



## REPORT

### I. INTRODUCTION AND BACKGROUND

#### A. Introduction

On 9 December 2003, the United Nations Convention Against Corruption (“UN Convention”) was opened for signature in Merida, Mexico. To date, 118 countries, including the United States, have signed the UN Convention, and 18 have ratified it.<sup>1</sup> It will enter into force 90 days after the thirtieth instrument of ratification has been deposited, an event which is generally expected to occur this year, given the rapid rate of accession to date.

The UN Convention is not the first international anticorruption treaty to be entered into. To the contrary, recent years have seen a spate of treaties in this area. The Organization for Economic Cooperation and Development (“OECD”), the Council of Europe (“CoE”), the Organization of American States (“OAS”), and other regional and subregional organizations have all adopted conventions on the topic of anticorruption.<sup>2</sup> Several of these treaties have come into force, and the U.S. is party to two of them -- the OAS and OECD Conventions. The U.S. also participates in a CoE body, the Group of States Against Corruption (GRECO), that monitors its anticorruption program, as well as the Follow-Up Mechanism to the Inter-American Convention.

The American Bar Association (“ABA”) has followed the development of these international instruments closely and has supported U.S. ratification of both the OECD and OAS Conventions.<sup>3</sup> Since the ABA first took a position ten years ago to support efforts in the

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<sup>1</sup> United Nations Convention Against Corruption, date of signing, G.A. Res. 58/4, U.N. GAOR, 58th Sess., U.N. Doc. A/RES/58/4 (2003) (hereinafter UN Convention Against Corruption). Information about countries signing and/or ratifying the Convention, *available at* <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty18.asp>.

<sup>2</sup> *See, e.g.*, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999) (the “OECD Convention”); Inter-American Convention Against Corruption, Mar. 29, 1996, 35 I.L.M. 724 (entered into force Mar. 6, 1997) (“OAS Convention” or “Inter-American Convention”); Criminal Law Convention Against Corruption, Jan. 27, 1999, ETS No. 173 (entered into force July 1, 2002) (“Council of Europe Criminal Convention”); Civil Law Convention Against Corruption, Nov. 4, 1999, ETS No. 174, *entered into force*, Nov. 1, 2003; Additional Protocol to the Criminal Law Convention on Corruption, May 15, 2003, ETS No. 191 (entered into force Jan. 2, 2005).

<sup>3</sup> The ABA also approved a report and recommendation on the Council of Europe Criminal Law Convention in 2000, which recommended that a “wait and see” attitude be taken with respect to that Convention. Since then, that Convention has entered into force, and has more recently begun to attract ratifications from capital-exporting countries who are members of

international community to deter corrupt practices in the conduct of international business ten years ago,<sup>4</sup> international standards have gone from the hortatory to the actual. Yet none of the existing conventions offer the possibility of a truly global regime. Although the OECD Convention, developed for capital-exporting countries, enjoys the participation of the countries that generate most cross-border trade and investment activity, and is therefore a very important “supply side” instrument, it does not aspire to universality and takes a narrow approach to the issue. And the regional conventions are definitionally limited to a geographic area.

Yet the problem of corruption does not confine itself neatly to discrete regions or countries. Corrupt practices are characterized by a “race to the bottom” -- that is, a searching out by those participating in them of those jurisdictions that offer the most forgiving rules, the least transparency and accountability, the greatest ease of “no questions” operation. This and other aspects of the corruption problem, then, have given rise to a perceived need for a global architecture.

Moreover, the proliferation of conventions on the topic of anticorruption has itself created a need for more universal rules.

## **B. Background**

On the heels of its Convention Against Transnational Organized Crime concluded in November 2000,<sup>5</sup> the United Nations in late 2000 decided to pursue the negotiation of a global convention focused solely on the issue of corruption. After preparatory work in 2001, negotiations began in 2002 by an *ad hoc* committee constituted for such purpose. The committee held seven negotiating sessions, the last of which was in October 2003. The United States participated actively in all sessions. A report of these negotiations was submitted to the UN General Assembly shortly thereafter, and the Convention and accompanying resolution were adopted by the General Assembly. Upon the Convention’s opening for signature in December 2003, the United States immediately opted to sign.

The UN Convention is by far the broadest of any of the international anticorruption conventions to date. Not only does it deal with the full gamut of topics -- from prevention to civil and criminal enforcement -- but it also encompasses a wide range of criminal corruption-

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the European Union. See Peter W. Schroth and Ana Daniela Bostan, *International Constitutional Law and Anti-Corruption Measures in the European Union’s Accession Negotiations: Romania in Comparative Perspective*, 52 Am. J. Comp. L. 514 (2004).

<sup>4</sup> ABA Recommendation and Report, Report No. 117A (Feb. 1995), *reprinted in* 30 Int’l Law. 193 (1996).

<sup>5</sup> The Convention Against Transnational Organized Crime and its Protocols, U.N. Doc. A/55/383 (2000), Nov. 2, 2000, *available at* <[http://www.unodc.org/unodc/en/crime\\_cicp\\_convention.html](http://www.unodc.org/unodc/en/crime_cicp_convention.html)>. This Convention, known as the Palermo Convention, includes a number of anticorruption provisions.

related offenses, some far-reaching provisions on civil liability, a chapter that breaks new ground on asset recovery, and ambitious and complex provisions on international cooperation.

These topics will be addressed in the following sections in the order set forth below:

- Section II, Preventive Measures
- Section III, Criminalization
- Section IV, Private Rights of Action
- Section V, International Cooperation
- Section VI, Asset Recovery
- Section VII, Monitoring

In each section, we will attempt to provide an overview of the relevant provisions, how they fit with the provisions of existing conventions, and the implications (if any) for U.S. law. We note that the U.S. government's intention in negotiating the Convention was not to include provisions that would require new legislation in the United States. Our analysis indicates this goal has been achieved.

## **II. PREVENTIVE MEASURES**

The UN Convention includes the strongest preventive measures found to date in an international legal instrument. Preventive measures are intended to help countries establish the tools to prevent the criminal behavior that costs them billions of dollars every year. They also reflect the Convention's goal of establishing a comprehensive approach to dealing with corruption, from the preventive to the enforcement side, and asset recovery. They also seek to ensure that recovered assets are returned to an environment where the risk of future corruption is reduced.

Chapter II of the Convention contains the majority of its preventive measures, including mandatory provisions calling for: (1) anti-corruption policies; (2) anti-corruption bodies; (3) measures to prevent corruption in the public sector and by public officials; (4) measures governing public procurement and management of public finances; (5) public information and reporting measures; (6) measures relating to the judiciary; (7) measures to prevent corruption and promoting transparency in the private sector; (8) measures promoting civil society participation, and (9) implementing measures to prevent money laundering. The Convention's approach represents an advance from other anti-corruption agreements, where preventive measures are discretionary, but the obligations are consistent with U.S. legal regimes.

In addition, Chapter V (Asset Recovery) includes provisions for banks to implement certain practices that are designed to prevent and detect transfers of the proceeds of crime, and Chapter VI (Technical Assistance and Information Exchange) requires State Parties to maintain training and technical assistance to prevent corruption.

## A. Public Sector Measures

To combat corruption in the public sector, the Convention calls for each State Party to develop and implement effective anti-corruption policies, establish and promote effective practices, evaluate legal and administrative measures and collaborate with other States and international and regional organizations.<sup>6</sup> States are also required to ensure the existence of independent bodies to implement anti-corruption policies and to provide knowledge about the prevention of corruption.<sup>7</sup> In the United State, the strict separation of powers creates “checks and balances” to prevent, detect and prosecute corruption, but that also prevents a single anti-corruption strategy.<sup>8</sup> Each branch of the government must take steps to cooperate and coordinate in the anti-corruption area. The United States is already in compliance with this portion of the Convention, and no alteration to U.S. laws will be necessary.

### 1. Public Officials

In addition to the mandatory measures, Chapter II includes discretionary provisions, such as measures to ensure fair and transparent hiring, retention, and promotion systems for civil servants<sup>9</sup> and training for individuals in public positions considered particularly vulnerable to corruption.<sup>10</sup> In the U.S., executive branch employees are regulated by the Standards of Ethical Conduct for Executive Branch Employees,<sup>11</sup> issued by the U.S. Office of Government Ethics, but each agency is responsible for training, counseling, and disciplining regarding standards of conduct.<sup>12</sup>

Discretionary provisions for elected officials include legal and administrative measures for fair elections<sup>13</sup>; transparency in funding electoral campaigns and political parties<sup>14</sup>; and systems that promote transparency and prevent conflicts of interest.<sup>15</sup> The provision addressing campaign

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<sup>6</sup> UN Convention Against Corruption, Art. 5.

<sup>7</sup> *Id.*, Art. 6.

<sup>8</sup> See Group of States Against Corruption (GRECO), First Evaluation Round, Evaluation Report on the United States of America, adopted at the 17<sup>th</sup> Plenary Meeting, March 22-25, 2004 (hereinafter “GRECO First U.S. Evaluation”), p. 6, ¶ 18. Available at [www.greco.coe.int](http://www.greco.coe.int).

<sup>9</sup> UN Convention Against Corruption, Art. 7, at ¶ 1.

<sup>10</sup> *Id.*, Art. 7, at ¶ 1, at (b).

<sup>11</sup> 5 C.F.R. § 2635.

<sup>12</sup> See GRECO First U.S. Evaluation, p. 7, ¶ 21. Available at [www.greco.coe.int](http://www.greco.coe.int).

<sup>13</sup> UN Convention Against Corruption, Art. 7, at ¶ 2.

<sup>14</sup> *Id.*, Art. 7, at ¶ 3.

<sup>15</sup> *Id.*, Art. 7, at ¶ 4.

finance is so discretionary, it only requires that States “shall consider” taking appropriate measures, leading to criticism that it is “so weak as to be toothless.”<sup>16</sup> Responding to concerns about lax standards in the U.S., the U.S. Congress recently enacted the Bipartisan Campaign Reform Act of 2002 to reduce corruption in politics by restricting campaign financing.<sup>17</sup>

The Convention calls for States to establish and promote codes of conduct for public officials and to promulgate disciplinary measures for violations.<sup>18</sup> The codes of conduct for public officials are to include systems for registering the income, assets and liabilities of persons who perform certain public functions, and where appropriate, for making such registrations public,<sup>19</sup> as well as procedures and mechanisms for reporting acts of corruption.<sup>20</sup>

In the U.S., the Ethics in Government Act of 1978 requires public financial disclosure for senior elected and appointed officials, although the purpose of the requiring financial disclosure reports, and making them public, is to detect and prevent conflicts of interest, not necessarily to detect illicit enrichment.<sup>21</sup> In addition, the Hatch Act limits the participation of federal employees in political activity in order to protect impartiality.<sup>22</sup> Furthermore, federal officials in the U.S. must report instances of corruption to authorities, and agency heads must report any allegation or complaint regarding a violation of the U.S. criminal code.<sup>23</sup>

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<sup>16</sup> Lucinda A. Low, *Towards Universal International Anticorruption Standards: The United Nations Convention Against Corruption and Other International Anticorruption Treaties: Too Much of a Good Thing?*, Prepared for a Conference of the International Bar Association, International Chamber of Commerce, Organization for Economic Cooperation and Development, “The Awakening Giant of Anticorruption Enforcement” Apr. 22-23, 2004, Paris, France.

<sup>17</sup> 2 U.S.C. § 441, *et seq.*, amended by Pub. L. No. 107-155; *see* Nancy Z. Boswell, Phyllis Dininio and Michael Johnston, *Country Reports, The United States of America*, at [www.globalcorruptionreport.org/download/gcr2004/11\\_Country\\_reports\\_L\\_Z.pdf](http://www.globalcorruptionreport.org/download/gcr2004/11_Country_reports_L_Z.pdf).

<sup>18</sup> UN Convention Against Corruption, Art. 8, at ¶ 1; Art. 8, at ¶ 6.

