



## **2007 TI PROGRESS REPORT:**

# **ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS**

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## INTRODUCTION

This is the third progress report on the enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials prepared by Transparency International (TI), the global coalition against corruption. It examines the enforcement performance of 34 of the 37 countries that have ratified the OECD Anti-Bribery Convention. The first report was issued in March 2005, covering 24 countries; the second in June 2006, covering 31 countries. TI's progress reports are intended to provide an annual assessment of government enforcement. Enforcement of the OECD Convention is crucially important to the fight against international corruption. Most major multinational companies have their headquarters in signatory states and effective enforcement would significantly reduce the supply side of international corruption.

The report is based on information provided by TI national experts in each country, who are highly qualified professionals selected by TI National Chapters (Appendix A lists TI experts and their qualifications.) They responded to a questionnaire (Appendix B), after consulting with government officials and other knowledgeable persons in their country. They were aided in their work by the valuable Phase I and Phase II country reports prepared by the OECD Working Group on Bribery in the course of its reviews of government compliance with the convention.<sup>1</sup> There are three new countries (Brazil, Chile and Slovenia) covered in this report that were not included last year.

The following table lists foreign bribery prosecutions and investigations for the 34 participating countries. Section I summarises the key findings and recommendations of the TI report. Section II analyses data on national enforcement. Section III assesses factors affecting enforcement. Section IV provides examples of cases involving multinational companies; these examples are included for the first time this year. Section V provides TI's recommendations for increasing enforcement.

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<sup>1</sup> The published reports can be found at:  
[http://www.oecd.org/document/24/0,2340,en\\_2649\\_34859\\_1933144\\_1\\_1\\_1\\_1.00.html](http://www.oecd.org/document/24/0,2340,en_2649_34859_1933144_1_1_1_1.00.html)

## FOREIGN BRIBERY PROSECUTIONS AND INVESTIGATIONS

Country	Prosecutions		Investigations		Share of World Exports
	2007	2006	2007	2006	% for 2006 Source:OECD/IMF (2006 data)
Argentina	0	0	0	0	0.35
Australia	0	0	4(1)**	3	1.08
Austria	0	u	0	0	1.26
Belgium	4*	3	some	0	2.36
Brazil	0	-	0	-	1.07
Bulgaria	3	3	2	0	0.14
Canada	1	1	some	u	3.16
Chile	0	-	0	-	0.38
Czech Rep.	0	0	0	0	0.73
Denmark	1	1	21 (21)**	21(21)**	0.97
Estonia	0	0	0	0	0.09
Finland	0	0	1	1	0.64
France	9	8	u	u	4.09
Germany	4+	3	83+ (63)**	43 (21)**	8.87
Greece	u	0	u	u	0.39
Hungary	18	18	27	26	0.60
Ireland	u	u	3 (3)**	u	1.20
Italy	2	1	1	1	3.53
Japan	1	0	u	u	4.78
Korea (South)	5	5	2	0	2.62
Mexico	0	0	1	0	1.82
Netherlands	10 (8)**	0	8	0	3.35
New Zealand	0	0	2(2)**	0	0.21
Norway	2	2	u	u	1.06
Poland	0	u	0	u	0.94
Portugal	0	0	2	2	0.41
Slovak Rep.	0	0	0	1(1)**	0.32
Slovenia	0	-	0	-	0.18
Spain	2	2	1	u	2.18
Sweden	1	1	14 (12)**	12 (12)**	1.35
Switzerland	1	1	23 (17)**	4	1.33
Turkey	0	0	0	0	0.77
United Kingdom	0	0	15	4	4.64
United States	67	50	60	55	9.99

\* The Belgian authorities are also prosecuting 6 cases referred to them by OLAF and 1 NATO case

\*\* Numbers in brackets indicate number of Oil for Food cases included in the total number

u Information unavailable

## I. OVERVIEW

### ***Convention is at crossroads***

Eight years after the convention entered into force, its success is not yet assured. There is now significant enforcement<sup>2</sup> in fourteen countries, compared to twelve in the 2006 report and eight in the 2005 report. However, there has been little or no enforcement in twenty countries, demonstrating a serious lack of political commitment by over half of the signatories.

- Countries with significant enforcement: **Belgium, Bulgaria, Denmark, France, Germany, Hungary, Italy, Korea, the Netherlands, Norway, Spain, Sweden, Switzerland, and the United States.**
- Countries with no prosecutions: **Argentina, Australia, Austria, Brazil, Chile, Czech Republic, Estonia, Finland, Greece, Iceland, Ireland, Mexico, New Zealand, Poland, Portugal, Slovak Republic, Slovenia and the United Kingdom.**
- Status of major exporters: There is now significant enforcement in five of the largest exporters: **France, Germany, Italy, the United States and the Netherlands**, the first four of which have prosecutions against major multinational companies. However, there have been no significant prosecutions in three other major exporters: **Japan, the United Kingdom, and Canada**. Because the convention is based on a collective commitment to end foreign bribery, until all the major exporters play by the same rules, the success of the convention remains in doubt.
- Al Yamamah termination presents serious threat: The termination by the **United Kingdom** of the investigation of bribery allegations against BAE Systems on the Al Yamamah arms project in Saudi Arabia presents a serious threat to the convention. The UK government's assertion that national security concerns overrode the commitment to prosecute foreign bribery opens a dangerous loophole that other parties could assert when investigations may offend powerful officials in important countries.
- TI experts report that there have been improvements in enforcement systems in **fourteen** countries.

### ***Recommendations***

- It is essential to continue a vigorous monitoring programme, including country visits, until there is active enforcement by all signatories.
- A much higher level of enforcement will be needed before the critical criterion for success – widespread recognition by international business that foreign bribery is no longer acceptable – will be achieved.
- OECD must begin to utilise stronger measures to ensure compliance by governments that have not shown the political will to prosecute foreign bribery.
- Prompt action by the UK government, and if necessary by OECD, is required to overcome the dangerous precedent effects of the Al Yamamah termination.

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<sup>2</sup> “Significant enforcement” is defined based on the number and importance of prosecutions and investigations, taking into account the size of the country's exports. This definition recognises country differences in size of export business and differences in the importance of the cases. Investigations are important as the initial step toward prosecutions. However, the number of investigations is important only if they lead to prosecutions.

## II. FOREIGN BRIBERY PROSECUTIONS AND INVESTIGATIONS

### A. Prosecutions

Foreign bribery prosecutions<sup>3</sup> have been brought in **sixteen** out of thirty-four countries. This includes the fourteen countries with significant enforcement listed in the overview plus Canada and Japan, which each has one minor prosecution.

- Prosecutions involving major multinationals: **Seven** countries have brought major cases involving multinational companies. These are: Denmark, France, Germany, Italy, Norway, Spain, and the United States.
- Multiple prosecutions: The number of countries where more than one case has been brought has increased from nine to **eleven**: Belgium, Bulgaria, France, Germany, Hungary, Italy, Korea, the Netherlands, Norway, Spain, and the United States.
- No prosecutions: In **fifteen** of thirty-four countries there have been no reported foreign bribery prosecutions, compared with fourteen of thirty-one countries last year: Argentina, Australia, Austria, Brazil, Chile, Czech Republic, Estonia, Finland, Mexico, New Zealand, Poland, Portugal, Slovak Republic, Slovenia and the United Kingdom.
- No information available: Greece, Ireland and Turkey.

### B. Investigations

Foreign bribery investigations<sup>4</sup> were conducted in **twenty** countries of thirty-four as compared with seventeen countries of thirty-one last year. The countries conducting investigations are: Australia, Belgium, Bulgaria, Canada, Denmark, Finland, Germany, Hungary, Ireland, Italy, Korea, Mexico, the Netherlands, New Zealand, Portugal, Spain, Sweden, Switzerland, the United Kingdom and the United States.

- Increased investigations: In **nine** of these countries, the number of investigations has gone up, with substantial increases in Germany, Hungary, the Netherlands, Switzerland and the United Kingdom.
- No investigations: There are **nine** countries where no foreign bribery investigations were reported: Argentina, Austria, Brazil, Chile, Czech Republic, Estonia, Poland, Slovak Republic and Slovenia.

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<sup>3</sup> TI's questionnaire uses a broad definition to include all prosecutions relating to bribery of foreign public officials, whether brought under laws dealing with corruption or under other laws, such as laws dealing with fraud, money laundering, tax evasion, or accounting violations. The number of prosecutions reported is subject to some uncertainty, because many countries do not publish information on foreign bribery prosecutions and the information was obtained from contacts with government and other sources.

<sup>4</sup> Reliable information about investigations is harder to obtain than about prosecutions. Governments generally do not disclose ongoing investigations. Information about investigations is available through lawyers, the media and from public disclosure by companies under investigation. The number of investigations is also subject to some uncertainty because in some countries there is no clear line between formal investigations and preliminary inquiries. The numbers reported reflect the judgment of TI's experts.

- No information available: In an additional **five** countries there is no data available on investigations: France, Greece, Japan, Norway and Turkey.

