that price and quality—not greased palms—will determine who gains and who loses in markets abroad.

The antibribery convention calls for strict penalties for bribery and tight accounting procedures to make it harder to hide illegal payments. Bribe givers will also face charges for money laundering. The bottom line will be fines, loss of business and even imprisonment. We will need to submit the convention to Congress by April with a goal of ratification by the end of the year.

To enforce this agreement governments will offer mutual legal assistance; and there will be rigorous monitoring in the OECD. Based on this agreement, France has already announced the end of tax deductibility for bribes. But we must make sure that our trading partners uphold their commitments.

U.S. firms and workers will clearly benefit from this new accord. Since mid-1994 foreign firms have used bribery to win approximately 180 commercial contracts valued at nearly $80 billion. We estimate that over the past year American companies lost at least 50 of these contracts, valued at more than $15 billion. And since many of these contracts were for groundbreaking projects—the kind that produce exports for years to come—the ultimate cost could be much higher.

As important as this agreement is, we must recognize that it only places severe penalties on those companies and individuals who offer bribes. It does not address the government officials who seek and accept bribes. We must now aggressively urge countries to reform their government procurement practices.

Greater openness and fairness in government procurement will significantly increase opportunities for U.S. business in the global procurement market, which has been estimated to be worth more than $3 trillion. We must begin by encouraging nondiscriminatory, timely and transparent procedures in government procurement. There is a World Trade Organization agreement covering government procurement, but only 25 countries have signed it. Our goal is for all countries to do so.

We must recognize the challenges that still lie ahead. We have a new WTO working group that will push countries to adopt more open and transparent rules. Work is also progressing in the Asia Pacific Economic Cooperation forum and the Free Trade in the Americas Agreement process. The U.S., like-minded countries, and the business community must press for world-wide adoption of these procurement reforms as we build a sound global trading system.

Senator HAGEL. Thank you, Senator.

Now, Mr. Secretary, welcome again and glad you are here. We have two panels this morning. Under Secretary of State Eizenstat will be first to present testimony, and the second panel is Mr. Fritz F. Heimann, Chairman, United States Transparency International. So, if you would proceed, Mr. Secretary.

STATEMENT OF HON. STUART E. EIZENSTAT, UNDER SECRETARY OF STATE FOR ECONOMIC, BUSINESS AND AGRICULTURAL AFFAIRS

Mr. EIZENSTAT. Thank you very much, Mr. Chairman, Senators. I would like to express particular appreciation to Chairman Helms

for scheduling this hearing so promptly after we have sent the convention and the implementing legislation to the Senate. It is important the United States lead in the ratification and implementation of this convention, just as we did in the negotiation.

Ten years ago the U.S. Congress amended our Foreign Corrupt Practices Act and, in so doing, called upon the executive branch to negotiate with our major trading partners in the OECD an international agreement prohibiting bribery of foreign public officials in international business transactions. This, by the way, had been a goal of successive U.S. administrations since the passage of the 1977 Foreign Corrupt Practices Act, in which I am pleased to say I played a personal role when I was serving in the White House during that period in helping to draft and conceptualize.

The goal has been to internationalize the principles of the Foreign Corrupt Practices Act so that other countries would rise to our high standard and so that U.S. businesses would not be put at a competitive disadvantage in doing business abroad, as we were criminalizing activity by our business people but other countries were not.

The U.S. Government, with the support of the business community and Members of Congress, both Republican and Democrat, had been working steadily for years to convince our trading partners to criminalize the bribery of foreign public officials, and I am very pleased that today I can say we have met this goal. We are strengthening the rule of law in international business and will be providing for a more level playing field for our businesses operating abroad and trying to export.

We were right to enact the Foreign Corrupt Practices Act 20 years ago, and we have been right and Congress was right to ask us 10 years ago to press harder for our trade competitors to enact similar prohibitions. We have succeeded with the OECD convention and there has been really a sea change in attitude. I think Senator Sarbanes indicated this. Thirty-three nations have agreed to enact criminal laws which will closely follow the prohibitions found in our statute. This is a major achievement for the rule of law.

Bribery damages economic development and it hinders the growth of democracy in developing countries. It hurts U.S. exporters and suppliers in every State and in every district in the United States, and it impedes U.S. international trade. The U.S. Government is aware of allegations of bribery by foreign firms in the last year alone affecting international contracts worth almost $30 billion, all of which would not be prohibited by criminal laws in the home jurisdictions.

Governments that signed the convention have now pledged to seek its approval and enactment of implementing legislation by the end of this year. It is the product of strong American leadership and bipartisan effort by the Congress as well, and therefore early U.S. action is essential to spurring our major competitors. That is again why I am particularly appreciative that Chairman Helms would have scheduled this hearing so promptly.

Permit me to briefly highlight what this convention does.

It obligates the parties to criminalize bribery of foreign public officials, including officials in all branches of a foreign government, whether appointed or elected. It includes payments to officials of

public agencies, of public enterprises, and of public international organizations as well. It would cover government controlled parastatals so that publicly owned, foreign owned airlines and utilities and state telecommunications companies, which are increasingly important in public procurement, would be covered as well and only those operating on a purely commercial basis would be exempt.

The parties must also apply effective, proportionate, and dissuasive criminal penalties to those who bribe foreign public officials. If a country's legal system lacks the concept of criminal corporate liability, it must then provide for equivalent non-criminal sanctions, including monetary penalties.

The convention also requires that parties be able to seize or confiscate both the bribe and the proceeds of the bribe, the net profits resulting from the illegal transaction, or to impose equivalent fines.

The convention has strong provisions to prohibit accounting omissions and falsification, and importantly to provide mutual legal assistance and even extradition to enforce each other's laws. These mutual assistance provisions are particularly important because they will enhance foreign governments in their efforts to enforce alleged bribery, but they will also improve our own enforcement of our Foreign Corrupt Practices Act because we will be getting more cooperation from foreign governments in both extradition and providing evidence that we can use in our own prosecutions.

While the convention does not directly cover bribery of foreign political parties, party officials and candidates for public office, OECD members have agreed to discuss these issues on a priority basis in the anti-bribery working group of the OECD, which negotiated this convention, and to consider proposals to cover such political officials by the May 1999 OECD annual ministerial. However, the convention will cover business related bribes to foreign public officials made through political parties, made through party officials, made through candidates, as well as those bribes that corrupt foreign public officials directed to them.

The greatest impact of our Foreign Corrupt Practices Act over the years has been achieved through the business community's own response to the law, their institution of meaningful internal corporate controls, effective internal and external auditing, and the adoption of codes of conduct. We would expect to see a similar dynamic if this convention is ratified in other OECD countries.

The convention also provides us for the first time with a mechanism to monitor through regular peer review both the quality of the legislation enacted by other nations and the effectiveness of their enforcement of their legislation. Regular comprehensive monitoring will provide us with the ability to determine whether other nations actually do what they have agreed to do.

I expect that soon after the convention enters into force, we will begin to see a sharp curtailment in the practice of bribery of foreign public officials in major international business transactions. For the first time, our competitors will have to weigh the risks of bribery against the supposed benefits.

This convention does not stand in isolation. It is the centerpiece of a comprehensive U.S. Government strategy to combat bribery and corruption abroad. In our own hemisphere, we successfully

concluded the Inter-American Convention Against Corruption, which has recently been submitted to the Senate for its advice and consent. It is my hope that an early hearing can be held at the convenience of this committee on this convention as well. Three countries in Latin America were among the five non-OECD members that signed the OECD Anti-Bribery Convention.

We are also working with the International Monetary Fund and multilateral development banks to encourage those institutions to help countries promote good governments and the rule of law.

In the OECD as well, we are pressing our partners that allow tax deductibility, as Senator Feingold mentioned, an outrageous situation, to deal with this situation and eliminate this preferential treatment. Progress is already being made in countries like Denmark, Norway, and Portugal, and in others. This process on tax deductibility will be accelerated with the conclusion of the OECD convention and we hope that this will be the next step taken.

Since the convention follows our own Foreign Corrupt Practices Act very closely, we will need, Mr. Chairman, to make far fewer changes to our domestic law than will other countries who have no domestic criminal laws in this area themselves.

We have tailored for our few proposed amendments our provisions so that our law will have a scope similar to what we expect our major trading partners to achieve as they enact their laws. We have been careful not to put U.S. firms at a competitive disadvantage. My written statement outlines the changes in more detail that we have proposed to the Foreign Corrupt Practices Act as implementing legislation.

We and all signatories to the convention agreed to seek approval and enactment of implementing legislation by the end of 1998. We believe that it is essential that the U.S. meet this schedule. If we do not, other countries will use our delay as an excuse to avoid or delay their own implementation. The sooner we act in ratifying the convention and enacting our implementing legislation, the sooner others will act. That will, therefore, level the playing field on which our companies must compete to obtain business overseas.

The business community in the United States strongly supports our efforts to ratify the convention as soon as possible.

In conclusion, the successful culmination and conclusion of this OECD Anti-Bribery Convention has been a genuine bipartisan effort spurred by Congress over the past 10 years, and one that several administrations have given priority to.

I welcome the committee's interest in this important issue and I urge you to take action to approve the OECD convention and to ensure that the benefits of the convention are realized rapidly so that our own companies can at last play on a more level playing field.

Thank you again and I am pleased to answer any and all questions.

[The prepared statement of Mr. Eizenstat follows:]

PREPARED STATEMENT OF STUART E. EIZENSTAT

Mr. Chairman and Members of the Committee:

Ten years ago this summer, the United States Congress passed the Omnibus Trade Act which, in part, amended our Foreign Corrupt Practices Act. The amend-

ments were a reaffirmation of the strong support of the Congress for effective anti-bribery legislation.

As part of this action, the Congress called on the executive branch to negotiate—with our major trading partners in the Organization for Economic Cooperation and Development—an international agreement prohibiting bribery of foreign public officials in international business transactions.

Such action has been a goal of successive U.S. administrations since passage of the 1977 U.S. Foreign Corrupt Practices Act. As then-President Carter's chief domestic advisor, I was involved in development and passage of the FCPA, and can attest to the high priority attached to getting a commitment from the world's largest industrial countries that they adopt strict anti-bribery laws of their own. The goal was to internationalize the principles in the FCPA so that other countries would rise to our high standards and so that U.S. businesses would not be at a competitive disadvantage doing business abroad.

The U.S. Government, with the support of the business community and members of Congress, both Republicans and Democrats, has been working steadily for years to convince our trading partners to criminalize the bribery of foreign public officials. I am very pleased to inform you today that we have met this goal. And we have done so in a manner which will provide for freer and fairer international competition, will strengthen the rule of law in international business and will provide for a more level playing field for U.S. businesses overseas.

On December 17 of last year, on behalf of the United States, Secretary of State Madeleine Albright signed the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

We were right to enact the Foreign Corrupt Practices Act over 20 years ago. And we have been right to press hard for our trade competitors to enact similar prohibitions. We have succeeded with the OECD Convention. Thirty-three nations have agreed to enact criminal laws which will closely follow the prohibitions found in our statute. This is a major achievement for the rule of law.

This Convention obligates the world's largest economies to outlaw the bribery of officials of other countries in international business transactions. This is an important issue for the United States, U.S. businesses and workers.

Let me say, Mr. Chairman, this Convention is very much in our national interest. Bribery damages economic development and hinders the growth of democracy. It hurts U.S. exporters and suppliers—in every state and district in the U.S.—and impedes international trade. The U.S. government is aware of allegations of bribery by foreign firms in the last year affecting international contracts worth almost $30 billion, which is not currently prohibited by criminal laws in their home jurisdictions.

Governments that signed the Convention have pledged to seek its approval, and enactment of implementing legislation, by the end of this year. The Convention is the product of strong American leadership, and early U.S. action is essential to spurring on our major competitors, whose implementation efforts will directly benefit our international interests and U.S. firms and their employees. I am confident that the OECD Convention will enter into force promptly and that the Parties will enact strong laws and enforce them effectively.

I would to like to express my thanks, Mr. Chairman, for scheduling this hearing so promptly. It is important that we lead in the ratification and implementation of this Convention, just as we did in its negotiation.

THE OECD CONVENTION

Let me briefly highlight for you what this Convention does:

- The Convention obligates the Parties to criminalize bribery of foreign public officials, including officials in all branches of government, whether appointed or elected. This prohibition includes payments to officials of public agencies, public enterprises, and public international organizations. This, therefore, would cover government-controlled parastatals, such as airlines, utilities, state telecommunications companies, which are increasing important in public procurement. Only those operating on a purely commercial basis would be exempt.
- The Parties must apply "effective, proportionate and dissuasive criminal penalties" to those who bribe foreign public officials. If a country's legal system lacks the concept of criminal corporate liability, it must provide for equivalent non-criminal sanctions, including monetary penalties.
- The Convention requires that parties be able to seize or confiscate both the bribe and the bribe proceeds—the net profits that result from the illegal transaction—or to impose equivalent fines so as to provide a powerful disincentive

to bribery. Under our law, substantial fines have had significant impact on corporate compliance.

- The Convention has strong provisions to prohibit accounting omissions and falsification, and to provide for mutual legal assistance and extradition. These mutual legal assistance provisions, in particular, will greatly enhance cooperation with foreign governments in cases of alleged bribery, improving both our own enforcement of the FCPA and foreign governments' enforcement of anti-bribery laws.

The Convention will cover business-related bribes to foreign public officials made through political parties, party officials, and candidates, as well as those bribes that corrupt foreign public officials direct to them.

While the Convention does not cover directly bribery of foreign poltician parties, party officials, and candidates for political office, OECD members have agreed to discuss these issues on a priority basis in the OECD's anti-bribery working group, which negotiated the Convention, and to consider proposals to address these issues by the May 1999 OECD annual Ministerial meeting.

WHAT TO EXPECT FROM OUR PARTNERS

The greatest impact of the FCPA has been achieved through enforcement measures and through the business community's response to the law: the institution of meaningful internal corporate controls, effective internal and external auditing, and codes of conduct requiring compliance not only with the FCPA, but also with other federal criminal laws.

We would expect to see a similar dynamic in other OECD countries. The OECD Convention requirements, which closely follow the FCPA, represent a very high standard. As our OECD partners enact effective criminal and civil laws to fully implement those requirements, their business communities will need to take appropriate steps to comply.

The Convention also provides us with a mechanism to monitor, through regular peer review, both the quality of the legislation enacted by the other nations and the effectiveness of their enforcement of their legislation. We expect this review mechanism to be modeled after a highly successful one developed by the Financial Action Task Force on Money Laundering. Regular, comprehensive monitoring will provide us with the ability to determine whether other nations actually do what they have agreed to do to prohibit their nationals and their corporations from bribing to obtain business from foreign governments.

SEVERAL YEARS HENCE:

To be specific, what should we expect to see over the next several years?

I expect that within the next year we will see ratification of the OECD Convention by a majority of the OECD nations. Approval by the U.S., Germany, France and Japan, by the target date of December 31, 1998, is key to early and effective implementation. Most ratifying nations are expected to enact their implementing criminal and civil legislation along with or immediately following ratification.

Over the next two years we will see the institution of regular, comprehensive reviews of the adequacy of both implementing legislation and enforcement efforts. We also should begin to see cases prosecuted by Signatories to the Convention.

But of much greater significance, I expect that soon after the Convention enters into force—and effective criminal prohibitions are enacted into law in the ratifying nations—we will begin to see a sharp curtailment in the practice of bribery of foreign public officials in major international business transactions.

The demand for such bribery in some cases will still exist, but the risks for OECD companies that are tempted to acquiesce in the payment of bribes will be very substantial. For the first time our competitors in the OECD countries will have to weigh those risks against the supposed benefits of bribery. When this occurs, I am confident that our companies will face a more level playing field as they compete for international business on a fair basis.

RELATED ANTI-CORRUPTION INITIATIVES

The successful conclusion of the OECD Anti-Bribery Convention has not occurred in a vacuum. It is indicative of a changing international environment, where there is much more willingness than in the past to address directly the problem of international corruption.

The Convention is the centerpiece of a comprehensive U.S. government strategy to combat bribery and corruption. We are, for example, working with the International Monetary Fund and the multilateral development banks to focus on the de-

bilitating effects of corruption on economic stability and development, and to encourage those institutions to help countries promote good governance.

In this Hemisphere, we successfully concluded the Inter-American Convention Against Corruption, which has recently been submitted to the U.S. Senate for its advice and consent to ratification. It is my hope that at an early time convenient for the Committee that a hearing on this Convention will be scheduled—and to which we would be invited to testify. Three countries in Latin America—Argentina, Brazil and Chile—were among the five non-OECD members that signed the OECD Anti-Bribery Convention. The other two countries are Bulgaria and the Slovak Republic.

We also are working in the World Trade Organization and in regional fora in Asia and Latin America to encourage increased transparency in government procurement, the major arena for this type of foreign commercial bribery.

In the OECD as well, we are pressing our partners that allow the tax deductibility of bribes as business expenses to eliminate this preferential treatment. Since a 1996 Recommendation which called for such action, Denmark, Norway and Portugal have completed the necessary legislative action, and nine of ten remaining countries have begun the process of changing their laws so as to deny the tax deductibility of bribes. This process has accelerated with the conclusion of the OECD Convention.

IMPLEMENTING LEGISLATION

Since the Convention follows our FCPA closely, we have submitted to Congress only those amendments designed to bring our law into full compliance with its obligations and to implement the Convention.

We have tailored our proposed amendments so that our law will have a scope similar to that we expect our major trading partners to achieve as they enact their own laws. We have been careful not to put U.S. firms at a disadvantage.

First, the FCPA currently criminalizes payments made to influence any decision of a foreign official or to induce that official to do or omit to do any act, in order to obtain or retain business. An amendment will clarify that the scope of the FCPA includes payments made to secure "any improper advantage", the language used in the OECD Convention, in order to obtain or retain business.

Second, the OECD Convention requires parties to cover prohibited acts by "any person". The current FCPA covers only issuers with securities registered with the Securities and Exchange Commission and "domestic concerns". An amendment will expand the scope of the FPCA to cover acts prohibited by the Convention of persons other than issuers or domestic concerns (i.e., all foreign natural and legal persons), committed while in the territory of the United States, regardless of whether the mails or a means or instrumentality of interstate commerce are used, in furtherance of the prohibited acts.

Third, the OECD Convention calls on parties with jurisdiction to prosecute their nationals for offenses committed abroad to assert nationality jurisdiction over the bribery of foreign public officials, consistent with national legal and constitutional principles. Accordingly, an amendment will provide for jurisdiction over the acts of U.S. businesses and nationals, in furtherance of unlawful payments, that take place wholly outside the United States.

