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Foreign Corrupt Practices

STUART H. DEMING*

On both international and domestic fronts, efforts to deter foreign corrupt practices in the conduct of international business showed increased vigor and marked developments in 1997. The efforts of the U.S. Department of Justice are no longer the sole source of enforcement activity. Other countries, multilateral institutions, and additional U.S. domestic agencies are beginning to play a role.

I. International Efforts

Significant progress was made in efforts to achieve a multilateral consensus on a common approach to deterring foreign corrupt practices in the conduct of international business. While the manner and the degree to which these new agreements will be implemented and enforced remains unclear, they represent major substantive steps beyond mere statements of hortatory principles.

A. OECD

Most significant of the international developments in 1997 was the work of the Organization for Economic Cooperation and Development (OECD). Concerted efforts in recent years culminated on November 21, 1997, in the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) in Paris, France.¹ Along with the twenty-nine OECD member countries, Argentina, Brazil, Bulgaria, Chile and the Slovak Republic also agreed to the OECD Convention.²

Previously, in 1994, the OECD adopted a Recommendation on Combating Bribery in

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1. OFFICE OF THE CHIEF COUNSEL FOR INTERNATIONAL COMMERCE, U.S. DEPT. OF COMMERCE SUMMARY OF OECD ANTI-BRIBERY CONVENTION, (1998) (visited Feb. 10, 1998) <<http://www.ita.doc.gov/legal/oecdsum.html>>.

2. The OECD Convention was signed by representatives of participating countries on December 17, 1997 in Paris, France. *Id.*

International Business Transactions. The 1994 Recommendation started the process of considering a common approach to deterring foreign corrupt practices. As an initial step, a Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials was adopted in 1996. It called for member countries to take steps to eliminate the tax deductibility of bribes to foreign officials as a business expense.

On May 23, 1997, the OECD adopted a Revised Recommendation of the Council on Combating Bribery in International Business Transactions (Revised Recommendation).³ Aside from reaffirming the need of member countries to criminalize the bribery of foreign public officials,⁴ possibly the most important outcome of the Revised Recommendation was the "Agreed Common Elements of Criminal Legislation and Related Action" set forth in its Annex.⁵ In both language and approach, these "Common Elements" were fundamentally in accord with the basic principles of the Foreign Corrupt Practices Act (FCPA) in the United States,⁶ and they provided a sound basis for moving towards appropriate and effective measures to deter foreign corrupt practices.

The OECD Convention obligates the parties to the convention to criminalize the bribery of foreign public officials.⁷ This includes officials in all branches and all levels 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.⁸ A public function includes any activity in the public interest.⁹ A public enterprise is any enterprise over which a government exercises a dominant influence.¹⁰ The prohibitions do not apply, however, to an enterprise that operates on a normal commercial basis substantially equivalent to that of a private enterprise without preferential subsidies or other privileges.

Like the FCPA, the OECD Convention does not require the criminalization of "[s]mall 'facilitation' payments."¹¹ However, unlike the FCPA, the OECD Convention does not specifically cover political parties. Negotiators did agree to an accelerated work plan to address several outstanding issues, including acts of bribery relating to foreign political parties and to persons in anticipation of their becoming foreign public officials. The results of this review will be reported to OECD ministers by the Council meeting in 1999.

To the extent that political parties are currently covered, the OECD Convention prohibits business-related bribes to foreign public officials made through political parties and party officials, as well as bribes directed to political parties by public officials.¹² In addition, some persons who are not formally designated as public officials, but who perform a public function, may

3. REVISED RECOMMENDATION OF THE COUNCIL ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, OECD/C(97)123/FINAL. Also available at (visited Feb. 10, 1998) <<http://www.oecd.org/daf/cm/s/bribery/bribrecm.htm>> [hereinafter REVISED RECOMMENDATION].

4. *Id.* at 3.

5. *Id.* at 7-9.

6. 15 U.S.C. §§ 78m, 78dd-1, 78dd-2, & 78ff (1994).

7. CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, OECD/IME/BR(97)16/FINAL, Art. 1 [hereinafter OECD CONVENTION]. Also available at (visited Feb. 10, 1998) <<http://www.oecd.org/daf/cm/s/bribery/20nov1e.htm>>.

8. *Id.* art. 1, ¶ 4.

9. COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, OECD/IME/BR(97)17/FINAL, ¶ 12 [hereinafter OECD COMMENTARIES]. Also available at (visited Feb. 10, 1998) <<http://www.oecd.org/daf/cm/s/bribery/20nov2e.htm>>.

