



TRANSPARENCY INTERNATIONAL | USA

Report to the Committee of Experts
on
Compliance of the United States of America
with the
Inter-American Convention Against Corruption



Introduction

- The Inter-American Convention took the lead in encouraging civil society participation.
- US government team: supportive and transparent
- UNCAC Review
 - US published self-assessment online
 - Agreed to host site visits
- Encouragement for all state parties to show support for the UNCAC process



Article III(7) of the Convention: Denial or prevention of favorable tax treatment for expenditures made in violation of the anticorruption laws

The U.S. has taken adequate actions to comply with this article.

- The Internal Revenue code prohibits the deduction of payments made to any government or agency or instrumentality thereof “if the payment constitutes and illegal bribe or kickback or, if the payment is to an official or employee of a foreign government, the payment is unlawful under the Foreign Corrupt Practices Act.” (26 U.S.C. § 162(c)(1))

Article III(10) of the Convention: Prevention of bribery of domestic and foreign government officials

While we have some recommendations, overall the U.S. should be commended for their efforts. Following are examples of good practices.

- U.S. laws and measures to deter or impede bribery of domestic and foreign government officials:**
 - *Foreign Corrupt Practices Act “Accounting Provisions”*
 - Publicly-listed companies to make and keep accurate books and records and to maintain a system of internal accounting controls.
 - Provide a powerful deterrent to improper payments.
 - In the **first nine months of 2010** alone, the SEC obtained over **\$400 million** in disgorgement interest and penalties.



Article III(10) of the Convention: Prevention of bribery of domestic and foreign government officials

- **U.S. laws and measures to deter or impede bribery of domestic and foreign government officials:**
 - *SEC's top 10 FCPA-related disgorgements (including prejudgment interest):*
 - Siemens: \$350 million in 2008
 - KBR \$177 million in 2009
 - Snamprogetti \$125 million in 2010
 - Technip \$98 million in 2010
 - Alcatel-Lucent \$45 million in 2010
 - Chevron \$25 million in 2007
 - Pride \$23.5 million in 2010
 - GE \$22.5 million in 2010
 - Baker Hughes \$23 million in 2007



Article III(10) of the Convention: Prevention of bribery of domestic and foreign government officials

- **U.S. laws and measures to deter or impede bribery of domestic and foreign government officials:**
 - *Increase of prosecutorial scope and resources*
 - The SEC established a specialized FCPA Unit
 - Led by a senior SEC enforcement official and comprised of FCPA investigation and enforcement specialists.
 - The SEC Division of Enforcement has started using settlement vehicles known as deferred prosecution agreements (“DPAs”) and non-prosecution agreements (“NPAs”).
 - Part of a new initiative to encourage companies and individuals to cooperate with SEC investigations
 - *Sarbanes-Oxley Act of 2002* (15 U.S.C. § 7241 et. seq. (2002))
 - Section 404 requires companies to establish and maintain an adequate system of internal controls and procedures for financial reporting and to annually assess the effectiveness of those controls and procedures
 - Section 302 requires quarterly certification by a company’s chief executive and financial officers that filings are accurate and internal controls have been reviewed for effectiveness



Article III(10) of the Convention: Prevention of bribery of domestic and foreign government officials

- **U.S. laws and measures to deter or impede bribery of domestic and foreign government officials:**
 - *Privately-Held Companies*
 - FCPA accounting provisions and Sarbanes-Oxley Sections 404 and 302 do not apply to individuals and privately-held entities
 - But, other statutes have a similar impact including the mail and wire fraud and obstruction of justice statutes
 - U.S. law also prohibits individuals and privately-held companies from supplying false statements/records to the government, including in connection with filing tax returns, obtaining government benefits and conducting business with the government.

Recommendation: The United States should consider whether current law and practice is adequate with respect to privately-held companies and individuals.