<sup>19</sup> *Id.*, Art. 8, at ¶ 5.

<sup>20</sup> *Id.*, Art. 8, at ¶ 4.

<sup>21</sup> 5 U.S.C. app. § 101, *et seq.*; *see* United States (Jan. 31, 2005), *Response to Questionnaire of Committee of Experts of the Follow-Up Mechanism for the Implementation of the Inter-American Convention Against Corruption, Chapter Two(a)*, available at [www.oas.org/juridico/spanish/usa\\_res2.pdf](http://www.oas.org/juridico/spanish/usa_res2.pdf); 5 C.F.R. 2634.901, *et seq.*, also requires confidential financial disclosures for non-senior officials.

<sup>22</sup> 5 U.S.C. §§ 7321-7326; Foley Hoag LLP, *Compliance of the United States of America with the Inter-American Convention Against Corruption, Report of Civil Society to the Committee of Experts, Chapter One, (1)(a)* (Jan. 31, 2005).

<sup>23</sup> 28 U.S.C. § 535.

## 2. Public Procurement and Management of Public Finances

States are also required to establish procedures for public procurement and management of public finances.<sup>24</sup> This article includes specific, obligatory, rules for transparency in government procurement systems and public financial management. In the U.S., the law provides for public participation through procedures whereby disappointed bidders can challenge federal contract awards.<sup>25</sup> The rules prescribed in the Convention include: public distribution of invitations to tender and contract awards; transparent selection and award criteria; an effective procurement appeal system; and measures to regulate matters regarding personnel responsible for procurements.<sup>26</sup> The *travaux préparatoires* asserts an exemption for information that a State considers necessary to protect its “essential interests related to national security.”<sup>27</sup>

The budget and public accountability provisions call for transparent procedures to adopt the national budget; timely reporting of revenue and expenditure; accounting and auditing standards and related oversight; effective and efficient risk management and internal control systems; and appropriate corrective actions for failure to comply with these requirements.<sup>28</sup>

It is interesting to note that so many countries were willing to sign onto obligatory standards in the UN Convention, but would not agree to launch negotiations on procurement transparency in the WTO just a short time earlier. This is, therefore, an important move by the international community to accept transparency standards for government procurement.

In the United States, the Procurement Integrity Act works with the criminal conflict-of-interest statute to limit the release of sensitive procurement information,<sup>29</sup> and the Federal Acquisition Regulations functions to standardize government contracting procedures.<sup>30</sup> Again, no change to U.S. law will be required to adhere to the Convention.

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<sup>24</sup> UN Convention Against Corruption, Art. 9.

<sup>25</sup> 48 C.F.R. Part 33.

<sup>26</sup> UN Convention Against Corruption, Art. 9, at ¶ 1.

<sup>27</sup> *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the work of its first to seventh sessions, Addendum, Interpretive notes for the official records of the negotiation of the United Nations Convention against Corruption*, U.N. Doc. A/58/422/Add.1, ¶ 13 (hereinafter “*Travaux Préparatoires*”). This is also one of the nine exemptions to FOIA, which is being used to classify a larger number of documents, *see* 5 U.S.C. § 552.

<sup>28</sup> UN Convention Against Corruption, Art. 9, at ¶ 2.

<sup>29</sup> 41 U.S.C. § 423, implemented at 48 C.F.R. § 3.104-1, *et seq.* (Federal Acquisition Regulation 3.104-1, *et seq.*); 18 U.S.C. § 208.

<sup>30</sup> *See* [www.arnet.gov/far](http://www.arnet.gov/far).

### 3. Public Reporting

This provision requires States to take measures to enhance transparency in public administration, in relation to its organization, functioning, and decision-making processes.<sup>31</sup> This may include allowing the public to obtain information on the organization, functioning and decision-making processes on decisions and legal acts that concern members of the public, as well as simplifying procedures to facilitate public access.<sup>32</sup> It also requires simplification of administrative procedures to facilitate public access to decision-makers, and the publication of information.<sup>33</sup> Given the importance of access to public information for the meaningful participation of citizens in public administration and policy development, Article 10 represents an important step toward transparent public administration.

This is consistent with current U.S. law, specifically the Freedom of Information Act, which generally provides any person with the right to obtain access to federal agency records, although the Privacy Act limits access to such records in specified circumstances.<sup>34</sup> Additionally, the Administrative Procedures Act requires that all federal agency proposed rules and regulations be announced in the *Federal Register*, with opportunity for public comment, and requires agencies to issue responses to the comments.<sup>35</sup> Other statutes, such as the Federal Advisory Committee Act, require federal public advisory committees to hold their meetings in public, allow the public to attend, and in some cases, to be heard.<sup>36</sup>

### 4. Measures Relating to the Judiciary

Maintaining an independent judiciary is critical to combating corruption, and thus, each State is required by the Convention to take measures to prevent opportunities for corruption among the judiciary, potentially including rules respecting the conduct of members of the judiciary.<sup>37</sup> Similar measures may be applied to prosecutors. For United States judges, there is a Code of Conduct for United States Judges, and the federal judiciary is self-regulated through the Judicial Conference of the United States.<sup>38</sup>

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<sup>31</sup> UN Convention Against Corruption, Art. 10.

<sup>32</sup> *Id.*, Art. 10(a).

<sup>33</sup> *Id.*, Arts. 10(b) and 10(c).

<sup>34</sup> 5 U.S.C. § 552.

<sup>35</sup> *Id.*, § 551.

<sup>36</sup> 5 U.S.C. App. 801, as amended by 5 U.S.C. § 552b.

<sup>37</sup> UN Convention Against Corruption, Art. 11, ¶ 1.

<sup>38</sup> 28 U.S.C. § 331; the procedures for filings and responding to complaints against judges are prescribed in 28 U.S.C. § 362(c); *see also* <http://www.uscourts.gov/judconf.html>.

The weakness of this Article is that it does not prescribe specific measures. Nevertheless, given the lack of judicial integrity and independence that contributes to impunity throughout the world, this focus on the judiciary is notable. It will be particularly important for either the Conference of States Parties or a review mechanism to specify to States Parties what measures they should implement.

## **5. Private Sector Compliance Measures**

In addition to the public sector measures, States are required by the Convention to take measures to prevent corruption and enhance accounting and auditing standards in the private sector.<sup>39</sup> Measures shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply.<sup>40</sup> Suggested measures include those designed to promote cooperation with law enforcement agencies, standards and procedures to maintain the integrity and transparency of private entities and measures designed to prevent misuse of procedures and conflicts of interest relating to private entities and to ensure that private enterprises have sufficient internal auditing controls to assist in detecting and preventing acts of corruption.<sup>41</sup>

As discussed more fully in the next Section, this Article prohibits the tax deductibility of bribes, and requires that States maintain accounting, internal control, and auditing standards to prohibit certain specified acts carried out for the purpose of committing any offense established in according with this Convention.<sup>42</sup>

In the U.S., the Office of Government Ethics (OGE) does not train or counsel the private sector, although it has been argued that the OGE's mandate should be expanded to liaison with the private sector.<sup>43</sup>

## **6. Participation of Society**

In preventing and fighting corruption, States shall promote the participation of individuals and others outside the public sector, such as civil society, and non-governmental and community organizations.<sup>44</sup> This Article suggests the taking of measures to enhance the transparency and promote the contribution of the public in decision-making processes, ensure

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<sup>39</sup> UN Convention Against Corruption, Art. 12, at ¶ 1.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*, Art. 12, at ¶ 2.

<sup>42</sup> *See* III.C.2 *infra*.

<sup>43</sup> *Compliance of the United States of America with the Inter-American Convention Against Corruption, Report of Civil Society to the Committee of Experts, Chapter One, (1)(a)* (Jan. 31, 2005).

<sup>44</sup> UN Convention Against Corruption, Art. 13, at ¶ 1.

public access to information, and promote the undertaking of public information activities.<sup>45</sup> All of these measures are provided for in U.S. law, but could be enhanced in practice. States must also ensure public awareness of, and access to, the anti-corruption bodies, and an opportunity to report any incidents that may be considered an offense under this Convention.<sup>46</sup> In the U.S., the Whistleblower Protection Act of 1989 protects federal employees alleging wrongdoing, and brings the allegations to the attention of civil society and non-governmental organizations.<sup>47</sup>

## 7. Measures to Prevent Money-Laundering

States are also required to implement measures to prevent money-laundering.<sup>48</sup> This includes instituting a regulatory and supervisory regime for banks and other financial institutions susceptible to money-laundering to deter all forms of money laundering.<sup>49</sup> Administrative, regulatory, law enforcement and other authorities dedicated to money-laundering shall be able to cooperate and exchange information.<sup>50</sup>

This Article encourages States to implement measures to detect and monitor cash across borders, such as through reporting requirements, without impeding the movement of legitimate capital,<sup>51</sup> to require financial institutions to include and maintain information on the originator of electronic funds transfer forms, and for enhanced scrutiny of transfer of funds that do not contain complete information on the originator.<sup>52</sup> In 1986, the U.S. made money laundering a separate criminal offense,<sup>53</sup> “financial institutions” are regulated under the Bank Secrecy Act,<sup>54</sup> and domestic and international money laundering issues are handled by a dedicated office, the Financial Crimes Enforcement Network (FinCen) in the U.S. Treasury Department.

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.*, Art. 13, at ¶ 2.

<sup>47</sup> 5 U.S.C. § 2302(b)(8) (*see* United States (Jan. 31, 2005), *Response to Questionnaire of Committee of Experts of the Follow-Up Mechanism for the Implementation of the Inter-American Convention Against Corruption*, available at [www.oas.org/juridico/spanish/usa\\_res2.pdf](http://www.oas.org/juridico/spanish/usa_res2.pdf)).

<sup>48</sup> UN Convention Against Corruption, Art. 14.

<sup>49</sup> *Id.*, Art. 14, at ¶ 1 at (a).

<sup>50</sup> *Id.*, Art. 14, at ¶ 1 at (b).

<sup>51</sup> *Id.*, Art. 14, at ¶ 2.

<sup>52</sup> *Id.*, Art. 14, at ¶ 3.

<sup>53</sup> Money Laundering Control Act of 1986, Pub. L. 99-570, codified at 18 U.S.C. §§ 1956, 1957.

<sup>54</sup> Bank Secrecy Act, as amended, *codified at* 31 U.S.C. § 5311, *et seq.*

This Article suggests that States use relevant initiatives regional, interregional and multilateral organizations against money-laundering as guidelines in establishing regulatory and supervisory domestic regimes.<sup>55</sup> These terms were understood to refer in particular to the recommendations of the Financial Action Task Force on Money Laundering, a group in which the United States has taken a leadership role, among other established anti-money laundering initiatives.<sup>56</sup> The U.S. also provides extensive training to other countries in anti-money laundering techniques and is an active participant in a range of other international organizations and initiatives on money laundering.

## **8. Asset Recovery: Prevention and Detection of Transfers of Proceeds of Crime**

Effective preventive measures help avoid the necessity of costly and difficult asset recovery efforts.<sup>57</sup> To detect suspicious transactions for reporting to competent authorities, this Article calls on State Parties to require financial institutions to verify the identity of customers, take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates.<sup>58</sup> This Article also calls on State Parties to take measures to ensure that their financial institutions maintain adequate records of accounts and transactions involving such individuals.<sup>59</sup> The *travaux préparatoires* explain that this applies to public officials of other States as well.<sup>60</sup>

In addition, this Article requires regional, interregional and multilateral organizations working to combat money-laundering to issue advisories regarding the type of persons to whose accounts financial institutions should apply these measures<sup>61</sup> and to notify financial institutions of the identity of particular persons to whose accounts such measures should apply.<sup>62</sup> Finally, the Article urges State Parties to provide effective financial disclosure systems for public officials, including foreign accounts over which the official has signature authority, and to apply

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<sup>55</sup> UN Convention Against Corruption, Art. 14, at ¶ 4.