10. *Id.* ¶ 14.

11. *Id.* ¶ 9.

12. SUMMARY OF OECD ANTI-BRIBERY CONVENTION, *supra* note 2, at 1.

be considered to be foreign public officials under the legal principles of some countries.¹³ Similarly, under the legal systems of some countries, the OECD Convention may apply to an advantage promised or given to a person in anticipation of becoming a foreign public official.

The negotiators agreed to apply "effective, proportionate and dissuasive criminal penalties" to those who bribe foreign public officials.¹⁴ Countries whose legal systems lack the concept of criminal corporate liability must provide for equivalent non-criminal sanctions, including monetary penalties.¹⁵ The OECD Convention further requires that countries be able to seize or confiscate the bribe and bribe proceeds or property of similar value, or that monetary sanctions of comparable effect be applicable.¹⁶

Parties to the OECD Convention are required to take necessary measures, within the framework of their relevant laws and regulations, to prohibit the establishment of off-the-books accounts and similar practices used to bribe or hide the bribery of foreign public officials.¹⁷ Bribery of foreign public officials is made a predicate offense for purposes of money laundering legislation on the same terms as bribery of domestic public officials.¹⁸

Parties to the OECD Convention 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.¹⁹ The territorial basis for jurisdiction is to be interpreted broadly so that an extensive physical connection to the act of bribery is not required.²⁰

A provision is also made for parties to the OECD Convention to review their current bases for jurisdiction and to take remedial steps if they are not effective in the fight against bribery of foreign public officials.²¹ Parties shall consult when more than one party asserts jurisdiction.²² Participating governments are pledged to work together to provide legal assistance and to make bribery of foreign public officials an extraditable offense.²³

As part of the Revised Recommendation, OECD member states were called on to submit to national legislatures by April 1, 1998 implementing legislation to criminalize bribery of foreign public officials and to seek the enactment of such laws by the end of 1998. Parties to the OECD Convention are required to cooperate in a follow-up program, within the framework of the OECD, to monitor and promote full implementation.²⁴

Prior to 1999, the OECD Convention will enter into force when five of the OECD's ten largest exporting countries, representing sixty percent of the combined total exports of those ten countries, deposit their instruments of ratification.²⁵ Thereafter, it will enter into force when at least two signatories have deposited their instruments of ratification and declared their willingness to be bound.²⁶

13. *Id.* An example could be political party officials in countries with single political parties. *Id.*

14. OECD CONVENTION, *supra* note 7, art. 3, ¶ 1.

15. *Id.* art. 3, ¶ 2.

16. *Id.* art. 3, ¶ 3.

17. *Id.* art. 8, ¶ 1.

18. *Id.* art. 7, ¶ 1.

19. *Id.* art. 4, ¶¶ 1 & 2; OECD COMMENTARIES, *supra* note 9, ¶ 26.

20. *Id.* ¶ 25.

21. OECD CONVENTION, *supra* note 7, art. 4, ¶ 4.

22. *Id.* art. 4, ¶ 3.

23. *Id.* art. 9, ¶ 1 & art. 10, ¶ 1.

24. *Id.* art. 12.

25. *Id.* art. 15, ¶ 1.

26. *Id.* art. 15, ¶ 2.

B. OAS

The Inter-American Convention Against Corruption (Inter-American Convention) was adopted and opened for signature on March 29, 1996 in Caracas, Venezuela.²⁷ It seeks to promote and strengthen cooperation to "prevent, detect, punish and eradicate corruption in the performance of public functions."²⁸ The Inter-American Convention entered into force on March 20, 1997, after the instruments of ratification of Paraguay and Bolivia were deposited. Mexico, Argentina, Ecuador, Peru, Venezuela, and Costa Rica are the other countries that have ratified it to date.²⁹ Of the thirty-five members of the Organization of American States (OAS), twenty-three have signed the Inter-American Convention.

Although the Inter-American Convention was the first multilateral legal framework established to combat public corruption in international business transactions, the bribery of foreign officials is not its primary focus, as with the OECD Convention.³⁰ "[S]ubject to their Constitutions and the fundamental principles of their legal systems," the parties to the Inter-American Convention agreed to prohibit and punish transnational bribery of foreign officials.³¹ For those countries that ratify and implement the Inter-American Convention, this "subject to" proviso may ultimately provide a means for parties to avoid the implementation of prohibitions against transnational bribery.