Fourth, the OECD Convention includes officials of international agencies within the definition of foreign public official. Accordingly, an amendment will expand the FCPA definition of foreign official to include officials of public international organizations.

Finally, under the current FCPA, non-U.S. citizen employees and agents of issuers and domestic concerns are subject only to civil, rather than criminal, penalties. A proposed amendment to the penalty sections relating to issuers and domestic concerns will ensure that penalties for non-U.S. citizen employees and agents of issuers and domestic concerns accord with those of U.S. citizen employees and agents.

TIMING

We and all Signatories to the Convention agreed to seek approval of the Convention and the enactment of implementing legislation by the end of 1998.

We believe that it is essential that the United States meet this schedule. If we do not, other countries will use our delay as an excuse to avoid or delay their own implementation.

Certainly, we all want U.S. firms and their employees to realize the benefits of this Convention as soon as possible. The sooner we act in ratifying the Convention and enacting out implementing legislation, the sooner others will act, thereby leveling the playing field on which our companies must compete to obtain business overseas.

The business community strongly supports our efforts to ratify the Convention as soon as possible. The U.S. Council for International Business, the National Association of Manufacturers, the National Foreign Trade Council and other business groups have publicly endorsed the Convention. We have consulted closely with interested non-governmental groups, such as Transparency International/USA, whose Chairman, Fritz Heimann, is also scheduled to testify here today.

CONCLUSION

Mr. Chairman, and members of the Committee,

The successful conclusion of the OECD Anti-Bribery Convention has been a bipartisan effort, with substantial actions in pursuit of a common goal having been taken by the Congress and Administrations over the past 10 years. Those of us here today, as well as our predecessors, share in the credit for this accomplishment.

I welcome the Committee's interest in this important issue and I urge you to take action—to approve the OECD Convention and to ensure that the benefits of the Convention are realized rapidly.

Senator HAGEL. Mr. Secretary, thank you.

Why do we not start with a 5-minute round of questions and see where we go.

Mr. Secretary, reading from a recent *Wall Street Journal* article which documents in some detail the corruption and bribery, the article talks about corruption and bribes have been getting worse in recent years, especially given recession, high unemployment, and other economic problems in Europe. European competitors look to overseas work to make up the shortfall of business at home, according to the story, and much of that work is in the form of huge infrastructure projects in the developing world where poorly paid officials decide who gets the business.

The story goes on to say in some cases bribes are used to pay off local officials who control how foreign aid money is spent on major projects. According to the *Wall Street Journal*—same story—in the 1990's bribery generally ranges from 10 to 15 percent of the contract—you know that—up from, according to this story, 5 percent previously.

Now, a couple of questions. Which European countries' corporations spend the most annually on bribes?

Mr. EIZENSTAT. Well, we did a study when I was Under Secretary of Commerce, to which actually Senator Feingold referred, when we tried to quantify the amount of bribery which occurred. It is quite widespread. I think it is best not in public session to try to finger particular companies, but it is a very widespread practice throughout Europe and one for which there are very few countries that have any effective enforcement.

Because it is so pervasive, it is not something that could be dealt with other than through a multilateral agreement and that is why this is so important.

Senator HAGEL. Mr. Secretary, would you provide for the record some more elaboration on that in written form?

Mr. EIZENSTAT. We will attempt to give you as many details as we can, and if you wish to have a briefing in closed session, we can go into more detail.

Senator HAGEL. Thank you.

Following along this line of general questions regarding European companies, how serious do you think the Europeans are, Mr. Secretary, about having to forego this business practice and changing their ways?

Mr. EIZENSTAT. Mr. Chairman, I frankly would say that 5 years ago no one would have believed that this convention would have been possible because of the prevalence of the activities by so many European firms.

Senator Sarbanes alluded to this and I think that there has indeed been a sea change, and the sea change has occurred because many of the corporations in Europe themselves complained about the huge costs of trying to acquire these contracts, the shakedowns that occur, the unsavory activities through which they are required to go, and the fact that the United States had a very positive model.

So, I think they are very serious. This is not being done purely out of a non-pecuniary motive. They I think increasingly feel that it is important to live up to high moral standards, but their corporations are also telling them this has become a very high cost of doing business to get major contracts and one they want to avoid.

Senator HAGEL. Mr. Secretary, like the U.S. Foreign Corrupt Practices Act, I understand this treaty permits facilitation payments. Would a 5 percent commission to a local government official constitute a facilitation payment?

Mr. EIZENSTAT. Well, it would depend on the particular factual situation. Even under our Foreign Corrupt Practices Act, commissions obviously can be paid in appropriate circumstances to people who facilitate the acquisition of contracts. One has to look on a case-by-case basis to determine that.

Senator HAGEL. I understand a German official stated recently that German companies spend an estimated $5.63 billion a year on bribes to foreign officials, most of it added on top of the contract price and then written off on their taxes. If this treaty is implemented, do you believe these kinds of bribes will be, can be eliminated?

Mr. EIZENSTAT. Absolutely. They will be and they can be and I think that there will be very effective enforcement. I believe that almost all of the major European countries will enact penalties of a criminal nature and that there will be effective enforcement, again not because of altruism alone, but because I think increasingly their corporations see it in their business interest to do so. So, we have every confidence that there will be effective enforcement.

Senator HAGEL. What about, for example, skirting around the edges on this with political parties, bosses of political parties? My understanding is the treaty does not prohibit bribes to political parties?

Mr. EIZENSTAT. We tried very hard to have political parties covered, and in fact when I was Ambassador to the European Union, we had a situation involving an alleged bribe to the Socialist Party of Belgium that typified the problem. While we did not succeed in fully covering political parties, we made a real start.

First, as I mentioned, we have a commitment that this issue will be taken up in the spring 1999 session, and we hope that this will be addressed in a serious way.

Second, the convention does make a real start in covering political party officials in the following ways. It would prohibit bribes involving political parties and party officials in the following cir-

cumstances: When the party or official is used as an intermediary for a bribe to a foreign public official; when corrupt foreign public officials direct business related bribes to political parties, which is often the case—they will say, do not pay me, pay my party—and in one-party systems where political parties are, in effect, the government and party officials in effect carry out public functions. In all these situations, the political parties would be covered. So, we made a real down payment, but we do believe that this ought to be the next effort to go even a step further.

Senator HAGEL. Mr. Secretary, thank you. Senator Sarbanes.

Senator SARBANES. Thank you, Mr. Chairman. Mr. Chairman, I have a letter that was sent to me by the Business Roundtable, signed by 35 of our leading and major corporations, which I would like to include in the record as well.

Senator HAGEL. It will be.

[The letter of the Business Roundtable follows:]

May 28, 1998

THE HON. PAUL S. SARBANES
United States Senate
309 Hart Senate Office Building
Washington, DC 20510

DEAR SENATOR SARBANES:

We are writing to express our support for the speedy ratification and implementation of the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions that the Administration has just submitted to the Congress.

The OECD Convention is a major victory for the United States in its battle against international corruption and bribery. It creates an international antibribery system that obligates signatory countries to adopt domestic laws to combat foreign bribery. Since the Foreign Corrupt Practices Act (FCPA) was adopted in 1977, the United States has tried to persuade our major trading partners to enact comparable laws. In the 1988 Omnibus Trade Act, the Congress directed the President to negotiate an international agreement in the OECD on the prohibition of overseas bribes. After years of negotiation, the United States has succeeded in getting thirty-three other countries (all the OBCD members and five non-members) to join the United States in the Convention.

The Congress, current and past Administrations, and the private sector have made their fight against international bribery and corruption a priority because international corruption undermines important U.S. goals of (1) achieving a level playing field for those U.S. companies and their workers that compete overseas, (2) fostering economic development and trade liberalization, and (3) promoting democracy and democratic institutions. The Department of Commerce has estimated that between 1994 and 1996, there were at least 100 cases of foreign firms using bribery to undercut U.S. firms' efforts to win international contracts, costing our companies over $45 billion. The OECD Convention is designed to eliminate these trade distorting activities and make foreign bribery a crime in major trading countries.

Speedy ratification and implementation of the OECD Convention by the Untied States is, however, an absolute imperative in order for the Convention to succeed. Some of the other parties are not as committed to the Convention as the United States and are likely to use a delay in U.S. ratification to undermine it. Speedy implementation of the OECD Convention is also necessary to show the other parties that the United States takes its obligations under the Convention seriously and expects other parties to do the same. Since the Convention's effectiveness depends on the adoption of international anti bribery laws by the other parties, implementation by the United States is necessary to lead the way, substantively and politically, for implementation of the Convention by other parties.

Enclosed, for your information, is background material on the OECD Convention and a summary of the amendments necessary to bring the FCPA into compliance with the OECD Convention.

We are committed to working with you to help protect U.S. businesses and workers from unfair and corrupt foreign competitionthrough the ratification and implementation of the OECD Anti Bribery Convention by the Congress this year.

Sincerely

Peter S. Janson
President & CEO
ABB Inc.

Lawrence A. Bossidy
Chairman & CEO
AlliedSignal, Inc.

William J. Hudson Jr.
President & CEO
AMP Incorporated

Curtis H. Barnette
Chairman & CEO
Bethlehem Steel Corporation

Donald V. Fites
Chariman & CEO
Caterpillar Inc.

Robert J. Eaton
Chairman, President & CEO
Chrysler Corporation

Robert B. Palmer
Chairman, President & CEO
Digital Equipment Corporation

Charles O. Holliday
President & CEO
DuPont Company

Richard J. Swift
Chairman, President & CEO
Foster Wheeler Corporation

Michael R. Bonsignore
Chairman & CEO
Honeywell, Inc

D.T. Engen
Chairman, President & CEO
ITT Industries, Inc.

Larry D. Yost
Chairman & CEO
Mentor Automotive, Inc.

Dennis J. Picard
Chairman & CEO
Raytheon Company

Dana G. Mead
Chairman & CEO
Tenneco

James F. Hardymon
Chairman & CEO
Textron Incorporated

Tony L. White
Chairman & CEO
The Perkin-Elmer Corporation

James P. Kelly
Chairman & CEO
United Parcel Service of America

John A. Luke Jr.
Chairman & CEO
Westvaco

Enclosures

Harold A. Wagner
Chairman, President & CEO
Air Products and Chemicals, Inc.

Maurice R. Greenberg
Chairman & CEO
American International Group, Inc.

C. Michael Armstrong
Chairman & CEO
AT&T

Ernest S. Micek
Chairman, President & CEO
Cargill, Inc.

Michael H. Jordan
Chairman & CEO
CBS Corporation

John W. Snow
Chairman, President & CEO
CSX Corporation

William E. Bradford
Chairman & CEO
Dresser Industries, Inc.

George M. C. Fisher
Chairman & CEO
Eastman Kodak Company

John F. Welch Jr.
Chairman & CEO
General Electric Company

James E. Perrella
Chairman, President & CEO
Ingersoll-Rand Company

Raymond V. Gilmartin
Chairman, President & CEO
Merck & Company, Inc.

W. Wayne Allen
Chairman & CEO
Phillips Petroleum Company

D. H. Davis Jr.
Chairman & CEO
Rockwell International Corporation

Thomas J. Engibous
President & CEO
Texas Instruments Incorporated

Philip M. Condit
Chairman, President & CEO
The Boeing Company

Joseph T. Gorman
Chairman & CEO
TRW Inc.

George David
Chairman, President & CEO
United Technologies Corporation

WHAT IS THE OECD ANTIBRIBERY CONVENTION?

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions creates an international anti bribery system that obligates signatory countries to enact domestic laws to combat foreign bribery.

- The United States, which has had such a law since 1977, will no longer be alone once the Convention is ratified and implemented by the parties.
- Thirty-three countries have joined this historic Convention. Those countries included the 29 OECD members (United States, U.K., Japan, Canada, France, Germany, Italy, Korea, Mexico, Switzerland, Australia, Austria, Belgium, Czech Republic, Denmark, Finland, Greece, Hungary, Iceland, Ireland, Luxembourg, The Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Turkey) and five other nations (Argentina, Brazil, Bulgaria, Chile and the Slovak Republic).
- The OECD Convention will level the international trade playing field since our major trading partners are now obligated to enact foreign anti bribery laws.

Similarly to the Foreign Corrupt Practices Act ("FCPA"), the OECD Convention-

- *provides* that parties shall make it a crime "for any person intentionally to offer, promise or give any undue pecuniary or other advantage ... to a foreign public official ... in order to obtain or retain business or other improper advantage in the conduct of international business;"
- *applies* to corrupt payments to office-holders, legislators, and personnel of government controlled companies (so-called "parastatals");
- *recognizes* an exemption for small "facilitating payments;" and
- *requires* parties to enact accounting requirements for the purpose of preventing false or misleading accounting practices that can be used to bribe or to hide such bribery.

In order to ensure full and effective implementation, the OECD Convention also requires that the parties to the OECD Convention-

- *review* their current basis for jurisdiction and take remedial steps if they are not effective in the fight against bribery;
- *consult* when more than one party asserts jurisdiction;
- *provide* legal assistance to each other relating to investigations and proceedings and make bribery of foreign officials an extraditable offense; and
- *cooperate* in a follow-up program in the OECD to monitor compliance with the Convention

The parties to the OECD Convention have already agreed to an accelerated work plan to address several outstanding issues related to the Convention, including acts of bribery relating to foreign political parties, and coverage of foreign subsidiaries.

THE OECD ANTIBRIBERY CONVENTION
SUMMARY OF PROPOSED LEGISLATIVE CHANGES
TO THE FOREIGN CORRUPT PRACTICES ACT

The following five amendments to the Foreign Corrupt Practice Act ("FCPA") are needed to implement the recently-signed OECD Convention on Combating Bribery of Foreign Public Officials it International Business Transactions:

First an amendment to expand the scope of the FCPA to include payments made to secure "an improper advantage."

(The OECD Convention requires parties to cover payments made to "obtain or retain business or other improper advantage in the conduct of international business." While the FCPA has been interpreted broadly to include this, the amendment is necessary to ensure that the other parties do not doubt U.S. implementation of the Convention.)

Second, an amendment to expand the scope of the FCPA to cover foreign persons for acts committed while in the United States.

(The OECD convention requires parties to cover prohibited acts by "any person." The FCPA currently covers only issuers, as defined in the 1934 Securities Exchange Act, and domestic concerns.

Third, an amendment to expand the FCPA definition of foreign official to include officials of public international organizations.

(The OECD Convention, unlike the current FCPA, includes officials of international agencies within the definition of foreign public official.)

Fourth, an amendment to provide for jurisdiction over the acts of U.S. persons that take place wholly outside the United States.

(The OECD Convention calls on parties to prosecute their nationals for offenses committed abroad. The FCPA currently covers only issuers as defined in the 1934 Securities Exchange Act, and domestic concerns who use the mails or other means of interstate commerce.)

Fifth, an amendment to the FCPA's penalty sections relating to issuers and domestic concerns to ensure that penalties for non-U.S. citizen employees and agents of issuers and domestic concern accord with those of U.S. citizen employees and agents.

Under the current FCPA, non-U.S. citizen employees and agents of issuers and domestic concerns are subject only to civil, rather than criminal, penalties.)

This package of amendments will bring the FCPA into conformity with the OECD Convention and lead the way for implementation of the OECD Convention by the other parties.

THE OECD ANTIBRIBERY CONVENTION A U.S. VICTORY OVER INTERNATIONAL CORRUPTION

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions is a major victory for the United States in its battle against international bribery and corruption.

- Since the Foreign Corrupt Practices Act ("FCPA") was adopted in 1977, the United States alone has prohibited foreign bribery.
- Without U.S. leadership and perseverance, 33 other countries would not have joined the OECD Convention on December 17, 1997.

The OECD Convention is the result of bipartisan cooperation and the collaborative efforts of the Congress, the Executive Branch and the private sector.

- In the 1988 Omnibus Trade Act, the Congress directed the President to negotiate an international agreement in the OECD on the prohibition of overseas bribes.

The OECD Convention will level the international trade playing field.

- The U.S. Department of Commerce estimates that between 1994 and 1996 there have been almost 100 cases of foreign firms using bribery to undercut U.S. firms' efforts to win international contracts worth over 45 billion.

Speedy ratification of the OECD Convention is needed to persuade other parties to ratify the Convention quickly.

- Some of the other parties are not as committed to the Convention as the United States and are likely to use a delay in U.S. ratification to undermine the Convention.

Speedy implementation of the OECD Convention is also necessary to show the other parties that the United States takes its obligations under the Convention seriously and expects other parties to do the same.

- Since the Convention's effectiveness depends on the adoption of international antibribery laws by the other parties, implementation by the United States is necessary to lead the way, substantively and politically, for implementation of the Convention by the other parties.

Because the FCPA is already in force in the United States, only minor amendments are necessary to bring it into line with the OECD Convention.

- A summary of proposed legislative changes to the FCPA is attached.

Senator SARBANES. I just want to quote briefly one paragraph of it which says: "Speedy ratification and implementation of the OECD Convention by the United States is an absolute imperative in order for the Convention to succeed. Some of the other parties are not as committed to the Convention as the United States and are likely to use a delay in U.S. ratification to undermine it. Speedy implementation of the OECD Convention is also necessary to show the other parties that the United States takes its obligations under the Convention seriously and expects other parties to do the same. Since the Convention's effectiveness depends on the adoption of international anti-bribery laws by the other parties, implementation by the United States is necessary to lead the way, substantively and politically, for implementation of the Convention by other parties."

Mr. Secretary, you touched on that, but I want to develop that a little bit because I think we need to sort of do what we can to sort of break the Congress out of the mode of saying, well, we will get to it. It is not controversial. It obviously serves our interests, and at some point we will go ahead and approve this thing.

I think it is important—well, how important is it—let me put it to you this way—that we act quickly and promptly and at the head of the line as an impetus or as a motivation for others to follow through so we really can get this thing into place by the end of this year?

Mr. EIZENSTAT. It is really critically important. Every day that we delay is another contract lost, another bribe being paid by a foreign company to get a contract.

The way the entry into force operates is that if we are to meet this end of 1998 target date, then 5 of the 10 largest OECD trading partners, which themselves represent 60 percent of the combined total exports of those 10 countries, have to deposit their instruments of ratification. If we are to meet this by the end of 1998 and encourage Japan, France, Germany, Korea, and others, we have to act and we have to show leadership. This has, after all, been our baby in a sense. We have been pushing this for a decade so that we need to show leadership here.

If we cannot get it done, then the entry into force would occur in 1999 if any two countries ratify, but that would mean the delay of a full year. Again, we would have another $15 billion to $30 billion in bribes paid, more contracts lost, and more jobs at risk in the United States.