<sup>56</sup> *Travaux Préparatoires*, *supra* note 27, at ¶ 21.

<sup>57</sup> Lucinda A. Low, *Towards Universal International Anticorruption Standards: The United Nations Convention Against Corruption and Other International Anticorruption Treaties: Too Much of a Good Thing?*, *supra* note 16 (section on Asset Recovery).

<sup>58</sup> UN Convention Against Corruption, Art. 52 at ¶ 1.

<sup>59</sup> *Id.*, Art. 52, at ¶ 2.

<sup>60</sup> *Travaux Préparatoires*, *supra* note 27, ¶ 49.

<sup>61</sup> UN Convention Against Corruption, Art. 52, at ¶ 2 at (a).

<sup>62</sup> *Id.*, Art. 52, at ¶ 2 at (b).

sanctions for non-compliance.<sup>63</sup> The United States is already in compliance with these provisions, and is very active in such efforts, as discussed above, particularly in the context of combating terrorist financing.

## 9. Technical Assistance and Information Exchange

This Article requires States to initiate, develop or improve specific training programs for personnel responsible to prevent and combat corruption.<sup>64</sup> These training programs may involve effective measures to prevent, investigate, punish and control corruption. They should include training in: evidence-gathering and investigative methods; developing a strategic anti-corruption policy; training competent authorities in requesting mutual legal assistance under this Convention; evaluating and strengthening institutions and management of public finances and the private sector; preventing and recovering the transfer of proceeds of offenses; surveillance of the movements of proceeds of offenses; and legal and administrative mechanisms to facilitate the return of proceeds of offenses.<sup>65</sup> States shall also strengthen measures for regional and international cooperation and assistance to prevent corruption and recover the proceeds of corruption.<sup>66</sup> These mechanisms for technical cooperation are consistent with the mechanisms currently used by the United States,<sup>67</sup> and are among the facets of the U.S. Government's international transparency and anti-corruption agenda.<sup>68</sup> For a more detailed discussion of these issues, see Part V, *infra*.

## III. CRIMINALIZATION

### A. Overview

One of the basic objectives of the UN Convention is the criminalization of corrupt practices. Parties are obligated to establish certain offenses within their domestic law as well as consider adopting other offenses related to various types of corruption. Basic forms of corruption such as active and passive bribery, embezzlement of public funds, laundering proceeds of crime, and obstruction of justice, as well as related accounting offences, are required

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<sup>63</sup> *Id.*, Art 52, at ¶ 6.

<sup>64</sup> *Id.*, Art. 60.

<sup>65</sup> *Id.*, Art. 60, at ¶ 1.

<sup>66</sup> *Id.*, Art. 60, at ¶¶ 2, 5.

<sup>67</sup> The Department of Justice, Criminal Division's Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) and International Criminal Investigative Training Assistance Program (ICITAP), among other State Department and U.S. Agency for International Development programs, provide such training.

<sup>68</sup> See Fact Sheet: U.S. Anti-Corruption Agenda and Special Projects in Europe, available at <http://usinfo.state.gov/eur/Archive/2005/Jan/11-918938.html>.

to be criminalized.<sup>69</sup> The other offenses, which are only required to be considered for adoption, include trading in influence, abuse of public functions, illicit enrichment, private-sector or commercial bribery, and the embezzlement of private property.<sup>70</sup>

In its current form, the legal regime of the United States incorporates all of the criminal provisions mandated by the UN Convention.<sup>71</sup> Many of the other offenses have been, in large part, addressed either directly or indirectly within the context of the legal regime that currently exists in the United States.<sup>72</sup>

The following section focuses on the offense of transnational bribery as defined by the UN Convention, related definitions, and accounting and money laundering offenses, as well as general and procedural provisions on liability of entities and statutes of limitations. This focus facilitates a comparison of the UN Convention's provisions with the provisions of the OECD and OAS Antibribery Conventions, to which the U.S. is already a party. These are also the mandatory criminalization provisions which would involve a significant departure from pre-existing international obligations and typical domestic criminal legislation for most countries not already party to the OECD Convention.

## **B. Transnational Bribery**

The UN Convention follows the FCPA's anti-bribery provisions, the OECD Convention, and the Inter-American Convention in requiring that there be a commercial nexus to the prohibition against inducements to foreign officials. Parties are required to criminalize the

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<sup>69</sup> UN Convention Against Corruption, Arts. 16-17, 23, 25. However, criminalization of the "demand side" of transnational bribery is non-mandatory.

<sup>70</sup> *Id.*, Arts. 18-22.

<sup>71</sup> For example, 18 U.S.C. § 201 applies to active and passive bribery; 18 U.S.C. § 641 and a number of related statutes, 18 U.S.C. §§ 642-666 apply to embezzlement of public funds; 18 U.S.C. §§ 1956-1957 apply to laundering the proceeds of crime; and 18 U.S.C. §§ 1501-1520 apply to obstruction of justice.

<sup>72</sup> For example, trading in influence is addressed in various ways with respect to campaign finance laws; abuse of public functions is addressed in a number of ways in the various obstruction statutes, 18 U.S.C. §§ 641-666; illicit enrichment is indirectly addressed through a variety of federal and state laws and regulations which, in combination, effectively address the issue of illicit enrichment by government officials by requiring disclosures by certain senior officials and through the net worth method of proof in tax evasion cases under 26 U.S.C. § 7201; private sector or commercial bribery is in large part addressed by 18 U.S.C. § 1952(a)(3) and the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343; embezzlement of private property is addressed directly under certain federal statutes, *e.g.*, 18 U.S.C. §§ 667-668, and under the laws of all of the states and indirectly under federal law by, among others, mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, and interstate travel in aid of racketeering enterprises. 18 U.S.C. § 1952.

promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.<sup>73</sup>

The UN Convention explicitly expands on what is customarily viewed as the definition of “international business” to include “the provision of international aid” within the meaning of conducting international business.<sup>74</sup> While the anti-bribery provisions of the FCPA have not been generally viewed as extending to the provision of international aid, the application of the anti-bribery provisions in the settlement reached in *Metcalf & Eddy* suggest that U.S. law, in its current form, could reach such a result.<sup>75</sup> However, U.S. courts have yet to address this precise issue.

In contrast with the active component of transnational bribery, no commercial nexus is required for the passive component of transnational bribery under the UN Convention.<sup>76</sup> Nor is there a commercial nexus requirement for active or passive domestic bribery under the UN Convention.<sup>77</sup> This follows the legal regime in the United States, and presumably most countries, where any form of bribery of its officials or any solicitation of bribes by its officials are prohibited.<sup>78</sup>

## 1. Foreign Public Official

The UN Convention defines “foreign public official” in similar terms to that of the OECD Convention.<sup>79</sup> “Any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected, and any person exercising a public function for a foreign country, including for a public agency or public enterprise.”<sup>80</sup> It extends to all “levels and subdivisions of government, from national to local,” of the foreign country.<sup>81</sup>

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<sup>73</sup> UN Convention Against Corruption, Art. 16, ¶ 1.

<sup>74</sup> *Travaux Préparatoires*, supra note 27, at ¶ 25.

<sup>75</sup> *United States v. Metcalf & Eddy, Inc.*, No. 99CV12566NG, Consent and Undertaking (D. Mass., Dec. 14, 1999), reprinted in *Business Laws, Inc. (FCPA)* at § 699.749.

<sup>76</sup> UN Convention Against Corruption, Art. 16, at ¶ 2.

<sup>77</sup> *Id.*, Art. 15.

<sup>78</sup> *E.g.*, 18 U.S.C. § 201.

<sup>79</sup> UN Convention Against Corruption, Art. 2, at ¶ (b); OECD Convention, Art. 1, at ¶ 4(a).

<sup>80</sup> *Id.*, Art. 2 at ¶ (b).

<sup>81</sup> *Travaux Préparatoires*, supra note 27, at ¶ 5.

Like the OECD Convention, a candidate for public office, an official of a political party, and a political party (all covered by the U.S. FCPA) are not included within the definition of a foreign public official.

## **2. Autonomous Definition**

Like the OECD Convention, the standard enunciated by the UN Convention is an autonomous standard. Proof of the law or regulations of an official's country is not required. This extends to situations where a party to the UN Convention has adopted a statute defining the offense of transnational bribery in terms of payments "to induce a breach of the official's duty" and where it is also understood that every public official has a duty to exercise judgment or discretion impartially.<sup>82</sup>

## **3. Facilitating Payments**

No express exception was created for facilitating payments either in the UN Convention or in the *travaux preparatoires* to the UN Convention. It was the position of the United States in signing the UN Convention that no change in U.S. law would be required for its implementation. The United States government interprets facilitation payments under the FCPA as not being made for the purpose of obtaining or retaining business.<sup>83</sup>

### **C. Other Offenses**

#### **1. Money Laundering**

Unlike the OECD Convention and the COE Criminal Law Convention where only bribery is required to be a predicate offense for money laundering,<sup>84</sup> the UN Convention mandates a much wider basis for invoking a party's money laundering statutes. The UN Convention requires the adoption of money laundering statutes whereby "the widest range of criminal offenses" are used as predicate offenses.<sup>85</sup>

#### **2. Tax and Accounting Offenses**

The tax deductibility of bribes, whether paid in a domestic or foreign setting, is to be prohibited by parties to the UN Convention.<sup>86</sup> The parties are also required to take measures to

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<sup>82</sup> *Id.*, ¶ 24.

<sup>83</sup> 15 U.S.C. §§ 78dd-1(b); 78dd-2(b); 78dd-3(b).

<sup>84</sup> OECD Convention, Art. 7; COE Criminal Law Convention, Art. 13.

<sup>85</sup> UN Convention Against Corruption, Art. 23.

<sup>86</sup> *Id.*, Art. 12, at ¶ 4.

ensure that private enterprises have sufficient internal auditing controls<sup>87</sup>, and to prohibit the following conduct carried out for the purpose of committing any of the offences established in accordance with the UN Convention:

- (a) the establishment of off-the-books accounts;
- (b) the making of off-the-books or inadequately identified transactions;
- (c) the recording of non-existent expenditures;
- (d) the entry of liabilities with incorrect identification of their objects;
- (e) the use of false documents; and
- (f) the intentional destruction of bookkeeping documents earlier than foreseen by the law.<sup>88</sup>

The United States prohibited the tax deductibility of bribes many years ago.<sup>89</sup> For publicly-held entities, the accounting and internal controls provisions of the FCPA, especially in the wake of Sarbanes-Oxley, more than reflect the Convention's requirements.<sup>90</sup> While the United States does not have an equivalent set of provisions for individuals and privately-held entities, a legal regime is already in place that, in large part, effectively addresses the mandatory provisions of the UN Convention with respect to record-keeping. The mail and wire fraud statutes and the obstruction of justice statutes of the United States are particularly apropos.<sup>91</sup> In a number of respects, complying with the Internal Revenue Code has a similar deterrent effect on individuals and privately-held entities with respect to their record-keeping practices.<sup>92</sup>

While these provisions may not, therefore, be significant for the United States, their mandatory character and specificity mean that they represent a significant advance over prior anticorruption treaties.<sup>93</sup>

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<sup>87</sup> *Id.*, at ¶ 2(f). This requirement is qualified by the language “taking into account their structure and size”) and by the *chapeau* language of Article 12. The same subsection goes on to require that accounts and financial statements of enterprises are subject to appropriate auditing and certification procedures.

<sup>88</sup> *Id.*, Art. 12, at ¶ 3.

<sup>89</sup> 26 U.S.C. § 162(c)(1).

<sup>90</sup> 15 U.S.C. § 78m(b)(2). Sarbanes-Oxley did not modify the books and records and internal control provisions *per se*, but did, through its measures to improve corporate governance, attempt to make those provisions more effective, for example, by requiring that senior executives certify with respect to the company's internal control systems.

<sup>91</sup> 18 U.S.C. § 641, *et seq.*; 18 U.S.C. §§ 1341, 1343.