### III. FACTORS AFFECTING ENFORCEMENT

The TI country experts were asked a range of questions about factors that are important to the conduct of effective enforcement. The following summaries of the responses indicate current status and also, as far as possible, indicate trends.

Although they have made some improvements, two of the world's leading exporters, the **United Kingdom** and **Japan**, have failed to correct major flaws in their legal and enforcement systems. In a large number of other countries experts report multiple problems, with the least progress in **Ireland, Portugal** and **Turkey**.

#### A. Political control over enforcement

This year's report contained a question concerning political control over the enforcement process which had not been in previous reports. This was prompted by the UK termination of the investigation of the Al Yamamah case.

Article 5 of the OECD Convention states:

'Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.'

A number of the TI experts found that there was some evidence of political control over enforcement in their country.

#### Selected comments from TI experts:

*The **Austrian** expert noted that the right of the Minister of Justice to give directives directly to prosecutors is a very powerful legal instrument by which the Minister can stop prosecution of specific cases. Separation of the Minister or the political level respectively from prosecution decisions should be required.*

*The **Belgian** expert noted the OECD's expressed worries, based on known national bribery cases, that "external economic pressure" is taken into account by the courts for the weighing of the cases brought before them. However, the expert notes that on an informal basis, a political intervention to stop or suspend an investigation, in a very fractioned political environment, would be hard to imagine. The police force and judicial organs seem to be immune against informal interventions. On a formal basis, the Minister of Justice has the power to make a "positive injunction", i.e. to require prosecutors to initiate or continue an enforcement action, but this is rarely done, the instructing judges and magistrates having the right to decide over the "opportunity" of prosecution. Constitutionally, the Minister of Justice has no power to make a "negative injunction" to magistrates or judges.*

*In **Brazil**, the TI expert notes that the ministry responsible for enforcement is independent of the executive.*

*According to the TI expert in **Canada**, law enforcement agencies in Canada have the responsibility for the laying of charges against an accused. In this respect, the Royal Canadian Mounted Police (RCMP) the principal investigatory agency with respect to foreign*

*bribery, operates independently from Parliament and is not subject to political influence in its determination of which cases it will investigate and when it will lay charges.*

*The TI expert in the **Czech Republic** reports that some on-going investigations or prosecutions of alleged domestic crimes committed by members of the Czech political and entrepreneurial elite may have been influenced by politicians.*

*In **Hungary**, the TI expert notes that prosecutors of the Prosecution Service of Hungary are independent from the government.*

*In **New Zealand** concerns were raised by the lead examiners in the October 2006 Phase 2 report about the possible influence of Article 5 factors regarding the decision by law enforcement authorities not to investigate a significant Oil-for-Food related matter. According to the New Zealand expert, anecdotal evidence suggests that bribery of foreign officials is not particularly uncommon, but has been rationalised as a necessary means of doing business. The deficiencies or obstacles to enforcement have to do with an apparent lack of courage and will to get to grips with the issue both in legal and ethical senses. There seems to be an attitude which abhors the idea of bribery and corruption of officials within New Zealand, but accepts a different or lower standard with respect to bribery and corruption offshore.*

*The **Portuguese** TI expert reports that one of the investigators interviewed stated that he knew a case in which political interference was felt in violation of Article 5 of the convention, but he did not provide any details. The Phase 2 report on Portugal noted that in one specific case of alleged foreign bribery no investigative activities had been initiated despite the fact that numerous sources outside of Portugal, including an international organisation, foreign public institutions, civil society and the media had reported the allegations.*

*The TI expert in **Spain** notes that termination of a prosecution by political decision-makers is impossible.*

*According to the TI expert in **Turkey**, government influence on investigations or prosecution was said to have occurred in several cases on different matters last year, however, we have not heard any incident for investigation of foreign bribery.*

*The TI expert in the **United Kingdom** notes there has been severe criticism in the UK and abroad of the decision on 14 December 2006 of the Director of the Serious Fraud Office to discontinue the investigation into the affairs of BAE Systems in relation to the Al Yamamah defence contract. There is a justifiable apprehension that that decision violates Article 5 of the OECD Convention.*

#### **Statement by Slovakian Minister**

"Slovak firms — both government-owned and private — should learn how to officially account for bribes that would allow for the sale of Slovak arms to some developing countries where corruption in arms trade is unavoidable", said the Slovakian Economy Minister Lubomir Jahnotek in a 22 March 2007 interview with the weekly magazine Trend. Jahnotek also labeled bribes as "nontraditional forms of sale that really work."

## B. Organisation of enforcement

Because investigation and prosecution of foreign bribery is highly specialised work, it is desirable to establish a centralised office in charge of this task. In this way, investigation and prosecution do not have to rely on local prosecutors with large caseloads of domestic crime.

### Status and Trend

- **Status** – About **3/4** of countries surveyed satisfactory
- **Trend** – **Mildly positive**

#### **1. Centralised national office or unit for foreign bribery enforcement?**

Yes: **Fifteen** countries. Australia, Belgium, Czech Republic, Denmark, France, Greece, Hungary, Korea, Mexico, the Netherlands, Norway, Spain, Sweden, Switzerland, United States.

#### **2. If not centralised, what level of coordination and supervision is provided for foreign bribery enforcement?**

Of the nineteen countries without a centralised office, the following considered coordination satisfactory or unsatisfactory:

Satisfactory: **Ten** countries. Bulgaria, Canada, Chile, Estonia, Finland, Germany, Italy, New Zealand, Slovak Republic, United Kingdom.

Unsatisfactory: **Nine** countries. Argentina, Austria, Brazil, Ireland, Japan, Poland, Portugal, Slovenia, Turkey.

#### **Selected comments from TI experts:**

*According to the **Austrian** expert, in principle the Ministry of Justice is the central legal institution for coordination; however, no proactive enforcement or coordination seems to be carried out.*

*According to the **German** TI expert, if Germany had a centralised federal office for foreign bribery prosecutions, we might see more investigations and court cases, but there is little likelihood that Germany would take this step.*

*The TI expert reports that **Greece** possesses a centralised authority for bribery enforcement but their impact remains unsatisfactory due to entrenched practices, the share of the black money in the national economy and the lack of anti-corruption mentality.*

*According to the TI expert in **Hungary**, in the case of bribery in international relations, it is the Central Investigative Office for Prosecution that carries out the investigation.*

*The TI expert in **Italy** notes that last year the Ministry of Foreign Affairs promoted, together with the Ministry of Justice, two inter-ministerial coordination meetings involving all the bodies dealing with problems of bribery in international trade, including the Ufficio Italiano Cambi (Italian Foreign Exchange Office) and SACE (export credit agency).*

*The **Japanese** TI expert notes that there is no centralised national office for convention enforcement in Japan, and is unlikely to be one in the near future, but thanks to the recent Phase 2bis review and the Japanese government's responses to it, the ministries concerned -- foreign affairs, justice and trade and industry --- as well as other authorities such as police, tax, and financial, have started to show a certain degree of coordination among themselves. It is a positive development that was not seen in the past.*

The TI expert in **Switzerland** reports that since January 2002 the competence for prosecuting financial and economic cases has been shifted from cantonal level to federal (national) level. The reason for this change is to avoid smaller cantons being overwhelmed by the investigation of highly complex affairs and to obtain better coordination of procedures.

The TI expert in the **United Kingdom** reports that in July 2006, the Prime Minister asked the Secretary of State for International Development to lead the Government's work on combating overseas corruption and the Government published its first Action Plan for 2006/2007. In this lead role, the Secretary of State chairs a Cabinet Office Coordinating Committee. At the same time, the Government published its first Action Plan for 2006/2007. This new emphasis on coordination will hopefully lead to greater focus on enforcement.

## C. Available resources

### **Assessment of staffing and resources for foreign bribery enforcement**

The TI experts based their assessments on number of staff and other resources in relation to caseload and volume of foreign trade.

#### **Status and Trend**

- **Status** – Over 1/2 of countries surveyed satisfactory
- **Trend** – **Positive**, with improvements reported in **Italy, Portugal, Sweden, the United Kingdom** and the **United States**

Satisfactory: 20 countries. Argentina, Australia, Belgium, Bulgaria, Canada, Chile, Denmark, Estonia, Finland, France, Hungary, Korea, Mexico, New Zealand, Portugal Slovak Republic, Sweden, Switzerland, United Kingdom, United States.

Unsatisfactory: 13 countries. Austria, Brazil, Czech Republic, Germany, Greece, Italy, Japan, the Netherlands, Norway, Poland, Slovenia, Spain, Turkey.

No response: Ireland.

#### **Selected comments from TI experts:**

As noted by the TI expert in the **Czech Republic**, although there have been continuous efforts to enhance the professionalism of corruption investigations in the Czech Republic, there are still not enough experts to investigate highly sophisticated and often complicated acts of foreign bribery.

In **France**, the TI expert notes that resources are a debated issue. Staffing of the various offices has been increased substantially in recent years. However, there still are complaints in relation to human resources issues.