Senator SARBANES. Well, I guess the point I am trying to get at, it is not only important that we do it by the end of 1998, but we need to do it now, so to speak, so it serves as a prompting——

Mr. EIZENSTAT. Exactly. If we do not do it now, then the other countries will not even come close to meeting the end of 1998. Everyone is looking to us.

Senator SARBANES. Right.

Mr. EIZENSTAT. If we do not act, they will delay.

Senator SARBANES. Now, let me ask this question about the plans for future expansion. We have got these OECD countries, which are leading developed economies, but I notice there are a fair number of fairly large economies around the world that are not participating in it. Now, they may be somewhat less developed, but they still are developed countries and significant players in the international economic scheme.

Will they kind of move into what they perceive a vacuum and start engaging in these practices in order to gain an advantage? Or is there a possibility of expanding this to bring in other such countries?

Mr. EIZENSTAT. We are going to make a major effort to expand it, and I believe that the momentum, Senator, which is being created, this sea change to which I alluded, is occurring worldwide. If I may just give you some examples. There are already five non-OECD countries who have agreed to ratify this, three in Latin American, Brazil, Chile, and Argentina. Bulgaria and Slovakia have also agreed to do so. We are going to put a major multilateral effort on to get other major economies, but the fact that we already

have so early on five non-OECD countries to go with the 29 that we have means that we will be covering with the 34 countries about 75 percent of all the trade in the world.

Senator SARBANES. Well, Mr. Chairman, I see my time is about to expire. I may not be able to stay for the second panel to hear Mr. Heimann from U.S. Transparency International. I do just want to say a word about the work they are doing.

This whole transparency movement worldwide is extremely important in my judgment. What is happening is we see that this issue of corruption I think is a looming problem on the international scene and it undermines governments. It obviously affects the legitimacy of political actions, and the Transparency people, not only in this arena but in other arenas as well, have been doing very good work in trying to develop ways to attack this. It is really a cancer in the international body politic, this growing corruption problem and the lack of legitimate standards.

I will not be here for that panel but I wanted to make that observation about the work of U.S. Transparency International.

Mr. EIZENSTAT. Senator, may I just say that we have worked very closely with Transparency International for years now not only in this area of anti-bribery, but in general, the whole issue of rule of law and transparency, they have been really critical in, and they deserve a major pat on the back, as you have given them.

Senator HAGEL. Senator Sarbanes, thank you.

Senator Robb?

Senator ROBB. Thank you, Mr. Chairman. Again, I have the same scheduling difficulty that Senator Sarbanes has, and I would like to once again join him in his commendation for the Transparency efforts because I will not be able to remain for that.

Very briefly, Secretary Eizenstat, let me ask you a general question first.

The difficulty, it seems to me, that we have—and we allude to it, but I am not sure that we have discussed it sufficiently—is the culture of bribery which we clearly see as bribery and has frustrated U.S. companies and officials and others who view the transparency and the rule of law that we do, and yet there are a number of countries that, from the very beginning of their business practices, have simply viewed it differently. We do not agree with it all but we do not understand it. But some view what we see clearly as bribery as a cost of doing business, a middleman, blackmail, hush money. There are a lot of different ways to characterize it, but it has been so fully ingrained in the culture that it is very difficult not to contend with that practice no matter how many laws, treaties, or whatever we come up with.

Is it your belief that this particular treaty will make major inroads into changing the culture so that the international community does not have to continue to deal with something that is culturally ingrained and viewed differently than we see in very black and white terms here but is seen differently in some other nations?

Mr. EIZENSTAT. Your question is an important one. I think that there has been a culture which has accepted and even encouraged this as long as the bottom line was getting a contract.

I think one of the prime reasons we have seen the Europeans come around on this is not only the bipartisan urging that we have

had for a decade, but it is the fact that their own corporations realize that this is self-defeating. So, I think that there is a change in culture and that there will be, as a result, effective enforcement because the major corporations there recognize that they need an external constraint so they can say to the corrupt foreign official, look, our laws now prevent this, do not ask us. It allows them to put a shield up. So, I think that in many ways we are going to see a change in culture. We are already beginning to see it and this will give them an excuse in effect to avoid doing what they would prefer not to do now.

Senator ROBB. It seems to me that that in many ways is the ultimate challenge that we face, and I share your hope that we can change that culture.

One specific question has to do with foreign subsidiaries of U.S. companies and whether or not U.S. citizens who work for foreign subsidiaries and are in fact bound in most cases legally by the laws of the foreign government in which their subsidiary resides would be covered and whether or not we should include this in the Foreign Corrupt Practices Act.

Mr. EIZENSTAT. The answer is yes. First of all, we are toughening up the treatment of foreign nationals in the United States under the Foreign Corrupt Practices Act. Now our citizens are subject to criminal penalties if they engage in a bribe, but a foreign national residing in the United States is only subject to civil penalties. That would change under the convention and under the changes we are suggesting for the Foreign Corrupt Practices Act.

In addition, the foreign subsidiaries of U.S. firms would be liable under the Foreign Corrupt Practices Act for acts they committed in the United States, and U.S. nationals employed by foreign subsidiaries could also be held liable for acts of foreign bribery committed anywhere. So, it is quite extensive.

In that sense, if I may, Senator Hagel, you asked about the facilitation payments. No payment to obtain or retain benefits, regardless of what it is called, whether it is an agency, a commission, a consulting fee, would be exempt from prosecution either under our Foreign Corrupt Practices Act or under this new convention.

Senator ROBB. Thank you, Mr. Secretary. I see my time has expired.

This is not a particularly hostile committee into which to bring this, and I join others in thanking the chairman of the full committee for his prompt effort to bring this before the bribery and I hope before the full Senate so that we can take appropriate action as quickly as possible.

Thank you, Mr. Chairman.

The CHAIRMAN [presiding]. Senator Feingold?

Senator FEINGOLD. Mr. Chairman, let me begin by thanking you for bringing this treaty so quickly before the committee. We all agree it is very important and I am very grateful for that.

Mr. Secretary, my thanks to you for your presentation, your expertise, and your leadership on this issue.

I am interested in this issue of the tax deductions for corporate bribery. You mentioned that there was every intention to move forward to make sure the countries that we are working with here ac-

tually eliminate the tax deductibility of these bribes. But as I understand it, it is not actually part of this convention.

Can you tell me what specific steps you expect to occur and over what time frame so that this could actually be accomplished, the elimination of the deductibility?

Mr. EIZENSTAT. Yes. As you pointed out, one of the grossest and most pernicious practices is actually permitting bribes to be deducted in some countries as a business expense. One of the first formal actions under our anti-bribery agenda in the OECD was the approval in 1996, Senator, of a recommendation that OECD member countries reexamine their tax laws with a view to denying tax deductibility of bribes.

At that time, 15 of the 29 countries indicated that bribe payments were not tax deductible, but of those which claimed the need for legislation to end the practice, Denmark, Norway, and Portugal have moved quickly to end tax deductibility. France has now passed the necessary legislation contingent on the entry into force of this convention to do so. Nine others, including Germany, Belgium, Luxembourg, the Netherlands, and several others have begun the process of changing their legislation, and several have been spurred on by the conclusion of this convention. Now, only Iceland among OECD member countries has yet to indicate the course it will take.

So, we think that the passage of this convention will act as a further spur to get countries to do what they committed to do in 1996 which is to pass legislation disallowing deductions for bribes.

Senator FEINGOLD. Thank you.

With regard to another point you made and that still arises outside of the four corners of the agreement is the question of foreign public official not including the definition of some political party officials. Can you just say a little bit about why the parties were unable to agree on the extent to which political party officials would be covered and how can we make further progress in this regard?

Mr. EIZENSTAT. One of the last issues as we were negotiating this was to try to include political officials and political parties. We pressed very hard for this, and as I indicated, we did make a down payment. In effect, if they act as a conduit to the public official or if they are directed by the public official to take a bribe in lieu of the public official getting it, they would be covered.

But quite frankly, a number of the European countries were not willing to make the necessary change to fully cover political parties. They did agree, again, on the down payment that I have indicated, and they also agreed to take it up in 1999. But it was their objections that prevented this being more fully covered and I think it is the next challenge that we face.

Senator FEINGOLD. Very good. I, as you know, serve on the subcommittee having to do with African issues on this committee, and I understand that the Organization of African Unity is holding its annual summit this week. Have we made any progress with respect to encouraging that organization to establish the kind of anti-bribery standards that we are talking about here?

Mr. EIZENSTAT. Not as much certainly as we have done in the OECD or as we have done in the OAS where all the countries of this hemisphere that are in the OAS Convention, which is also be-

fore Chairman Helms and the Senate, have agreed not only on anti-bribery action but much broader action in terms of the way public officials could amass wealth through undercover methods by money laundering and the like. I have to say with respect to the Organization of African Unity we have not made that kind of progress, but we are determined to do it.

Also, by working with international financial institutions, including the African Development Bank, to make sure that their own lending practices are such that they are not part of a corrupt practice, this will help all countries in Africa as well.

Indeed, one of the amendments that we will be seeking as a result of the convention to our own Foreign Corrupt Practices Act would for the first time cover officials of international organizations who have heretofore not been subject. So, they could have accepted a bribe and not been penalized. For the first time, we will be penalizing any official from any international organization that is party to a bribe as well, and this will help I think set a tone in Africa.

But we need a lot more work there. There is a great deal of corruption in many African countries, and we know that this is something we need to work on.

Senator FEINGOLD. I assume that I and other members of the committee could help by raising this issue with African heads of state when they come visit with us.

Mr. EIZENSTAT. Absolutely, because I think they realize that this is a detriment to their own economic development.

Senator FEINGOLD. Thank you, Mr. Secretary and Mr. Chairman, very much.

The CHAIRMAN. Mr. Secretary, I think this is the first time I have been tardy in arriving at a committee meeting, and I will explain by expressing the opinion that perhaps the Lord wanted to infuse me with a bit of humility this morning.

This was a day for us to have the yardman, who is a very fine, old, retired gentleman who just does it for his friends for a little bit of money. It was hot, and on days like this, I carry him some ice water. I was going out with the big glass of ice water and I heard the front door shut behind me.

Mrs. Helms is at the beach. Everybody on my street is at the beach except for the two or three who are working. I roamed up and down that street trying to find a telephone. Finally, the yardman took me down to a shopping center and I called the office and they brought me a key.

I apologize for being late, but I do thank you, Senator Hagel for filling in for me.

Mr. EIZENSTAT. Mr. Chairman, if I may say, the only thing important that you missed by being late is my profuse compliments to you for holding this hearing so promptly.

The CHAIRMAN. Well, I will get them in print and I will frame them.

I might say about the Secretary, he has one of the greatest academic records at the University of North Carolina, of which Mrs. Helms is also an alumnus. She was there a few years before him, but she refuses to let me say what year.

But in any case, thank you for coming and I thank you Senator Hagel for helping me in my great hour of need.

I am going to summarize a statement that I was going to make at the start of the hearing because I want it to be a part of the record. Obviously, this committee meeting was scheduled to consider the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed by the United States and 33 other nations in December and sent to the Senate on May the 4th of this year.

Now, this being just June the 9th, I hope it is a measurement of this committee's efforts to expedite consideration of treaties when the administration shows a degree of cooperation in the process. Of course, you are responsible for that, Secretary Eizenstat, and I appreciate it. We are having some difficulty with some other treaties that have been hanging fire, and I am happy to use a little bait and switch with the administration, hoping that they will send those treaties to the Senate too. But that is neither here nor there.

The committee's attention to this treaty reflects the somewhat urgent need to push—and I use that word advisedly—to push our European allies and other countries to enact laws that criminalize bribery of foreign officials by their citizens overseas. Now, this treaty, of course, demands enactment of such laws by every country ratifying the treaty. We may not have a whole lot of influence with some of those countries, but those receiving foreign aid will certainly have an encouragement I will say to them here—and I hope they will notice.

For more than two decades—20 years or more—the United States has unilaterally imposed such restrictions on its businesses through the Foreign Corrupt Practices Act. That legislation came into being largely because of growing incidents of U.S. companies engaging in bribery overseas during the 1970's that brought shame and embarrassment to the United States. It certainly did to me.

When the Foreign Corrupt Practices Act became law, many critics claimed it to be "Pollyanna-ish," an example of the United States enforcing its values on the rest of the world. We always hear that when we stand up for what is right. Some sources will say, well, "you cannot control them, you cannot control various things," but we can try and we can at least take a position ourselves as to what is right and what is wrong.

U.S. businesses are recognized worldwide today as among the cleanest, and I hope that point has been made this morning. In many cases, it also makes the United States businessmen and women more innovative and safer because criminals around the world now know that U.S. businesses must comply with anti-bribery laws.

At the same time, U.S. companies have lost business to European and other OECD member companies who continue to bribe foreign officials to win contracts. Some estimate this amount to be at least $100 billion. Is that correct?

Mr. EIZENSTAT. Well, even on an annual basis, Senator, it is about $30 billion. So, if you multiply that by a few years, you get up to that level.

The CHAIRMAN. So that is what U.S. businesses have lost in sales over a period of time.

Even more objectionable than the bribery itself is the fact that European governments, such as the French, actually subsidize such activities by making these bribes tax deductible.

Now, this was described in a January 8, 1998 article in the *New York Times*, which said that the family of Prime Minister Bhutto of Pakistan enriched itself through foreign payoffs by European companies while Mrs. Bhutto was serving as Prime Minister of Pakistan.

I was a little bit surprised and dismayed about that, I might say parenthetically, because we had Mrs. Bhutto for a coffee before the committee and extended hospitality to her. She is a delicate, charming little lady, who, at the time, had just given birth to I think her second child. Maybe it was the first.

At that time I got a lecture every second she was sitting next to me about you know who, India. She talked about India, India, India so much that when I took her up to the Senate chamber to present her to the Senate, I hate to confess this, but I slipped in introducing her to the Senate as the Prime Minister of India.

I corrected that quickly, but the deed was done and of course all of the news media noticed that—and they should have.

Well, I am going to ask that the rest of my statement be included in the record and say that there is a problem—and this hearing and the testimony by the Honorable Secretary indicates that there is a problem—that we have got to face one way or another. We can ignore it at our own peril. Bribery affects countries that are least able to resist the appeal of bribes, as they do not pay their workers livable wages. It is also clear that this treaty will be scarcely more than a band-aid on the problem of corruption if all countries ratifying the treaty do not put in place tough laws that deter their companies from engaging in bribery overseas.

So, as a condition to Senate advice and consent to ratification, I am going to urge, and even demand, stringent reporting requirements in the treaty's resolution of ratification because I want the Senate to be constantly and fully informed of the actions of all treaty ratifiers to both pass and enforce tough domestic laws that criminalize bribery overseas.

The United States has spent hundreds of billions of dollars—when you count the fact that it has borrowed money on which we paid interest—on foreign aid over the past half century. Often aid is given to countries that are all the way at the top of the list in terms of corruption and graft. Yet, no amount of assistance can help a country whose officials steal from their own people. As long as this corruption exists, that we know is wrong, and we do nothing about it and even make excuses, saying, well, we cannot do anything about it, then we are part of the problem; we are not a part of the solution.

[The prepared statement of Senator Helms follows:]

STATEMENT OF CHAIRMAN HELMS

This Committee meeting has been schedule to consider the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, signed by the United States and 33 other nations in December, and sent to the Senate on May 4, 1998.

This being June 9, this is a measurement of the Committee's efforts to expedite consideration of treaties When the Administration shows a degree of cooperation in

the process. The Committee's attention to this particular treaty reflects a somewhat urgent need to push our European allies, and other countries, to enact laws that criminalize bribery of foreign officials by their citizens overseas. (This treaty demands enactment of such laws by every country ratifying the treaty.)

For more than two decades the United States has unilaterally imposed such restrictions on its businesses through the Foreign Corrupt Practices Act—legislation that came into being largely because of growing incidents of U.S. companies engaging in bribery overseas during the 1970s that brought shame and embarrassment to the United States.

When the Foreign Corrupt Practices Act became law, many critics claimed it to be "Polly Anna-ish" legislation, and an example of the United States enforcing its values on the rest of the world. Today, 20 years later, those critics have been silenced. U.S. businesses are recognized worldwide as among the cleanest. In many cases, it also makes U.S. business men and women more innovative, and safer because criminals around the world now know that U.S. businesses must comply with anti-bribery laws.

At the same time, U.S. companies have lost business to European and other OECD member state companies who continue to bribe foreign officials to win contracts. Some estimate this amount to be as high as $100 billion in lost sales. Even more objectionable than the bribery itself is the fact that European governments, such as the French, actually make such bribes tax deductible.

Consider the case described in a January 8, 1998, article in the *New York Times.* According to this account the family of Prime Minister Bhutto of Pakistan enriched itself through foreign payoffs by European companies, while Mrs. Bhutto was serving as Prime Minister of Pakistan.

Specifically, the article detailed how a French military contractor agreed to pay Mrs. Bhutto's husband $200 million in order to get a $4 billion jet fighter deal. The article also pointed to a leading Swiss company that paid millions of dollars between 1994 and 1996 to offshore companies controlled by Bhutto family members in order to gain business advantages.

One need only look at recent events in Indonesia and the Suharto family's corruption to see how such bribery and graft can ravage a society and undermine political and economic stability. China too is grappling with increased corruption as the old communist party regime comes to grips with a more market-oriented economy. One recent article in a Chinese paper cites a poll of Asian businessmen that ranked China as first in Asia for rampant corruption. The largest growth area for their corruption, interestingly, is in the political field, which is not covered by the treaty pending before us today, but which is covered by the U.S. Foreign Corrupt Practices Act. It seems that the Chinese have taken to using the same techniques in the U.S. that foreign businessmen use in China.

So, it's clear there is a problem. Bribery affects countries that are least able to resist the appeal of bribes, as they do not pay their workers livable wages. And it's also clear this treaty will be scarcely more than a band-aid on the problem if all countries ratifying the treaty do not put in place tough laws that deter their companies from engaging in bribery overseas.

I must admit to some degree of skepticism as to the will of all of the treaty's 34 signatories to implement and fully enforce commitments made under the treaty. One need only look to the domestic laws of countries like Germany and France that still permit their companies to deduct bribes as a legitimate business expense. Despite the fanfare of signing an OECD resolution last year promising to prohibit such deductions, there's been little progress in those countries to rewrite their laws to prohibit such deductions.

So, as a condition to Senate advise and consent to ratification, I shall demand stringent reporting requirements in the treaty's resolution of ratification that will fully inform the Senate of the actions of the treaty ratifiers to both pass and enforce tough domestic laws that criminalize bribery overseas.

Let me conclude with this observation: The United States has spent hundreds of billion in foreign aid over the last 50 years often to countries that rank at the top of the list in terms of corruption and graft. No amount of assistance can aid a country whose officials steal from their own people. If OECD nations continue to turn a blind eye to bribery by their own companies, they not only condone such corruption, they are party to it.