<sup>92</sup> A classic situation is the application of a *Klein* conspiracy under 18 U.S.C. § 371 relative to defrauding the United States. *See United States v. Klein*, 247 F.2d 908 (2d Cir. 1957).

<sup>93</sup> The OAS Convention's provisions in this area, found in Article III(10), are entirely optional. Article 8 of the OECD Convention is mandatory, but has been interpreted by most countries as merely forbidding false financial statements. *See Peter W. Schroth, Fostering*

## **D. General and Procedural Provisions**

### **1. Liability of Entities**

Each party is obligated to establish the liability of legal or juridical persons for offenses established in accordance with the UN Convention.<sup>94</sup> In contrast to the COE Criminal Law Convention, no requirement is placed on what must be known by any one person for there to be liability on the part of an entity. Like the OECD Convention,<sup>95</sup> those criteria are to be determined in accordance with a party's legal principles.<sup>96</sup> In addition, also like the OECD Convention,<sup>97</sup> there is no requirement that the liability of juridical persons be criminal in nature as long as they are "subject to effective, proportionate and dissuasive criminal or non-criminal sanctions."<sup>98</sup>

### **2. Statutes of Limitations**

In recognition of the inherent difficulties associated with investigating corruption, a long period for a statute of limitations is required for any offense established by the UN Convention.<sup>99</sup> For anyone who has evaded the administration of justice, the imposition of a longer period for a statute of limitations or, in the alternative, the suspension of a statute of limitations is required.<sup>100</sup>

This is consistent with the statutory regime of the United States. A five-year statute of limitations applies.<sup>101</sup> However, for an individual fleeing from justice, no statute of limitations applies.<sup>102</sup> Tolling can also take place under certain circumstances, including a request for

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*Informed and Responsible Management: The Failure of the Corruption Treaties' Provisions on Accounting and Controls*, 17 Res. Int'l Bus. & Fin. 313 (2003).

<sup>94</sup> UN Convention Against Corruption, Art. 26.

<sup>95</sup> OECD Convention, Art. 2.

<sup>96</sup> UN Convention Against Corruption, Art. 26, at ¶ 1.

<sup>97</sup> OECD Convention, Art. 3, at ¶ 3.

<sup>98</sup> UN Convention Against Corruption, Art. 26, at ¶ 4.

<sup>99</sup> *Id.*, Art. 29.

<sup>100</sup> *Id.*

<sup>101</sup> 18 U.S.C. § 3282.

<sup>102</sup> *Id.* at § 3290.

evidence from abroad.<sup>103</sup> Different legal theories can also be used which have the practical effect of extending the statute of limitations.<sup>104</sup>

#### IV. PRIVATE RIGHTS OF ACTION

Article 35 of the UN Convention provides that:

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law,  
to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

This provision of the UN Convention thus appears to mandate the establishment of private rights of action for damages from “acts of corruption”. In this regard, the UN Convention covers new ground for the United States, since none of the anticorruption treaties to which it is currently party contain similar provisions.<sup>105</sup>

Because of its mandatory language, questions have been raised about what obligations this Article might impose upon the United States in terms of its domestic implementation. Questions have also been raised as to whether, even if no new legislation were enacted, Article 35 might serve as a basis for instituting a lawsuit under existing legislation, such as the Alien Tort Statute (“ATS”).<sup>106</sup> Moreover, assuming the United States does not intend to pass any new legislation to implement the UN Convention,<sup>107</sup> the question has also arisen whether the United States should take a reservation to this provision of the Convention, or alternatively, whether an

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<sup>103</sup> *Id.* at § 3292.

<sup>104</sup> For example, the money laundering statutes, 18 U.S.C. §§ 1956(c)(7) and 1957(f)(3), can have the practical effect in certain circumstances of extending the statute of limitations for years since they relate to the proceeds of prohibited activity under the anti-bribery provisions of the FCPA.

<sup>105</sup> The Council of Europe Civil Law Convention Against Corruption, cited at note 2 *supra*, which entered into force in late 2003, is focused exclusively on issues of civil responsibility for acts of corruption. It includes among its key provisions the requirement that each party provide for a private right of action for “full compensation” against an individual or entity that has committed or authorized an act of corruption or failed to take reasonable steps to prevent an act of corruption. CoE Civil Law Convention, art. 3, ¶ 1. The U.S. has neither signed nor ratified this treaty, and there is no ABA position on the treaty.

<sup>106</sup> 28 U. S. C. §1350.

<sup>107</sup> As noted at the outset of this Report, drafting a convention that did not require any new implementing legislation was a goal of the U.S. negotiating team. See Section I, page 4 *supra*.

understanding or declaration is necessary to clarify, especially in the domestic sphere, what the effect this provision is intended to have.

Turning first to the question whether the UN Convention requires the U.S. Government to enact legislation to establish a private right of action for corruption-related activities, it is important to note at the outset that Article 35, like most provisions of the UN Convention, is non-self-executing.<sup>108</sup> Therefore, unless U.S. law already implements Article 35, U.S. ratification of the UN Convention would mean that the United States would become obliged to pass implementing legislation creating a private right of action.

Although U.S. courts do not recognize a private right of action under the Foreign Corrupt Practices Act, as amended (“FCPA”),<sup>109</sup> they do recognize private remedies in certain circumstances for corruption-related actions. Corruption-related activities have, for example, served as predicate acts for civil RICO claims, *see*, for example, *Dooley v. United Technologies Corp.*, 803 F. Supp. 428, 437-440 (D.D.C. 1992) (bribery of Saudi Arabian officials) and *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1066-67 (3d Cir. 1988), *aff’d* 493 U.S. 400, 110 S. Ct. 701 (1990) (military contract obtained through bribery),<sup>110</sup> and for claims of tortious interference with prospective economic advantage. *See Rotec Indus., Inc. v. Mitsubishi Corp.*, 163 F. Supp. 2d 1268 (D. Or. 2001) (suit against competitor for lost contract due to bribery); *Korea Supply Company v. Lockheed Martin Corporation*, 29 Cal. 4<sup>th</sup> 1134 (2003).

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<sup>108</sup> U.S. law distinguishes between self-executing treaties, which do not require additional legislative action to have an effect on domestic law; and non-self-executing treaties, which require additional implementing legislation to have domestic legal effect and to be enforceable in U.S. courts. The only provisions of the UN Convention that are self-executing are the Article 44 and 46 (extradition and mutual legal assistance, respectively), discussed *infra* at Section V.A. and B. Since Article 35 of the UN Convention requires each State Party to enact implementing legislation into domestic law if it does not already have such legislation, it is not self-executing.

<sup>109</sup> *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 961 (1991); *Citicorp Int'l Trading Co. v. Western Oil & Refining Co.*, 771 F. Supp. 600 (S.D.N.Y. 1991).

<sup>110</sup> It is acknowledged that civil RICO actions have a number of requirements that can, at times, significantly limit RICO’s applicability. For example, the extraterritorial application of RICO requires that some conduct occur within the United States material to the alleged crime or that there be substantial effects within the United States which are a direct and foreseeable result of the conduct outside of the United States. *See, e.g., Aldana v. Fresh Del Monte Produce, Inc.*, 305 F. Supp. 2d 1285, 1306 (S.D. Fla. 2003). In a number of respects, these requirements correspond to the jurisdictional requirements of the FCPA, such as, for example, the FCPA’s general lack of jurisdiction over foreign subsidiaries of U.S. companies. Yet situations do exist, including situations where all of the parties are headquartered in, or are residents of, the United States, where the conduct in question may be subject to criminal liability under the FCPA but not to civil liability under RICO. Nonetheless, where the requirements to a civil RICO action can be met, its treble damage and attorney fee provisions make RICO a particularly effective remedy.

Moreover, a close analysis of the UN Convention, particularly the *travaux préparatoires*, confirms that the Convention drafters intended to give States Parties the widest degree of leeway in how they implement Article 35. The *travaux préparatoires* make clear that each State has the right to determine the circumstances under which it will make its courts available for redress of corruption-related activities, and that Article 35's provisions are not intended to require or endorse any particular choice made by a State.<sup>111</sup> Accordingly, we believe the U.S. Government is within its right to conclude that existing rights of action under U.S. law satisfy the requirements of Article 35, as further delineated by the *travaux*, making it unnecessary for the United States to take a reservation to this Article.<sup>112</sup>

The question whether Article 35 might serve as a basis for instituting a lawsuit under the ATS arises because a number of federal courts in recent years have interpreted the ATS quite broadly, giving rise to the possible assertion that “acts of corruption” might be considered violative of a U.S. treaty obligation (*i.e.*, the UN Convention) or “customary international law”.<sup>113</sup> This question was for all intents and purposes resolved in June, 2004 by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. \_\_\_\_, 124 S. Ct. 2739 (2004). The U.S. Supreme Court, in *Sosa*, made clear that a private party would not have a remedy under the ATS for a violation of a non-self-executing treaty. Accordingly, the UN Convention, which is generally not self-executing (including its provisions with respect to “acts of corruption”), would not provide a cause of action under the ATS for a treaty violation.

The Supreme Court also narrowed the instances in which action could be brought under the ATS based on a violation of “customary international law” in a way that should resolve any question in this regard. The Court, in *Sosa*, held that the ATS, a provision of the Judiciary Act of 1789, was a jurisdictional statute, and that while the Congress in 1789 apparently intended that it provide the basis for a very limited set of actions, “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the

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<sup>111</sup> The note to Article 35 states that “[t]he *travaux préparatoires* will indicate that this article is intended to establish the principle that States Parties should ensure that they have mechanisms permitting persons or entities suffering damage to initiate legal proceedings, in appropriate circumstances, against those who commit acts of corruption (*e.g.*, where the acts have a legitimate relationship to the State Party in which the proceeding is brought.) While Article [35] does not restrict the right of each State Party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State Party in doing so.”

<sup>112</sup> Indeed, a reservation would be inappropriate in our view given that United States law currently allows such actions to be brought. Since a reservation is intended to deny compliance (Article 1(d), Vienna Convention on the Law of Treaties), it would not be the proper approach here.

<sup>113</sup> The ATS provides jurisdiction to institute a lawsuit for alleged torts that are in violation of (i) the law of nations (*i.e.*, customary international law) or (ii) a U.S. treaty.

ATS] was enacted.” Slip Op. at 38. The Court cites with approval the concurring opinion of Judge Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F. 2d 774 (CADDC 1984) that the “ ‘limits of [the ATS’s] reach be defined by a ‘handful of heinous actions – each of which violates definable, universal and obligatory norms.’ ” The Supreme Court concluded that “[i]t was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.” *Id.* at 21. The Court’s decision was clearly intended to raise a high bar with respect to new causes of action under the ATS. Corruption-related offenses are unlikely to meet this high threshold.

Although a reservation to the Convention is unnecessary since the U.S. can legitimately take the position that existing law provides avenues for private rights of action for corruption-related offenses which meet the Convention’s standards, the foregoing analysis makes it clear that, assuming the U.S. proceeds to ratify the Convention, and given the mandatory language of Article 35, it should accompany its ratification with a declaration that clarifies its understanding of this Article and its basis for concluding that no further implementing legislation is necessary. Such a declaration<sup>114</sup> would cover the following points: (1) that Article 35 is non-self-executing; and (2) that U.S. courts currently recognize private remedies in certain circumstances for corruption-related actions.

## **V. INTERNATIONAL COOPERATION**

Like most modern multilateral treaties relating to criminal behavior, the UN Convention contains provisions for international cooperation through extradition, mutual legal assistance, and informal law enforcement cooperation. The Convention provides for its use as the basis for such international cooperation in the absence of bilateral or other treaty arrangements. There is nothing particularly unique about these provisions in this convention. The United States has in fact led global efforts to promote international cooperation through the types of mechanisms described by the Convention. Other treaties covering different subject matter, such as the Transnational Organized Crime Convention, include similar provisions regarding international cooperation. Regional anti-corruption conventions, such as the Inter-American Convention, and the OECD Antibribery Convention, also include such measures. However, the expansion of international cooperation mechanisms on corruption to a global scope are an essential element of combating corruption, which is increasingly transnational in nature.