Article III(10) of the Convention: Prevention of bribery of domestic and foreign government officials

- **U.S. laws and measures to deter or impede bribery of domestic and foreign government officials:**
 - *Incentives for Voluntary Disclosure*
 - The government is compelled to consider a company's voluntary disclosure (or lack thereof) in charging, settling, and sentencing decisions.
 - Despite this guidance, as well as efforts by SEC officials to communicate publicly the benefits of voluntary disclosure and cooperation in investigations, some question the extent of the benefits conferred as a result.

Recommendation: The DOJ and SEC should issue additional guidance indicating what benefits may accrue from voluntary disclosure and the conditions under which they might be accorded.

Article VIII of the Convention: Transnational Bribery

We have listed below some examples of good practices, as well as recommendations. Please note that the recommendations are made in light of overall high enforcement by the U.S.

- The FCPA also includes an anti-bribery provision, which makes it unlawful for a U.S. person or company to make a corrupt payment to a foreign official to secure any improper advantage in order to assist in obtaining or retaining business for, or with, or directing business to, any person.
 - The provision also applies to foreign firms and persons who take any act in furtherance of such a corrupt payment while in the United States.
 - In recent years, DOJ and SEC enforcement efforts have increased significantly.
 - **FCPA Enforcement Trends**
 - *More prosecutions, higher penalties:*
- TI's soon to be published progress report on the OECD Anti-Bribery Convention will showcase some of these trends.
- **Since 2001**, the DOJ and SEC have brought **227 cases**.
- **In 2010**, there were **106 open investigations**.
- **Sanctions have increased as well**
- Siemens (approx. \$800 million) in 2008
 - Halliburton/KBR (approx. \$600 million) in 2009
 - BAE (\$400 million) in 2010
 - Technip (\$400 million) in 2010
 - Daimler (\$185 million) in 2010
 - Alcatel-Lucent (\$137 million) in 2010



Article VIII of the Convention: Transnational Bribery

• FCPA Enforcement Trends

▪ *DOJ Prosecution of Individuals:*

- The DOJ has significantly increased FCPA prosecutions against individuals, including at high levels of private sector and government.
- **In 2010**, an FCPA violator received an **87-month prison sentence**

▪ *Increase of prosecutorial resources:*

- The DOJ and FBI have resources focused on FCPA enforcement and have recently expanded the number of lawyers and agents dedicated to FCPA investigation

▪ *More aggressive investigative techniques:*

- The government's determination to be more proactive is evident from a 2010 "sting" operation.
 - 22 individuals were arrested who sought to bribe an FBI agent posing as a representative of a defense minister in order to win part of a contract to supply military and law enforcement equipment.

▪ *Expansion of enforcement scope:*

- The DOJ relies on several statutes to reach conduct that falls short of violating the FCPA, conduct that constitutes commercial bribery, or conduct by government officials or their family members
- Travel Act; laws pertaining to mail and wire fraud, money laundering, aiding and abetting, tax evasion, false statements, conspiracy.



Article VIII of the Convention: Transnational Bribery

- **FCPA Enforcement Trends**

- *Comprehensive Approach to Case Settlement:*

- Deferred prosecution settlements (DPAs) and non-prosecution agreements (NPAs) avoid the cost, time and uncertainty of trial
 - However, these are concluded under a *credible* threat of prosecution, and parties are subject to stringent requirements subject to court approval.

Recommendations: Two concerns have been raised with recent settlements

- (1) some questioned why none of the companies was debarred from bidding on United States contracts
 - Government contracting officials should clarify how they determine when to impose such a penalty and contracting regulations should require officials to take into account FCPA investigations, settlements and convictions
- (2) Home governments of officials who are alleged to have accepted or solicited bribes have not consistently investigated and prosecuted actions against the official
 - The United States government should encourage, and be seen to encourage governments to investigate and pursue cases
 - It should provide technical assistance in securing evidence
 - It should also make public as much information as possible so citizens are able to bring pressure on their government

Article VIII of the Convention: Transnational Bribery

- **FCPA Enforcement Trends**

- *Incentives for voluntary disclosure:*

- The government is compelled to consider a company's voluntary disclosure (or lack thereof) in charging, settling, and sentencing decisions.
 - When combined with other forms of cooperation, voluntary disclosure may substantially mitigate or even eliminate penalties that would be imposed if the FCPA violations were uncovered by the government.
 - Some question the extent of the benefits conferred as a result.

