

SECTION RECOMMENDATIONS AND REPORTS

American Bar Association Section of International Law and Practice Report to the House of Delegates* Inter-American Convention Against Corruption**

RECOMMENDATIONS

Be It Resolved, that the American Bar Association supports the prompt ratification and implementation of the Inter-American Convention Against Corruption (Inter-American Convention) by the United States, by other members of the Organization of American States (OAS), and by other countries that are eligible to accede to the Inter-American Convention.

Be It Further Resolved, that the American Bar Association urges

1. that such ratification be subject to minimal reservations and understandings;
and
2. that such implementation be full, effective and consistent.

*This Recommendation was approved by the Council of the Section at its Executive Meeting on August 2, 1997, in Washington, D.C.

**The Task Force on International Standards for Corrupt Practices of the Section of International Law and Practice took the lead in preparing the foregoing Recommendation and Report. This Task Force was chaired by Stuart H. Deming and John A. Detzner.

Be It Further Resolved, that, to assure consistency and effectiveness, the American Bar Association supports the criminalization of the bribery of foreign officials through the Inter-American Convention and through other instruments and fora in a manner consistent with the agreed upon common elements set forth in the Annex to the Organization for Economic Co-operation and Development's (OECD) Revised Recommendation of the Council on Combating Bribery in International Business Transactions and with the basic principles of the Foreign Corrupt Practices Act of the United States.

Be It Further Resolved, that the American Bar Association supports efforts by the OECD and its member countries to promptly carry out, fully implement, and actively enforce the OECD's Revised Recommendation of the Council on Combating Bribery in International Business Transactions in a manner that effectively deters foreign corrupt practices in the conduct of international business.

REPORT

I. Introduction

The Inter-American Convention Against Corruption (Inter-American Convention) was adopted and opened for signature on March 29, 1996 in Caracas, Venezuela.¹ It is the first multilateral legal framework established to combat public corruption in international business transactions.² It seeks to promote and strengthen cooperation to "prevent, detect, punish and eradicate corruption in the performance of public functions."³ The Inter-American Convention identifies acts of corruption to which the Inter-American Convention applies and contains binding obligations as well as hortatory principles.⁴ It also provides for institutional development and mechanisms for the enforcement of anti-corruption measures.

To assure the effectiveness of the Inter-American Convention, the United States must reaffirm its leadership by moving quickly and forcefully to ratify and implement the Inter-American Convention to the fullest extent possible. The American Bar Association (ABA) is prepared to support such ratification and implementation in the United States and elsewhere. Given the position taken by the ABA in 1995 to support efforts to deter corrupt practices in the conduct of international business and given the history of the ABA in promoting democracy and the rule

1. Specialized Conference on the Draft Inter-American Convention Against Corruption, OEA/Ser.K/XXXIV.1 CICOR/doc.16/96 rev. 2, 9 Sept. 1996 (hereinafter "Specialized Conference"), at 6.

2. "Toward the Next American Century: A U.S. Strategic Response to Foreign Competitive Practices," Trade Promotion Coordinating Committee, Fourth Annual Report to the U.S. Congress ("Fourth Annual Report of Trade Promotion Committee"), Oct. 1996, at 115.

3. "Summary of the Organization of American States Inter-American Convention Against Corruption," U.S. Department of Commerce, Chief Counsel for International Commerce, Apr. 30, 1996 (hereinafter "Summary"), at 3.

4. *Id.*

of law,⁵ a unique opportunity is provided through the ABA to place the resources and experiences of U.S. lawyers at the disposal of governments, international organizations and non-governmental organizations to assist in the ratification and implementation of the Inter-American Convention.