### **A. Extradition**

Article 44 of the UN Convention lays out the parameters of extradition under the Convention. It requires that the offenses included in the Convention be deemed extraditable offenses when dual criminality exists, and allows for extradition when there is not dual criminality.<sup>115</sup> In the absence of a bilateral extradition treaty, the Convention may itself form the

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<sup>114</sup> It might also be helpful for the section-by-section analysis of the treaty to contain a more detailed discussion of these points.

<sup>115</sup> UN Convention Against Corruption, Art. 44, at ¶¶ 1, 2, and 4.

basis for extradition when a treaty is required. In that event, a country shall either seek to conclude treaties on extradition where appropriate or state that it accepts the treaty as a basis for extradition at the time of ratification.<sup>116</sup> Extradition is subject to the conditions provided for by applicable treaties.<sup>117</sup> Countries that decline to extradite their own nationals must refer requests for extradition to local authorities for prosecution or, if extradition is sought solely for the service of a sentence, the requested country shall incarcerate the individual in their country if domestic law so permits.<sup>118</sup> Surrender conditional on serving the sentence in the surrendering country is permitted.<sup>119</sup> The Convention also allows for and encourages expedition of extradition procedures (subject to domestic law), detention prior to extradition proceedings, and conclusion of bilateral and multilateral extradition treaties.<sup>120</sup> Countries must provide for fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by domestic law, and there is no obligation to extradite if there are substantial grounds to believe that the request is made for purposes of prosecuting on the grounds of sex, race, religion, nationality, ethnic origin, or political opinions.<sup>121</sup> States parties are obliged to consult (where appropriate) prior to refusing extradition and may not refuse on the sole ground that the offense also involves fiscal matters.<sup>122</sup> Article 45 adds that States Parties may consider negotiating agreements or arrangements for the transfer of persons sentenced to complete their sentences.

All of the foregoing is consistent with existing U.S. law<sup>123</sup> and is substantially similar to the provisions of the United Nations Convention Against Transnational Organized Crime and existing anti-corruption conventions to which the U.S. is party. U.S. law requires an extradition treaty only for the surrender of citizens, nationals, and permanent residents,<sup>124</sup> although as a policy matter, the U.S. Government holds that extradition can only be performed on the basis of a bilateral treaty (and not a multilateral treaty). As it has done in its ratification of the OECD and Inter-American Convention, the U.S. will therefore most likely not recognize the UN Convention as a basis for extradition and will instead opt for continuing to conclude bilateral treaties in order to comply with the Convention, as is allowed by Article 44 (paragraph 6b). This article is self-executing under U.S. law. The real impact of the extradition article in the U.S. will be that it will

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<sup>116</sup> *Id.*, Art. 44, at ¶¶ 5 and 6.

<sup>117</sup> *Id.*, Art. 44, at ¶ 8.

<sup>118</sup> *Id.*, Art. 44, at ¶¶ 11 and 13.

<sup>119</sup> *Id.*, Art. 44, at ¶¶ 12 and 18.

<sup>120</sup> *Id.*, Art. 44, at ¶¶ 9 and 10.

<sup>121</sup> *Id.*, Art. 44, at ¶¶ 14 and 15.

<sup>122</sup> *Id.*, Art. 44, at ¶¶ 16 and 17.

<sup>123</sup> *See* 18 U.S.C. § 3181., *et seq.*

<sup>124</sup> 18 U.S.C. § 3181(b). The U.S. currently has extradition treaties in force with 110 foreign jurisdictions.

extend the older extradition treaties, which provided for extradition for specified offenses rather than the dual criminality provisions of modern treaties, to include corruption offenses.

At least one court has found that if an extradition treaty so provides, the U.S. may extradite for acts that are not crimes in the U.S.,<sup>125</sup> although as a practical matter all or virtually all extradition treaties to which the U.S. is a party require dual criminality. All mandatory offenses under the Convention, which are those that must be extraditable offenses, are already offenses under U.S. law and many of them have already been found to be extraditable by courts. The Convention does not oblige extradition for the discretionary offenses. U.S. law expressly allows for detention by warrant prior to extradition.<sup>126</sup> Those held for extradition are entitled to hearings, provision of necessary witnesses at state expense when indigent, and release upon petition after two months if proceedings are not complete unless sufficient cause for continued detention is shown.<sup>127</sup> U.S. law also provides for the return of U.S. citizens convicted abroad to serve their sentences or for foreigners convicted in the U.S. to be sent to their home countries to serve their sentences when there is a prisoner transfer treaty in effect.<sup>128</sup>

## **B. Mutual Legal Assistance**

The UN Convention requires that countries afford each other the widest measure of mutual legal assistance in relation to offenses covered by the Convention “to the fullest extent possible under relevant laws.”<sup>129</sup> It includes taking evidence, service of process, searches, seizures, examination of objects and sites, expert evaluations, procurement of originals and certified copies, identifying and tracing proceeds and instrumentalities for evidentiary purposes, asset recovery, *et cetera*. Provisions are made for ensuring confidentiality of requests and restrictions on use of the information provided through mutual legal assistance. The Article is without prejudice to existing treaties. While assistance is required in non-coercive situations regardless of dual criminality, a state may require dual criminality in order to provide coercive assistance (*i.e.* search and seizure). Central authorities are to be designated and states may require submissions via Interpol or through diplomatic channels (*i.e.* letters rogatory) if they so choose. States may refuse a request that is not in conformity with the procedures prescribed in the Convention; prejudicial to sovereignty, security, *ordre public*, or other essential interests; execution would be prohibited under domestic law; or contrary to the legal system of the requested party. In the event of a refusal, reasons for the refusal must be given. The provisions are substantially similar to the United Nations Convention Against Transnational Organized Crime, other anti-corruption conventions to which the U.S. is party, and existing mutual legal assistance treaties.

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<sup>125</sup> *Gallina v. Fraser*, 278 F.2d 77 (2nd Cir. 1960).

<sup>126</sup> 18 U.S.C. § 3184.

<sup>127</sup> 18 U.S.C. §§ 3188-3192.

<sup>128</sup> 18 U.S.C. §§ 4100-4115. There are currently 12 bilateral prisoner transfer treaties in force, as well as two multilateral treaties covering an additional 59 jurisdictions.

<sup>129</sup> UN Convention Against Corruption, Art. 46.

The article is not in conflict with U.S. law. In fact, the United States has been one of the strongest proponents of mutual legal assistance and has concluded bilateral mutual legal assistance treaties with at least 48 foreign jurisdictions. 18 nations are States Parties to the Inter-American Convention on Mutual Assistance in Criminal Matters, including the United States. The primary domestic authority to implement the treaties is via the procedures established in 28 U.S.C. § 1782.<sup>130</sup> The U.S. can provide assistance regardless of dual criminality. This provision would be self-executing under U.S. law.

As it did with the OECD Convention, the Senate will most likely attach an understanding to the UN Convention that reads as follows: “The United States shall exercise its rights to limit the use of assistance it provides under the Treaty so that any assistance provided by the Government of the United States shall not be transferred to or otherwise used to assist the International Criminal Court agreed to in Rome, Italy, on July 17, 1998, unless the treaty establishing the court has entered into force for the United States by and with the advice and consent of the Senate, as required by Article II, section 2 of the United States Constitution.” This is required by 22 U.S.C. § 7423.

### **C. Informal Law Enforcement Cooperation**

Discretionary law enforcement cooperation is the subject of Article 48 of the UN Convention. This Article encourages States Parties to cooperate closely with one another, consistent with their respective domestic systems, to combat corruption, including: enhancing communication; cooperation with inquiries; provision of items for analysis; exchange of information on means and methods; facilitation of exchange of personnel; and coordination with the purpose of early identification of offenses. Parties are also to consider bilateral or multilateral arrangements and agreements to enhance such cooperation and to use modern technology to cooperate. Article 49 encourages bilateral or multilateral agreements for joint investigations. Article 50 mandates the use of special investigative techniques (such as controlled delivery, surveillance, and undercover operations) where permitted by domestic law. Article 50 also provides for the conclusion of agreements to allow use of such techniques in the context of cooperation and allows for case-by-case arrangements for such use in the absence of agreement.

All of these provisions are consistent with U.S. law. As an initial matter, 22 U.S.C. §2656i(c)(1) obliges every U.S. diplomatic mission to include strengthening law enforcement cooperation relating to international crime in its responsibilities. As a practical matter, the

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<sup>130</sup> 28 U.S.C. § 1782 is actually narrower than most mutual legal assistance treaty provisions, including the UN Convention Against Corruption, and makes no mention of mutual legal assistance. However, as the provisions for mutual legal assistance are self-executing, they supersede the narrower provisions of the statute and use the statute as an implementing procedure. In other words, § 1782 provides the procedure for execution, but not the standard for deciding whether or not to grant the request. *See In re Comm’rs Subpoenas*, 325 F.3d 1287 (11th Cir. 2003). Reference to the use of mutual legal assistance treaties also appears in 18 U.S.C. § 1956.

United States has been a world leader in promoting multilateral and bilateral law enforcement cooperation in combating corruption, including funding of and participation in web-based information exchange systems and a wide range of international organizations. The U.S. frequently conducts joint investigations. The American Fellows program, established in 2001, provides for the exchange of government officials between the United States and nations of the Americas, with an emphasis on exchanges that enhance anticorruption coordination. All of the special investigative techniques described in Article 50 are permitted under U.S. law and are frequently used by law enforcement.

#### **D. Technical Assistance**

Articles 60 and 62 of the Convention deal with training and technical assistance. Article 60 requires countries to develop or improve training for personnel to the extent necessary and suggest areas where such training should occur.<sup>131</sup> It also obligates States Parties, within their capacity, to afford technical assistance in training to developing countries, both bilaterally and through international organizations and agreements.<sup>132</sup> Article 60 concludes by recommending that countries share names of asset forfeiture experts, use conferences and seminars to promote cooperation, establish voluntary mechanisms to contribute financially to developing countries' efforts, and voluntarily contribute to the United Nations Office on Drugs and Crime to foster programs and projects in developing countries.<sup>133</sup> Article 62 obligates parties to make concrete efforts to enhance cooperation with developing countries, including financial and material assistance and technical assistance, and to "endeavor" to contribute to the UN funding mechanism, including through forfeited assets. It also encourages countries to persuade other states and financial institutions to join in these efforts.<sup>134</sup>

These provisions are consistent with United States law and provisions appearing in other conventions.<sup>135</sup> The United States already participates actively in any number of international organizations, conferences, and seminars to promote cooperation in the fight against corruption. It provides technical assistance to a number of countries through the U.S. Agency for International Development, the Bureau of International Narcotics and Law Enforcement Affairs of the Department of States, and the Department of Justice. The U.S. recently contributed \$500,000 to the United Nations Office on Drugs and Crime to aid in implementation of the Convention and is an active participant in several efforts within APEC, the G-8, and other multilateral fora to encourage others to accept and implement the Convention.<sup>136</sup> Provision of

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<sup>131</sup> UN Convention Against Corruption, Art. 60, at ¶ 1.

<sup>132</sup> *Id.*, Art. 60, at ¶¶ 2-4.

<sup>133</sup> *Id.*, Art. 60, at ¶¶ 5-8.

<sup>134</sup> *Id.*, Art. 62.

<sup>135</sup> *See, e.g.*, the Inter-American Convention, Art. XIV, at ¶ 2.

<sup>136</sup> Available at <http://www.state.gov/g/inl/corr> for more information on U.S. anticorruption technical assistance. The budgets for anticorruption activities for fiscal year 2005 for the Bureau of International Narcotics and Law Enforcement Affairs of the Department of

international assistance to combat corruption and enhance transparency and good governance is specifically provided for in 22 U.S.C. §§ 2151aa(b)(3) and 2152c.