Recommendations: The United States should clarify the incentives for this important tool to operate effectively.

- The DOJ and SEC should issue additional guidance indicating what benefits may accrue from voluntary disclosure and the conditions under which they might be accorded.

Article VIII of the Convention: Transnational Bribery

- **FCPA Enforcement Trends**

- *Addressing facilitating payments:*

- Small payments made to foreign government officials for the purpose of expediting or securing routine government functions to which the payor is entitled are exempt from the anti-bribery provision of the FCPA.
 - The exception for these facilitating payments remains an issue of considerable attention and debate.

Recommendations: TI-USA has urged and continues to encourage companies to adopt compliance policies and programs that prohibit such payments.

- The DOJ and SEC should also do more to clarify what is permissible under the exception's narrow constraints, and to encourage private sector action to eliminate these payments.
- The US government should also do more to encourage host governments to take action to reduce the solicitation of such payments.



Article IX of the Convention: Illicit Enrichment

- **Criminalization of illicit enrichment**
 - Illicit enrichment is not a separate offence under U.S. law. There are a variety of federal and state laws and regulations which effectively address the issue of illicit enrichment by government officials
 - Example: The **net worth method of proof** in prosecuting tax evasion cases under 26 U.S.C. § 7201.
 - The Ethics in Government Act of 1978 requires public financial disclosure for members of all three branches of government – executive, legislative and judicial – to detect and prevent conflicts of interest.
 - Applies to career as well as to political employees, and individuals are required to file a personal financial disclosure report upon taking their position; annually thereafter; and upon leaving office.
 - When information on a financial disclosure report indicates that an actual conflict of interest may have occurred, that matter is referred for further investigation and possible prosecution and/or administrative sanction.



First Round Recommendations

- **Article III, Paragraph 11 of the Convention: Mechanisms to encourage participation by civil society and nongovernmental organizations in efforts to prevent corruption**
 - *Mechanisms for access to information:*
 - Since the United States Second Round review, new regulations have gone into effect strengthening citizens' access to public information.
 - In January 2009, President Obama issues a Presidential Memorandum on the Freedom of Information Act (FOIA), ordering all U.S. government agencies and departments to “adopt a presumption in favor” of acting on FOIA requests.
 - The FOIA gives citizens the right to obtain government information and establishes a general presumption that all records in the possession of the U.S. Executive Branch should be accessible to the public.
 - If an agency denies a request, the burden of proof is on the government to demonstrate that the information falls under one of **nine statutory exceptions** to the rule requiring it to provide the records requested.



Second Round Recommendations

- **Article III (5) of the Convention: Systems of government hiring and procurement of goods and services**
 - *Government systems for procurement of goods and services:*
 - Since the United States Second Round review, new requirements have gone into effect that can greatly enhance prevention of fraud in procurement.
 - Recent amendments to the Federal Acquisition Regulations (“FAR”) will require companies who bid on government contracts to take actions that will have a positive anti-bribery effect.
 - Successful bidders are subject to a “responsible contractor” eligibility condition and are required to meet certain minimum “code” requirements.



Second Round Recommendations

- **Article III (5) of the Convention: Systems of government hiring and procurement of goods and services**
 - *Government systems for procurement of goods and services:*
 - Most companies that win contracts with the U.S. government also are now required to:
 - adopt written codes of business ethics and conduct;
 - institute business ethics training programs and an internal control system to promote compliance with the code (small businesses are excepted); and,
 - Since 2008, most companies have also been required to disclose possible violations of federal criminal law, including FCPA violations, and to implement specific internal controls to prevent and detect improper conduct.
 - The rule also creates a cause for disbarment or suspension for knowing failure to report violations of criminal law related to the award or performance of a contract or subcontract.