In **Germany**, the question of resources varies significantly between the Bundesländer. Generally prosecutors believe that an increase in personnel and financial resources at investigation, prosecution and court levels could have a positive impact.

The TI expert in **Hungary** notes that among the staff of the Central Investigative Office for Prosecution, responsible for foreign bribery investigations, are the most qualified, trained prosecutors in the country. They are highly experienced in the prosecution of complex and serious criminal cases.

The **Italian** TI expert reports that the budget provided for the High Commissioner for the prevention and the fight against corruption is very low. The expert also reports that Italy has taken a number of initiatives to improve training on the foreign bribery offence. Notably, the

*Guardia di Finanza, prosecutors and magistrates have already received, or are due to receive in 2007, supplementary training on the foreign bribery offence.*

*According to the TI expert in **Korea** more resources should be specifically dedicated and allocated to investigate bribery cases that occur overseas.*

*The **Norwegian** corruption team at Økokrim (Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime) consists of a handful (less than a dozen) prosecutors and investigators, according to the local TI expert. A main shortcoming is that Okokrim does not have enough investigative resources. An additional problem is the lack of resources and competence in police districts.*

*The TI expert in **Portugal** notes that the 2007 Judicial Police budget increased to 100 million euros approximately. This investigative body has put in place special training programmes for its operational agents and is now considering the introduction of specialized recruitment. If this policy of structural changes is continued, more concrete results can be expected in the future.*

*The TI expert in **Spain** comments that foreign bribery investigations are very expensive and complicated. The resources are inadequate considering the time and people needed for such investigations.*

*In **Sweden** the enforcement unit consists of five prosecutors and two qualified investigators (economists), says the TI expert. One or possibly two additional investigators will be added during 2007. The main shortcoming is that the Unit has not enough investigative resources of its own but has to “borrow” investigators from other police units.*

*The **United Kingdom** expert notes that the Serious Fraud Office is now supported by the Overseas Anti-Corruption Unit (OACU), which has been expressly set up to deal with foreign bribery cases. It is already active and showing every sign of taking its mandate very seriously. Relative to the typical complexity of foreign fraud and bribery cases, the OACU team (10 strong) is not large and at this stage is only funded by the Department for International Development for three years.*

*According to the TI expert in the **United States**, over the past year, there have been some signs that the US government has increased the number of staff assigned to this area. Nonetheless, the continued increase in cases and voluntary disclosures continues to strain Securities and Exchange Commission and Department of Justice resources.*

#### **D. Statutory and other legal inadequacies**

##### ***Significant inadequacies in the legal framework for foreign bribery prosecutions***

TI experts report inadequacies in the following eighteen countries: Argentina, Australia, Austria, Brazil, Canada, Chile, Czech Republic, France, Germany, Greece, Ireland, Italy, Japan, Korea, Poland, Spain, Turkey, United Kingdom.

The legal inadequacies reported include:

- *Inadequate definition of the foreign bribery offence:* Australia, Austria, Canada, Greece, Ireland, Korea, Spain, Turkey, United Kingdom.
- *Short statutes of limitation:* France, Italy, Spain. *Also, delays in courts relevant for statutory limits:* Belgium, Bulgaria, Greece, Italy.
- *Jurisdictional limitations:* Argentina, Austria, Canada, Chile, Greece, Ireland, Japan, Spain.
- *Lack of criminal liability for corporations:* Argentina, Brazil, Chile, Czech Republic, Germany, Greece, Hungary (inadequate provision, see Phase 2

Report), Italy, Mexico, Poland, Spain (partially), Sweden, Turkey, United Kingdom.

*Note: Criminal liability of corporations is not an OECD Convention requirement but in TI's view it is important because it provides a much stronger deterrent to corporate misconduct than personal liability.*

- *Lack of liability (civil or criminal) for corporations: Slovak Republic.*

#### *Additional*

- *Exception to Article 5: Canada.*
- *Criteria to define the false accounting offence: Greece.*
- *Defences and exemptions: Australia, Czech Republic, Italy, Poland, Slovak Republic, Turkey.*
- *High evidentiary threshold for prosecution: Japan.*
- *Inadequate sanctions: Australia, Korea, Greece, Spain.*
- *Extradition problems: Spain.*

#### **Selected comments from TI experts:**

*According to the **Argentinian** TI expert, jurisdictional limitations exist because there is no nationality jurisdiction for foreign bribery. Concerning criminal liability for corporations, the Bureau of Criminal Policy of the Ministry of Justice and Human Rights included this topic in a draft bill that proposes an important amendment to the criminal code. Yet it is unlikely that the government will send the bill to Congress.*

*The **Austrian** TI expert observes that criminal liability of corporations entered into force as of January 2006; but no cases have been brought so far, so there is no experience yet as regards jurisdiction.*

*The TI expert in **Canada** points out that in addition to the lack of nationality jurisdiction in the country, Canada has made a reservation to OECD Convention Article 5 with respect to investigation and prosecution of an offence under the Corruption of Foreign Public Officials Act (CFPOA). This could allow certain cases of foreign bribery to go unprosecuted. Further, the CFPOA requires that the purpose of the bribe must be "for profit" which also limits the application of the statute.*

*In the **Czech Republic**, the investigation of foreign bribery may in some cases be impeded by the defence of active repentance set forth in Art. 163 of the national Penal Code, says the TI expert in Prague. The Achilles heel of the Czech combat against corruption, both domestic and foreign, is the non-existence of criminal liability of legal persons.*

*The **French** TI expert mentions that the only current difficulty for prosecution of corruption in France is the statute of limitations duration of only three years. It is the same for all crimes of the same category, misdemeanours, but (unlike the situation in Italy) the period may be extended if certain procedural steps have been taken.*

*The **United Kingdom** government's record on corruption law reform is poor, says the UK expert for TI. The current law on corruption rests on a mix of common law and statutes, principally those enacted in 1889, 1906 and 1916. The Law Commission published a consultation paper in January 1997 and published its proposals in March 1998. The draft legislation proposed by the Commission was adapted in a Draft Bill published by the Government only in 2003 and referred for scrutiny to an all-party Joint Parliamentary Committee (JPC). The JPC's report was very critical of the fundamental approach to defining bribery, which was based on an artificially extended concept of agency. The committee concluded that the Bill was unclear and suggested an alternative way of defining bribery. This was initially rejected by the Government, although in December 2005 it commenced a consultation process to see if an agreed way forward could be found. On 5 March 2007, the Home Office at long last published a response to the December 2005 consultation and announced that the definition of bribery would be referred back to the Law Commission, an exercise expected to take a further eighteen months with no assurance that parliamentary*

time would be found to enact legislation. Meanwhile the government is unwilling even to consider more comprehensive legislation of the type proposed by TI (UK).

## E. Complaint procedure

### **Government's efforts to provide publicly-known and accessible procedures for reporting foreign bribery allegations**

#### **Status and Trend**

- **Status** – About **2/3** of countries surveyed satisfactory
- **Trend** – **Positive**, with country performance moving to satisfactory in several countries including **Australia, Finland, Germany and Japan.**

Satisfactory: 21 countries. Argentina, Australia, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Japan, Korea, Mexico, New Zealand, Poland, Slovak Republic, Slovenia, Switzerland, United States.

Unsatisfactory: 13 countries. Austria, Belgium, Brazil, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, Turkey, United Kingdom.

#### **Selected comments from TI experts:**

According to the TI expert in **Canada**, the Royal Canadian Mounted Police (RCMP) Commercial Crime Program carries out a comprehensive daily media scan. The RCMP also has around 35 liaison officers assigned to Canadian embassies around the world who are briefed on foreign bribery and the Corruption of Foreign Public Officials Act (CHPOA) before they leave on foreign assignment. In addition, the RCMP operates an internet site where complaints can be made by anyone on-line, although it does not appear that this mode of communication has to date generated anything of significant substance. The Canadian International Development Agency has in place a Protocol for Dealing with Allegations of Corruption which outlines internal procedures regarding corruption allegations.

In the **Czech Republic**, the respondent gives a positive assessment of the existing complaint mechanisms as there are many channels through which the public can report bribery allegations and a complainant has the right to be informed about how their complaint was handled. Almost every ministry has a hotline, as does Transparency International - Czech Republic.

The **French** TI expert points out that the Government has launched advocacy campaigns for the implementation of the duty for civil servants to report violations of the foreign bribery law that they witness in the course of their mission. A special emphasis has been put on this duty by the Ministry of Foreign Affairs, in its instructions to the diplomatic agents abroad.

The **Hungarian** expert is of the view that a website should be established and advertised to receive complaints against members of Hungarian enterprises from public officials of foreign countries.

As reported by the **Japanese** TI expert, the Ministry of Economy Trade and Industry (METI) launched a website linked to the ministry specifically relating to foreign bribery. The website gives viewers the Japanese text of the OECD Convention, the Unfair Competition Prevention Law (UCPL) and related ordinances. METI-compiled Guidelines for the Prevention of Bribery of Foreign Public Officials as well as a Q&A and links to a help-line for consultation and complaints are also available.