II. Background

The Inter-American Convention was negotiated under the auspices of the Organization of American States (OAS) following a mandate agreed to by the 34 heads of state that participated in the Summit of the Americas in 1994.⁶ The OAS General Assembly later instructed its Permanent Council to “convene a specialized conference to consider and, if appropriate, adopt a draft ‘Inter-American Convention Against Corruption.’”⁷ As part of this process, one of the specialized OAS entities, the Inter-American Juridical Committee (OAS Juridical Committee), was involved in the initial drafting and structuring of the Inter-American Convention.⁸ On October 4, 1995, the Permanent Council authorized a special series of meetings and urged member states to designate experts and called upon the OAS Juridical Committee to participate in the review of the draft Inter-American Convention.⁹

On February 22, 1996, the Permanent Council approved the convocation of the Specialized Conference,¹⁰ which took place in Caracas, Venezuela from March 27 to 29, 1996.¹¹ The Inter-American Convention was approved at the fourth session on March 29, 1996.¹² Twenty-one countries signed it at the closing ceremony.¹³ Two additional countries have since signed the Inter-American Convention, including the United States on June 2, 1996.¹⁴ The Inter-American Convention entered into force on March 6, 1997, after the second of the instruments of ratification of Paraguay and Bolivia were deposited with the OAS General Secretariat. Mexico, Peru, Venezuela, Costa Rica and Ecuador have since deposited their instruments of ratification.¹⁵ The Inter-American Convention remains open for signature, ratification and accession by any state.¹⁶

5. ABA Recommendation and Report, Report No. 117A, Feb. 1995.

6. Summary at 1.

7. Specialized Conference at 1.

8. *Id.* (referring to CP/GT/PEC-22/95—International Cooperation against Corruption prepared by the OAS Juridical Committee).

9. *Id.* (referring to CP/RES. 658 (1044/95)).

10. *Id.* at 3.

11. *Id.* at 3 and 6.

12. *Id.* at 6.

13. The signatories at the closing ceremonies included Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. *Id.* at 6.

14. Guatemala and the United States. Report of Official, U.S. Permanent Mission to the OAS, June 25, 1997.

15. *Id.*

16. Inter-American Convention at Art. XXI-XXIII.

III. Summary of Inter-American Convention

The Inter-American Convention applies to civil servants at all levels, high-level political appointees and temporary government officials, and others carrying out "public" functions.¹⁷ "[A]ny temporary or permanent, paid or honorary activity, performed by a natural person in the name of the State or in the service of the State or its institutions, at any level" is considered a "public function."¹⁸ And "public official," "government official" and "public servant" are placed under one broad definition covering "any official or employee of the State or its agencies, including those who have been selected, appointed, or elected to perform activities or functions in the name of the State or in the service of the State, at any level of its hierarchy."¹⁹

A. ACTS OF CORRUPTION

The Inter-American Convention applies to the direct or indirect solicitation or acceptance by a government official of any benefit: for himself or for another person or entity in exchange for any act or omission in the performance of his public functions; the offering or granting of such benefits; acts or omissions in the course of public functions to obtain such benefits; and the fraudulent use or concealment of property derived from, or any participation in, an act of corruption.²⁰ All parties must establish these corrupt practices as a criminal offense under their domestic law.²¹ In addition, each party must establish its jurisdiction over such offenses when committed in its territory.²²

B. TRANSNATIONAL BRIBERY

As only one OAS country, the United States, outlaws the bribery of foreign officials, such bribery is not listed as an act of corruption in the Inter-American Convention. Instead, it is treated in a separate article.²³ In that article, the parties to the Inter-American Convention, "subject to their Constitutions and the fundamental principles of their legal systems," agree to prohibit and punish transnational bribery of foreign officials.²⁴ Once established as a criminal offense under the domestic laws of a party, transnational bribery will be considered an act of corruption under the Inter-American Convention.²⁵ For those countries that ratify

17. In certain circumstances, consultants may be considered "public officials" under the terms of the Inter-American Convention. Summary at 4.

18. Inter-American Convention at Art. I.

19. *Id.*

20. *Id.* at Art. VI.

21. *Id.* at Art. VII.

22. *Id.* at Art. V, ¶ 1.

23. *Id.* at Art. VIII.

24. *Id.*

25. *Id.*

and implement the Inter-American Convention, this "subject to" proviso may provide a convenient excuse for parties to avoid the implementation of prohibitions against transnational bribery. It is therefore essential that the use of the proviso be extremely limited and not be used as an artificial justification for failing to carry out both the spirit and the express language of the Inter-American Convention.