### **E. Information Exchange**

Article 61 of the Convention suggests, but does not require, that each state party analyze corruption trends and circumstances within its territory and share statistics, expertise, and other information in order to develop common definitions, standards, and best practices. It also suggests, but does not require, that countries monitor anticorruption efforts and assess their effectiveness and efficiency.

This is consistent with the statutory regime of the United States. The U.S. already analyzes corruption trends and circumstances both within its territory (at least on the federal level) and abroad and monitors anticorruption efforts.<sup>137</sup>

### **F. Remaining Provisions of the Convention**

The last two chapters of the UN Convention provide for implementation, including a conference of States Parties; establishment of a secretariat; domestic implementation; dispute settlement; and entry into force, amendment, denunciation, and depositary information.<sup>138</sup> The Convention leaves open the issue of a monitoring mechanism, discussed in Section VII below.

Article 66, Settlement of Disputes, provides for negotiation, arbitration, and ultimately the jurisdiction of the International Court of Justice in resolving disputes.<sup>139</sup> The article also provides that any state may reserve to this provision.<sup>140</sup> The United States will most likely reserve to this provision and reject both mandatory arbitration and the jurisdiction of the International Court of Justice.

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State and the U.S. Agency for International Development, exclusive of bilateral programs, is estimated to be around \$12 million, according to their congressional budget justifications.

<sup>137</sup> The United States already participates in at least three evaluation mechanisms of anticorruption efforts, through the Council of Europe's GRECO, the Organization of American States Follow-up Mechanism for Implementing the Inter-American Convention Against Corruption, and the OECD's Working Group on Bribery, which monitors implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The United States is also active in any number of information-sharing organizations, such as the Financial Action Task Force, the Egmont Group, the Lyon-Roma Group, the Network of Government Institutions in Public Ethics in the Americas, the Organization for Economic Cooperation and Development, and many others.

<sup>138</sup> UN Convention Against Corruption, Arts. 63-70.

<sup>139</sup> *Id.*, Art. 66, at ¶ 2.

<sup>140</sup> *Id.*, Art. 66, at ¶ 3.

## VI. SEIZURE AND CONFISCATION OF ASSETS

This Section deals with seizure, confiscation and recovery of property as the proceeds or instrumentality of an offense defined in the UN Convention or as property acquired through the commission of such an offense, and with international cooperation in connection therewith. These topics are treated in Articles 31 and 51 through 59 of the UN Convention.

In general, nothing in these Articles of the UN Convention will require any change in the law of the United States. First, these are areas in which the U.S. has been a leader, and its law is already well developed. Second, many of the provisions of these Articles are similar to the requirements of earlier treaties, with which the U.S. is already in compliance. Third, many of the provisions of these Articles are either qualified or entirely optional. In particular, the reprehensible<sup>141</sup> paragraph 31(8), allowing countries that neither have a constitutional presumption of innocence nor are parties to any international convention on human rights to impose the burden of proof of innocent acquisition on the holder of the property sought to be confiscated, is so thoroughly qualified as never to require implementation by any country.<sup>142</sup>

Although the law of the United States will not be harmed, or even directly affected, by these Articles, that of some other countries may be harmed by adoption, on the basis of a United Nations convention, of laws in violation of human rights.<sup>143</sup> The American Bar Association should consider urging that, where provisions of the UN Convention can be construed in more than one way, all countries give preference to the construction that is consistent with the Universal Declaration of Human Rights,<sup>144</sup> the International Covenant on Civil and Political Rights<sup>145</sup> and any other human rights treaties to which they are party, and that optional provisions in violation of human rights not be implemented at all.

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<sup>141</sup> Peter W. Schroth, *Recovery of State Property or the Proceed of Crime in the African, United Nations and Earlier Conventions Against Corruption*, 6 Proc. Int'l Acad. Afr. Bus. & Dev. 436, 440 (2005) (hereinafter "*Recovery of State Property*").

<sup>142</sup> Paragraph 31(8), which begins, "States parties may consider the possibility" and concludes, "to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings," must be read in conjunction with the very controversial Article 20, which begins, "Subject to its constitution and the fundamental principles of its legal system" and continues, "each State Party shall consider adopting...." See Peter W. Schroth, *Termites in the House: Notes on the Illusion of Substance in the UN Convention against Corruption*, Proc. 2004 Acad. Int'l Bus. N.E. 162, 167-168 (2004) (hereinafter "*Termites*"), where these provisions are labeled "venomous warrior termites."

<sup>143</sup> This is the main argument of *Termites*, *supra* note 142.

<sup>144</sup> Universal Declaration of Human Rights, Dec. 10, 1948, GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, U.N. Doc. A/810 (1948).

<sup>145</sup> G.A. Res. 2200A (XXI), *adopted and opened for signature* 16 Dec. 1966, *entered into force* 23 Mar. 1976.

## A. Background to the Topic

The UN Convention may be considered to deal with seizure, confiscation and recovery of two broad categories of property. One is the proceeds or instrumentalities of defined offenses, called “property acquired through or involved in the commission of an offense” in Article 54.<sup>146</sup> The other is property taken from the state or someone else in connection with defined offenses; despite some ambiguity, this usually seems to be all that is meant by “direct recovery of property,” as in Article 53. Several earlier anti-corruption treaties are concerned in some way with confiscation of proceeds and instrumentalities, although most require only assistance to other countries, not that States Parties enact their own confiscation laws.<sup>147</sup>

The first treatment of this subject in an anti-corruption treaty was Article XV of the Inter-American Convention, which calls for assistance by other States Parties “in the identification, tracing, freezing, seizure and forfeiture of property or proceeds obtained, derived from or used in the commission of offenses” defined in that convention. It does not require that States Parties enact laws permitting seizure and forfeiture, however, but only that they assist one another in enforcing any such laws.

The OECD Convention requires, in paragraph 3(3), that States Parties make “the bribe and the proceeds of the bribery of a foreign public official” subject to seizure and confiscation (or comparable monetary sanctions). Neither the Inter-American Convention nor the OECD Convention speaks to recovery of stolen property. Articles 51 through 59 are therefore in most respects the first, and all respects the most extensive, treatment of points relating to seizure, confiscation and asset recovery in any of the anti-corruption treaties.<sup>148</sup>

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<sup>146</sup> Confiscation of proceeds and confiscation of instrumentalities have different justifications and therefore may be considered quite separate categories for some purposes, but both have ordinarily been dealt with in penal law, rather than property law. Also, it will ordinarily be easier to prove that items are instrumentalities of an offense when they have been used as such already than when they are alleged to be merely “destined” for such use. *See infra* note 1512 and accompanying text.

<sup>147</sup> The asset-recovery provisions of the anti-corruption treaties of the European Union, the Organization of American States, the Organization for Economic Cooperation and Development, the Council of Europe, the Southern African Development Community, the African Union and the United Nations are discussed in *Recovery of State Property*, *supra* note 141. As noted earlier, the United State is a party to the OAS and OECD conventions.

<sup>148</sup> The African Union Convention on Preventing and Combating Corruption, opened for signature 11 July 2003, *available at* [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention on Combating Corruption.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf), requires laws for recovery of stolen property to a greater extent than does the UN Convention Against Corruption, but does so in a “chaotic” way and in a provision (para. 4(1)) that says one thing in the French text and something quite different in the English, Portuguese and Arabic texts, all of which are equally authentic. *Recovery of State Property*, *supra* note 141 at 439-440; Peter W. Schroth, *The African Convention on Preventing and Combating Corruption*, 49 J. Afr. L. \_\_\_\_ (2005).

The traditional safeguards against abusive confiscation have been the requirement of conviction of the underlying crime before final confiscation of property alleged to be proceeds or instrumentalities and the requirement of strict proof of title before final confiscation of property alleged to belong to another. The law of the United States allowing civil forfeiture<sup>149</sup> already goes beyond what is required by the UN Convention, in that the latter requires only laws permitting confiscation and asset recovery when a defined offense has been committed (*i.e.*, a conviction has been obtained). In particular, Article 54 requires that other States Parties be enabled to recover property where *both* a defined offense has been committed *and* legitimate ownership has been established, whereas U.S. law ordinarily allows an action for recovery of property upon proof of ownership alone.

### **B. Article 31: Freezing, Seizure and Confiscation**

Article 31, which is part of Chapter III (Articles 15-42) on criminalization and law enforcement, begins by requiring each state party to provide for the confiscation of proceeds or equivalently valued property, or instrumentalities and things that were “destined for use” in defined offences. The *travaux préparatoires* instruct that the term “instrumentalities” should not be interpreted in an overly broad manner.<sup>150</sup> Similarly, “destined,” in this context, must be interpreted as “intended,” although the word might be considered ill-chosen.<sup>151</sup> While other articles in the UN Convention provide for civil forfeiture or recovery of assets, Article 31’s provisions for identification, tracing, freezing, seizure and confiscation apply only to criminal proceeds, property equivalent to the value of criminal proceeds, and instrumentalities used or “destined for use in offenses.”<sup>152</sup>

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<sup>149</sup> Including, but not limited to, 18 U.S.C. § 981(a)(1).

<sup>150</sup> *Travaux Préparatoires*, *supra* note 27, at ¶ 63.

<sup>151</sup> *Recovery of State Property*, *supra* note 141, at 441, 443, compares art. 31(1)(b) to the “precogs” in Philip K. Dick’s story “The Minority Report” and the 2002 Steven Spielberg/Tom Cruise film basis thereon, but concludes that this provision must be read as requiring conviction of a crime as a condition to final confiscation:

this is the only reading of the Chinese text; a reading supported as possible by almost all the dictionaries consulted for the other five languages; the only reading consistent with the provisions of Articles 53 and 54; and the only reading consistent with the acknowledgment, in the Preamble to the UN Convention Against Corruption, of “the fundamental principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights.”

<sup>152</sup> All of the pertinent paragraphs, *i.e.*, 1, 2, 4, 5, 6 and 8, concern crimes, offenses and offenders.

Paragraphs 31(2) and (3) require States Parties to take the measures necessary to find and to hold the assets for final confiscation or release. Paragraphs 31(4), (5) and (6) include transformed and converted assets, criminal assets intermingled with innocent assets, and the income or other benefits proceeding from the criminally gained assets. Paragraph 31(7) requires States Parties to grant the appropriate authorities the power to subpoena or seize bank, financial and commercial records, and to lift any barrier of bank secrecy to actions under Articles 31 and 55. As noted above,<sup>153</sup> paragraph 31(8) allows, but does not require, States Parties to place the burden on the “offender” to demonstrate the lawful origin of the assets,<sup>154</sup> a clause the ABA should insist be interpreted as requiring that the status of offender be established by conviction of a defined offense. The apparent unconstitutionality of a contrary reading, which was the subject of reservations by both Canada and the United States in the case of the Inter-American Convention,<sup>155</sup> is not of direct U.S. concern here, because this provision is entirely optional. Paragraphs 31(9) and (10) protect the rights of “bona fide”<sup>156</sup> third parties and, astonishingly, subject Article 31 obligations to the domestic law (undefined and unlimited) of the States Parties.<sup>157</sup>

Article 31’s mandates do not go beyond, and usually do not go as far as, current U.S. law with regard to identification, tracing, freezing, seizure or confiscation of assets gained by criminal means. Even if anything could be found in this Article that went beyond current U.S. law, it would be trumped by paragraph 31(10), which makes everything else in Article 31 subject to domestic law.

### C. Chapter V: Asset Recovery

Building on Chapter IV (Articles 43-50) of the UN Convention, which provides specific requirements for international cooperation, Chapter V (Articles 51-59), focusing on asset recovery, delineates specific mechanisms for recovery of property through international cooperation for confiscation. The chapter on asset recovery concludes, in Article 59, by advising states to consider concluding bilateral and multilateral agreements and arrangements to enhance the effectiveness of international cooperation for asset recovery.

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<sup>153</sup> Text at note 141, *supra*.