The TI expert in **Norway** notes that information about a hotline is provided on Økokrim's (Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime) website. Okokrim mostly receives information about allegations of corruption from the media, tax authorities and whistleblowers. Other government entities, like the Ministry of Foreign Affairs and the National Agency for Development Cooperation, seem to lack adequate procedures for reporting foreign bribery allegations.

The **Slovak** expert indicates that Slovak tax officials are subject to the general duty to report crimes.

In **Spain** there are no hotlines or websites for people reporting bribery, according to the TI expert.

The **Swedish** TI expert reports that the National Anti-Corruption Unit gets most of its information about suspected cases from the media, tax authorities and whistleblowers. Anonymous reports and complaints are also not unusual.

The TI expert in **Switzerland** points out that in February 2007 the Federal Department of Development and Cooperation opened a compliance office for reports of bribery allegations. In March 2007, the canton of Zurich announced plans to widen its ombudsman institution to include bribery cases and became the first canton to offer a hotline for bribery cases.

The **Turkish** TI expert notes that reporting of foreign bribery allegations is left to the time consuming and expensive general complaint procedures, since easily accessible procedures, such as hotlines or websites, do not exist.

According to the **United Kingdom** TI expert, there are no government "hotlines" or websites for the public or companies to report allegations of bribery. Overseas, reports are made to UK diplomatic posts. The Written Follow-Up report to the OECD points out that as of 8 February 2007, 25 of the allegations referred to the Overseas Corruption Register maintained by the Serious Fraud Office had come from the Foreign and Commonwealth Office (FCO).

The **United States** expert points out that the Sarbanes-Oxley Act requires publicly-traded companies to establish a mechanism for the confidential receipt of employee complaints. The government also encourages corporations to establish hotlines and reporting procedures.

## F. Whistleblower protection

### Status and Trend

- **Status** – Almost **1/2** of countries surveyed still unsatisfactory in public sector and under **1/2** in private sector
- **Trend** – **Positive**, with improvements reported in **Italy, Japan Norway and Switzerland**

### 1. Whistleblower protection in the public sector

Satisfactory: **Fifteen** countries. Austria, Canada, Estonia, Finland, Germany, Hungary, Japan, Korea, New Zealand, Poland, Slovak Republic, Sweden, Switzerland, United Kingdom, United States.

Unsatisfactory: **Nineteen** countries. Argentina, Australia, Belgium, Brazil, Bulgaria, Chile, Czech Republic, Denmark, France, Greece, Ireland, Italy, Mexico, the Netherlands, Norway, Portugal, Slovenia, Spain, Turkey.

## **2. Whistleblower protection in the private sector**

**Satisfactory:** **Ten** countries. Bulgaria, Estonia, Finland, Germany, Hungary, Japan, New Zealand, Slovak Republic, Switzerland, United Kingdom, United States.

**Unsatisfactory:** **Twenty-one** countries. Argentina, Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, France, Greece, Ireland, Italy, Korea, Mexico, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland and Turkey.

**No response:** Brazil, Poland.

### **Selected comments from TI experts:**

*In **Argentina**, the Committee of Experts of the OAS Convention Follow Up Mechanism in December 2006 strongly recommended that Argentina strengthen its whistleblower protection programme.*

*The **Canadian** TI expert reports that legislation enacted three years ago creates a new employment-related intimidation offence protecting employees who report unlawful conduct within their corporation. There is no legislation that would help encourage employees in the private sector to blow the whistle on the payment of a foreign bribe by their employer.*

*In **France**, according to the TI expert, the legal protection of whistleblowers does not appear satisfactory. While the statutes of the public administration contain provisions which protect the civil servants who denounce criminal or punishable facts in good faith, their effectiveness remains uncertain and their implementation should be improved. With regard to the employees of the private sector, there is no legal protection.*

*According to the **Italian** TI expert, no steps were taken to introduce stronger whistleblower protection for public sector employees who report good faith suspicions of foreign bribery, despite the recommendation by the OECD Working Group on Bribery.*

*The TI expert in **Japan** notes that a whistleblower protection law enacted in 2004 came into force in April 2006. The law covers whistleblower protection in the public sector as well as the private sector, and the Unfair Competition Prevention Law (UCPL) is within the scope of the law. Thus it provides for protection of whistleblowers making foreign bribery complaints.*

*The **Korean** TI expert reports that the Anti-Corruption Act protects whistleblowing related to state-owned companies, but no legal provision encourages whistleblowing or protects whistleblowers against reprisals for exposing corruption in the private sector. Reports of bribery suspicions in the private sector therefore remain uncommon.*

*The TI report on **New Zealand** indicates that the Protected Disclosures Act gives protection to employees who report serious wrong-doing in the public interest, including bribery. But the legislative provisions have not been tested and are likely to be no stronger than existing employment law protections.*

*According to the TI expert in **Norway**, there are new legal provisions for whistleblower protection in force since 1 January 2007 that apply to both the public and private sectors. They seem to provide adequate protection against retaliation. However, there is a requirement that the whistleblower must have acted defensibly or justifiably (“defensible whistleblowing”). This is counterproductive. Media coverage of actual cases indicates that it is unlikely that whistleblowers are well protected in practice.*

*There is no protection for whistleblowers under Spanish law, according to the TI expert in **Spain**. Of the 35 big Spanish companies listed on the stock market in Spain, only four, (Repsol, Ferrovial, Cintral and BBVA) have whistleblower protection systems.*

In **Sweden**, the TI expert states that there is no specific whistleblower protection. Public servants have “source protection” if they tip off journalists and there is also a prohibition of dismissal without “grounds of fact” in the labour legislation. However, the many other ways of harassing a whistleblower other than dismissing him are not prohibited by law. A regulation in the Penal Code about “interference in a judicial matter” however may offer protection in some cases.

The **Swiss** TI expert reports that the government is moving towards improving the legislative protection of whistleblowers, as recommended by the OECD Phase 2 report. In February 2007, the Swiss Agency for Development and Cooperation opened a compliance office for whistleblowers. The goal is to motivate whistleblowers to report bribery cases and other malpractices. In the private sector more and more companies open whistleblower hotlines.

## **G. Public awareness**

### **Government efforts to create public awareness that foreign bribery is a crime**

#### **Status and Trend**

- **Status** – About **1/2** of countries surveyed satisfactory
- **Trend** – **Positive**, with improvements reported in **Austria, Germany, Sweden, Switzerland** and the **United Kingdom**

Satisfactory: **Eighteen** countries. Australia, Bulgaria, Canada, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Korea, Mexico, the Netherlands, Poland, Slovenia, Switzerland, United Kingdom, United States.

Unsatisfactory: **Sixteen** countries. Argentina, Austria, Belgium, Brazil, Chile, Czech Republic, Denmark, Ireland, Japan, New Zealand, Norway, Portugal, Slovak Republic, Spain, Sweden, Turkey.

#### **Selected comments from TI experts:**

The **Australian** TI expert notes that the level of awareness has certainly increased greatly because of the huge spate of publicity over the Australian Wheat Board affair. Two books have been issued also about the inquiry and information booklets forthcoming from the Tax Office and the Attorney General.

The TI expert in **Austria** reports that more extensive awareness-raising activities started recently, not least triggered by the critical OECD Phase 2 Report and also due to the parliamentary investigation of the Eurofighter procurement processes. Specific government activities include: Special training courses being prepared for judges and prosecutors, to start in 2008 and initiatives for awareness-raising in the enterprise sector, in cooperation with the Chamber of Commerce. These and other measures led to a high level of awareness.

In the **Czech Republic**, with the exception of the Export Guarantee and Insurance Corporation (EGAP), the Government has exerted no effort during the last year to make publicly known that foreign bribery is a criminal offence, reports the TI expert.

According to TI's expert in **Germany**, in 2006 the Federal Government issued a flyer in German and English informing about the legal framework concerning foreign bribery. The brochure was widely distributed among public authorities and in the private sector at home and abroad. Senior officials of the Federal Ministry of Justice participated in several public functions dedicated to a public debate on foreign bribery.

The **Italian** TI report indicates that the Ministry for Economic Development, SACE (Italy's export credit agency) and the Ministry of Foreign Affairs have been active in disseminating information on foreign bribery both to their staff and to private sector stakeholders.

In **Mexico** the government's efforts have continued satisfactorily this past year in promoting awareness of the convention's requirements. As was highlighted in the 2006 OECD evaluation, the government's awareness-raising efforts have primarily focused on four distinct audiences and involved a variety of activities, ranging from organizing and participating in conferences, meetings and presentations to distributing educational material on the convention and helping conduct related studies.

The **New Zealand** TI expert reports that although information from the Ministry of Justice and other agencies has been distributed widely, including via websites, awareness that bribery of foreign officials is a criminal offence is extremely low. Of 250–300 New Zealand business people who participated in business ethics courses during 2005–2007, less than ten were aware of the Crimes Act provisions concerning the bribery of foreign officials.