The Inter-American Convention's elements of the offense of foreign official bribery are in general terms quite similar to the Foreign Corrupt Practices Act (FCPA).²⁶ Both legal regimes are comparable in scope: both apply to payments made in seeking to obtain or retain business; and both focus on the giving of something of value for an act or omission by an official, or exercise of influence, in violation of his or her duties. The differences between the two legal regimes are matters of detail rather than fundamental concepts or principles.²⁷

Perhaps the key apparent difference is that the Inter-American Convention does not explicitly provide an exception for facilitating payments like the FCPA.²⁸ Payments to secure "routine governmental actions," as opposed to a discretionary act or decision, do not violate the FCPA.²⁹ Such facilitating payments could be considered payments made to an official "in exchange for [an] act . . . in the performance of his public functions,"³⁰ and therefore may be considered acts of corruption under the Inter-American Convention. However, the report of the OAS Juridical Committee on model elements for inclusion in domestic implementing legislation, at least implicitly, recognizes that countries may be able to exclude facilitating payments from their legislation.³¹

There are other less apparent differences.³² Yet, notwithstanding these differences, the basic contours of the transnational bribery provisions of the Inter-American Convention are consistent with the basic principles of the FCPA. Because of this, it may be possible for the United States to take the position that the FCPA represents full implementation of Article VIII of the Inter-American

26. 15 U.S.C. §§ 78 *et seq.*

27. With respect to the key definition of public official, some commentators have, for example, argued that the Inter-American Convention provides greater clarity. L. Low, K. Atkinson & A. Bjorklund, "A Comparison of the Inter-American Convention Against Corruption and U.S. Foreign Corrupt Practices Act," Prepared for Inter-American Bar Association XXXIIIrd Conference, May 18-23, 1997, Rio de Janeiro, Brazil, at 34.

28. 15 U.S.C. §§ 78dd-1(b) and 78dd-2(b).

29. *Id.*

30. Inter-American Convention at Art. VI, ¶ 1, (a) and (b).

31. L. Low, K. Atkinson & A. Bjorklund, "A Comparison of the Inter-American Convention Against Corruption and U.S. Foreign Corrupt Practices Act," at 31.

32. Unlike the FCPA, promises are not expressly covered in Article VIII of the Inter-American Convention, relating to transnational bribery. This may be insignificant since "offering something of value to a foreign official in exchange for a benefit" is an act of corruption. L. Low, K. Atkinson & A. Bjorklund, "A Comparison of the Inter-American Convention Against Corruption and U.S. Foreign Corrupt Practices Act," at 27-28 (citing Art. VI, ¶ 1, (b)). The Inter-American Convention may cover a broader scope of benefits to a public official than is traditionally viewed under the FCPA. *Id.* at 29. Also, what constitutes a "public official" appears to be more limited under the Inter-American Convention.

Convention, and ratify it subject to that understanding. The United States may also want to consider whether the FCPA could be improved by adopting certain provisions of the Inter-American Convention, but that exercise should not detract from the fundamental desirability of ratification of the Inter-American Convention by the United States and other OAS member states.

C. ILLICIT ENRICHMENT

Illicit enrichment is also not listed as an act of corruption under the Inter-American Convention. Like transnational bribery, it is treated as a separate article. Illicit enrichment is defined as "a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions."³³ "Subject to their Constitutions and the fundamental principles of their legal systems,"³⁴ parties to the Inter-American Convention are required to make illicit enrichment an offense under their laws.³⁵

Some OAS countries had recognized illicit enrichment as an offense under their domestic laws prior to the adoption of the Inter-American Convention. In the United States, there are a variety of federal and state laws and regulations which, in combination, effectively address the issue of illicit enrichment by government officials. For example, the net worth method of proof in prosecuting tax evasion cases under 26 U.S.C. § 7201 has been used for years in the United States as a recognized means of addressing a form of unjust enrichment. As a result, from a constitutional standpoint, as long as the burden of proving illicit enrichment remains with the government, there does not appear to be a conflict with basic U.S. legal principles.