Like the OECD Convention, the Inter-American Convention's elements of the offense of foreign official bribery are, in general terms, quite similar to the FCPA. Both legal regimes are comparable in scope in that both apply to payments made in seeking to obtain or retain business and 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.³²

C. EUROPEAN UNION

On May 26, 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).³³ The EU Convention criminalizes the bribery of

27. Specialized Conference on the Draft Inter-American Convention Against Corruption, OEA/Ser.K/XXXIV.1 CICOR/doc.16/96 rev. 2, Sept. 9, 1996, at 6. See also Inter-American Convention Against Corruption, March 29, 1996, 35 I.L.M. 724 (entered into force Mar. 6, 1997) [hereinafter Inter-American Convention].

28. U.S. DEP'T OF COMMERCE, OFFICE OF THE CHIEF COUNSEL FOR INT'L COMMERCE, SUMMARY OF THE ORGANIZATION OF AMERICAN STATES INTER-AMERICAN CONVENTION AGAINST CORRUPTION 3 (1996).

29. U.S. DEP'T OF JUSTICE, OFFICE OF THE CHIEF COUNSEL FOR INT'L COMMERCE, ANTI-CORRUPTION REVIEW 25 (1997).

30. *Toward the Next American Century: A U.S. Strategic Response to Foreign Competitive Practices*, 4 TRADE PROMOTION COMM. ANN. REPT. (Oct. 1996), at 15.

31. *Id.*

32. 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, et al., *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. Perhaps the key apparent difference is that the Inter-American Convention does not explicitly provide an exception for facilitating payments like the FCPA. Payments to secure "routine governmental actions," as opposed to a discretionary act or decision, do not violate the FCPA. Such facilitating payments could be considered payments made to an official "in exchange for [an] act . . . in the performance of his public functions," 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. *Id.* at 31.

33. ANTI CORRUPTION REVIEW, *supra* note 29, at 18.

EU officials and public officials of EU member countries. Unlike the FCPA, it does not contain the limiting clause "in order to obtain or retain business."³⁴ It also does not apply to foreign nationals or firms.³⁵ But the major distinction is that, contrary to the other conventions and the FCPA, the EU Convention does not prohibit transnational bribery of foreign officials of countries that are not part of the EU. At this point, it is unclear what impact the OECD Convention will ultimately have on the implementation and enforcement of the EU Convention.

D. OTHER DEVELOPMENTS

On November 21, 1997, the Pacific Basin Economic Council (PBEC) approved a PBEC Statement on Standards or Transactions between Business and Governments (Statement).³⁶ Modeled after the Rules of Conduct adopted by the International Chamber of Commerce in 1996, the Statement was approved by all twenty PBEC member committees, including thirteen from non-OECD economies in Asia and Latin America. The Statement calls on PBEC member companies to adhere to a specific set of standards of corporate behavior, including: respect for national laws; avoidance of improper inducements; appropriate remuneration and control of agents; proper financial recording and auditing; transparency and disclosure of political contributions as required by law; and, development of company codes of conduct.

II. Domestic Developments

Both the U.S. Securities and Exchange Commission (SEC) and Department of Justice can bring actions for violations of the FCPA. The SEC, with regulatory authority over public "reporting" companies,³⁷ can bring civil actions for violations of the FCPA's prohibition against bribery and for violations of the accounting provisions of the law. The Department of Justice can prosecute criminal violations of the FCPA and bring civil actions against U.S. individuals and companies that are not "reporting" companies under the Securities Exchange Act of 1934 (Exchange Act).

While countless actions were brought over the years under the accounting and record-keeping provisions in contexts in which the bribery of foreign officials was not involved, the SEC demonstrated little interest in the anti-bribery provisions of the FCPA. Almost all of the enforcement activity pursuant to the anti-bribery provisions was undertaken by the Department of Justice. However, two recent actions by the SEC reinforce the breadth of its powers and signal a new interest in focusing its investigatory efforts on the anti-bribery provisions of the FCPA.

A. FOREIGN SUBSIDIARIES

In *SEC v. Triton Energy Corporation*, senior officers of Triton Indonesia, Inc., the foreign subsidiary of Triton Energy Corporation, authorized improper payments to Triton Indonesia's business agent acting as an intermediary between Triton Indonesia and Indonesian government

34. *Id.*

35. *Id.*

36. *Statement on Standards for Transactions Between Business and Governments* (visited Feb. 13, 1998) <<http://www.pbec.org/transpar.htm>>. PBEC is made up of the companies from the economies represented by Asia Pacific Economic Cooperation (APEC).