According to the TI expert in **Norway**, the Ministry of Foreign Affairs has produced a good anti-corruption brochure for businesses, but it should be promoted more consistently and forcefully. Much remains to be done to raise awareness.

According to the **Portuguese** TI expert, the press is still lagging behind in terms of disclosing and reporting possible occurrences. There have been no relevant governmental campaigns to raise public awareness about the OECD Convention, especially amongst the business community, public officials and journalists. Many journalists dealing regularly with corruption do not know about the existence of the OECD Convention and how it operates.

The **Spanish** TI expert notes that the Ministry of Industry is doing a good job but has not enough cooperation from other ministries and subnational governments.

The TI expert in **Sweden** reports that the Ministries for Foreign Affairs and of Finance to have begun preparing a brochure concerning corruption. However, much remains to be done in order to convince the general public and particularly people in trade and industry that bribery of foreign public officials is a serious offence.

In **Turkey**, according to the TI expert, except for legal experts and people working in this area, there is limited knowledge in society regarding foreign bribery being a crime. This is due to a lack of effort on the part of the government for creating awareness.

In the **United Kingdom**, reports the TI expert, there has been a notable increase in measures to increase awareness in the period under review, particularly within and through the Foreign and Commonwealth Office (FCO). The FCO works jointly with UK Trade and Investment (UKTI) to spread awareness that foreign bribery is a crime. Economic officers preparing to go overseas receive information on corruption issues and the obligation to report allegations against UK nationals and corporations.

## H. Public access to information about enforcement

TI experts were asked if there is adequate access to information about foreign bribery cases. While the experts may have been able to gain access to this information through inquiries with the government, such information should be publicly available.

### Status and Trend

- **Status** – About **1/2** of countries surveyed satisfactory
- **Trend** – Little change

**Yes: Seventeen** countries. Australia, Belgium, Canada, Chile, Estonia, Finland, Hungary, Japan, Korea, Mexico, New Zealand, Norway, Slovak Republic, Slovenia, Sweden, Switzerland, United States.

**No: Fifteen** countries. Austria, Argentina, Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, the Netherlands, Poland, Portugal, Spain, Turkey, United Kingdom.

*No response:* Brazil, Bulgaria.

### Selected comments from TI experts

*For **Argentina** the TI expert reports that, due to the country's federal organisation, overall there are 25 different judicial systems, whose databases are far from being centralised. This situation works against accessing information on foreign bribery cases. At the Federal Criminal Courts, the request for information must be precise, with specific questions about a particular case. At the Anti-corruption Office (AO) there is adequate public access to information regarding cases where the AO is claimant before the judiciary.*

*The **Austrian** TI expert notes that the official criminal statistics do not give information on specific types of offences under the relevant Article of the Penal Code.*

*The TI expert in **Brazil** explains that neither the Federal Public Ministry nor the Brazilian judiciary produce statistical or analytical reports on amount, type or other information about the cases that enter the system. If cases involving transnational bribery were brought with any frequency, it would be very difficult to get the appropriate information from the control organisms.*

*The TI expert in **Canada** reports that the number of foreign bribery prosecutions is a matter of public record and is reported in the Annual Report to Parliament that the Ministries of Foreign Affairs, International Trade and of Justice are required by law to prepare on the implementation of the OECD Convention and on the enforcement of the Corruption of Foreign Public Officials Act (CFPOA). This includes information collected from provincial authorities.*

*In **Germany**, the access to data on foreign bribery cases is complex and difficult, the TI expert says. The 16 Bundesländer and their jurisdictions are reluctant to release such information, partly out of respect for the existing laws protecting the personal data of accused persons. However, it may be questioned whether more precise statistics providing anonymised case data would affect data protection concerns.*

*In **Norway**, the TI expert reports that some information about the cases is provided on the website of the National Authority for the Investigation and Prosecution of Economic and Environmental Crime. Also, the media report extensively about cases being investigated or prosecuted.*

The **Spanish** expert points out that the Public Prosecutor's Office provides the official numbers but it is impossible to find out other information about cases.

The TI expert in **Turkey** notes that no information is available specifically for foreign bribery cases. The website for judicial statistics does provide statistical information for articles of the Criminal law, however, foreign bribery is regulated as a sub-section of article 252 (5) and this information cannot be obtained publicly from this site.

## I. Accounting and auditing requirements

### **Assessment of accounting and auditing requirements intended to prevent practices for hiding foreign bribery**

#### **Status and Trend**

- **Status** – Over **3/4** of countries surveyed satisfactory
- **Trend** – **Positive**, with **Japan** moving to satisfactory and improvements reported in systems in **Canada** and **Slovakia**

Satisfactory: **Twenty-six** countries. Argentina, Australia, Brazil, Bulgaria, Chile, Czech Republic, Denmark, Estonia, France, Greece, Hungary, Ireland, Italy, Japan, Korea, the Netherlands, New Zealand, Norway, Poland, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, United Kingdom, United States.

Unsatisfactory: **Eight** countries. Austria, Belgium, Canada, Finland, Germany, Mexico, Portugal, Turkey.

#### **Selected comments from TI experts:**

The **Argentinian** TI expert notes that Argentina has its accounting legislation in place, although control from State agencies is weak. He mentions that in 2003 the General Inspectorate of Companies passed several Resolutions in order to strengthen the control over off-shore companies and foreign legal persons, especially in money laundering operations or tax evasion.

The TI expert in **Australia** states his concern at the loophole which may exist in respect of bribes paid by offshore non-consolidated entities, especially disguised payments.

The **Belgian** TI expert points out that the auditors are very much aware of their duties with respect to money laundering but they still are reticent on reporting corruption.

The **Canadian** expert reports that recent amendments to Securities legislation in Canada along the lines of the Sarbanes-Oxley Act have expanded criminal and administrative sanctions against wrongdoers, created new statutory causes of action for breach of securities legislation and imposed more stringent duties on auditors, directors and senior officers of public companies in the area of disclosure and certification of financial statements.

According to the **Czech** TI expert, the Czech authorities have implemented virtually all requirements that are imposed by the convention with regard to accounting and auditing standards. The enforcement thereof is, however, problematic in the area of off-the-books accounts, which are generally speaking hard to detect and punish.

The TI expert in **France** notes that there is an obligation for auditors to report to the court prosecutor any violation of company law they find in the course of their audit mission, and a supervising body has been set up by law to control their practices.

In **Greece**, the TI expert reports that although no new measures have been adopted, there is tighter application of the existing ones (mainly implementing EC financial law).

The TI expert in **Japan** noted that under the tax reform law amended in 2006, a rule stipulating that any “entertainment and social expense” excluding less than 5,000 yen eat-and-drink expenses is non-deductible applies until the end of FY2007. This is a positive development.

The **Mexican** TI expert refers to the 2006 OECD Evaluation, which raised an important point about a deficiency in the current legislation. Article 116 of the Criminal Procedure Code obliges citizens to report cases of criminal wrongdoing to the authorities. But at the same time accountants are professionally bound to confidentiality. Thus, the law, the professional norm or both need to be modified to allow accountants to breach confidentiality in specific circumstances.

The TI expert in **New Zealand** reports that the New Zealand Institute of Chartered Accountants has included “off-shore bribes” in its professional educational courses.

The **Portuguese** TI expert notes that the Portuguese accounting system is still sufficiently complex and dispersed in several laws and directives to create a propitious environment for illicit financial and economic operations.

According to the **Slovakian** TI expert, insofar as Slovak accounting standards were not fully compatible with International Accounting Standards (IAS), after 1 January 2006, additional entities are required to provide financial reporting in compliance with IAS.

In **Spain**, reports the TI expert, the law is very detailed about bookkeeping, but banks, lawyers and notaries too often fail to communicate to government officials about possible money laundering operations.

The **Swedish** TI expert reports that chartered accountants seem to be satisfied with the requirements and aware of their obligation to report any illicit practice. Some prosecutors are of the opinion that it may be difficult for an accountant to detect such practices and that even if he does, it could be difficult for him to be determined enough to report.

In **Turkey**, except for public companies and financial institutions, auditing is not mandatory, according to the local expert for TI. Auditors are under an obligation to report any suspicious transaction, including expenses abroad. However, under the 40/1 of Law No. 193, companies operating in the areas of export, transportation and construction may write off 0.5% of their expenses abroad even if they cannot document it.

## **J. Private sector efforts**

### **Assessment of the effectiveness of corporate anti-bribery compliance programmes**

#### **Status and Trend**

- **Status** – About **1/2** of countries surveyed satisfactory
- **Trend** – **Positive**, with country performance moving to satisfactory in several countries including **Australia, Austria, Belgium, Denmark** and **Hungary**, and improvements also reported in **Norway, Spain** and **Sweden**

Satisfactory: **Fourteen** countries. Australia, Austria, Belgium, Canada (for large companies), Denmark, Finland, France, Hungary, Italy, Japan, Korea, Sweden, United Kingdom, United States.