We will now hear from the Honorable Under Secretary of State, Stu Eizenstat, who will be followed by Mr. Fritz Heimann, Chairman of the U.S. branch of Transparency International, and counselor to the general counsel of General Electric.

The CHAIRMAN. Let me ask a question, since I brought up Madam Bhutto.

When the United States suspended the delivery of the F–16 fighter aircraft to Pakistan some years back, that was in response to Pakistan's pursuit of nuclear weapons, was it not?

Mr. EIZENSTAT. Yes, sir.

The CHAIRMAN. Now, that of course culminated in you know what last month, Pakistan succeeded in its nuclear test.

Now, this past January, the *New York Times* reported that the Government of France not only failed to support U.S. antiproliferation efforts toward Pakistan, France tried to win the contract to deliver French-made fighter aircraft by giving a $200 million bribe to the husband of Madam Bhutto. Have you discussed that this morning?

Mr. EIZENSTAT. No, sir.

The CHAIRMAN. Well, I want us to ventilate that just a little bit so it would be made a matter of unmistakable record because we will always have Senators who are so busy with their own committee work they do not have time to look at others, and we are all guilty of that to some extent.

Now, because the French bribe went to the Prime Minister's husband and not to the Prime Minister herself would that be prohibited by this treaty?

Mr. EIZENSTAT. It is an important question, Mr. Chairman. We are aware of the allegations that have been reported on this. One of the interesting points is that in the story it notes the apparent care taken to avoid violation of existing French domestic corruption laws in the sense that, according to the story, no French nationals were permitted to participate in the bribe because that would have involved domestic French law.

When France ratifies this convention and enacts a criminal law against the bribery of foreign officials, such a transaction could be illegal then under French law, and that is the value of the convention.

Now, with respect to the payment of an official spouse, although this would not be a *per se* violation either of our own Foreign Corrupt Practices Act, as it now exists, or of the convention, it would be covered under two circumstances.

One, again if the allegations are correct—and these are only allegations—if the official was aware of the bribe and directed the payment to his or her spouse to try to avoid it, that would be covered.

Second, it would also be covered if the official had indirectly benefited, even if she or he did not directly benefit.

So, in those two ways a spouse could be covered, and therefore this, if it were true, might have been covered by the convention and, if we amend our Foreign Corrupt Practices Act accordingly, by our own act as well.

The CHAIRMAN. Do you think we ought to think about a modification to make it unmistakable that it would be unlawful?

Mr. EIZENSTAT. Well, it would be I think useful in terms of legislative record perhaps under our own law, but because the convention did not quite go that far—it only covered spouses in the two situations—I think rather than reopening the whole convention, this ought to be one of the followup issues. We do have some followup in terms of political parties which were not fully covered, and this I think would be a good point to do as a followup in 1999

to see if we could cover this more clearly. I think your point is well taken.

The CHAIRMAN. I tell you what, let us both think about that, about how we can make it applicable one way or another—either by a sidebar or some other mechanism.

Do the French continue to allow its companies a tax deduction for such bribes?

Mr. EIZENSTAT. Well, you are quite right in pointing this out because France and Germany both do permit tax deductibility. France has now passed the necessary legislation to end that, and one of the values of, Mr. Chairman, your leadership in calling such an early hearing is that that new legislation will go into effect barring tax deductibility for the first time as soon as this convention enters into force. So, that pernicious practice in France would be ended.

The CHAIRMAN. Good.

Well, let us see. How many of our major trading partners allow their companies to deduct bribes from their taxes?

Mr. EIZENSTAT. Well, in 1996, Mr. Chairman, when we first began working on the tax deductibility item, there were then I think 26 members of the OECD. It was before its expansion to 29. Fifteen indicated that bribe payments were not tax deductible. That would have meant that around a dozen did permit in some form or another tax deductibility.

I might also mention, in addition to France, that Norway, Denmark, and Portugal, which evidently permitted tax deductibility, have now ended this practice by moving quickly to pass legislation, and nine other countries, Australia, Austria, Belgium, Germany, Luxembourg, the Netherlands, New Zealand, Sweden, and Switzerland, have begun the process of ending tax deductibility. Clearly this convention, which you have championed for so long and again which you have moved us to negotiate so quickly, once this goes into force, it will be a further spur to these nine countries as well.

The CHAIRMAN. I do not tell the media how to do their business, but did you guys get all of those?

Because I want to give wide circulation to the list he just read.

I am going to wind up and I have a few questions in writing that I will offer because you have been here for a long time.

More than a year ago, the OECD countries signed on to a nonbinding resolution to eliminate tax deductions for bribes. Do you expect that these deductions will finally be eliminated now as a result of treaty?

Mr. EIZENSTAT. We hope that this will be one of the things that will be taken up in the next spring meeting in 1999. I do believe, Senator, that we will see these nine countries and several others in tax deductibility and that this convention will be a true spur to it. So, I really hope that by the end of next year, virtually all of our major trading partners and competitors will have ended tax deductibility and will have ratified this convention and for the first time criminalized in their own laws the kind of bribery we have for 20 years criminalized in ours and put our own companies at a competitive disadvantage in doing so.

The CHAIRMAN. Well, let us make a little pact here, that your side and our side work together in every way possible to make it happen.

I must ask you about the State Department. Are you prepared to monitor this situation?

Mr. EIZENSTAT. Yes, sir, we are. This is really one of our highest priorities, and we have set up an anti-bribery working group in the OECD, in which we will be very active players, to monitor this and make sure that the necessary legislation is passed by our European friends.

The CHAIRMAN. Good.

Now, maybe one of the other Senators did ask this. The top five exporting countries, after the United States, are Germany, Japan, France, United Kingdom, and Italy. Do you think they will have fully ratified and fully implemented this treaty by December 1998, as they pledge to do?

Mr. EIZENSTAT. I believe that they will if we do so. Frankly, everybody is sitting back and waiting for us to act. If we show the kind of leadership that you clearly want us to show, and you are showing, I believe that they will.

The CHAIRMAN. Well, I am going to encourage the majority leader to put this on the Senate calendar as soon as the committee acts on the treaty.

Mr. Secretary, I often say that the best speeches I make are made by me when I am driving home. I say, gee, why did I not say so and so and so and so. Let me give you a chance to close the record. Do you have anything that you would like to add that has not been addressed?

Mr. EIZENSTAT. I will probably think of it when I am driving home too. But right now none occurs to me.

The CHAIRMAN. Thank you so much for being here, and I apologize for my tardiness.

Mr. EIZENSTAT. Thank you very much, Mr. Chairman.

The CHAIRMAN. I also apologize to Mr. Heimann who is the Chairman of U.S. Transparency International. He sat patiently and if he had a baseball bat, I suspect he would work on me.

But we will go as rapidly as you would like, and if you will step forward, sir.

Mr. EIZENSTAT. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Heimann, if you will have a seat. Thank you very much for coming this morning. I hope you will not have a bad opinion of us because I was so tardy, but good Senators were here.

If you have a prepared statement, I guarantee you that will be included in the printed record and whatever you want to do about it.

STATEMENT OF FRITZ F. HEIMANN, CHAIRMAN, TRANSPARENCY INTERNATIONAL USA, WASHINGTON, DC

Mr. HEIMANN. Mr. Chairman, I am very pleased to testify on behalf of Transparency International. TI is a coalition of business and other groups combating international corruption and now has national chapters in over 70 countries. The U.S. chapter is supported by more than 30 major U.S. companies.

I am counselor to the General Counsel of General Electric and also serve as Chair of TI-USA and have participated actively in the anti-corruption work at the U.S. Council on International Business, Business Roundtable, and the International Chamber of Commerce. Thus, I have very extensive contact not just with American but also with foreign businessmen on the subject.

I am here to urge prompt action by the Senate to ratify the convention. The convention would take bribery out of the equation in international business. This would level the playing field between U.S. companies and foreign competitors, resulting in more orders for American companies, more jobs for American workers. The convention would also contribute significantly to other key U.S. objectives, helping to overcome the effect of corruption on international development programs and on the stability of struggling democracies in Eastern Europe and elsewhere.

The convention has the overwhelming support of U.S. business and of all the major business organizations, including the Business Roundtable, the U.S. Council on International Business, the National Foreign Trade Council, NAM, and the ECAT.

My testimony will cover three issues: Why corruption has finally become an international issue, why the convention provides a solid framework for combating corruption, and what steps we must take to make sure that the objectives of the convention are achieved.

In the last few years, there has been a remarkable transformation in the willingness of the international community to confront the cancer of corruption. This is a development of which the United States can be justly proud.

Twenty-one years ago, the Foreign Corrupt Practices Act was passed unanimously by the Senate and by the House. This was an historic first step, the first time any country made it a crime to bribe foreign officials. We expected that other countries would follow the American example. After all, the same bribery scandals which prompted the Congress to act had created major reverberations in Japan, Italy, and Indonesia, and other countries. This expectation proved wrong. Not a single country curbed foreign bribery.

Since the FCPA went into effect, American companies have lost orders amounting to many tens of billions of dollars to foreign competitors who remained free to pay bribes. In many countries, including Germany and France, bribes continue to be tax deductible business expenses. In other words, their governments not merely condone but effectively subsidize bribery. Notwithstanding the failure of other countries to act, the Congress refused to repeal or water down the FCPA.

In the past 5 years, the tide has finally begun to turn. There is now widespread recognition that international bribery should no longer be tolerated. The changes reflect the following factors.

First, the end of the cold war has resulted in the spread of democratic governments around the world. Political processes have become much more open. There is more freedom of the press, more independent prosecutors, and judges. As a result, corruption is much harder to cover up.

Failure of international development programs to help the world's poorest countries is now largely attributed to corruption.

The Asian crisis has discredited the claim that rapid economic growth can continue notwithstanding endemic corruption.

Massive bribery scandals in highly industrial countries, such as Italy, Japan, France, Belgium, many others, have demolished the argument that corruption is only a problem in the developing world.

International business leaders have increasingly recognized that a global economy requires common rules and that these rules must be morally defensible.

Finally, Transparency International has grown with extraordinary speed and has helped raise public awareness of the costs of corruption.

These factors have produced a tidal change in public perception around the world. There is now widespread recognition that action against corruption is required. The U.S. is no longer a lone voice in the wilderness.

There are, of course, entrenched groups who oppose reform. Corruption obviously has powerful beneficiaries: Corrupt companies, corrupt officials, and a legion of middlemen. However, the prospects for reform have never been better.

The OECD convention is the most important achievement to date of the international drive for reform. The OECD provides an ideal forum for leveling the international playing field because its members include the home bases of practically every major international company.

The convention is the product of 4 years of very hard work. The U.S. Government deserves great credit for diplomatic skill, for forcefulness, and above all perseverance. In the early years, very few of us would have expected to be sitting here today advocating prompt action on the convention.

The convention provides a very solid framework for an effective international system. Secretary Eizenstat has already described the key provisions, as does my statement. Let me just summarize very briefly.

Bribery is very broadly defined, actually more broadly than in the FCPA.

The term "foreign public official" is also broadly defined and includes administrative, legislative, and judicial officials, whether appointed or elected. It also covers officials of government controlled companies.

I might add that I take a somewhat more optimistic view of the question of large gifts to spouses of Prime Ministers than the Secretary took earlier. The language of the convention clearly talks about direct and indirect gifts, gifts from third parties and other intermediaries, and gifts of the magnitude, Mr. Chairman, that you referred to I think would very easily be covered by the terms of the convention because I do not think anybody can reasonably argue that the Prime Minister's husband was given very large amounts of money simply because they liked the husband.

The convention also provides for more transparent accounting rules, for mutual legal assistance, including extradition, and establishes a monitoring and followup process to which I want to come back very shortly.

Like any agreement emerging from multi-party negotiations on a tight time schedule, the OECD convention is not perfect. However, a followup process has been established to address such issues as prohibition of improper payments to foreign political parties and treatment of foreign subsidiaries. Proposed changes will be taken up at next year's OECD ministerial.

The convention in its present form is a first-rate document that closely parallels the requirements of the FCPA. There is no reason to delay bringing it into effect promptly. Further improvements can obviously be made over time.

Agreement on the text of the convention by 34 nations represents a major breakthrough. However, three additional steps must be taken by national governments before the convention will have a practical impact on the conduct of international business: First, ratification by enough countries to meet the entry into force provision; second, passage of implementing legislation; and three, enforcement by national prosecutors.

All 34 governments have committed to seek ratification by the end of this year, a very challenging target. Prompt action by the U.S. Senate would provide an enormously helpful signal. Other countries are watching what we do. Any delay here would be regarded as a ready excuse for delays elsewhere. Without U.S. ratification, it would be practically impossible to meet the conditions for entry into force in 1998.

Passage of implementing legislation is a much bigger step in other countries than it is here. We only require small changes to conform the FCPA to the requirements of the convention. In other counties, making foreign bribery a crime requires broad, new legislation.

After implementing laws are passed, enforcement programs must be organized. This too is a major challenge. The history of corruption reform is full of anti-bribery laws that are never enforced.

It appears that most OECD members will ratify the convention this year. The critical issue for the future will be the quality of the implementing laws and the enforcement program.

The OECD monitoring program must make sure that consistent and effective results are achieved. This will not be easy because there are substantial differences in how the 34 legal systems work. It is important to forestall the development of major differences in how effectively foreign bribery is prohibited. This could lead to a lowest common denominator trend because governments would be reluctant to impose stricter prohibitions on their own companies than will be imposed on their competitors. This risk can be overcome provided that the monitoring program holds all parties to high standards.

We want to stress three issues which we consider essential for an effective monitoring program.

First, the effort to design and organize a strong monitoring program should proceed as quickly as possible. A clear message that all parties will be held to high standards must go out before any tendency to enact minimalist implementing legislation gathers force.

Second, monitoring should begin promptly even if it starts on an informal basis. To wait until 1999 after the convention enters into

force would run the risk that many countries will have enacted inconsistent implementing laws, which will be difficult to correct.

Third, we urge that the monitoring process should be open to inputs from the business sector and from civil society. It should not be limited to governments criticizing other governments behind closed doors.

Because the development of a strong monitoring program is so crucial to achieving the objectives of the convention, we suggest that this committee ask the State Department to provide periodic progress reports, and I am delighted, Mr. Chairman, that you are ahead of us with respect to that proposal.

To conclude, the convention will make foreign bribery a crime in the world's major exporting nations. It will significantly raise the standards for global competition, thereby improving American competitiveness and strengthening international development, market reforms, and democratization. The convention deserves strong support from your committee on both practical and moral grounds, and we thank you particularly for giving this subject such quick attention. Thank you very much.

[The prepared statement of Mr. Heimann follows:]

STATEMENT OF FRITZ F. HEIMANN

Mr. Chairman, members of the Committee on Foreign Relations, I am very pleased to be invited to testify on behalf of Transparency International. TI is a non-governmental organization committed to combating international corruption. It was launched in 1993 and now has national chapters in over 70 countries on every continent. TI-USA, of which I am chairman, is supported by a broad coalition, including more than thirty major American companies, labor, scholars, development experts, and many distinguished individuals. I have been a lawyer for General Electric for over four decades and serve as Counselor to the General Counsel. I also chair the working group on extortion and bribery of the U.S. Council on International Business.

I am here to urge prompt action by the Senate to ratify the OECD Convention to Combat Bribery of Foreign Public Officials. The Convention would take bribery out of the equation in international business. This would level the playing field between U.S. companies and foreign competitors, resulting in more orders for American companies and more jobs for American workers. The Convention would also contribute to other key U.S. objectives, by helping to overcome the effects of corruption on international development programs and on the stability of struggling democracies is Central and Eastern Europe and elsewhere.

The Convention has the overwhelming support of a broad coalition of major business organizations, including the Business Roundtable, the U.S. Council on International Business, the National Foreign Trade Council, the National Association of Manufacturers, and the Emergency Committee for American Trade.

My testimony will cover three subjects: (1) Why corruption has finally become a high-priority international issue; (2) Why the OECD Convention provides a solid framework for combating corruption; and (3) What steps must be taken to make sure that the objectives of the Convention are achieved.

I. WHY CORRUPTION HAS BECOME CRITICAL INTERNATIONAL ISSUE

During the past five years there has been a remarkable transformation in the willingness of the international community to confront the cancer of corruption. This is a development of which the United States can be justly proud, and for which the U.S. Congress deserves particular credit.

In 1977 the Foreign Corrupt Practices Act passed the Senate 87-0 and the House 349-0. The FCPA was an historic step, the first time any country made it a crime to bribe foreign officials. It was expected that other countries would follow the American example. After all, the same bribery scandals which prompted Congress to act had created major reverberations in Japan, Italy, the Netherlands, Indonesia and Honduras. This expectation proved wrong. Not a single country acted to curb foreign bribery.

Since the FCPA went into effect, U.S. companies have lost orders amounting to many tens of billions of dollars to foreign competitors who remained free to pay bribes.[1] In many countries, including Germany and France, bribes continued to be treated as tax-deductible business expenses. Foreign governments not merely condoned, but effectively subsidized foreign bribes. Notwithstanding the failure of other countries to act, the U.S. Congress refused to repeal or water down the FCPA and insisted on retaining the moral high ground. In the past five years the tide has finally began to turn. There is now widespread recognition that international bribery should no longer be tolerated. This changes reflects the following factors:

- The end of the Cold War has resulted in the spread of democratic governments around the world. Political processes have become more open and corruption is harder to cover up. There is more freedom of the press, more independent prosecutors and judges.
- Corruption has been identified as a major obstacle to the transition to democracy and market economies in Central and Eastern Europe.
- Much of the failure of international development programs to improve the economies of the world's poorest countries is now widely attributed to corruption. The World Bank, under the leadership of Jim Wolfensohn, has made corruption a high-priority issue.
- The Asian crisis has discredited the claim that rapid economic growth can continue notwithstanding endemic corruption. The IMF is making transparency a key element in its assistance programs.
- Massive bribery scandals in highly industrialized countries, including Italy, Japan, Korea, Spain, France and Belgium, have demolished the common excuse for inaction, that corruption is a serious problem only in developing countries. This has clearly created support for the OECD program.
- There is increasing recognition by international business leaders that a global economy requires common rules, and that these rules must be morally defensible. This has resulted in the development by the International Chamber of Commerce of strong Rules of Conduct to Combat Extortion and Bribery.
- Transparency International has grown with extraordinary speed and has helped raise public awareness of the costs of corruption. TI actively promotes the development of systemic reforms such as the OECD Convention.