37. For FCPA purposes, "reporting" companies include issuers that have a class of securities registered pursuant to section 12 of the Exchange Act and issuers that are required to file reports under section 15(d) of the Exchange Act. *See* Securities Exchange Act of 1934 § 30A(a), 15 U.S.C. § 78dd-1(a) (1994).

agencies, "knowing[ly] or recklessly disregarding the high probability that [the business agent] either had or would pass such payments along to Indonesian government employees for the purpose of influencing their decisions affecting the business of Triton Indonesia."³⁸ These officers, together with other Triton Indonesia employees, also concealed the payments by falsely documenting and recording the transactions as routine business expenditures.

While Triton Energy did not expressly authorize the improper payments and "misbookings,"³⁹ it failed to devise and maintain an adequate system of internal accounting controls to detect and prevent improper payments by Triton Indonesia to government officials and to provide reasonable assurance that transactions were recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles. The SEC's order found that senior officials of Triton Energy took no action despite receiving information from its auditors indicating that Triton Indonesia was engaged in potentially unlawful conduct.⁴⁰

The accounting and recording-keeping provisions were central to the commencement and ultimate settlement of the action brought by the SEC. However, violations of the anti-bribery provisions were alleged in the initial complaint against Triton Energy. In addition, the settlement relative to officers of Triton Indonesia included injunctions against violating the anti-bribery provisions of the FCPA. There were similar injunctions against officers of Triton Energy. The officers of the parent company expressed concern about the questionable payments but failed to require Triton Indonesia to cease the practices.⁴¹

B. ADRs

In *SEC v. Montedison, S.p.A.*, the SEC filed an action against an Italian firm that was a foreign issuer under the Exchange Act for failing to accurately report bribes to Italian officials.⁴² The accounting and record-keeping provisions, and not the anti-bribery provisions, were among the legal bases for the enforcement action. Montedison had ADRs listed on the New York Stock Exchange since 1987.⁴³ It was charged with defrauding the investing public by materially misstating its financial condition and results of operations in periodic reports filed with the SEC by concealing hundreds of millions of dollars of payments that, among other things, were used to bribe politicians in Italy.⁴⁴

The fraudulent conduct went undetected for several years because of a seriously deficient internal control environment at Montedison.⁴⁵ As a result, among the charges brought was a violation of section 13(b)(2)(B) of the Exchange Act, for failing "to devise and maintain a system of internal accounting controls." Montedison was also charged with violating section 13(b)(2)(A) of the Exchange Act for creating and maintaining false books and records.⁴⁶ Although the anti-bribery provisions were not involved, the essence of the SEC's action related to corrupt practices taking place in a foreign country. While often overlooked, many foreign companies

38. Triton Energy Corp., 63 S.E.C. 2490 (1997).

39. *Id.*

40. *Id.* at 2491.

41. *Id.*

42. *Sec v. Montedison, S.p.A.*, 63 S.E.C. 615 (1997).

43. The ADR's were registered under section 12(b) of the Exchange Act, and company files reports with the SEC pursuant to section 13(a) of the Exchange Act. The company files annual reports with the SEC on Form 20-F. Montedison, S.p.A., SEC Litigation Release No. 15, 164 (Nov. 21, 1996).

44. *SEC v. Montedison, S.p.A.*, Complaint at ¶ 1.

45. *Id.* at ¶ 2.

46. *Id.* at ¶ 26.

who enter the U.S. capital markets and who are issuers under the Exchange Act are, like Montedison, subject to the terms of the FCPA.

C. DEPARTMENT OF JUSTICE

Confirming analyses provided by many commentators, the Department of Justice issued an opinion in 1997 relative to donations made as part of securing foreign business. It found that a donation of an elementary school made directly to a government entity "and not to any foreign official" did not appear to be prohibited by the FCPA.⁴⁷ The thrust of the analysis looked to those factors that assured the benefit went to the government and not to any public official.

III. Conclusion

The coalescing of international and domestic efforts to deter foreign corrupt practices in 1997 will prompt heightened activity on the part of multinational enterprises, regardless of their national ties, to implement internal compliance programs to deter foreign corrupt practices. Whether through international conventions, tighter restrictions on the part of multilateral lending agencies, or enhanced efforts by the SEC in the United States, these large enterprises are under increasing scrutiny. The enhanced cooperation prompted by these international efforts, however, will also lead to more activity on the part of the U.S. Department of Justice as barriers to securing critical evidence are gradually removed.

47. FCPA Opinion Procedure Release 97-02, U.S. Dept. of Just. (Nov. 5, 1997).