**Unsatisfactory:** **Seventeen** countries. Argentina, Bulgaria, Chile, Czech Republic, Estonia, Germany, Greece, Ireland, Mexico, the Netherlands, New Zealand, Norway, Portugal, Slovak Republic, Slovenia, Spain, Turkey.

**No response:** Brazil, Poland, Switzerland.

**Selected comments from TI experts:**

*It is reported by the **Australian** TI expert that the top 100 Australian companies, doing the bulk of overseas business, have enhanced their programmes since last year. Concern exists with regard to the smaller companies.*

*In **Belgium**, reports the TI expert, corporations tend to give increased attention to compliance, probably out of fear of reputational damage, and invest more efforts in training and information of their employees. Seminars are organized around integrity programmes and for the training of compliance officers. A growing number of Belgian companies have codes of conduct and appoints compliance officers.*

*The **Czech** expert notes that according to the information from the Czech Chamber of Commerce, there are no specialised programmes running in the Czech business sector aimed at eradicating foreign bribery. The members were only informed once about the existence of the OECD Convention.*

*In **Hungary** the TI expert notes that ethic codes of international companies address the problem of corruption, but contain mostly general declarations instead of specific norms. Ethics codes are rarely adopted by medium and small sized Hungarian enterprises.*

*The **Korean** TI expert states that to implement ethical management, some companies make employees pledge that they will engage in ethical performance. In other cases, ethical performance is included in performance evaluations, and whistleblowing systems are adopted.*

*The TI expert in **Mexico** reports that a thorough search produced no evidence of any significant recent advances in corporate anti-bribery compliance programmes. While some companies make reference to illicit payments in general terms few if any satisfactorily cover the offence of transnational bribery.*

*The TI expert in **Norway** notes that there is an increase in establishing codes of conduct with regard to anti-corruption. However, implementation of the codes seems uncertain.*

*The **Slovakian** TI expert states that Slovak corporations generally do not put emphasis on corporate anti-bribery compliance programmes.*

*The TI expert in **Spain** notes that Spanish companies are improving but are not doing enough yet. Less than half of the 35 big Spanish companies in the stock market have an official policy against corruption.*

*In **Sweden**, according to the TI expert, the will of companies to establish ethical codes, including anti-bribery regulations, has increased significantly during the last years. But, although the wording of the codes is relatively specific, application and follow-up of the codes are uncertain. Some companies, however, avoid doing business in countries with a high degree of corruption.*

*The **Turkish** TI expert states that some of the big sized Turkish companies also seem to make an effort to embed ethical issues in their corporate culture, but do not take a supply side approach.*

*As reported by the **United States** TI expert, recent enforcement actions have highlighted weaknesses in compliance programmes and have sought to strengthen those programmes by imposing compliance monitors as a condition of settlement. Multi-national companies'*

*corporate anti-bribery compliance programmes are generally perceived as effective, in part due to requirements of the Sarbanes-Oxley Act and incentives created by revised sentencing guidelines. There may be some need to strengthen programmes of foreign issuers of securities on U.S. exchanges. Use of the programmes in small and medium sized enterprises needs to be expanded.*

#### **IV. MULTINATIONAL CASES**

This section provides information on eight prominent foreign bribery cases involving multinational companies. The aim is to illustrate the kinds of cases that have arisen and how they have been handled.

##### **A. Oil and Gas Sector**

###### **Baker Hughes**

On 26 April 2007, the United States Securities and Exchange Commission (SEC) and United States Department of Justice (DoJ) announced fines imposed on Baker Hughes Incorporated (Baker Hughes) and its wholly owned subsidiary Baker Hughes Services International, Inc. (BHSI) with an office in Atyrau, Kazakhstan totalling more than US \$44 million for violating the Foreign Corrupt Practices Act. Baker Hughes is a Houston, Texas-based global provider of oil field products and services. The SEC and DoJ allege that Baker Hughes paid approximately US \$5.2 million to two agents in relation to bribery of officials of State-owned companies in Kazakhstan after which Baker Hughes was awarded an oil services contract in the Karachaganak oil field in Kazakhstan that generated more than US \$219 million in gross revenues from 2001 through 2006. Another agent was paid over US \$1 million to a Swiss bank account in connection with the award of a large chemical contract with KazTransOil, the national oil transportation operator of Kazakhstan.

The SEC's complaint against Baker Hughes also alleges that between 1998 and 2005, Baker Hughes made payments in Nigeria, Angola, Indonesia, Russia, Uzbekistan and Kazakhstan in circumstances that reflected a failure to implement sufficient internal controls, thus allegedly violating the books and records and internal controls provisions of the FCPA. The payments allegedly included commission payments from 1998 to 2004 of US \$5.3 million to an agent who worked in Kazakhstan, Russia and Uzbekistan and payments of more than US \$10.3 million in commissions to an agent in Angola from 1998 to 2003.

Without admitting or denying the SEC's allegations, Baker Hughes consented to the entry of a final judgment permanently enjoining it from future violations of the FCPA and ordering it to pay a civil penalty of US \$10 million and disgorgement with prejudgment interest of approximately US \$23 million; and to retain an independent consultant to review the company's FCPA policies and procedures. To settle the criminal FCPA charges filed by the DoJ against Baker Hughes and BHSI, Baker Hughes entered a guilty plea and agreed to pay a criminal fine of US \$11 million as well as retain, for a period of three years, a monitor to review and assess the company's compliance programme and monitor its implementation of and compliance with new internal policies and procedures. For its part, the DoJ has agreed to defer prosecution for two years.

On announcing these outcomes the SEC and DoJ acknowledged the help provided, in the form of mutual legal assistance, by the Isle of Man Financial Supervision Commission, HM Procureur (Attorney General) for Guernsey, and by the authorities of the United Kingdom and Switzerland.

*Sources: United States vs. Baker Hughes Incorporated and Baker Hughes Services International Inc. - Department of Justice Press Release (26 April 2007); SEC vs. Baker Hughes Incorporated and Roy Fearnley - Securities and Exchange Commission Press Release (26 April 2007)*

## Statoil ASA

In September 2003, a Norwegian newspaper uncovered a foreign bribery scandal by the Norwegian oil company Statoil in Iran. As part of the company's efforts to secure lucrative oil contracts, the company hired the services of an Iranian consultancy firm owned by the son of former Iranian President Hashemi Rafsanjani. Statoil paid US \$15.2 million to this company to influence important political figures in Iran to grant oil contracts to Statoil.

The revelations led to cases being brought in both Norway and the United States. In Norway, Statoil was found guilty of corruption by a Norwegian court and ordered to pay approximately US \$3 million in fines and several members of the company's leadership had to step down from their posts. Statoil insisted that this did not imply any admission of guilt on their part.

In the US, charges were brought against Statoil for violating the Foreign Corrupt Practices Act by paying bribes to Iranian government officials. In October 2006 Statoil was ordered to pay US \$21 million in fines. As part of the settlement agreement Statoil admitted that they had paid bribes to an Iranian public servant in 2002 and 2003, with the aim of securing contracts for Statoil in the development of gas fields. Bribes were also allegedly paid to secure other contracts in the country and to get hold of confidential information. Wrong accounting procedures had been used in order to hide the bribes in the records. The settlement also stipulated that no Statoil employee or representative for the company could make any statements to the media contradicting the verdict for the next three years.

*Source: United States vs. Statoil ASA - Department of Justice Press Release 13 Oct 2006); SEC vs. Statoil ASA - Securities and Exchange Commission Info - Statoil ASA - 6-K - For 10/30/06 (13 Oct 2006)*

## Total SA

A case involving Total SA, France's biggest oil and gas group, was opened in 2002, after the French anti-money-laundering unit Tracfin noticed money being transferred from a Total subsidiary to a Swiss company, Teliac. In 2004 Tracfin investigated whether Teliac in turn funneled cash to officials in Iraq, Russia, and Tanzania, where Total was pursuing business. Four Total executives were put under formal investigation.

In December 2006, French financial police launched an investigation into allegations that Total SA had paid bribes to win a contract on an Iranian natural gas field a decade ago. The case was triggered by their discovery of approximately US \$78 million in the Swiss bank account of an intermediary. Total had signed a US \$2 billion contract for the first phase of the project in September 1997, winning the biggest deal with Iran since the Islamic Revolution.

In March 2007, French judicial officials announced that the new CEO of Total, as well as other unit heads were being questioned as part of the investigation into the 1997 deal. The CEO was informed that he was under formal investigation on suspicions of "corruption of foreign public agents and misuse of corporate assets". Six months before he had already been questioned as part of an investigation into suspected corruption linked to the United Nations Oil-for-Food Programme. Total has denied any wrongdoing on the Iran gas deal or in Iraq.

At the same time, the US Securities and Exchange Commission as well as the US Department of Justice have summoned Total SA to explain the group's activities in Iran. The SEC has requested Total SA to disclose documents pertaining to transactions in Iran.