These factors have produced a tidal change in public perceptions around the world. There now is widespread recognition that action against corruption is required. There are still entrenched groups who oppose reforms. Corruption obviously has powerful beneficiaries: corrupt companies, corrupt officials, and a legion of middlemen. However the prospects for reform have never been better.

II. Why OECD Convention Provides Solid Framework for Combating International Corruption

The OECD Convention is the most important achievement to date of the international drive for reform. The OECD is the ideal forum for tackling the supply side of international corruption because the industrialized countries that belong to the OECD are the home bases of practically all major international companies.

The Convention is the product of four years of hard work. The U.S. Government deserves great credit for diplomatic skill, forcefulness, and above all perseverance. The Convention provides a solid framework for an effective international system to prohibit bribery of foreign public officials.

- Bribery is broadly defined, more broadly than in the FCPA. The Convention prohibits not only bribes "to obtain or retain business" but also to secure "other improper advantage in the conduct of international business." This makes clear that bribery is prohibited not just in procurement of orders, but also in environmental and other regulatory procedures, in tax and customs matters, and in judicial proceedings.
- The term "foreign public official" is also broadly defined and includes administrative, legislative and judicial officials, whether appointed or elected. It also covers officials of government-controlled companies. This was a big win for the American negotiating team, over determined opposition, because in many countries procurement in key sectors such as transportation, telecommunications, energy and infra-structure projects is conducted by government corporations.

[1] The U.S. Department of Commerce estimates that 139 international commercial contracts valued at $64 billion may have involved bribery by foreign firms and that U.S. firms lost 36 of those contracts valued at $11 billion. The National Export Strategy, Fourth Annual Report to the U.S. Congress, October 1996, at 113.

- Sanctions for foreign bribery must be comparable to those for bribery of domestic officials, and must include effective criminal penalties or equivalent civil sanctions.
- The Convention also calls for establishing accounting and auditing standards, including prohibition of off-the-books accounts.
- Mutual legal assistance, including extradition, is required. This is important because investigations under the FCPA were often stymied by lack of cooperation from foreign governments. The Convention establishes a monitoring and follow-up process. This is of critical importance to assure effective and consistent implementation by 34 countries with major differences in their legal systems. The monitoring program will be conducted by the OECD's Anti-Bribery Working Group, and is expected to be modeled on the monitoring program of the Financial Action Task Force on money laundering. The FATF process is widely respected.

Like any agreement emerging from multi-party negotiations conducted on a tight time schedule, the OECD Convention has some shortcomings. A follow-up process has been established by which the OECD Anti-Bribery Working Group, the same body that drafted the Convention, will address such issues as prohibition of improper payments to officials of foreign political parties, and treatment of foreign subsidiaries. Proposed changes will be taken up at the May 1999 OECD Ministerial.

The Convention in its present form is a first-rate document that closely parallels the requirements of the FCPA. There is no reason to delay bringing it into effect. Further improvements can be made over time.

As noted before, the Convention tackles the supply side of corruption. The demand side—corruption by public officials—must also be addressed. The World Bank and others are working on procurement reforms, increased transparency, and other programs to combat demand-side abuses. The credibility of efforts from the North to promote reforms in the developing world will be greatly strengthened by the OECD effort to end foreign bribery by the industrialized countries.

III. Assuring Effective Implementation and Enforcement

Agreement on the text of the Convention by 34 nations represents a major breakthrough. However, three additional steps must be taken by national governments before the Convention will have a practical impact on the conduct of international business: (1) ratification by enough countries to meet the entry into force provision, (2) passage of implementing legislation, and (3) enforcement by national prosecutors.

All 34 governments have committed to seek ratification by the end of this year, a very challenging target. Prompt action by the Senate would provide an enormously helpful signal. Other countries are watching what we do. Any delay here would be regarded as a ready excuse for delays elsewhere. Without U.S. ratification it would be practically impossible to meet the conditions for entry into force in 1998.

Passage of implementing legislation is a bigger step in other countries than in the U.S. Here only relatively small changes are required to conform the FCPA to the requirements of the Convention. In other countries making foreign bribery a crime requires new legislation. After implementing laws are passed, enforcement programs must be organized. This is key challenge: the history of corruption reform is replete with anti-bribery laws that are never enforced. Effective enforcement requires political will, plus adequate resources.

While these three steps require action by national governments, the OECD monitoring program must make sure that consistent and effective results are achieved. This will not be easy because there are substantial differences in how the 34 legal systems work. It is important to forestall major differences in how foreign bribery is prohibited. Governments will be reluctant to impose stricter prohibitions on their own companies than will be imposed on their competitors. This could lead to a lowest common denominator trend. This risk can be overcome, provided the monitoring program provides clear assurance that all parties will be held to high standards.

The experience with the monitoring program of the Financial Action Task Force on money laundering indicates that the challenge of achieving effective and consistent enforcement can be met. The effort to organize the OECD monitoring is already under way. We want to stress three issues which we consider essential for an effective monitoring process.

- First, the effort to design and organize a strong monitoring program should proceed as quickly as possible. The message that all parties will be held to high standards must go out before any tendency to enact minimalist implementing legislation gathers force.

- Second, monitoring should begin promptly, even if it starts on an informal basis. To wait until after the Convention enters into effect would run the risk that many countries will have enacted inconsistent implementing laws, which will be difficult to correct.
- Third, the monitoring process should be open to inputs from the private sector and from civil society. It should not be limited to governments criticizing other governments behind closed doors. The monitoring process should be as transparent as possible in order to facilitate non-governmental inputs.
- Because the development of a strong monitoring program is so important to achieving the objectives of the Convention, we suggest that this Committee ask the State Department to provide periodic progress reports

IV. CONCLUSION

The Convention is part of on ongoing process at the OECD. This includes not only the monitoring program and the follow-up program to address unresolved issues, but also the implementation of several OECD anti-bribery initiatives dealing with issues other than criminalization, including the 1996 recommendation to terminate tax deductibility of bribes. The success of the OECD to date, coupled with the change in public opinion regarding corruption, provides assurance that the challenges ahead can be dealt with successfully.

To conclude, the Convention will make foreign bribery a crime in the world's major exporting nations. It will significantly raise the standards for global competition, thereby improving American competitiveness, and strengthening international development, market reforms and democratization programs. The Convention deserves strong support from your Committee on both practical and moral grounds. Finally, we want to express our appreciation to the Chairman for scheduling this hearing so soon after the Convention was transmitted, and for placing the Convention on the agenda for action on June 23.

The CHAIRMAN. Sir, this is an excellent statement. I just consulted with one of my bosses back here, and I find that unless I ask, request, or stipulate that the entire text be made available to every Senator, it would not be. But I assure you I have just given instructions that it be made available to every Senator.

Mr. HEIMANN. Thank you very much.

The CHAIRMAN.It is an excellent statement, and I commend you on it and I thank you for coming.

Now, I want to get you on the record for two or three things. I posed a question to Stu Eizenstat and I pose it to you now. Which European countries' corporations spend the most annually on bribes to foreign government officials? Is it France or Germany or Denmark?

Mr. HEIMANN. TI publishes an annual index rating countries based on the level of corruption, and I have been involved in lots of arguments with people how accurate is this index. One obvious problem you face in this field is that all bribery is conducted in secrecy. So, certainly in my experience at GE, whenever we lose a business, we run a lost business analysis. Very often the salesmen come back with reports saying we lost because the other guys paid a bribe. We have learned to apply a little bit of skepticism to that. It is just a wonderful excuse for losing business. So, my guess is that bribery is extremely pervasive in all these countries.

If you look at the history in the U.S., after the Foreign Corrupt Practices Act was passed, the SEC provided a period during which companies could report on prior bribes, and 400 American companies had paid bribes and reported that to the SEC in return for indemnity.

My best guess is the same thing is the case in the rest of the world. Bribery, as long as it is not legally prohibited, will be prac-

ticed very, very broadly, and that is why I think this convention is absolutely essential.

The CHAIRMAN. I expect the real answer to it is that it is not a question of who is paying bribes, it is a matter of who is not paying bribes because so many people are doing it.

Do you have evidence that the European companies are serious about foregoing business—and that their governments will not look the other way—should this treaty enter into force? Will they be serious about the enforcement of any laws they pass?

Mr. HEIMANN. My experience through the International Chamber of Commerce, which has a committee made up of businessmen from many of the major OECD countries, is that the important business leaders would be delighted to end corruption. They do not like it. They think it has a terrible effect within the moral climate within the company. They are concerned, however, that they do not want to lose business as long as other people continue to pay bribes.

The CHAIRMAN. That is encouraging.

Mr. HEIMANN. The beauty of the OECD approach is that it ends this dilemma. Once all the major competitors criminalize bribery, I think the companies are going to comply.

I think the same thing is going to happen that happened in the U.S. GE traditionally had a policy on antitrust compliance. After the FCPA was passed, we amended that policy to include compliance with the Foreign Corrupt Practices Act. I was involved in counseling our business people, and when you tell them, look, if you pay a bribe, not merely are you not doing the company a favor by winning an order that way, you are likely to wind up in jail and the company is subject to a huge fine. That made a big, big difference in how they responded, and I am sure German Companies, French companies, Italian companies will react exactly the same way. They will put in compliance programs once they are legally at risk.

The CHAIRMAN. Well, I thank you, sir.

This is a step that has got to be taken, and I hope the critics of it will let me know precisely, specifically what they would do to improve the legislation. We are going to have a business session this week—in 2 weeks, and this will be prominent on the agenda for that. We will report it out and I am going to encourage the Majority Leader to bring this before the Senate as promptly as possible.

I will ask you, as I ask Stu Eizenstat, do you have any further comments that you might think, gee, I wished I had thought of that?

Mr. HEIMANN. I think I would like to answer exactly the way Stu Eizenstat answered. Thank you very much.

The CHAIRMAN. Well, your statement is excellent and you are certainly kind to come and be with us. If you have further thoughts on the legislation or the treaty, please let me know either by telephone or by letter because if I am sincere about anything—and I think I am—I want to work to make everything that comes out of this committee effective and not find out a year later that it has this defect or the other.

But thank you again.

If there be no further business to come before the committee, we stand in recess.

[Whereupon, at 12:08 p.m., the committee adjourned, subject to the call of the Chair.]

APPENDIX

RESPONSES TO ADDITIONAL QUESTIONS FOR THE RECORD SUBMITTED BY THE COMMITTEE

UNITED STATES DEPARTMENT OF STATE,
Washington, D.C.,
June 22, 1998.

The Honorable JESSE HELMS,
Chairman, Committee on Foreign Relations,
United States Senate.

DEAR MR. CHAIRMAN: Following the June 9, 1998 hearing on OECD Bribery Convention (Treaty Doc. 105–43), additional questions were submitted or the record. Please find enclosed the responses to those questions.

If we can be of further assistance to you, please do not hesitate to contact us.

Sincerely,

BARBARA LARKIN,
Assistant Secretary,
Legislative Affairs.

Enclosure: As stated

QUESTIONS SUBMITTED BY SENATOR HELMS

Question 1. In his testimony, Under Secretary Eizenstat noted that $30 billion was lost in contracts last year as a result of bribes by competitors. If this treaty were fully enforced, would all of the bribes associated with these contracts be covered by the treaty? If not, indicate the amount associated with bribes not covered by the treaty.

Answer. The United States government is aware of allegations of bribes in the past year for 61 international contracts worth almost $30 billion dollars. United States firms competed for some of these contracts. If implemented and enforced by signatories, the anti-bribery convention would have covered approximately 70% of these incidents of alleged bribery.

The above suspected cases of bribery which would likely not be covered by the Convention fall into two categories: (a) those cases of bribery where the individual or firm undertaking the bribe was a national of a signatory to the Convention or (b) those cases of bribery where the intended bribe was a political party or a party official. It is intended that OECD outreach efforts to countries not presently signatories to the Convention will reduce over time cases falling under category (a), while the OBCD's future workplan to address bribes to political parties, party officials and candidates for political office is intended to reduce significantly cases falling under category (b).

Question 2. Please provide a list of all cases brought under the Foreign Corrupt Practices Act.

Question 3. Please provide a list of all penalties imposed, and amounts paid, under the Foreign Corrupt Practices Act.

Question 4. Please provide a list of all settlements made, prior to final decision, under the Foreign Corrupt Practices Act.

Answer. Responses to Questions 2, 3, and 4 follow:

Department of Justice

I. Pre-Act Criminal Prosecutions:

1. U.S. v. J. Ray McDermott & Co. Inc., E.D. Louisiana, 1978.
2. U.S. v. Bethlehem Steel Corporation, (80 Cr. No. 0431), S.D.N.Y., 1980.

3. U.S. v. The Williams Companies, (Cr. No.78–00144), D.D.C., 1978 [Currency and Foreign Transactions Reporting Act].

The company paid a fine and civil penalty of $187,000.

4. U.S. v. Control Data Corporation, (Cr. No.78–00210), D.D.C., 1978 [Mail Fraud and Currency and Foreign Transactions Reporting Act].

The corporation paid a fine and civil penalty of $1,381,000.

5. U.S. v. Westinghouse Electric Company, (Cr. No.78–00566), D.D.C., 1978 [False statements to Export-Import Bank and Agency for International Development]

The company paid a fine of $300,000.

6. U.S. v. United Brands Company, (Cr. No.78–538), S.D.N.Y., 1978 [Mail Fraud]

The company paid a fine of$15,000.

7. U.S. v. United States Lines, Inc., (Cr. No.), D.D.C., [Conspiracy to defraud the Federal Maritime Administration].

The company paid a fine of $5,000.

8. U.S. v. Sea-Land Services, Inc., (Cr. No.78-103), D.D.C. 1978 [Conspiracy to defraud the Federal Maritime Administration].

The company paid a fine of $5,000.

9. U.S. v. Seatrain Lines, Inc., (Cr. No.78–49) [Conspiracy to defraud the Federal Maritime Administration and Currency Transactions Reporting Act].

The company and a subsidiary each paid fines of $260,000.

10. U.S. v. Lockheed Corporation, (Cr. No.79–00270), D.D.C., 1979 [Currency and Foreign Transactions Reporting Act, Wire Fraud, false statements to Export-Import Bank].

The company paid a fine and civil penalties of $647,000.

11. U.S. v. Gulfstream American Corporation, (Cr. No.79–00007), D.D.C., 1979 [False Statements to Export-Import Bank and Commerce Department]

The company paid a fine of$120,000.

12. U.S. v. Page Airways; Inc., (Cr. No.7900273), D.D.C., 1978 [Currency and Foreign Transactions Report Act].

The company paid a fine and civil penalty of $52,647.

13. U.S. v. Textron, Inc., (Cr. No.79–00330), D.D.C, 1979 [Currency and Foreign Transactions Report Act].

The company paid a fine and civil penalty of$131,670.

14. U.S. v. McDonnell Douglas Corporation., et al., (Cr. No.79–516), D.D.C., [Mail Fraud, Wire Fraud, conspiracy, false statements to Export-Import Bank].

II. FCPA Criminal Prosecutions:

1. U.S. v. Kenny International Corp., (Cr. No.79–372), D.D.C., 1979.

The company pled to one count of violating the FCPA and consented to a civil injunction against further FCPA violations. The corporation was fined $50,000 and required to pay restitution to the Cook Islands government in the amount of NZ $337,000.

The chairman of Kenny International consented to the entry of a civil injunction and agreed to enter a plea of guilty to criminal charges in the Cook Islands.

2. U.S. v. Crawford Enterprises, Inc., Donald G. Crawford, William E. Hall, Mario S. Gonzalez, Ricardo G. Beltran, Andres I. Garcia, George S. McLean, Luis A. Uriarte, Al L. Eyster and James R. Smith, (Cr. No. H–82–224), S.D.Tx, Houston Division, 1982.

Crawford Ent. Pled no contest—Fined $3,450,000
D. Crawford Pled no contest—Fined $309,000
W. Hall Pled no contest—Fined $150,000
A. Garcia Pled no contest—Fined $75,000
A. Eyster Pled no contest—Fined $5,000
J. Smith Pled no contest—Fined $5,000
G. McLean Acquitted

3. U.S. v. C.E. Miller Corporation and Charles E. Miller, (Cr. No.82–788), C.D. Cal., 1982.

The corporation pled guilty and was fined $20,000. The individual defendant pled guilty and was sentenced to three years probation and 500 hours community service.

4. U.S. v. Marquis King, (Cr. No.83–00020), D.D.C., 1983.

The defendant pled guilty to violations of Currency and Foreign Transactions Reporting Act and was sentenced to 14 months incarceration and required to pay prosecution costs.

5. U.S. v. Ruston Gas Turbines, Inc., (Cr. No. H–82–207), S.D. Tex., 1982.

The corporation pled guilty to a FCPA violation and was fined $750,000.

6. U.S. v. International Harvester Company, et al, (Cr. No.82–244), S.D. Tex., 1982.

The corporation pled guilty to one count of conspiracy to violate the FCPA and was fined $10,000 plus costs of $40,000.

An individual defendant also pled guilty to one count and was sentenced to one year of incarceration (suspended)

7. U.S. v. Applied Process Products Overseas, Inc., (Cr. No. 83–00004), D.D.C., 1983.

The company pled guilty to a FCPA violation and was fined $5,000. In addition it consented to a permanent civil injunction.

8. U.S. v. Gary Bateman, (Cr. No.83–00005), D.D.C., 1983.

The defendant pled guilty to 5 CFTR misdemeanors and was sentenced to three years probation. In addition, he agreed to pay a civil penalty of $229,512, a civil tax payment of $300,000, and costs of prosecution of $5,000.

9. U.S. v. Sam P. Wallace Company, Inc., (Cr. No.83–0034) (PG), D.P.R., 1983.

The corporation pled guilty to three counts of FCPA accounting violations and was fined $30,000. In addition, it also pled guilty to a CFTR violation and was fined $500,000.

10. U.S. v. Alfonso A. Rodriguez, (Cr. No.83–0044 (JI))), D.P.R., 1983.

The defendant pled guilty to one count of FCPA bribery and was sentenced to three years probation and fined $10,000.

11. U.S. v. Harry G. Carpenter and W.S. Kirkpatrick, Inc., (Cr. No.85–353), D.N.J., 1985.

The corporation pled guilty to a FCPA violation and was fined $75,000.

The individual defendant pled guilty to one count FCPA bribery and was sentenced to three years probation, community service, and a fine of $10,000.

12. U.S. v. Silicon Contractors, Inc., Diversified Group, Inc., Herbert D. Hughes, Ronald R. Richardson, Richard L. Noble and John Sherman, (Cr. No.85–251), E.D. La., 1985.

The corporation pled guilty to a FCPA violation, agreed to a permanent civil injunction, and was fined $150,000.

Hughes, Richardson, Noble and Sherman agreed to the entry of civil injunctions.