<sup>154</sup> *Id.*, Art 31 (8).

<sup>155</sup> See Peter W. Schroth, *The United States and the International Bribery Conventions*, 50 Am. J. Comp. L. 593, 615-619 (supp.) (2002).

<sup>156</sup> In this context, “bona fide” probably means third parties who are both innocent and not in league with the accused party. Again, it is important that the burden of proof of bona fides not be shifted to the “third parties.” The protection of bona fide third parties is repeated in paragraph 55(9), discussed in the text accompanying note 184 *infra*.

<sup>157</sup> “Nothing contained in this article shall affect the principle that the measures to which it refers shall be ... subject to the provisions of the domestic law of a State Party.” Art 31(10). See generally *Termites*, *supra* note 142.

An international agreement on asset recovery is necessary, because of the different requirements of states' domestic laws and the importance of returning illicit assets to states where corruption at a high national level may have damaged the state's domestic institutions.<sup>158</sup> International cooperation is essential to prevent the export, and then to enable the recovery, of illicitly acquired assets.<sup>159</sup>

Both the existence of the legal tools necessary for return of assets to a foreign country and the government's willingness to use those tools have been demonstrated by the United States government. In early 2004, the United States turned over more than \$20 million to Peru's Fondo Especial de Administración del Dinero Obtenido Ilícitamente en Perjuicio del Estado, which was established in 2001 to administer returned assets that had been misappropriated during the Fujimori years. The property had been confiscated on the basis of violations of U.S. criminal law, such as money laundering and transportation across state lines of property taken by fraud, and identified by the Department of Justice and the FBI as derived from corrupt acts committed by presidential advisor Vladimir Montesinos and his associates during the Fujimori government.<sup>160</sup>

#### **D. Articles 51: General Provision, and 52: Prevention and Detection of Transfers of Proceeds of Crime**

In keeping with the public statements of the negotiators and UN officials, Article 51 proclaims the particular importance of asset recovery, declaring "the return of assets pursuant to this chapter" to be "a fundamental principle of this Convention...." The chapter goes well beyond return of assets, however, including some measures of prevention as well as an apparatus of international cooperation for detection, recovery and return or disposal of relevant assets. To a large extent, this is accomplished by adding corruption to the evils addressed by existing domestic laws and international agreements against money laundering, requiring "know-your-customer" procedures, limiting off-shore banks, etc. Disappointingly, however, paragraph 52(5) makes financial disclosure requirements for public officials entirely optional.

Article 52 delineates six broad measures intended to establish a framework for international cooperation in the prevention and detection of proceeds of crime. The U.S. has treated the prevention and detection of financial crimes as an issue of increasing importance for more than twenty years.<sup>161</sup> Incremental changes in U.S. law expanded the breadth and

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<sup>158</sup> United Nations Convention Against Corruption, Convention Highlights: Asset recovery, *available at* [http://www.unodc.org/unodc/en/crime\\_convention\\_corruption.html](http://www.unodc.org/unodc/en/crime_convention_corruption.html)

<sup>159</sup> See United Nations Convention Against Corruption, Took Kit, Chapter IX: Recovery and Return of Proceeds of Corruption, p. 637, *available at* [http://www.unodc.org/pdf/crime/corruption/toolkit/AC\\_Toolkit\\_chap9.pdf](http://www.unodc.org/pdf/crime/corruption/toolkit/AC_Toolkit_chap9.pdf)

<sup>160</sup> A State Department fact sheet on this transfer of assets *available at* [www.state.gov/r/pa/prs/ps/2004/28114.htm](http://www.state.gov/r/pa/prs/ps/2004/28114.htm).

<sup>161</sup> The Currency and Foreign Transactions Reporting Act, also known as the Bank Secrecy Act (BSA), as amended, 31 U.S.C. § 5311-5330, effective Sept. 13, 1982. See Peter W.

effectiveness of this legislative, regulatory, and enforcement vehicle.<sup>162</sup> The U.S. has previously acted with the international community towards the collective goal of combating financial crime in ratifying the OECD Antibribery Convention.<sup>163</sup> The U.S. has also been an active participant in the Financial Action Task Force and the Egmont Group (a network of Financial Intelligence Units), the two premiere organizations for international cooperation on proceeds of crime. Domestically and internationally, the Bank Secrecy Act (BSA), as amended by the U.S.A Patriot Act,<sup>164</sup> and its implementing regulations have now established a legal framework at least in compliance with, and often exceeding, that called for in the UN Convention.

Paragraph 52(1) of the UN Convention requires financial institutions to act inquisitively and apply varied levels of scrutiny to clients with differing risk profiles, based upon their identity and transactions. Every U.S. bank must already adopt a customer identification program as part of its wider BSA compliance program.<sup>165</sup> The UN Convention's further language in this area regarding political figures and high value accounts mirrors that of a contemporaneous OCC Bulletin, which provided official guidance to U.S. financial institutions in early 2001,<sup>166</sup> and Section 312(a)(3)(B) of the PATRIOT Act.<sup>167</sup>

The UN Convention requires implementation of notification procedures to alert jurisdictions of high risk individuals or institutions. United States law provides a two-part rule,

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Schroth, *Bank Confidentiality and the War on Money Laundering in the United States*, 42 Am. J. Comp. L. 369 (supp.) (1994).

<sup>162</sup> Congress Amended the BSA many times to hone its effectiveness, for example, making money laundering a criminal activity through the Anti-Drug Abuse Act of 1986, which included the (MLCA) Money Laundering Control Act of 1986, Pub. L. No. 99-570, 18 U.S.C. §§1956, 1957, and the Money Laundering Suppression Act of 1994 (Title IV of the Riegle-Neal Community Development and Regulatory Improvement Act of 1994), requiring regulators to enhance training and procedures to identify money laundering.

<sup>163</sup> *Supra* note 2. The OECD Convention calls for signatories to move in a coordinated manner to adopt legislation, impose sanctions, and provide mutual legal assistance. The U.S. national implementing legislation is the Foreign Corrupt Practices Act (FCPA), as amended.

<sup>164</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (U.S.A Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act] (codified in scattered titles of U.S.C.).

<sup>165</sup> Patriot Act, Section 326. This customer identification program subsumes and enhances industry practice known as “know your customer” (KYC).

<sup>166</sup> *Compare* ¶ 52(1) of the UN Convention Against Corruption with OCC Bulletin, 2001-9, Feb. 20, 2001.

<sup>167</sup> This had its origin in the requirements for “politically exposed persons” contained in the Wolfsberg Anti-Money Laundering Principles. The USA Patriot Act has labeled them slightly differently as “senior foreign political figures”, but the concept is the same.

which allows and facilitates the exchange of information (1) between the government and financial institutions and (2) among financial institutions.<sup>168</sup> The UN Convention, expanding on this, would allow the exchange of information<sup>169</sup> between national governments who, “when appropriate,” could filter the information to their financial institutions.<sup>170</sup> This international exchange of information could raise significant privacy concerns without adequate safeguards. The corresponding provisions of U.S. law require the maintenance of adequate procedures to protect the security and confidentiality of the information and limit the use of shared information to identifying and reporting on money laundering or terrorist activities. The protections of U.S. law should not be affected, because, as usual, the text of the UN Convention is sufficiently qualified – in this case, by the words “where appropriate.” However, the ABA should consider urging that all countries interpret sub-paragraph 51(2)(b) as allowing notification only in circumstances providing appropriate safeguards for privacy and the confidentiality of bank records.

Paragraph 52(3) of the UN Convention also requires the maintenance of “adequate” records for an “appropriate” period of time, regarding these institutions and individuals. United States financial institutions are strictly regulated in the area of record keeping as to specificity of information and the length of time it is to be maintained.<sup>171</sup>

Both the UN Convention and U.S. law acknowledge and address the dangers of “shell” banks, those having no physical presence or affiliation with a regulated financial group. Paragraph 52(4) requires the establishment of appropriate measures to prevent the establishment of shell banks and indicates that state parties “may consider” requiring their financial institutions to avoid dealings with such banks. United States regulations go much further, unequivocally forbidding banking, directly or indirectly, through foreign correspondent accounts with shell banks.<sup>172</sup>

Paragraph 52(5) asks States Parties to consider requiring public officials to disclose their financial affairs, with sanctions for non-compliance, whereas U.S. law already provides for broad financial disclosure by its public officials.<sup>173</sup> Again, however, the UN Convention raises privacy concerns by defining those having access to, and the ability to share, such information as merely

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<sup>168</sup> See OCC Bulletin, 2002-42, Oct. 16, 2002, regarding the implementation of § 314 of the Patriot Act.

<sup>169</sup> See 31 C.F.R. §§ 103.100 and 103.110.

<sup>170</sup> UN Convention Against Corruption, ¶ 52(2)(b).

<sup>171</sup> 31 C.F.R. § 103.33 Records to be made and retained by financial institutions (delineates specific categories of records to be maintained for a period of five years).

<sup>172</sup> See Patriot Act, § 313, and the BSA regulations, 31 C.F.R. § 103.177.

<sup>173</sup> Civil or criminal penalties are premised upon the appropriate jurisdiction and seriousness of the offense.

“competent authorities.”<sup>174</sup> The ABA should consider urging all countries to insist that these “competent authorities” be adequately defined and strictly limited to prevent the over-availability of heretofore private information. In the U.S., for example, it is protected by the privacy policies of the financial institutions and the Gramm-Leach-Bliley Act.<sup>175</sup>

Paragraph 52(6) of the UN Convention requires States Parties only to consider requiring public officials to disclose foreign accounts. United States law casts a much wider net, in that all persons subject to the jurisdiction of the United States having an interest in a financial account in a foreign country must report all such accounts to the Internal Revenue Service.<sup>176</sup>

United States law currently provides a comprehensive and continually adapting regulatory system for the prevention and detection of money laundering and the transfer of proceeds of crime. This part of the UN Convention will require no substantive changes in U.S. law. The concern of the U.S. should be properly tailoring the flow of information between States Parties and their “competent authorities” to narrowly fit the objective of investigating and recovering the proceeds of a class of specifically defined offenses. The strictures of privacy must not be merely an afterthought.

#### **E. Article 53: Measures for Direct Recovery of Property**

Article 53 provides for the direct recovery of assets in civil actions. This type of recovery is intended in part as a disincentive to future corruption, to “deprive offenders of financial resources ... to destabilize governments or commit further acts of corruption or other crimes.”<sup>177</sup> The UNODC Toolkit explains that some states may not have *in rem* jurisdiction, or may prohibit the filing of a civil action by a sovereign state that is immune to counter-suit, or may not recognize a state’s claim based on property taken from, or harm done to, its citizens or other legal entities within the state, but carefully points out that “The Convention against Corruption seeks to address *some* of these problems...”<sup>178</sup> (emphasis added). Article 53 allows states – but not individuals or private entities – to file civil claims in other States Parties for the recovery of property and compensation or damages.

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<sup>174</sup> 31 C.F.R. § 103.53 governs the availability of information under the BSA. This section establishes a procedure by which the Secretary of the Treasury controls the dissemination of information.

<sup>175</sup> 15 U.S.C. §§ 6801-6827.

<sup>176</sup> See 31 C.F.R. §103.24 (Reports of foreign financial accounts). United States residents and persons in and doing business in the United States, with a financial account in a foreign country exceeding \$10,000, must note each such account on their tax returns and file Form 90-22.1, the Foreign Bank and Financial Account Report (FBAR).

<sup>177</sup> UN Convention Against Corruption Tool Kit, *available at* [http://www.unodc.org/unodc/corruption\\_toolkit.html](http://www.unodc.org/unodc/corruption_toolkit.html) (hereinafter cited as “UN Convention Toolkit”), Chapter IX, at 637.

<sup>178</sup> *Id.* at 643.