*Sources: AFP "Total boss says unaware of any US corruption probe" (6 April 2007); Reuters "France: Total CEO summoned by SEC on Iran deal" (3 April 2007); European Business "Cracking Down on Corporate Bribery" (6 Dec 2004)*

## B. Construction / Power Generation

### Enelpower-Siemens-Alstom

Allegations of bribery by employees of the Italian company Enelpower SpA in connection with construction contracts for power and desalination plants in Abu Dhabi, Oman and Qatar were investigated in 2003. The three contracts that Enelpower obtained collectively exceeded EUR 1 billion in value. Local consultants had assisted Enelpower to secure the contracts, after which the company subcontracted to Germany's Siemens AG to supply gas turbines and to France's Alstom to provide boilers. The Italian government has de facto control of the Enelpower SpA and officers of the company are considered "public officials" for purposes of Italy's national anti-bribery laws.

Following internal audits and a tip from a confidential informer, the Italian authorities charged two senior Enelpower officers with foreign bribery for allegedly paying officials in Abu Dhabi, Oman and Qatar to secure the contracts, through a local consultant. They also were charged with accepting payments from subcontractors, including Siemens AG and Alstom, who had transferred more than EUR 6 million into the foreign bank accounts of these officers.

Separately, Siemens AG and Alstom were charged in Italy with bribery of Italian officials for allegedly paying the two officers to win the subcontracts. In 2004, a Milan court took the extraordinary measure of banning Siemens AG from selling gas turbines to the Italian public administration for a one-year period for its part in the corruption scandal.

German authorities initiated a criminal prosecution against two former Siemens managers for paying kickbacks to officials of Enelpower SpA. In mid-May 2007, the court found that the ex-finance chief at Siemens' power generation unit had approved a EUR 6 million payment to win orders. A two-year suspended prison sentence for bribery and breach of fiduciary duty was imposed. A consultant to the company at the time of the offence was given a nine-month suspended sentence for aiding the bribery. The court ordered Siemens, which was not accused, to give up EUR 38 million of the gains it made from the sales. Siemens said the decision had "no basis in law or in fact" and it would appeal.

**Sources:** <http://www.nationaldefensemagazine.org/issues/2006/August/EthicsCorner.htm>; Italy: Phase 2 Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions, 29 Nov 2004, Page 25-26; BBC News, 13 March 2007; Reuters, 13 March 2007; Spiegel Online 14 March 2007

## C. Telecommunications

### Alcatel

In November 2004, the US Securities and Exchange Commission launched an informal inquiry into allegations that Alcatel CIT had made illegal payments to secure a mobile phone contract with the Costa Rican state-owned telephone company Instituto Costarricense de Electricidad (ICE). The allegations involved various state and local officials in Costa Rica, including the former President, two political parties and representatives of ICE. The Costa Rican government had awarded Alcatel a mobile telephone contract valued at US \$149 million in 2001, and another contract worth over US \$100 million in 2002.

Two years later, in 2006, the US Department of Justice charged the former deputy vice president of Alcatel with conspiracy and making bribe payments in violation of the US Foreign

Corrupt Practices Act. Alcatel's attorney stated: "it appears this is an institutionalised way of doing business by international companies in Latin America." The former Alcatel executive pleaded guilty to paying more than US \$2.5 million in bribes to secure the mobile phone contract with ICE. He now faces a maximum of 10 years in prison and US \$580,000 in fines. He had been employed by Alcatel for more than 20 years.

In Costa Rica, a former senior Alcatel official was charged in connection with the mobile telephone contract in 2007. The 10-count indictment accused him of making over US \$2.5 million in bribery payments and laundering the bribes. The payments were routed through a Costa Rican consulting firm, using wire transfers from accounts at banks in New York, the Bahamas and Miami.

In February 2007, ICE announced that it would end its existing contract with Alcatel, and not consider the equipment supplier for future contracts. A French magistrate is investigating Alcatel but no prosecution has been brought. Alcatel has filed a civil fraud case against its former employees seeking EUR 11.2 million in damages.

**Sources:** *United States vs. Sapsizian and Valverde Acosta - Department of Justice Press Release (7 June 2007; 20 March 2007; 19 Dec 2006); SEC vs. Alcatel Telecom Ltd. /Lucent Technologies - Securities and Exchange Commission Info - Alcatel 20-F/A (4 Aug 2006) - Lucent 10-Q (8 Feb 2006); Cadwalader FCPA Adviser, January 2007; Taipei Times, "Aide, businessman in railway scandal" (27 June 2004); German Office for Foreign Trade "Costa Rica Annulliert Vertrag mit Alcatel" (14 Feb 2007)*

## Siemens

In late 2006, five Siemens executives were arrested by German authorities on charges of bribery and embezzlement. Allegations were that Siemens employees had transferred as much as EUR 420 million into secret bank accounts over a seven-year period to be used for bribes to win foreign contracts. It was claimed that as many as 30 employees across three business units knew of the slush-fund scheme, including two members of the group's internal compliance department. Police uncovered suspicious payments made mostly through Swiss and Austrian accounts. The firm may need to review as much as EUR 3 billion worth of transactions in connection with the probe, according to a German news magazine.

Another investigation was initiated by the German authorities in late 2006 into possibly illegal payments included that of a particular six-figure payment, made by Siemens to the Iraqi government under Saddam Hussein. Allegations are that Siemens bribed government officials to secure energy and medical equipment contracts in the United Nations Oil-for-Food programme.

In April 2007, Siemens revealed that the US Securities and Exchange Commission had upgraded an informal inquiry into its accounts to a full-scale investigation. The US Department of Justice is also involved in examining possible criminal violations of US law. Prosecutors in Germany, Liechtenstein, Switzerland, Italy and Greece are looking into the claims.

**Sources:** *Electronic News "Siemens investigated by SEC, DoJ, as it loses CEO" (27 April 2007); Der Spiegel "New Report Details Far-Reaching Corruption" (29 Jan 2007)*

## Titan Corporation

In March 2005, the US Titan Corporation pleaded guilty to criminal charges brought by the Department of Justice of violating the Foreign Corrupt Practices Act anti-bribery and books-and-records provisions, as well as false tax returns. At the same time, the Securities and Exchange Commission (SEC) announced that Titan had settled a civil enforcement action charging violation of FCPA anti-bribery, internal controls, and books-and-records

provisions.

These complaints alleged that from 1999 to 2001, Titan Corporation, through its subsidiaries, made approximately US \$3.5 million in payments to the Benin Postal and Telecommunications Office through a Beninese national who was the business advisor to the President of Benin. Titan admitted that some of its officers knew that at least a portion of the money would be used to support the President's re-election campaign. The SEC complaint alleges that in 2001 Titan funnelled approximately US \$2 million to the election campaign of the then-incumbent president at the direction of a former senior Titan officer based in the United States. The payments were made with the specific purpose of securing the President's approval of continued business under a telephone network installation contract.

The civil complaint contains further allegations that Titan falsified documents that enabled its agents to under-report local commission payments in Nepal, Bangladesh, and Sri Lanka. Moreover, it states that Titan falsified documents presented to the United States government by under-reporting commissions earned on equipment exported to Sri Lanka, France, and Japan.

In the criminal case, Titan agreed to pay a criminal fine of US \$13 million. In its settlement, the SEC gave Titan credit for the amount of this fine but required it to pay an additional US \$15.5 million in disgorgement and prejudgment interest. The total amount of penalties assessed against Titan was US \$28.5 million.

**Sources:** *DoJ Criminal Information and Judgment, United States v. Titan Corporation (S.D. Cal. 2005); Titan Disclosure (2 June 2005); SEC v. Titan Corporation (S.D. Cal. 2005); United States v. Head, Case No. 06-cr-1380 (S.D. Cal. 2006); BBC News "US company admits Benin bribery" (2 March 2005)*

## D. Defence

### **BAE Systems / Al Yamamah**

In 1985, with the encouragement and support of the Government of Margaret Thatcher, British Aerospace (now BAE Systems plc) signed a contract to supply the Saudi Air force with 200 Tornado fighter planes and related equipment and services: the "Al Yamamah" contract. The first two phases of the contract are estimated to have been worth some £40 billion (US \$80 billion).

Recently, a third significant deal has been agreed in principle, but is being held for the time being. A further £20 billion (US \$40 billion) of sales of Eurofighter aircraft is said to be involved.

An investigation by the British Serious Fraud Office (SFO) started in November 2004 focusing on suspected false accounting in relation to a contract related to the Al Yamamah defence contract. It was suggested that BAE had channeled illegal payments to Saudi officials through offshore companies. The press reported the existence of a so-called "slush fund" established on behalf of BAE to channel benefits to Saudi nationals involved in the Al Yamamah contract. BAE has at all times denied any wrongdoing. In June 2007, *the Guardian* reported allegations that over £1 billion was paid by BAE to a Saudi prince, with payments of £30m were paid every quarter for at least 10 years.

On 14 December 2006, the UK Attorney General informed the House of Lords that the Director of the Serious Fraud Office had decided to discontinue its investigation into the affairs of BAE as far as they relate to the Al Yamamah defence contract. The decision had been taken considering "the need to safeguard national and international security." The Attorney General announced that "It has been necessary to balance the need to maintain the rule of law against the wider public interest." The announcement unleashed widespread criticism, both in the UK and externally.