13. U.S. v. NAPCO International, Inc. and Venturian Corporation, (Cr. No.4–89–65), D. Minn., 1989.

The defendants pled guilty to three counts of FCPA bribery and were fined $785,000. In addition, they paid $140,000 in civil settlement and $75,000 to settle tax charges.

14. U.S. v. Richard H. Liebo, (Cr. No. 4–89–76) D. Minn., 1989.

The defendant was convicted of FCPA bribery and false statements and was sentenced to 18 months incarceration (suspended) with three years probation.

15. U.S. v. Goodyear International Corp., (Cr. No.89–0156), D.D.C, 1989.

The corporation pled guilty to one count of FCPA bribery and was fined $250,000.

16. U.S. v. Young Rubicam Inc., Arthur R. Klein, Thomas Spangenberg, Arnold Foote Jr., Eric Anthony Abrahams, and Steven M. McKenna, (Cr. No. N–89–68 (PCD)), D. Conn., 1990.

The company pled guilty to one count of conspiracy to violate FCPA and was fined $500,000.

17. U.S. v. George V. Morton, (Cr. No. 3–90–061–H), N.D. Tex. (Dallas Div.), 1990.

The defendant pled guilty to one count of conspiracy to violate FCPA and was sentenced to three years probation.

18. U.S. v. John Blondek, Vernon R. Tull, Donald Castle and Darrell W.T. Lowry, (Cr. 741), N.D. Tex. 1990.

Two of the defendants were acquitted at trial. The charges were dismissed against the two remaining defendants.

19. U.S. v. F.G. Mason Engineering and Francis G. Mason, (Case No. B–90–29), JAC, D. Conn. 1990.

The corporation pled guilty to one count of conspiracy to violate the FCPA, was fined $75,000, and was required to pay restitution of $160,000.

The individual defendant also pled guilty to one count of conspiracy to violate the FCPA, was sentenced to 5 years probation, and was fined $75,000 (joint with Company).

20. U.S. v. Harris Corporation, John D. Iacobucci and Ronald L. Schultz, (Cr. No.90–0456), N.D. Cal., 1990.

The court granted a motion for judgment of acquittal at the close of the government's case.

21. U.S. v. Herbert Steindler, Rami Dotan, and Harold Katz, (Cr. No.194–29), S.D. Ohio 1994.

One defendant pled guilty to three counts of conspiracy, wire fraud and money laundering and was sentenced to 84 months incarceration and required to forfeit $1,741,453. The remaining defendants are fugitives.

22. U.S. v. Vitusa Corporation, (Cr. No. 94–253)(MTB), D.N.J., 1994.

The corporation pled guilty to a FCPA violation and was fined $20,000.

23. U.S. v. Denny Herzberg, (Cr. No. 94–254)(MTB), D.N.J., 1994.

The defendant pled guilty to a FCPA violation and was sentenced to two years probation and fined $5,000.

24. U.S. v. Lockheed Corporation, Suleiman A. Nassar and Allen R. Love, (Cr. No.1:94–Cr–22–016), N.D., Ga. Atlanta Div. 1994.

The corporation pled guilty to conspiracy to violate the FCPA and was fined $21.8 million. In addition, it paid a $3 million civil settlement. Defendant Nassar pled guilty to two counts and was sentenced to 18 months imprisonment. Defendant Love pled guilty to one count in a related case and was fined $20,000.

25. U.S. v. David H. Mead and Frerik Pluimers, D.N.J 1998 [Pending].

26. U.S. v. Herbert K. Tannenbaum, S.D.N.Y. 1998 [Pending].

III. FCPA Civil Injunctive Actions:

1. U.S. v. Roy J. Carver and E. Eugene Holley, (Civ. No.79–1768), S.D. Fl., 1979.

Carver and Holley consented to permanent injunctions from future violations of FCPA.

2. U.S. v. Finbar B. Kenny, et al., (Civ. 79–2038), 1979.

3. U.S. v. Dornier GmbH.

4. U.S. v. Eagle Manufacturing, Inc., (Civil Action No. B–91–171), S.D. Tex., 1991.

5. U.S. v. American Totalisator Company Inc., 1993.

The corporation consented to permanent injunction from future violations of FCPA.

IV. Other Cases:

1. U.S. v. General Electric Company, (Cr. No.1–92–87), S.D. Ohio 1992.

2. U.S. v. Benjamin Sonnenschein, (Cr. No.92–680) E.D.N.Y. 1992.

3. U.S. v. Gary S. Klein, (Cr. No.1–93–52) S.D. Ohio 1993.

4. U.S. v. National Airmotive Corporation, (DKT. No. CD93–377–CAL) N.D. Cal. 1993.

Question 5a. Please provide a detailed account of the laws enacted in each of the countries that are signatory to the treaty of the following:

- laws enacted that would prohibit bribery of public officials in international business transactions (details should include the jurisdictional reach of the country's judicial system, the definition of "bribery", and the definition of "public official")
- laws proposed that would prohibit bribery of public officials in international business transactions (details should include the jurisdictional reach of the country's judicial system, the definition of "bribery", the definition of "public official", and where such proposals are in the law-making process.)
- laws enacted that would prohibit the maintenance of off-the-book accounts, or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents for the purpose of bribing foreign officials or hiding bribery of foreign or domestic officials.
- laws proposed that would prohibit the maintenance of off-the-book accounts, or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, and the use

of false documents for the purpose of bribing foreign officials or hiding bribery of foreign or domestic officials.

Answer. (Note: In our response, we have separated out the portion of the above question which dealt with the tax deductibility of bribes, as the OECD Recommendation on tax deductibility of bribes is on a separate track from that of the OECD Convention. The tax deductibility question is addressed in a new question 5b.)

Most signatory countries are still in the process of finalizing the necessary legislative proposals to ratify and implement the OECD Convention. Most countries will need to do considerably more than amend an existing criminal statute, as is the case for the United States. We expect the June 29–July 1 meeting of the OECD Working Group on Bribery to result in specific initial information on the status of ratification and implementation actions in member countries.

We are not aware of any signatory country which, as of June 19, has either ratified the Convention or passed implementing legislation.

Attached is a table which summarizes the current status of ratification and implementation actions in each of the 29 OECD member countries and the five nonmember signatories of the Convention.

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions—Status of Signatories' Implementation

Attached is a chart in draft form setting out the title of each signatory's implementing legislation and a brief description of the status of each signatory's implementation of the convention. The chart has been prepared by the Trade Compliance Center of the United States Department of Commerce based on information U.S. embassies in the signatories' capitals and the U.S. delegation to the Working Group on Bribery of the Organization for Economic Cooperation and Development (OECD). The chart is current through June 22, 1998, and is periodically updated as further information is received.

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

[Trade Compliance Center, Department of Commerce, DRAFT—June 22, 1998]

Country	Relevant Laws	Progress Analysis	Status of Implementation and Ratification of the OECD Convention
Argentina			Legal advisers in the Ministry of Justice are divided whether the Convention will require amendments to the Argentine criminal code to redefine bribery. (Buenos Aires 1284, 12 March 1998) Delegate was unable to indicate an approximate date upon which legislation would be presented to its Parliament. (Paris 7678, 6 April 1998)
Australia	Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998 (proposed)		Australia participated in the Convention negotiations but did not sign the Convention (it is expected to do so when domestic procedures are completed). The Convention is being considered in conjunction with changes in the Crimes Act which will be necessary to implement the Convention. The Attorney-General has produced an ''exposure draft'' of the changes required. This draft, together with the Convention is before the Standing Committee on Treaties which is conducting hearings. (Canberra 1084, 20 March 1998) The new criminal legislation is expected to be presented formally to Parliament in June. The Australian delegate mentioned informally that the Australian business community indicated a very negative response to the Convention. She had serious concerns about Australia's ability to meet the December 31 deadline. (Paris 7678, 6 April 1998)
Austria	Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1998 (proposed)		Ratification of the Convention is ''nearly'' on track. Meeting the December 31, 1998 ratification deadline does not seem to be a problem. However, the GOA does not yet seem to have solved the problem of tax deductibility of bribes. (Vienna 2522, 20 March 1998) A draft bill on criminalization has been completed, and comments by the appropriate government agencies are due by May 10. Bribery of a foreign public official will be criminalized, existing criminal law provisions will be amended to prohibit ''any advantage'' and the new offense will be made a predicate offense for money laundering offenses. (Paris 7678, 6 April 1998)

Belgium	Anti-Corruption Bill (Doc. Parl., Sera:, 1–107/1,21 September 1995)		The Belgian Minister of Justice has submitted tough new anti-corruption legislation aimed at meeting Belgium's OECD and EU commitments to the Belgian Parliament. Debate began in the Senate on March 24. (Brussels 1913, 26 March 1998) The OECD Convention was to be sent to the State Council "in the weeks to come." Belgium's criminal law amendments may be in effect before the Convention is ratified, as the two procedures are not being linked. (Paris 7678, 6 April 1998) The Belgian representative to the OECD has indicated that Belgium will meet the end of 1998 deadline for ratification (Letter of 2 June 1998, from OECD Rep. Pierre-Dominique Schmidt).
Brazil			The Office of International Acts is currently preparing a transmittal statement for transmission to the Brazilian Congress. There is confidence that the Brazilian Congress will ultimately ratify the Convention—hopefully this year. (Brasilia 1094, 19 March 1998)
Bulgaria			The GOB is now in the process of drafting implementing legislation and expects to meet the deadline for bringing the implementing legislation into effect. The GOB will submit its request for ratification to Parliament once it has made more progress on drafting the implementing legislation. (Sofia 1950, 20 March 1998) A final text of implementing legislation is expected to be approved and published in the official Journal in late June or September. (Paris 7678, 6 April 1998)
Canada			Prime Minister Chretien made assurances that the Canadians would ratify the Convention by the end of 1998. The package will be submitted by the summer recess. (Ottawa 933, 16 March 1998) Draft legislation will be table in Commons by the end of April or May. While Canadian law generally does not allow tax deductions for bribes, there will be some changes to "tighten up" the provisions. (Paris 7678, 6 April 1998)
Chile			Consultations with the legal departments of the relevant Ministries are almost completed. A bill should be presented to the Parliament by the end of May or beginning of June. Chile has Parliamentary elections at the end of the year, but it was not indicated whether this would present a problem in meeting the December 31 deadline. (Paris 7678, 6 April 1998)

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

[Trade Compliance Center, Department of Commerce, DRAFT—June 22, 1998]

Country	Relevant Laws	Progress Analysis	Status of Implementation and Ratification of the OECD Convention
Czech Republic			The Czech Republic is in the process of proposing implementing legislation. A legislative draft, prepared by the MOJ, is being discussed and when approved will be sent to Parliament. This was expected to occur on April 1. (Paris 7678, 6 April 1998)
Denmark			The Danish general elections have delayed action on implementation of the Convention. The Convention may not be submitted to Parliament prior to the summer recess, but instead in the fall 1998 session. (Copenhagen 1536, 16 March 1998) The Danish delegate indicated her government expects the process of ratification and implementation may take a year, which means they would not meet the December 31 1998. (Paris 7678, 6 April 1998)
Finland			A bill has been drafted, but for technical reasons has not yet been submitted to the legislature. this should happen before the summer and the process may be completed by October. (Paris 7678, 6 April 1998)
France			France has prepared 2 bills to ratify the Convention and amend its criminal code. The respective texts have been submitted to the relevant Ministries for approval and to the State Council for its formal opinion before being presented to the legislature. The expectation is that the process will be completed by the end of 1998. (Paris 7678, 6 April 1998) France is unwilling to make its draft texts public until it has completed its interministerial process.
Germany	Draft of an Act to the Agreement of 17 December 1997 Concerning the Suppression of Bribery of Foreign Officials in International Commercial Intercourse (proposed)	U.S. DOJ discussed draft legislation with German counterpart and is satisfied that the legislation meets the Convention's requirements.	The German MOJ approved draft implementing legislation on March 27 and submitted it to its legislature on March 30. (Paris 7678, 6 April 1998) Sources at the Bundestat indicated that the Bundestat issued its formal review of the OECD Antibribery Convention on May 8 and raised non-substantive procedural issues. Progress towards ratification of the OECD Antibribery Law is still on schedule. (Bonn 4531, 8 May 1998)

Greece	Draft Bill Implementing the OECD Convention of Combating Bribery of Foreign Public Officials in International Business Transactions		Greece has prepared draft criminal and administrative legislation which was to be sent by April 1 to the competent Ministries. (Paris 7678, 6 April 1998) GOG intends to submit a draft bill ratifying the Convention and containing implementing legislation to Parliament as soon as its interministerial procedure are finished, e.g. probably in July. Enactment of the new bill is expected before the end of the year. (Letter of 5 June 1998, from OECD Rep. Spiros Lioukas)
Hungary	Amendment of the Act IV of 1978 on the Criminal Code (drafted)		Under Hungary's current legal regime, only natural persons (and not companies) are subject to the criminal code; changing the code would mean applying the Convention's disciplines domestically as well as abroad. The GOH is confident it will meet the 31 December 1998 deadline to pass implementing legislation. (Budapest 2496, 18 March 1998) Two draft texts have been prepared to ratify the Convention and amend the criminal code. The texts will be sent to the Ministries by the end of April and May respectively. (Paris 7678, 6 April 1998)
Iceland			The Icelandic Parliament has already adopted a resolution on the fulfillment of the Convention. the Drafting of implementing legislation has already begun and all necessary action should be done by the end of the year. (Paris 7678, 6 April 1998)
Ireland			The Irish Government is confident that it will meet the deadline of December 31, 1998, for implementing the Convention and is treating the December deadline as a firm obligation. (Dublin 1637, 26 March 1998) The delegate was absent from the March 30–April 1 Working Group meetings.
Italy			The Government is submitting all proposed modifications to Italian laws resulting from recent agreements on bribery to Parliament at the same time. Likely time frame is speculated at 5–6 months, meaning Italy would meet its January 1, 1999 target for Parliamentary approval. (Rome 2345, 26 March 1998)

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

[Trade Compliance Center, Department of Commerce, DRAFT—June 22, 1998]

Country	Relevant Laws	Progress Analysis	Status of Implementation and Ratification of the OECD Convention
Japan	Amendment to the Unfair Competition Prevention Law (proposed)	USG has voiced its serious reservations about the adequacy of proposed legislation. DThe GOJ submitted the Convention and its draft implementing legislation to the Diet on April 10. Parliamentary deliberations have begun. MITI Industrial Organizations Division Director relatively confident that the legislation will be passed this year, probably during the extraordinary Diet session which is expected to be convened in Autumn. (Tokyo 3114, 22 April 1998)	
Korea	Act on Anti-Bribery in Transactions Overseas 1998 (proposed)	.	The GOK expects no problems in meeting the OECD's agreed upon deadline of December 31, 1998 for legislative approval. (Seoul 1703, 25 March 1998) The delegate indicated every effort will be made to submit legislation by July 1. (Paris 7678, 6 April 1998)
Luxembourg			Luxembourg noted that work was being carried out in their MOJ and that action would be taken on ratification and implementing legislation package by the beginning of next year. (Paris 7678, 6 April 1998)
Mexico			The Government expects to submit the needed legislation shortly after Congress begins its next session in September. (Mexico 3004, 25 March 1998)

The Netherlands			Dutch implementation of the Convention is moving more slowly than officials had hoped due to technical drafting problems and the labyrinth process for approval of legislation (Hague 939, 16 March 1998) Delays in preparing draft legislation and interference by a member of Parliament are anticipated. The Netherlands delegate noted that they would be accommodating six Conventions and protocols in its new criminal legislation. (Paris 7678, 6 April 1998)
New Zealand			The GNZ expects to bring the Convention into force by December 31, 1998. Implementing legislation and the Convention itself will be presented to Parliament. Parliament is expected to easily pass the legislation and to pose no objection to the Convention itself. Both are expected to be approved before the end of the year. (Wellington 280, 10 March 1998)
Norway			Implementation of the Convention is on track. The MOJ has drafted an amendment to the criminal code expanding the existing ban on bribing Norwegian public officials to include a ban on bribing all public officials. The proposed legislation will be passed to the Norwegian Parliament in April or May. (Oslo 1407, 12 March 1998) The Convention is expected to be sent to Parliament by the end of June and ratification is expected to completed by fall. (Paris 7678, 6 April 1998)
Poland			The Polish Government is conducting its interministerial review of the Convention. Subsequently, it plans to submit the Conventions to the Parliament for ratification. Bribes are not deductible. Existing legislation already criminalizes bribery, but the Supreme Court last year narrowly constructed the Polish criminal code on bribery, limiting its applicability to bribes made to Polish public functionaries, but not to foreign ones. If the Government cannot get the Supreme Court to revise its position, then it will have to seek and amendment to the criminal code to reverse the court's position. (Warsaw 2984, 18 March 1998)

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

[Trade Compliance Center, Department of Commerce, DRAFT—June 22, 1998]

Country	Relevant Laws	Progress Analysis	Status of Implementation and Ratification of the OECD Convention
Portugal			The Convention and draft implementation decree are on track for Parliamentary approval by the end of July. The GOP expects the Parliament to "take special action, swiftly, without trouble," to ratify the Convention and decree law before the end of the current session (by end-July). (Lisbon 1318, 17 March 1998) Draft implementing legislation will be ready for submission to Parliament in two to three months. (Paris 7678, 6 April 1998)
Slovak Republic			The GOS expects to transmit the Convention text and ratify it by the December 31 deadline. (Bratislava 878, 13 March 1998) An advisory body has recommended that the Convention not enter into force for the Slovak Republic until 2000. (Working Group, 30 March 1998)
Spain			Modification of its penal code was to be cleared through the State Council the week of April 1 and thereafter presented to the Council of Ministers and Parliament. Ratification and implementing legislation will be linked. Spain expects to complete its action by the end of this year. (Paris 7678, 6 April 1998)
Sweden			The timetable for bringing the implementing legislation into force by December 31, 1998, is still firm. (Stockholm 1399, 10 March 1998)
Switzerland			Draft legislation is currently being circulated for comment. This consultative process will not be completed until May or June. If all goes well, the Federal Council could submit the legislation to Parliament during the final session of 1998 in December. It is unlikely there will be any vote until the spring session of 1999. (Bern 1107, 12 March 1998)
Turkey			The Government has prepared the instrument necessary for ratification and the implementing legislation is "underway." (Paris 7678, 6 April 1998)

United Kingdom	Primarily the Prevention of Corruption Act 1889–1916		The UK Home Office believes that existing UK corruption legislation will meet the Convention guidelines without further revision. However, independent of the Convention's mandate, they are currently reviewing existing corruption and anti-bribery legislation to "update and modernize its contents," specifically including its application to public and private sector corruption. Subsequently, the Home Office will draft and propose a new statue joining related domestic and international corruption issues into one legislative program for debate and possible implementation by Parliament this summer. (London 2766, 13 March 1988) The delegate stated that implementing legislation is not necessary in order to ratify the Convention. (Paris 7678, 6 April 1998)

Question 5b. Please provide a detailed account of the laws enacted in each of the countries that are signatory to the treaty of the following:

- laws enacted that would prohibit tax deductibility of bribes to public officials in international business transactions (details should include the jurisdictional reach of the country's judicial system, the definition of "bribery", the definition of "public official", the standard used to disallow such a deduction, and the ability of taxpayers to deduct inadequately identified expenditures.)