It is unlikely that the United States will seek to establish illicit enrichment as a separate offense under U.S. law. As suggested, it may not be necessary. However, in considering the Inter-American Convention for ratification, every effort should be made to achieve an effective balance between protecting fundamental U.S. legal principles and encouraging full U.S. cooperation with other countries in addressing public corruption. In order for the United States to be credible in leading efforts to deter corruption in the conduct of international business, it is critical that the United States be perceived as being receptive to and indeed dedicated to implementing and carrying out the essential elements of the Inter-American Convention.

33. Inter-American Convention at Art IX.

34. This is the same proviso found in Article VIII, pertaining to transnational bribery, of the Inter-American Convention.

35. Inter-American Convention at Art. VIII and IX.

D. COOPERATION

Parties to the Inter-American Convention that do not establish transnational bribery or illicit enrichment as offenses under their domestic laws must, to the extent permitted by their laws, provide the assistance and cooperation provided for in the Inter-American Convention to other parties with regard to transnational bribery and illicit enrichment.³⁶ The Inter-American Convention seeks to maximize cooperation among the parties.³⁷ Provision is also made to preclude the use of bank secrecy laws or political grounds as bases for refusing to cooperate.³⁸

E. EXTRADITION

Despite the special provisions of the Inter-American Convention to assure cooperation, unless a party makes such acts offenses under its domestic law, the extradition provisions do not apply to illicit enrichment, transnational bribery, or the acts described under its domestic law. In general, the Inter-American Convention extends existing extradition treaties among parties to include the offenses under the Inter-American Convention and provides that the Inter-American Convention may serve as the legal basis for extradition among parties that do not have extradition treaties among themselves or that do not require extradition treaties.³⁹

F. RATIFICATION

The Inter-American Convention thus represents a path-breaking step forward in the efforts to combat public corruption. It is critical to the success of this effort that the Inter-American Convention be ratified by most, if not all, of the OAS member states. It is also important that such ratification not be accompanied by reservations or understandings that would significantly dilute the extent of a country's commitment. The Inter-American Convention permits reservations, but only to specific articles.⁴⁰

While the "escape clauses" provided in the transnational bribery and illicit enrichment provisions of Articles VIII and IX, respectively, may allow ratification without implementing these articles and without taking a reservation, it is important that these provisions be used sparingly and only in the case of clear conflict with national constitutions or fundamental legal principles that cannot be resolved through any lesser means. In a similar regard, for reasons discussed below in Part V., it is also critical that national implementation possess a high degree of

36. *Id.*

37. *E.g.*, Inter-American Convention at Art. XV.

38. Inter-American Convention at Art. XVI and XVII.

39. *Id.* at Art. XIII, ¶¶ 2-4.

40. *Id.* at Art. XXIV.

consistency. The more widespread the ratification and the full implementation of the Inter-American Convention, the greater the likelihood it will receive similar treatment in a greater number of countries.

IV. Other Developments

Since the ABA first took a position on deterring corrupt practices in the conduct of international business, there has been much activity in international fora and institutions other than the OAS. To date, none of the initiatives in these other fora are as comprehensive or have progressed as far as the Inter-American Convention. The developments with a number of these initiatives are significant and should also be given consideration and support.

A. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

On May 23, 1997, the Organization for Economic Co-operation and Development (OECD) adopted a Revised Recommendation of the Council on Combating Bribery in International Business Transactions (Revised Recommendation).⁴¹ The Revised Recommendation reiterates previous positions taken by the OECD and takes note of intervening action taken by other international bodies.⁴² It also reaffirms the need of member countries to criminalize the bribery of foreign public officials.⁴³

Compared to the OECD's previous recommendations, the Revised Recommendation is more affirmative in nature and broader in scope. It makes specific reference to the need for accounting requirements and external audit and internal company controls.⁴⁴ In addition, its provisions address the need to deny tax deductibility of bribes, making public procurement transparent and facilitating international cooperation.⁴⁵ But possibly the most important outcome of the Revised Recommendation is the "Agreed Upon Common Elements of Criminal Legislation and Related Action" set forth in the Annex.⁴⁶ In both language and approach, they are fundamentally in accord with the basic principles of the FCPA, and they provide a sound basis for moving towards appropriate and effective measures to deter foreign corrupt practices.