Paragraph 53(b) requires each state party, “in accordance with its domestic law,” to take such measures as may be necessary to permit its courts to order those who have committed defined offenses “to pay compensation or damages to another State Party that has been harmed by such offenses....” Although the wording is not quite parallel, the requirement of this paragraph appears to be a sub-set of the broader requirement of Article 35. In particular, paragraph 53(b) calls for payment “to another State Party that has been harmed by such offenses,” rather than to “entities or persons who have suffered damage as a result of an act of corruption,” and the action in paragraph 53(b) is only against “those who have committed offenses establish in accordance with this Convention,” rather than “those responsible for that damage.” The comments on Article 35, *supra*, therefore apply as well to paragraph 53(b).

While Article 53 smoothes the path, to some extent, for the filing of civil actions in other States Parties, it does not, in itself, provide for mutual assistance in civil cases. Such international cooperation mechanisms are set forth in Articles 54 and 55.

#### **F. Article 54: Mechanisms for Recovery of Property Through International Cooperation in Confiscation**

Article 54 begins by requiring two kinds of international cooperation in confiscation and calling for consideration of a third. The two requirements are that each state party take necessary measures to permit its competent authorities to give effect to confiscation orders issued by the court of another state party (paragraph (1)(a)), and take necessary measures to permit its competent authorities to order confiscation of property of foreign origin where it has jurisdiction, by adjudication of the offense of money-laundering or other offense within its jurisdiction or by another procedure authorized by domestic law (paragraph (1)(b)). States Parties are also to consider taking measures to allow confiscation of such property without a criminal conviction in cases where the offender cannot be prosecuted, for reasons including death, flight or the other absence (paragraph (1)(c)). The distinction between requiring the first two and leaving the third optional underlines the point that, in the UN Convention, a criminal conviction is always a normal precondition to confiscation.<sup>179</sup> The law of many countries does not allow forfeiture without conviction of an offense that generated the original proceeds<sup>180</sup> and the potential for abuse of *in rem* or equivalent proceedings is very large. United State law does allow for *in rem* proceedings, permitting the government to obtain forfeiture of proceeds, property derived from proceeds, and assets of a crime.<sup>181</sup> Civil forfeiture may be obtained even if the owner of the proceeds is not ultimately convicted of a criminal offense.

When a state party requests another state (the requested state) to take measures to identify, trace and freeze or seize illicitly obtained proceeds, or instrumentalities used in a crime,

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<sup>179</sup> See *Recovery of State Property*, *supra* note 141, at 441.

<sup>180</sup> UN Convention Toolkit, note 151, *supra*, Chapter IX: Recovery and Return of Proceeds of Corruption, p. 639.

<sup>181</sup> 18 U.S.C. § 981(a)(1)(2002).

paragraph 54(2) requires the requested state to take provisional measures in accordance with its domestic law to provide mutual legal assistance by seeking and obtaining the freezing or seizure of property, which are specified in more detail than in earlier international treaties.<sup>182</sup> The requested state is to take necessary measures if (a) there is a freezing or seizure order of a court or other competent authority of the requesting state, or the requested state otherwise has a reasonable basis for believing there are sufficient grounds, and (b), in either case, there are sufficient grounds for believing that the property will eventually be subject to an order for confiscation (sub-paragraphs 52(2)(a) and (b)). These conditions are more than adequate authority for resisting such a request if the requested state considers it to be merely politically motivated or otherwise of doubtful legitimacy. For the first time, but keeping the matter entirely optional, sub-paragraph (2)(c) asks States Parties to consider taking additional measures to permit its competent authorities to preserve property for confiscation, “such as on the basis of a foreign arrest or criminal charge,” even in the absence of a formal request.

#### **G. Articles 55: International Cooperation for Purposes of Confiscation, and 56: Special Cooperation**

As part of recovery of assets, Article 55 provides fairly detailed procedures for international cooperation for the purposes of confiscation, including guidelines for recognizing and giving effect to requests from other states. When a state party receives a request from another state party regarding freezing, seizure or confiscation as it relates to proceeds of crime, property, equipment or other instrumentalities used in, or destined for use in defined offenses, paragraph 55(1) requires it to submit the request to its competent authorities for the purpose of obtaining an order for confiscation, and to give effect to the order if it is granted. In addition, the requested state is to take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities. The eventual confiscation order may be obtained in either the requesting or the requested state.

The UN Convention articulates the need for mutual legal assistance in general, and specifically with regard to asset recovery. Paragraph 55(3) states that the provisions of Article 46 – which covers mutual legal assistance at great length – are applicable *mutatis mutandis*, but specifies additional information to be provided with requests for asset recovery. If the request is for confiscation, there must be a description of the property to be confiscated, including, to the extent possible, the location, estimated value of the property, and sufficient facts for the requested State to seek the order under its domestic law (sub-paragraph (3)(a)). If it is for the requested State to give effect to an order of confiscation issued by the requesting party, there must be a legally admissible copy of the order of confiscation upon which the request is based, a statement of facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting state to provide adequate notification to bona fide third parties, and a statement that confiscation order is final (sub-paragraph (3)(b)).

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<sup>182</sup> Examples of such treaties are the 1988 Narcotic Drugs Convention and the 2000 Convention against Transnational Organized Crime. *See* UN Convention Toolkit, *supra* note 169, at 643. It is worth noting that under U.S. law, by virtue of Section 315 of the PATRIOT Act, foreign corruption offenses (whether or not violations of U.S. laws such as the FCPA) are predicate offenses for money laundering.

If the request is for freezing, seizure and confiscation in accordance with Article 31, it must contain a statement of facts, a description of the actions requested, and where available, a legally admissible copy of an order on which the request is based (sub-paragraph (3)(c)).

Paragraph 55(4) makes clear that all of these decisions and actions are to be taken in accordance with the requested state's domestic laws and procedures, or any bilateral or multilateral agreement to which it may be bound in relation to the requesting state. Thus, the UN Convention's implementation, in conjunction with these established laws, will be critical to an assessment of its impact and effectiveness.<sup>183</sup>

Paragraph 55(5) requires States Parties to provide the Secretary-General of the United Nations copies of its relevant laws and regulations, and any subsequent changes, that give effect to Article 55. Paragraph 55(6) provides that, where a state makes the measures required by Article 55 conditional on the existence of a relevant treaty, the UN Convention itself shall be considered the necessary and sufficient treaty basis. Paragraph 55(7) allows a state to refuse to cooperate if it does not receive sufficient and timely evidence, or if the property is of a *de minimis* value. Before lifting any provisional measure taken pursuant to Article 55, a state must, "wherever possible," give the requesting state an opportunity to present reasons in favor of continuing the provisional measures (paragraph 55(8)).

Paragraph 55(9), like paragraph 31(9),<sup>184</sup> instructs that the article in which it appears shall not be construed to prejudice the rights of bona fide third parties, although again the text fails to make explicit that the burden of proof of bona fides must not be shifted to such "third parties."

Another innovative addition is the proactive disclosure of information, which was specifically extended to asset recovery from the general mutual legal assistance provisions in the Convention Against Transnational Organized Crime.<sup>185</sup> Article 56 of the present UN Convention calls on States Parties to "endeavour" to share information, even without prior request, if a state determines that disclosing information on proceeds of defined offenses might assist another state in initiating or carrying out investigations, prosecutions or judicial proceedings, or might lead that state to request an order for confiscation. This provision is sufficiently qualified that no state will be obligated to do so.

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<sup>183</sup> See Lucinda A. Low, *Towards Universal International Anticorruption Standards: The United Nations Convention Against Corruption and Other International Anticorruption Treaties: Too Much of a Good Thing?*, Conference of the International Bar Association, International Chamber of Commerce and Organization for Economic Cooperation and Development, "The Awakening Giant of Anticorruption Enforcement," 22-23 April 2004, Paris, France.

<sup>184</sup> See *supra*, note 156 and accompanying text.

<sup>185</sup> UN Convention Toolkit, *supra* note 151, Chapter IX: Recovery and Return of Proceeds of Corruption, p. 644.

## **VII. MONITORING**

The Convention leaves open the issue of the form and structure of a follow-up or mutual evaluation mechanism. Given the experience with other anti-bribery and anti-corruption conventions, it is clear that a vigorous mutual evaluation mechanism, with civil society participation, is vital to securing effective national implementation and enforcement.

However, proposals for such a mechanism proved too controversial to resolve before the Convention was adopted. Numerous concerns were raised, including the scope of the Convention, the potential for duplication of other convention review mechanisms, differences in political systems, concerns about sovereignty, cost and lack of capacity. Therefore, Article 63 is not as specific as Article 12 of the OECD Convention on Bribery of Foreign Public Officials and the official commentary.<sup>186</sup> Article 63 establishes a Conference of State Parties to the Convention to “promote and review its implementation.” It is charged only with establishing rules and activities necessary to secure implementation and reviewing implementation.

Further work will be necessary to establish an effective and politically acceptable mechanism. The U.S. Government may view it as a prerequisite to US ratification, as was the case for the OECD and Inter-American Conventions. Requirement regular reporting to the Congress regarding implementation and monitoring should also be considered in the ratification process. Such a report was required in connection with the Inter-American Convention’s monitoring mechanism. Alternatively, the requirement could be folded into the mandatory annual report currently required by the International Anticorruption and Good Governance Act.

Any mechanism chosen should be carefully designed to minimize duplication of existing monitoring work by other institutions and to maximize limited resources. Even the U.S. Government’s relatively ample resources (compared to those of other countries) have been strained by the demands imposed by the review mechanisms of existing conventions. Yet such mechanisms may be the best vehicle for ensuring that countries do in fact properly implement and enforce the UN Convention.

Finally, any mechanism should permit and promote the participation of civil society in the monitoring process. Especially given the documented pernicious effects of corruption on democracy and development of a country, civil society has a strong interest in having a recognized voice in any monitoring process, even one that is based on a foundation of peer review.

## **CONCLUSIONS AND 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

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<sup>186</sup> Commentaries on the OECD Convention on Combating Bribery, points 34,35, and 36, adopted by the Negotiating Conference on 21 November 1997.

practices in the conduct of international business.”<sup>187</sup> At that time, it was unclear as to what extent these international initiatives, then in their initial stages, would produce “hard” rather than “soft” law.<sup>188</sup> In 1997, the ABA adopted a Recommendation calling for the prompt ratification and implementation of the Inter-American Convention as one of the first critical steps in transforming “soft” law into binding obligations that could result in effective mechanisms to prevent bribery and related conduct in the course of international business.<sup>189</sup> This was followed in 1998 by the Recommendation calling for the prompt ratification and implementation of the OECD Antibribery Convention, and in 2000 by a more cautious Recommendation on the Council of Europe Criminal Law Convention.

That a global convention effort would be before us only ten years after the first resolution on the subject of corruption is in many ways remarkable.

Of course, just because an effort aims at universal standards and there is a need for universal architecture does it mean that it has succeeded and that those standards should be embraced. The UN Convention is an ambitious and complex instrument and must be carefully studied in all of its constituent parts. Such study, as this report details, has indicated to us that the Convention deserves U.S. ratification. It would not require changes to U.S. law, and would provide the basis for universal obligations that would be helpful to the United States in achieving the effective enforcement of its own laws. It would continue the process of trying to “level the playing field” between the U.S. and other countries, and reduce the likelihood that outlaw nations will try to provide safe havens for money laundering and corrupt practices. To ensure that this occurs, an appropriate monitoring mechanism for the Convention needs to be developed. We therefore recommend U.S. ratification, with declarations that only Articles 44 (Extradition) and 46 (Mutual Legal Assistance) of the Convention are self-executing, and that no new legislation is necessary to implement the Convention, including Article 35 (Private Rights of Action).

Respectfully submitted,  
Kenneth B. Reisenfeld, Chair  
August, 2005

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<sup>187</sup> ABA Recommendation and Report, Report No. 117A.

<sup>188</sup> *Id.*

<sup>189</sup> ABA Recommendation and Report, Report No. 301 (Aug. 1997), *reprinted in* 31 Int'l Law 1122 (1977).