Answer. We can provide the following general information on OECD member country laws denying the tax deductibility of bribes. This information is from sources deemed reliable but is not verified.

Canada: Canadian law does not allow deductions for bribes paid to foreign government officials when the bribe is illegal in a foreign country.

Czech Republic: Czech law does not allow tax deductions for bribes paid to foreign public officials.

Denmark: As of January 1, 1998, Denmark has in force a law denying tax deductions for bribes paid to foreign public officials.

Finland: Finnish case law and administrative practice do not allow tax deductions for bribes paid to foreign public officials. No statutory rule.

Greece: Greek law does not allow tax deductions for bribes paid to foreign public officials.

Hungary: Hungary's law allows the deduction of expenses only as specified by law, and tax laws to not specifically refer to bribes. Therefore, Hungary's law does not allow tax deductions for bribes paid to foreign public officials.

Ireland: No specific legislation and no litigation. However, the tax administration view is that bribes paid to foreign public officials are not deductible.

Italy: Italian law does not allow tax deductions for bribes paid to foreign public officials.

Japan: Bribes are not deductible under Japanese law because they are treated as entertainment expenses, which are not deductible.

Korea: Korea does not allow tax deductions for bribes paid to foreign government officials since bribes are not considered to be business-related expenses.

Mexico: Mexico does not allow tax deductions for bribes because they do not meet the general requirements to qualify as deductible expenses and because, as related to illicit activities, such payments cannot meet the requirements under the Commerce Code of Mexico.

Netherlands: As of January 1, 1997, Dutch tax laws deny tax deductions for expenses in connection with illicit activities if a criminal court has ruled that a criminal offense has been committed. (We understand that Dutch criminal law will be amended to criminalize the bribery of a foreign public official.)

Norway: Under tax law enacted on December 10, 1996, Norway does not allow tax deductions for bribes paid to foreign private persons or public officials.

Poland: Poland does not allow tax deductions for bribes paid to foreign public officials. Bribery is illegal and an offense for both the briber and the recipient of the bribe. Gains and expenses connected with the offense of bribery cannot be taken into account.

Portugal: Under a law adopted on December 20, 1997, and effective on January 1, 1998, Portugal does not allow tax deductions for bribes paid to foreign public officials.

Spain: Spain does not allow tax deductions for bribes paid to foreign public officials.

Turkey: Turkey does not allow tax deductions for bribes paid to foreign officials because there is no explicit rule allowing deductions for bribes.

United Kingdom: U.K. law does not allow deductions for bribes paid to foreign officials if the bribe is a criminal offense, contrary to the Prevention of Corruption Acts. If any part of the offense is committed in the United Kingdom, e.g., the offer, agreement to pay, the soliciting, the acceptance, or the payment itself, the payment would be subject to corruption laws and a tax deduction would be denied. The U.K. Finance Act of 1993 disallows

tax deductions for all payments the making of which constitutes a criminal offense. Further, U.K. tax laws deny deductions for all gift and entertainment expenses.

We are not able to provide information on the ability of taxpayers to deduct inadequately identified expenditures. However, we recognize the importance of transparency in income tax Systems. We consider that there is no assurance that the deduction of inadequately identified expenditures is precluded under OECD member country tax systems.

- laws proposed that would prohibit tax deductibility of bribes to public officials in international business transactions (details should include the jurisdictional reach of the country's judicial system, the definition of "bribery", the definition of "public official", the standard used to disallow such a deduction, the ability of taxpayers to deduct inadequately identified expenditures, and where such proposals are in the law-making process.)

Answer. We are able to provide the following information on OECD member country proposals to prohibit the tax deductibility of bribes to foreign public officials. This information is from sources deemed reliable but is not verified.

Australia: The Australian Government has announced that it will implement appropriate measures to combat bribery of foreign public officials. The Commissioner of Taxation is drafting legislation on the issue of tax deductibility.

Austria: The Austrian Government is waiting for the criminalization of bribes to foreign public officials before proposing an amendment to the tax law in order to deny tax deductions for such bribes.

Belgium: At the end of March 1998, a bill limiting the deductibility of so-called "secret commissions was presented to Parliament along with a bill criminalizing bribes paid to foreign public officials.

France: On December 30, 1997, France enacted a change to their tax code denying a tax deduction for payments made to "foreign public officials" within the meaning of article 1 section 4 (footnote 4) of the OECD Convention or to a third party in order that this official act or refrain from acting in the performance of his official duties, in order to obtain or retain a contract or other improper advantage in international business transactions. This tax provision is effective for contracts concluded during tax years beginning as of the entry into force of the Convention.

Germany: At the end of March 1998, the federal government introduced legislation amending the provisions of national criminal law in order to criminalize the bribery of foreign officials. German income tax law will automatically exclude the deductibility of such amounts as business expenses if either the briber or the recipient has been subject to criminal penalties or to criminal proceedings that were subsequently discontinued on the basis of a discretionary decision by the prosecutor.

Luxembourg: The Luxembourg government has prepared draft legislation that would criminalize bribes to foreign public officials and deny tax deductions for such bribes.

New Zealand: Officials are working on a proposal to amend legislation for enactment in 1998 to disallow deductions for bribery.

Sweden: A bill explicitly denying the tax deductibility of bribes and other illicit payments is likely to be presented to the Swedish parliament this fall, with the intention of having the law in force as of January 1, 1999.

Switzerland: A proposal to deny a tax deduction for a bribe paid to a foreign official has been presented to Parliament. In October 1997, the Federal Council approved this proposal. A change to Swiss tax legislation is expected in the near future.

Question 6. Please provide a list of each signatory's efforts to date to ratify this treaty, and enact implementing legislation.

Answer. Available information is contained in the response to question 5a.

Question 7. Please define "undue pecuniary or other advantage" as used in Article 1(1).

Answer. A pecuniary advantage is a payment of money. It could include outright cash payments, as well as interest-free loans, favorable currency exchange rates, and other monetary benefits.

An "other" advantage is any other benefit conferred on the foreign public official. The purpose of including "other" advantages is specifically to include non-monetary gifts. Cf. 18 U.S.C. 201 (prohibiting improper offer of "anything of value" to a federal

public official). "Other" advantages could include shares or interests in business enterprises; offers of future employment; scholarships for the official's children; expense-paid vacations; construction of improvements to the official's residence; etc.

The operative qualifier in this clause is "undue." It would not, for instance, be an "undue advantage" if the company paid the expenses for the official to travel to the United States to visit its manufacturing facility and, as part of its marketing activities during that trip, paid reasonable food and lodging expenses for that official. Similarly, it would not be an "undue advantage" if the official's child earned the scholarship on his or her own merits, regardless of whether the scholarship was funded by a company seeking to do business with the official. It would be "undue" if the scholarship was created solely to be awarded to the official's child and it was not made available to others on a competitive basis.

Question 8. Please clarify whether bribes to a family member of a foreign official would be considered a criminal offense under the definition of Article 1.

Answer. The Convention, like the U.S. Foreign Corrupt Practices Act, covers bribes offered or paid to a foreign public official so that the official will take certain action, or refrain from acting, in the performance of official duties. Bribes to a family member of a foreign public official are covered in circumstances where (1) a bribe is paid to a family member as a conduit or intermediary, who in turn passes it to the foreign public official, the intended recipient; or (2) a foreign public official directs that a bribe, intended to induce that official to take certain action or refrain from acting, be paid to a family member.

Question 9. Please define "legal persons" for purposes of Article 2, and list the signatories to the proposed treaty that recognize corporations as legal persons.

Answer. "Legal person" is meant to cover corporations, partnerships, associations, joint-stock companies, business trusts, unincorporated organizations, sole proprietorships, or other juridical entities other than natural persons.

Our understanding is that all of the signatories to the Convention recognize corporations as legal persons.

Question 10. Please define "effective, proportionate and dissuasive" as used in Article 3(1).

Answer. "Effective, proportionate and dissuasive" criminal penalties are those that:

- Clearly apply to the offense of bribery of a foreign public official;
- Are proportionate (in the amount of fine and/or length of imprisonment) to the seriousness of the offense;
- Are comparable to the penalties that apply to bribery of a party's own public officials; and
- Provide a deterrent to such conduct.

Question 11. Please explain what is contemplated by "deprivation of liberty sufficient to enable effective mutual legal assistance and extradition" as used in Article 3(1).

Answer. Bilateral extradition treaties generally provide that, in order to be an extraditable offense, an offense must be punishable by deprivation of liberty for a certain minimum period, often more than one year. Some bilateral mutual legal assistance treaties have similar requirements regarding the furnishing of assistance. Article 3(1) requires that natural persons who commit bribery of a foreign public official be subject to penalties that exceed such thresholds, so that such persons would be subject to extradition and so that mutual legal assistance would be available in those cases.

Question 12. Please provide an example of the situation contemplated in Article 3(2).

Answer. Under German law, for example, corporations are not subject to criminal liability. Therefore, under Article 3(2) Germany would be obligated to ensure that corporations that engage in bribery of a foreign public official are subject to effective, proportionate and dissuasive non-criminal sanctions such as civil fines or other administrative measures.

In addition, under Article 3(3) Germany would be obligated to provide for the seizure and confiscation of the bribe and the proceeds of the bribery, or to impose monetary sanctions of comparable effect.

Question 13. For purposes of Article 4(1), what action must occur for an offense to be "committed in whole or in part" in a party's territory?

Answer. The Commentaries to Article 4(1) provide that "[t]he territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required." The level of activity in one's territory that is required to trigger the exercise of territorial jurisdiction may vary from country to country. Most signatories to the Convention would require more than incidental contacts.

Question 14. What is an "adequate time period" as required in Article 6, regarding the statute of limitations?

Answer. Under U.S. law, no special statute of limitations applies to FCPA violations. Accordingly, the applicable statute of limitations is five years. See 18 U.S.C. 3282. However, as many FCPA cases require the Department to obtain evidence from foreign countries, this period may be tolled for up to three additional years once an official request to a foreign country is made and filed with the court. See 18 U.S.C. 3292.

The Commentaries to the OECD Convention do not provide any guidance on this point. At a minimum, the United States would expect other signatories to provide for a limitations period at least as long as provided in their existing law for investigations of domestic corruption offenses. With implementation of the OBCD Convention, it will become easier and faster to obtain foreign evidence relating to FCPA cases.

Question 15. To which signatory countries will Article 7, regarding money laundering, apply?

Answer. Article 7 requires that each Party that has made bribery of its own public official a predicate offense for the purposes of money laundering legislation must do so on the same terms for bribery of a foreign public officials. The requirement applies to all signatory countries, although its practical effect depends on whether a Party has made either the offer or receipt of a bribe ("active or passive bribery") a predicate offense. Concerted international action to address money laundering issues in recent years, especially through the Financial Action Task Force on Money Laundering, has spurred additional countries to take such action. At present, the following countries make either active or passive bribery of public officials a predicate offense for the purposes of application of money laundering legislation:

The list below outlines those offenses which constitute predicate offenses for purposes of money laundering legislation in countries for which we have specific information:

Argentina—offenses with at least three years imprisonment
Australia—all indictable offenses with more than one year imprisonment
Austria—offenses with more than three years imprisonment
Belgium—all offenses
Brazil—certain offenses, including crimes against the public administration
Bulgaria—all offenses
Canada—enterprise crimes (covers bribery)
Chile—drug trafficking only
Czech Republic—all serious offenses
Denmark—certain offenses (not bribery)
Finland—all offenses
France—all offenses
Germany—all serious and some less serious offenses
Greece—certain offenses (covers bribery)
Iceland—all offenses
Ireland—all offenses
Italy—all intentional offenses
Japan—drug trafficking; receipt of bribes
Luxembourg—drug trafficking only
Mexico—all offenses
Netherlands—all offenses
New Zealand—serious offenses with more than 5 years imprisonment
Norway—all offenses
Portugal—range of offenses (covers corruption)
Slovakia—drug trafficking only
Spain—all serious offenses
Sweden—all serious offenses
Switzerland—all serious offenses
Turkey—most serious offenses
United Kingdom—all indictable offenses
United States—130 predicate offenses (covers bribery)

In certain of the above countries, the applicability of money laundering legislation will depend on whether bribery of a foreign public official will constitute a "serious" offense, thereby making it a predicate offense for money laundering legislation.

We do not at the present time have information regarding Hungary, Korea, and Poland.

Question 16. What is the effect of Article 9 on U.S. law in cases where the United States does not have a mutual legal assistance treaty with the other Party to the treaty. Is this provision self-executing?

Answer. This provision has the effect of requiring the United States to provide mutual legal assistance to other Parties to the convention in matters falling within the convention, consistent with applicable United States law. See 28 U.S.C. 1782. The provision is selfexecuting.

Question 17. What is the effect of Article 9 in cases in which the United States already has a mutual legal assistance treaty with the other party to the treaty?

Answer. Where the United States already has a mutual legal assistance treaty (MLAT) in force, this article presumes that mutual assistance will be provided in accordance with that MLAT.

Question 18. Article 10(2) says that a Party may consider this treaty to be a legal basis for extradition in the absence of an existing extradition treaty. Is Article 10(2) self executing for purposes of bribery of a foreign public official with countries that do not have an extradition treaty with the United States? If so, would this include cases brought under the Foreign Corrupt Practices Act, or only those that are also covered by the treaty? If so, would this apply to countries that accede to the treaty in the future?

Answer. Article 10(2) is self-executing with respect to countries that do not have an extradition treaty with the United States and choose to consider this convention as a basis for surrender; therefore the United States could rely on this convention in a request to such a country to extradite a person to the United States. However, long-standing United States practice and policy has been not to consider a multilateral treaty like this convention to be a basis in itself for extradition from the United States in the absence of a bilateral extradition treaty. This policy would apply to any offenses covered by the treaty, and would apply both to nations that already have signed the convention and those that accede in the future.

Question 19. Which signatories to the treaty refuse to extradite their own nationals?

Answer. An authoritative answer to this question is difficult since (1) many countries decide whether to extradite nationals on a case by case basis, or (2) do so only if certain conditions are present (e.g., exceptionally serious charges, or assurances that the extradited person can serve his sentence in his home state). The United States strongly believes that extradition should be granted without regard to the nationality of the offender, and we are aggressively (and rather successfully) urging other states to adopt this view; several nations that have not extradited their citizens in the past are in the process of changing their views, and more may well do so in future.

Our information suggests that the following states usually do not extradite their nationals due to statutory or constitutional prohibitions: Austria, Belgium, Brazil, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Luxembourg, Mexico, Norway, Switzerland, and Turkey. Our information suggests that the following states usually do extradite their nationals, but their laws either make the extradition of nationals discretionary or contain other restrictions on such extradition that must be met in individual cases: Australia, Chile, South Korea, Ireland, Japan, and the Netherlands. The United States, Canada, and the United Kingdom have no restrictions on extradition of nationals.

Question 20. Please detail the role of the OECD authority cited in Article 11. Would this override in any way the bilateral agreements on extradition and mutual legal assistance?

Answer. For the United States, the authority for making and receiving extradition requests would be the Secretary of State, and such requests would continue to be transmitted via diplomatic channels, as is the current practice. The authority for the United States for making and receiving mutual legal assistance requests under Article 11 would be the Attorney General, who also serves as Central Authority for all of our mutual legal assistance treaties. See 28 C.F.R. 0.64–1. Thus, this provision would not override or alter the procedure utilized under extradition or mutual legal assistance treaties.

Question 21. What are the expected costs of the implementation and monitoring program described in Article 12?

Answer. The implementation and monitoring program planned in the OECD Working Group on Bribery to evaluate progress under the OECD Anti-Bribery Convention and other OECD bribery-related commitments will rely almost exclusively on existing OECD Secretariat resources and on the participation of experts from OECD member countries.

The OECD, anticipating the upcoming work, has already planned to move an OECD Secretariat staff person - from within existing personnel resources - to pro-

vide additional support to the Working Group. This will occur without an increase in overall OECD budget. Some additional expense will be incurred by the Secretariat to provide a staff person from the Secretariat to participate in anticipated on-site inspections in Phase II of the monitoring effort. With 6–8 trips per year envisioned, estimated transportation and per diem expenses of $2000 per trip would result in travel costs to the Secretariat of $12–16,000 per year. These costs will be programmed from within the annual OECD travel budget.

Phase II on-site visits also will likely involve participation by experts from OECD member countries. Expenses related to the participation of these experts will be borne directly by the contributing country and will not affect the OECD budget. We can expect 1–3 trips per year for U.S. Government experts to participate in these visits. These expenses would be borne by the relevant U.S. Government agency from within existing travel budget resources.

Question 22. Please describe the OECD's plan of action for monitoring and implementation as required by Article 12.

Answer. Article 12 of the Convention requires that signatories will cooperate in a program of "systematic" follow-up to monitor and promote the full implementation of the Convention. (An analogous commitment to follow-up is contained in the OECD's May 1997 Revised Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions, which, in addition to criminalization, addresses recommendations on bribery-related issues in the areas of accounting/auditing, government procurement and tax policy.)

The OECD Working Group on Bribery is in the final stages of determining the precise process to be followed in carrying out the monitoring and follow-up functions. A final decision is expected by Autumn 1998, at least on the monitoring process through early 2000. In fact, monitoring is already starting, and involves periodic reports (beginning in late June 1998) from countries on the status of ratification and implementation of the Convention. This current 1998 phase will include informal evaluation of draft laws as well as formal evaluation of any enacted laws. Although a number of important details remain to be decided, the formal post-1998 process will likely entail two phases:

—Phase I (1999–April 2000) will entail formal legal evaluation of the consistency of ratification and implementation actions with the requirements of the Convention. Most likely, a detailed questionnaire will be completed by each country, examining convention issues as well as the areas covered by the 1997 Revised Recommendation. A report will be prepared by the OECD Secretariat and two third-country examiners for discussion by the Working Group in a special session with the examined country, after which a final country assessment will be prepared for the Spring 2000 Ministerial meeting of the OECD. There will be opportunity for input by interested private sector and nongovernmental organization representatives.