More recently, the Swiss government announced that it was investigating Saudi-owned Swiss bank accounts. In June 2007 both the US Department of Justice and the Securities and Exchange Commission announced that they were investigating alleged BAE payments to Saudi officials in connection with the Al Yamamah project.

**Sources:** *The Times* "US seeks to pursue BAE over claims company paid bribes" (2 May 2007); OECD Press Release "OECD to conduct a further examination of UK efforts against bribery" (14 March 2007); *The Telegraph* "Campaigners press BAE over Al-Yamamah 'leak'" (26 Jan 2007); *Guardian Unlimited* "BAE accused of secretly paying £1 billion to Saudi Prince" (07 June 2007)

## **V. TI RECOMMENDATIONS TO INCREASE ENFORCEMENT**

### **A. Need for continuing strong OECD monitoring programme**

Because there is still only limited enforcement of the OECD Convention on Combating Bribery of Foreign Public Officials, it is essential that the Working Group continues with a strong monitoring programme after the conclusion of Phase 2. Support for the convention will unravel without continued monitoring. It needs to ensure that lagging governments meet their commitment to end foreign bribery. Governments that now prosecute foreign bribery will be reluctant to continue enforcement when their competitors persist in winning orders through bribery.

Country visits must continue to be the major monitoring tool because they are the only reliable method for assessing the adequacy of enforcement. The level of review can vary depending on the status of enforcement. The principal focus should be on countries where there are no significant prosecutions. Priority should be given to the largest exporters, including Japan, United Kingdom, Canada and Netherlands. Follow-up reviews are also needed to make sure that governments correct the deficiencies identified in prior reviews.

### **B. Overcoming the consequences of the UK's termination of the Al Yamamah investigation**

The UK's termination of the Al Yamamah investigation is a serious threat to the future of the convention for three reasons. Each must be addressed to enable the convention to move forward.

- The claim of a national security exception threatens to emasculate Article 5 of the OECD Convention and creates an open-ended loophole that other countries could readily use.
- The credibility of UK support for the convention has been badly eroded. Serious doubts already existed because the UK has never brought a foreign bribery prosecution and had failed to correct its antiquated corruption laws, notwithstanding repeated OECD warnings going back to 1999. Lack of action by the UK endangers the convention because the UK ranks fourth among OECD exporters.
- The Al Yamamah termination raises troublesome doubts regarding the political will to enforce the convention in other cases involving national champions and large numbers of jobs.

These concerns can be overcome by reinstating the Al Yamamah investigation, by prosecuting other cases which are under investigation, and by passing a new UK corruption law without further delays.

In TI's view, Article 5 of the convention has a very broad scope (without an explicit national security exception) and there is no basis for an implicit national security exception. However, if the Al Yamamah investigation is not reinstated, OECD must take steps to control the precedent effects on Article 5. It will be necessary to define what exceptions to Article 5 should be permitted. Any exceptions should be very narrowly and restrictively defined. Reaching agreement may be difficult. However, the alternative of letting each country decide unilaterally whether a national security exception applies will result in the erosion of the convention.

### **C. Identifying obstacles to enforcement**

The Working Group should undertake a systematic review of its country reports to identify obstacles to convention enforcement, much of this information is already contained in the May 2006 "Mid-Term Study of Phase 2 Reports". A meeting with prosecutors from signatory states should be held to obtain their views of obstacles to enforcement and of steps needed to overcome them.

In TI's view, a critical obstacle is that foreign bribery cases require specialised professional resources, including forensic accountants, anti-money laundering experts, and lawyers familiar with mutual-legal assistance procedures. In most countries, such resources can only be provided by organising a centralised office for foreign bribery cases. Responsibility for foreign bribery should not be left to inadequately-staffed and overworked local prosecutors. Other obstacles include lack of accessible complaint-reporting procedures, inadequate whistleblower protection, and failure to provide for criminal liability of corporations.

Based on the proposed study, the Working Group should develop recommendations for actions to overcome obstacles to enforcement. Future monitoring reviews should check on the implementation of these recommendations.

### **D. Securing public attention and civil society participation**

The Working Group's reports are entitled to high credibility because they present detailed assessments of national enforcement programmes. Putting the reports on the OECD website is important, but is not enough to secure public attention and promote increased enforcement. The Working Group should take steps to secure a much higher level of public attention in the countries where reviews are conducted. Suggestions should be obtained from media representatives, civil society, the private sector and trade unions. Some actions have already been taken, including summaries of the conclusions of country reviews, but more is needed. In-country press conferences should be organised in cooperation with civil society, bar associations or other interested groups. The country reports should also be made easily accessible in the home country on government websites and in the national language and should be submitted to the national legislature.

The Working Group should also publish an annual report listing all foreign-bribery prosecutions, convictions and the number of investigations underway, in all signatory states. The report should be updated to reflect the information reported at the tour-

de-table conducted at each Working Group meeting. Keeping such information confidential is counter-productive. Some aspects of monitoring reviews may require confidentiality, but the names of all foreign bribery prosecutions and the number of all foreign bribery investigations should be publicly disclosed.

Further, while major steps have been taken to make the review process transparent, more could be done. Government responses to questionnaires should be published and made available to civil society organisations as soon as completed. Review visits should be publicised, as should opportunities for civil society organisations to make written and oral submissions.

## **E. Other issues**

Until a substantial majority of the parties are actively enforcing the convention's prohibition against foreign bribery, ensuring such enforcement must remain the Working Group's top priority. However, it is timely for the Working Group to consider several other issues. Action on such issues may require additional funding because it should not come out of funds required for monitoring enforcement.

### **1. Outreach to other major exporting states**

Accession to the convention by other major exporting states would promote the convention's objective to curb the supply-side of international corruption. The accession by South Africa is a welcome development, as would be an accession by China, India and Russia. Accession by such countries should be conditioned on their agreement to submit to the same monitoring reviews as the existing parties to the convention.

### **2. Bribery of political parties and party officials**

In 2000, TI submitted recommendations to the Working Group to strengthen the coverage of bribery of political parties and party officials. For the reasons explained in the submission, the prohibition against bribery of foreign public officials may not apply when a payment is made to a political party or party official, who influences the actions of a public official in awarding business. This is a serious loophole that can be closed by a commentary, without amending the convention.

### **3. Coverage of foreign subsidiaries**

There is widespread concern that the convention's prohibition against foreign bribery is often evaded when bribes are paid by foreign subsidiaries of parent companies based in OECD countries. That concern was amplified by the large number of such subsidiaries that are included in the Volcker Report's list of companies that paid kickbacks in Iraq under the United Nations Oil-for-Food programme.

TI recommends that the Working Group considers what actions can be taken to address this issue. One approach would be to urge governments to require their companies to adopt meaningful anti-bribery compliance programmes. As part of such programmes, parent companies based in OECD countries should apply their corporate anti-bribery policies to controlled subsidiaries. Such an approach is consistent with current thinking on corporate governance. It would not raise problems

regarding extraterritorial application and can be done by a commentary, without amending the convention.

#### **4. Facilitation payments**

The exemption of facilitation payments from the OECD Convention's prohibition of foreign bribery should be re-examined. The other anti-corruption conventions, adopted after the OECD Convention, do not exclude facilitation payments. A substantial number of OECD states prohibit facilitation payments.

There are three reasons why attitudes about facilitation payments have changed since the convention was adopted in 1996. First, it is now widely recognised that facilitation payments are a major problem in many developing countries and place a heavy burden on their poorest citizens. Second, facilitation payments are often organized from the top down, and not isolated acts by low-level officials. Third, corporate compliance experts have learned that it is often difficult to draw a line between facilitation payments and other bribes. This thinking is reflected in guides to compliance, including TI's Business Principles for Countering Bribery, the International Chamber of Commerce's Rules of Conduct to Combat Extortion and Bribery and the World Economic Forum Principle for Countering Bribery.

For these reasons, it would be desirable for OECD to reconsider the present broad exclusion of facilitation payments. The objective should be to encourage companies to work towards eliminating facilitation payments. Because the OECD exemption is provided in a Commentary to the convention, it can be changed by revising the Commentary without amending the convention.

#### **5. Cooperation with other monitoring organisations**

In recent years concern has developed over duplicative monitoring reviews under different anti-corruption conventions. Such concerns are heightened by the entry into force of the United Nations Convention against Corruption (UNCAC). The OECD should play an active part in the development of cooperative arrangements among the different monitoring organisations. Such cooperation is desirable not only to avoid duplication, but because all monitoring programmes have serious resource constraints. Cooperation and coordinating would make all of them more effective.

#### **6. Private-to-private bribery**

The International Chamber of Commerce has proposed that the OECD Working Group undertake a study of private-to-private bribery. There are important reasons for undertaking such a study. Privatisation of many governmental functions has blurred the line between the public and the private sector. Moreover, in many countries the private sector is larger than the public sector. In a global economy, private-to-private bribery transcends national borders and is considered to be widespread.

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