However, instead of endorsing unilateral action by member countries, the OECD's Revised Recommendation calls for the negotiation of an international convention.⁴⁷ Deferring to the negotiation of an international convention has been viewed in many quarters as a setback to efforts to deter corrupt practices in

41. OECD/C(97)123/FINAL.

42. *Id.* at 2.

43. *Id.* at 3.

44. *Id.* at 3.

45. *Id.* at 3-6.

46. *Id.* at 7-9.

47. *Id.*

the conduct of international business.⁴⁸ Despite the strong language calling for negotiations to begin promptly, for the treaty to be open for signature by the end of 1997, and for the treaty to enter into force twelve months thereafter,⁴⁹ there is concern that some OECD member countries insisted on an international convention as a subterfuge for further delay.⁵⁰

It is essential that the current momentum not be lost. Every effort should be made to ensure that the commitments called for in the Revised Recommendation are kept. This includes maintaining the schedule for the negotiations and, ultimately, the timing at which an international convention enters into force. It also includes minimizing reservations and understandings and fully implementing and actively enforcing an international convention. But in balancing these interests, great care must be exercised to avoid reducing an international convention to no more than a set of hortatory principles. The common elements, definitions and jurisdictional requirements of any international convention must be sufficiently broad and flexible so as to be an effective guide and mechanism for deterring foreign corrupt practices in the conduct of international business.

B. EUROPEAN UNION

On the same day that the OECD adopted its Revised Recommendation, May 23, 1997, the European Union (EU) adopted a Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union (EU Convention).⁵¹ The EU Convention criminalizes the bribery of EU officials as well as public officials of EU member countries. It represents another major step in the international movement towards deterring corrupt practices in the conduct of international business. Regrettably, it does not prohibit transnational bribery of foreign officials of countries that are not part of the EU, including the United States, the remainder of the industrialized world and all of the developing world.

C. UNITED NATIONS

In the United Nations, the United States introduced in 1996 a proposal for a "United Nations Declaration on Corruption and Bribery in Transnational Commercial Activities."⁵² The proposal called on member states to criminalize both domestic and international bribery and to prohibit the tax deductibility of bribes. It was adopted by the Economic and Social Council of the United Nations,

48. See, e.g., S. Goldschlager and S. Marcuss, "Getting Out From Under the Table," *Wash. Post*, July 14, 1997, at A19.

49. OECD/C(97)123/FINAL at 7-9.

50. See, e.g., S. Goldschlager and S. Marcuss, "Getting Out From Under the Table."

51. Report of Senior Official, U.S. Department of Justice, June 27, 1997.

52. Fourth Annual Report of Trade Promotion Committee at 117.

ECOSOC, on July 23, 1996,⁵³ and later led to the adoption on December 12, 1996, by the General Assembly of the United Nations of a resolution adopting an "International Code of Conduct for Public Officials" and calling for increased efforts to deter corruption in its various forms, including those international economic activities carried out by corporate entities.⁵⁴

D. WORLD BANK

In 1996, the World Bank (Bank) took pronounced action against bribery by explicitly establishing a policy for not tolerating fraud or corruption in Bank-financed contracts by bidders or borrowers.⁵⁵ The Bank will reject proposals for contract awards or cancel the portion of a loan if the bidder or the borrower has engaged in fraud or corruption in the procurement or execution of the contract. "Companies determined by the Bank to have engaged in corrupt or fraudulent practices will be blacklisted from participation in Bank-financed contracts, either indefinitely or for a stated period of time."⁵⁶

V. The Need for a Common Approach

To date, the United States is the only country with experience in criminalizing and prosecuting the bribery of foreign officials. This experience should be instructive as other countries begin to implement and enforce provisions criminalizing the bribery of foreign officials. But regardless of the extent to which U.S. law is taken as a model, the effectiveness of the Inter-American Convention and the degree to which it is implemented and enforced will be enhanced by developing common elements and consistency in its terms and application. Otherwise, the proliferation of divergent national laws and approaches will not only make more difficult compliance with the Inter-American Convention, it ultimately will undermine efforts to deter foreign corrupt practices.