—Phase II (2000 on) will examine the structures put into place to enforce the laws, the application of the laws and regulations in practice, and the consequences in the business sector. Phase II will likely involve 6–8 country evaluations per year, implying a cycle of 4–5 years to complete evaluation of all participating countries. Countries may be examined in order of their relative involvement in international trade. The examination will likely involve questionnaires, on-site visits to capitals by experts from participating third countries and draft reports to guide in-depth country examination sessions by the Working Group on Bribery. As in Phase I, there will be opportunity for input by interested private sector and non-governmental organization representatives.

Question 23. Please describe the Administration's plan of action for amending the proposed treaty to include bribery of political parties.

Answer. U.S. negotiators made a concerted effort to have political parties and party officials covered under the Convention. Other delegations, however, were not prepared to accept this, arguing that political parties and party officials could not be considered "public officials" as the term is generally understood.

At the conclusion of the negotiations on the text of the Convention in November 1997, United States representatives insisted upon formal agreement on a program of accelerated work on a number of issues not adequately addressed in the Convention text. These issues included bribery of political parties and political party officials in international business transactions, bribery of candidates for political office, and aspects of the use of money laundering legislation in the fight against illicit payments. Accordingly, the OECD Council on December 11, 1997, in approving the Convention text and recommending its adoption by Ministers representing participating countries, adopted a Decision committing member countries to examining these issues and reporting results to Ministers by the Spring 1999 annual OECD Ministerial meeting. At the suggestion of France, two additional issues were added

to this accelerated workplan on issues related to bribery of foreign public officials: (a) the role of foreign subsidiaries and (b) the role of offshore money centers.

Work on these issues will begin with the June 29–July 1 meeting of the OECD Working Group on Bribery. It is expected that an experts group of representatives of participating governments will be formed to outline possible recommendations over the late summer and early autumn, with formal Working Group discussions to begin in earnest in November 1998. On political parties, party officials, and candidates for political office, the U.S. objective will be to secure member country agreement to amend the Convention to include such entities/individuals among those to whom payment of bribes to obtain or retain business will be prohibited, as is the case under the U.S. Foreign Corrupt Practices Act. As in the negotiation of the Convention itself, multilateral, bilateral and public diplomacy will be required to achieve these objectives.

Question 24. Article 16 provides that an amendment may be adopted by consensus or "by such other means as the Parties may determine by consensus". Please elaborate on the kinds of scenarios that you contemplate for adoption of amendments in addition to consensus.

Answer. A consensus decision to adopt an amendment by a means other than by consensus may be necessary or desirable when a Party (Country "A") to the Convention, by virtue of a core element of its legal system or of its Constitution, is unable to join a consensus on an amendment which the vast majority of Parties are prepared to adopt. If the Parties are prepared to proceed with the amendment, without the participation of Country "A", *and if Country "A" has no objection to such action,* an amendment to strengthen the Convention could go forward, although *without committing Country "A"* to such action.

One possible scenario, purely for illustrative purposes, might involve a significant strengthening of the accounting provisions of the Convention, for example. If 32 or 33 signatories were prepared to proceed with such action, but one Party was legally barred from tightening accounting requirements, for example, it is not inconceivable that all Parties might agree that the 32 proceed in taking on the commitment, while permitting the lone Party to maintain a less stringent commitment.

Clearly, such an imbalance of commitments would not be acceptable in cases where it would result in meaningful competitive differences among Parties.

Question 25. What is the legal status of the commentary accompanying the Convention? Can the commentary be amended? If so, how?

Answer. The Commentaries were adopted by OECD members in November 1997 in conjunction with adoption of the Convention text. Although the Commentaries are not part of the Convention, they reflect the consensus interpretation of the negotiators of various provisions in the Convention. As such, the Commentaries should be accorded significant weight in any subsequent interpretation of the Convention.

—As the Commentaries reflect contemporaneous negotiating history, we are unaware of any process for their amendment.

QUESTIONS SUBMITTED BY SENATOR BIDEN

Question 1. Please elaborate on the meaning of the term "foreign public official" set forth in Article 1(4)(a).

- Does the term apply to all employees in the legislative, administrative, or judicial branch of a foreign country? Or is the expression "holding a legislative, administrative, or judicial office" meant to limit the reach of the Convention to certain officials?
- Does the term "administrative" include all executive branch officials?

Answer. The term "foreign public official" is meant to apply to all persons in the legislative, administrative, or judicial branch of government. "Administrative" as used in this context is synonymous with our Executive Branch.

The term "foreign public official" also includes any person exercising a public function for a foreign country, including for a public agency or public enterprise, and any official or agent of a public international organization.

Question 2. Which of the nations that are signatories of the Convention do not provide for criminal corporate liability?

Answer. The issue is somewhat complex, and we do not have complete information on all countries.

Australia, Canada, Denmark, France, the Netherlands, Norway, Sweden, the United States, and the United Kingdom have the concept of corporate criminal liability throughout—or in a large part of—their criminal law. Belgium and Finland are working to institute such liability.

Some countries have the concept of corporate criminal liability in special statutes. Japan uses the concept in environmental, anti-trust and securities legislation. Korea uses the concept in environmental and anti-trust legislation.

Many countries, such as Austria, Germany, Italy, Spain and Switzerland, have administrative sanctions (e.g., fines) for corporations, which may have effects comparable to our corporate criminal penalties. The member countries of the European Union will adopt such sanctions, when the recently-concluded Protocol II to the Convention on the Protection of the Financial Interests of the European Union is implemented.

During the course of the OECD Convention negotiations, Korea indicated that it would propose institution of corporate criminal liability for the offense of bribery of foreign public officials in international business transactions.

There is a clear trend internationally toward institution of corporate legal liability and a number of countries are expected to take such action over the next 5–10 years. This appears to be the case for many of the European Union member countries, for example.

In any event, the Convention requires that those countries which do not provide for corporate criminal liability in their legal systems must provide for effective, proportionate and dissuasive non-criminal sanctions for legal persons, including monetary sanctions, for bribery of foreign public officials in international business transactions.

Question 3. Is there a negotiating history regarding Commentary 9?

- Is there a common understanding among the signatories as to the meaning of the terms "small" and "facilitation payment"?

Answer. Commentary 9, regarding small or "facilitating payments", reflects the desire of the United States during the negotiation to retain our ability to continue to exempt facilitating payments from the FCPA. Under the FCPA, we exempt payments from the statute which are made to obtain "routine governmental action(s)", that is, payments which are to facilitate, expedite or secure the performance of a routine governmental action. These actions are described in detail in the FCPA. While the FCPA does not exempt such payments as "small", or place any dollar threshold on the size of such payments, it is common for persons to interpret this provision of the FCPA as limited to payments of very small value. The Commentary further reflects the FCPA's provision that a "routine governmental action" does not include any decision by a foreign official to award new business or continue existing business, i.e., *quid pro quo* bribery.

Question 4. What is the meaning of the term "undue" in Article 1(1)?

Answer. It would not, for instance, be an "undue" advantage if the company paid the expenses for the official to travel to the United States to visit its manufacturing facility and, as part of its marketing activities during that trip, paid reasonable food and lodging expenses for that official. Similarly, it would not be an "undue advantage" if the official's child earned the scholarship on his or her own merits, regardless of whether the scholarship was funded by a company seeking to do business with the official. It would be "undue" if the scholarship was created solely to be awarded to the official's child and it was not made available to others on a competitive basis.

Question 5. What is the legal status of the annex? Is it an integral part of the Convention?

Answer. Yes, the annex is an integral part of the Convention. The statistics in the annex are essential in determining whether the entry into force requirements of Article 15(1) have been satisfied.

Question 6. The Foreign Corrupt Practices Act criminalizes bribes in order to assist an issuer or domestic concern in "obtaining or retaining business for or with, or directing business to, any person." E.g., 15 U.S.C. 78dd–1(a)(1).

- Is it intended by the signatories that Article 1(1) requires parties to criminalize "directing business" to a person?

Answer. Neither the Convention nor the Commentaries contain any explicit reference to "directing business". Our expectation is that the implementing criminal, civil and administrative laws to be enacted by the Parties to the Convention will include the direction of business. For all practical purposes, the "direction" of business is included in obtaining or retaining business.

Question 7. Please provide a copy of the OECD's 1996 recommendation that countries review the tax deductibility regarding bribery.

Answer. The 1996 recommendation is attached (follows).

ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT
April 17, 1996

RECOMMENDATION OF THE COUNCIL ON THE TAX DEDUCTIBILITY OF BRIBES TO FOREIGN PUBLIC OFFICIALS

(adopted by the Council on 11 April 1996 at its 873rd session [C/M(96)8/PROV])

The Council.

Having regard to Article 5 (b) of the Convention on the Organisation for Economic Cooperation and Development of 14th December 1960;

Having regard to the OECD Council Recommendation on Bribery in International Business Transactions [C(94)75/FINAL];

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

Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favour bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign public officials as illegal.

II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.

Question 8. Does the Working Group on Bribery in International Business Transactions have a plan for how it will carry out the function of monitoring and promoting full implementation of the Convention under Article 12? If so, please discuss it.

Answer. Article 12 of the Convention requires that signatories will cooperate in a program of "systematic" follow-up to monitor and promote the full implementation of the Convention. (An analogous commitment to follow-up is contained in the OECD's May 1997 Revised Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions, which, in addition to criminalization, addresses recommendations on bribery-related issues in the areas of accounting/auditing, government procurement and tax policy.)

The OECD Working Group on Bribery is in the final stages of determining the precise process to be followed in carrying out the monitoring and follow-up functions. A final decision is expected by Autumn 1998, at least on the monitoring process through early 2000. In fact, monitoring is already starting, and involves periodic reports (beginning in late June 1998) from countries on the status of ratification and implementation of the Convention. This current 1998 phase will include informal evaluation of draft laws as well as formal evaluation of any enacted laws. Although a number of important details remain to be decided, the formal post-1998 process will likely entail two phases:

- Phase I (1999–April 2000) will entail formal legal evaluation of the consistency of ratification and implementation actions with the requirements of the Convention. Most likely, a detailed questionnaire will be completed by each country, examining convention issues as well as the areas covered by the 1997 Revised Recommendation. A report will be prepared by the OECD Secretariat and two third-country examiners for discussion by the Working Group in a special session with the examined country, after which a final country assessment will be prepared for the Spring 2000 Ministerial meeting of the OECD. There will be opportunity for input by interested private sector and nongovernmental organization representatives.
- Phase II (2000 on) will examine the structures put into place to enforce the laws, the application of the laws and regulations in practice, and the consequences in the business sector. Phase II will likely involve 6–8 country evaluations per year, implying a cycle of 4–5 years to complete evaluation of all participating countries. Countries may be examined in order of their relative involvement in international trade. The examination will likely involve questionnaires, on-site visits to capitals by experts from participating third countries and draft reports to guide in-depth country examination sessions by the Work-

ing Group on Bribery. As in Phase I, there will be opportunity for input by interested private sector and non-governmental organization representatives.

June 9, 1998

THE HON. JESSE HELMS,
Chairman,
Committee on Foreign Relations,
United States Senate.

DEAR MR. CHAIRMAN:

We would like to voice our shared support for swift Congressional approval of the recently-submitted Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and its related implementing legislation. This Convention, which was signed in December of last year at the Organization for Economic Cooperation and Development (OECD), is extremely important for the United States. It fulfills a desire expressed by the Congress in the Omnibus Trade and Competitiveness Act of 1988 that the United States Government seek from our OECD partners enactment of criminal prohibitions on foreign corrupt practices. The Convention is the culmination of efforts by this and previous Administrations.

Since 1977, when Congress enacted the Foreign Corrupt Practices Act (FCPA), the United States has been the only country to criminalize effectively the bribery of foreign public officials. Now, for the first time, the United States and its major trading partners have agreed upon an international Convention which obligates the world's largest economies to make it a crime to bribe the officials of other countries in international business transactions. This is a major contribution to the international rule of law and the promotion of democratic values of which we should all be proud. It will combat the damage which bribery causes to economic development efforts and to U.S. exporters.

We and the other 32 signatory countries have agreed to the ambitious goal of seeking adoption of necessary legislation to implement the Convention by the end of this year. It is essential that the United States meet this schedule, in order to continue U.S. leadership on this important issue and to encourage other countries to implement fully the agreement.

While the Convention tracks the FCPA closely, we have proposed certain amendments to bring our law into fill compliance with the obligations of and to implement the Convention. We have been working with the business community and with interested nongovernmental organizations in this effort, and have sought in the implementing legislation to ensure that U.S. firms will face disciplines comparable to those of foreign firms as a result of this agreement. When implemented and enforced by parties, the Convention will go a long way towards reducing incidents of bribery in international business transactions.

We urge the Congress to act quickly to ensure that U.S. firms and their employees can realize the benefits of this Convention as soon as possible.

Sincerely,

Robert E. Rubin
Secretary of the Treasury

Madeleine K. Albright
Secretary of State

Janet Reno
Attorney General

William M. Daley
Secretary of Commerce

Charlene Barshefsky
United States
Trade Representative

Arthur Levitt
Chairman
Securities and Exchange Commission

AMP INCORPORATED, EXECUTIVE OFFICES,
HARRISBURG, PA 17105–3608,
June 3, 1998.

The Honorable Jesse Helms,
United States Senate,
Washington, DC 20510.

Dear Senator Helms:

I am writing to express my support for the speedy ratification and implementation of the Organization for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions that the Administration has just submitted to the Congress.

The OECD Convention is a major victory for the United States in its battle against international corruption and bribery. It creates an international antibribery system that obligates signatory countries to adopt domestic laws to combat foreign bribery. Since the Foreign Corrupt Practices Act (FCPA) was adopted in 1977, the United States has tried to persuade our major trading partners to enact comparable laws. In the 1988 Omnibus Trade Act, the Congress directed the President to negotiate an international agreement in the OECD on the prohibition of overseas bribes. After years of negotiation, the United States has succeeded in getting thirty-three other countries (all the OECD members and five non-members) to join the United States in the Convention.

The Congress, current and past Administrations, and the private sector have made their fight against international bribery and corruption a priority because international corruption undermines important U.S. goals of (1) achieving a level playing field for those U.S. companies and their workers that compete overseas, (2) fostering economic development and trade liberalization, and (3) promoting democracy and democratic institutions. The Department of Commerce has estimated that between 1994 and 1996, there were at least 100 cases of foreign firms using bribery to undercut U.S. firms' efforts to win international contracts, costing our companies over $45 billion. The OECD Convention is designed to eliminate these trade distorting activities and make foreign bribery a crime in major trading countries.

Speedy ratification and implementation of the OECD Convention by the United States is, however, an absolute imperative in order for the Convention to succeed. Some of the other parties are not as committed to the Convention as the United States and are likely to use a delay in U.S. ratification to undermine it. Speedy implementation of the OECD Convention is also necessary to show the other parties that the United States takes its obligations under the Convention seriously and expects other parties to do the same. Since the Convention's effectiveness depends on the adoption of international antibribery laws by the other parties, implementation by the United States is necessary to lead the way, substantively and politically, for implementation of the Convention by other parties.

Enclosed, for your information, is background material on the OECD Convention and a summary of the amendments necessary to bring the FCPA into compliance with the OECD Convention.

I am committed to working with you to help protect U.S. businesses and workers from unfair and corrupt foreign competition through the ratification and implementation of the OECD Antibribery Convention by the Congress this year.

Sincerely,

WILLIAM J. HUDSON,
Chief Executive Officer and President,
AMP Incorporated.

STANLEY J. MARCUSS,
Partner, Bryan Cave, LLP,
700 Thirteenth Street, N.W.,
Washington, D.C. 20005-3960.

The Honorable Jesse Helms,
Chairman, Senate Committee on Foreign Relations,
Washington, D.C. 20510.

Re: Ratification of the OECD Anti-Bribery Convention and Adoption of Implementing Legislation

Dear Senator Helms:

The Senate is currently being asked to ratify the recently negotiated Convention on Combating Bribery of Foreign Government Officials. Congress as a whole is also currently being asked to amend the Foreign Corrupt Practices Act in light of the new Convention. Both the Convention and the proposed legislation are significant developments: the Convention, because it provides an opportunity to enlist other countries in the effort to prevent bribery in the international marketplace; the legislation, because it would significantly expand the reach of the FCPA as the analysis in Attachment A to this letter points out.

An important issue for Congress to consider during its deliberations, however, is whether the other signatories to the Convention will enact and enforce laws that are substantially similar to the FCPA. If they do not, the uneven playing field that currently confronts U.S. business will not only remain in place but will be made even worse if Congress should toughen the FCPA by enacting the amendments currently being proposed.

As you may know, the, Convention is not self-executing. It requires signatory countries to enact conforming domestic legislation. If they do not act at all or if they enact legislation that does not meet the Convention's requirements or fail adequately to enforce the laws they do enact, U.S. business will continue to be disadvantaged in the international marketplace. I should add that, even if other countries fulfill their Convention obligations, differences between their laws and U.S. law are inevitable because, as the analysis in Attachment B points out, there are significant differences between the FCPA and the laws that the Convention requires other countries to enact.

Many, nonetheless, agree that the Convention should be ratified, implemented and enforced expeditiously and in earnest by each and every signatory now that it has been agreed upon. To minimize the risk that other countries will fail to fulfill their Convention obligations and that the United States will continue to be the only country that has taken effective measures against foreign bribery, I believe Congress should adopt measures that require the Executive Branch to press for full and effective implementation of the Convention by each of its signatories.

Among the measures Congress might consider are the following:

A. Delaying the effective date of the FCPA amendments until a majority or some other proportion of the signatories have enacted legislation that meets the requirements of the Convention;

B. Making effectiveness of the FCPA amendments conditional on a Presidential certification that a majority or some other proportion of the signatories have enacted legislation that meets the requirements of the Convention.

C. Requiring the President to provide Congress with a periodic analysis of precisely what other signatory countries have done by way of implementing legislation and enforcement. The analysis should include detailed scrutiny of the precise terms of the implementing legislation, an assessment of whether such legislation meets the requirements of the Convention and a description of the ways in which such legislation differs from the FCPA.

D. Requiring creation of a private sector review board with which the Executive Branch must consult on progress toward implementation of the Convention by each of its signatories.

I would be happy to amplify these suggestions if you would find it useful and hope they are of interest. I would also be grateful if you would have this letter and its attachments inserted in the hearing record, because they may be of interest to others who are involved in the ratification and implementation process.

I would like to mention in closing that, while I am the Director of the Coalition for Fair International Business Practices, a group of U.S.-based multinationals interested in the pursuit of effective measures to eliminate foreign bribery worldwide, this letter is written in my personal capacity and does not reflect the views of every member of the Coalition.

Sincerely yours,

STANLEY J. MARCUSS.

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