Second Round Recommendations

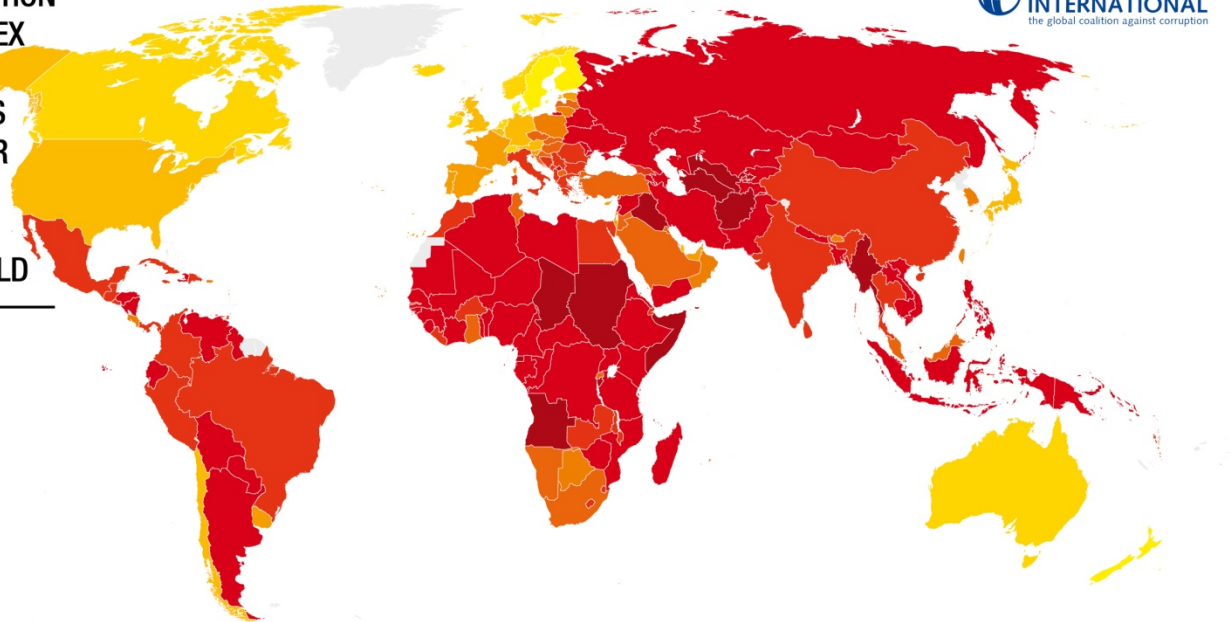
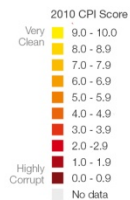
- **Article III (8) of the Convention: Systems for protecting public servants and private citizens who, in good faith, report acts of corruption**
 - Statutory Protections against retaliation:
 - The Civil Service Reform Act (“CSRA”) and the Whistleblower Protection Act (“WPA”) provide protection for federal government employees who report allegations of fraud and corruption.
 - The Sarbanes-Oxley Act of 2002 expanded significantly protection for private sector whistleblowers.

 - Since the United States Second Round review, new financial reform legislation has been enacted that also includes a whistleblower incentive provision (“whistleblower bounty”).
 - This requires the SEC to pay whistleblowers who volunteer original information in a successful enforcement action a percentage of collected sanctions, when the sanctions exceed \$1 million.
 - The percentage awarded, ranging from 10 to 30%, will be determined at the discretion of the SEC.
 - Significance of information provided and assistance provided by the whistleblower.
 - The law applies to cases brought under the FCPA as well as other judicial and administrative actions.



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THE 2010 CORRUPTION PERCEPTIONS INDEX MEASURES THE PERCEIVED LEVELS OF PUBLIC-SECTOR CORRUPTION IN 178 COUNTRIES AROUND THE WORLD



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