Accordingly, the definitions, common elements, and scope of application of the prohibitions on the bribery of foreign officials developed by the Working Group on Bribery of the OECD, and incorporated in the Annex of the Revised Recommendation, should be a guide for countries implementing the Inter-American Convention. The work-product of the Working Group that is set forth in the Annex is consistent with the provisions of the Inter-American Convention, and provides a clear enumeration of the elements of the offense and other key concerns. It is also representative of the U.S. experience and, more importantly, reflects a common view of legal experts from a wide range of backgrounds and experiences throughout the world:

53. E.S.C. Res. 1996/8, U.N. ESCOR, 45th pl. mtg., U.N. Doc. E/C.1996/8 (1996).

54. G.A. Res. 51/59, U.N. GAOR, 51st Sess., U.N. Doc. A/RES/51/59 (1997), ¶¶ 2 and 7.

55. Fourth Annual Report of Trade Promotion Committee at 118.

56. *Id.*

1. *Elements of the Offense of Active Bribery*

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

2. *Ancillary Elements or Offenses*

The general criminal law concepts of attempt, complicity and/or conspiracy of the law of the prosecuting state should be recognized as applicable to the offense of bribery of a foreign public official.

3. *Excuses and Defenses*

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

4. *Jurisdiction*

Jurisdiction over the offense of bribery of foreign public officials should in any case be established when the offense is committed in whole or in part in the prosecuting State's territory. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act can be minimal.

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

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

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

5. *Sanctions*

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

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

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

6. *Enforcement*

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

Complaints of victims should be seriously investigated by the competent authorities.

The statute of limitations should allow adequate time to address this complex offense.

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

7. *Connected Provisions (Criminal and Non-criminal)*

—Accounting, Record-Keeping and Disclosure

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

—Money laundering

The bribery of foreign public officials should be made a predicate offence for purposes of money laundering legislation where bribery of a domestic public official is a money laundering predicate offence, without regard to the place where the bribery occurs.

8. *International Co-operation*

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

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

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

Means should be explored and undertaken to improve the efficiency of mutual legal assistance.⁵⁷

VI. Recommended Action

In 1995, the ABA adopted a Recommendation supporting efforts “by the international community, by national governments, and by non-government organizations to encourage the adoption and implementation of effective legal measures and mechanisms to deter corrupt practices in the conduct of international business.”⁵⁸ At that time, it was unclear to what extent international initiatives then in their initial stages would produce “hard” rather than “soft” law.⁵⁹ The Inter-American Convention is one of the first critical steps in converting the rather recent and dramatic international developments into binding obligations that could result in effective mechanisms to prevent bribery and related conduct in the course of international business.

The ABA’s support is not only critical to facilitating the ratification and implementation of the OAS Convention, it is important to a broader range of efforts. The ABA has a distinctive role in these efforts inasmuch as it represents a community of lawyers uniquely qualified to address the range of issues associated with guiding the development and implementation of effective measures to deter corrupt practices in the conduct of international business. The United States remains the only country to date to take affirmative steps to penalize such corrupt practices on the part of its citizens, residents and businesses. U.S. lawyers therefore have years of experience addressing the multitude of issues associated with implementing and complying with such legal regimes.

For this reason, the Recommendation is meant to be broad in its scope so that the ABA and its members can play an active and constructive role in the ratification and implementation of the OAS Convention and in the ongoing efforts through the OECD to negotiate and implement a convention criminalizing the bribery of foreign officials. The ABA’s support is neither unlimited nor undefined. Such support and assistance must be guided by the basic principles of the FCPA and the common elements in the Annex to the Revised Recommendation of the OECD. Without a common focus, international efforts to deter foreign corrupt practices will fail to achieve their full potential.

Respectfully submitted,
Lucinda A. Low
Chair

August 1997

57. OECD/C(97)123/FINAL at 7-9.

58. ABA Recommendation and Report.

59. *Id.* at 5.

