



# Department of Justice

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**STATEMENT OF**

**BRUCE C. SWARTZ  
DEPUTY ASSISTANT ATTORNEY GENERAL  
UNITED STATES DEPARTMENT OF JUSTICE  
CRIMINAL DIVISION**

**BEFORE THE**

**COMMITTEE ON FOREIGN RELATIONS  
UNITED STATES SENATE**

**CONCERNING  
THE UNITED NATIONS CONVENTION AGAINST CORRUPTION**

**PRESENTED ON  
JUNE 21, 2006**

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**JUNE 21, 2006  
9:30 A.M.**

**I. INTRODUCTION**

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: I am pleased to appear before you today on behalf of the United States Department of Justice to testify in favor of the United Nations Convention Against Corruption. This new treaty will significantly and directly advance the national security and law enforcement interests of the United States. As former Attorney General Ashcroft stated at the treaty signing in Merida, Mexico: “The fight against corruption is critical to realizing our shared and essential interests. Corruption undermines the goals of peace loving and democratic nations. It jeopardizes free markets and sustainable development. It provides sanctuary to the forces of global terror, and facilitates the illicit activities of international and domestic criminals. It undermines the legitimacy of democratic governments and can, in its extreme forms, even threaten democracy itself.”

The U.N. Convention Against Corruption is the culmination of a worldwide movement against corruption that has resulted in smaller-scale corruption conventions, such as the Organization of American States Inter-American Convention Against Corruption and the Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Although those other conventions have addressed corruption on a

more limited basis, none has attacked corruption with the same substantive or geographical breadth as the U.N. Convention.

Mr. Chairman, I understand that the President and the Secretary of State have already submitted to this Committee substantial information detailing the various provisions of the Convention. You have also heard this morning from my State Department colleague, Mr. Witten. I do not intend to duplicate the information you have received from those sources. I would, however, like to take this opportunity to more fully explain exactly why this treaty is so important from a federal criminal law enforcement perspective. Specifically, I would like to discuss the Convention's core criminalization provisions under Chapter III; the provisions related to international law enforcement cooperation under Chapter IV; and the provisions related to asset recovery under Chapter V. I would also like to briefly discuss the technical assistance and implementation provisions of Chapters VI and VII.

The Attorney General has made fighting corruption one of his top priorities. And as Deputy Assistant Attorney General of the Justice Department's Criminal Division, I can tell you first-hand that the Department's anti-corruption efforts do not stop at our borders. Under the Attorney General's leadership, as well as the leadership of Assistant Attorney General Alice Fisher, the Criminal Division's prosecutors are working tirelessly every day to root out global corruption and to prosecute bribery of foreign officials.

For example, we are aggressively investigating violations of our Foreign Corrupt Practices Act, which as you know makes it illegal for U.S. companies and individuals doing business overseas to bribe foreign officials. We are also working extremely hard to root out bribery in the Iraq reconstruction process. And in partnership with the Department of State, we are working with our international partners to build and strengthen the ability of prosecutors around the world to fight corruption through our Overseas Prosecutorial Development and Training Assistance Program.

The U.N. Corruption Convention would create new opportunities for international law

enforcement cooperation to combat corruption around the world. It would give the Department new tools to more effectively prosecute companies and individuals who bribe foreign governments. And it would make it easier for the Department to recover the ill-gotten assets of corrupt government officials.

## **II. CRIMINALIZATION**

Let me begin by describing the Convention's core criminalization provisions, which can be found in Chapter III of the Convention. Articles 15, 16, 17, 23 and 25 require all signatory nations to enact laws criminalizing bribery and associated conduct. Article 15, for example, requires countries to criminalize bribery of domestic public officials. Article 16 in part requires countries to criminalize bribery of foreign public officials. Article 17 requires criminalization of embezzlement by public officials. Article 23 requires criminalization of money laundering and requires countries to expand the reach of their money laundering laws to predicate offenses associated with corruption. Finally, Article 25 requires criminalization of obstruction of justice related to offenses set forth in the Convention.

As this Committee may know, all of the foregoing offenses are already illegal under U.S. law. For that reason, and because the other criminalization provisions in Chapter III are discretionary, the U.S. does not need to enact any new legislation to implement Chapter III (or any other components) of this Convention. Rather than placing a burden on the U.S. to change its laws, this Convention puts the burden on countries around the world to enact anti-bribery laws that the U.S. already has in place.

The effect on U.S. economic and security interests of criminalizing bribery and related offenses on a global scale cannot be overstated. Let me give you an example. Under the U.S. Foreign Corrupt Practices Act, or FCPA, it is illegal for U.S. companies to bribe foreign government officials for the purpose of retaining or obtaining business or securing any unfair advantage. Because corruption is rampant in certain parts of the world in which our companies do business, U.S. companies seeking to play by the rules often have been at a competitive disadvantage.

The core criminalization provisions of this Convention will level the playing field by requiring

everyone to play by the same set of rules. The Convention effectively requires all States Parties to adopt a “Foreign Corrupt Practices Act” of their own. Now all companies based in countries that are Parties to the Convention will have an obligation to comply with the same anti-bribery laws in competing for business overseas. That is good for U.S. businesses. It is also good for federal law enforcement, because the less financial incentive companies have to bribe foreign government officials, the less likely they will be to ignore or subvert the requirements of the FCPA.

The Convention’s core criminalization provisions are also good for the U.S. economy. As this Committee knows, public corruption weakens the integrity, stability and transparency of market systems. By criminalizing domestic and foreign public corruption and related offenses, this Convention helps to promote the integrity, stability and transparency of foreign markets, thereby creating opportunities for U.S. investment in those markets.

Finally, the core criminalization provisions of the Convention are good for U.S. national security. For example, as President Bush stated in his transmittal message, corruption facilitates transnational crime and terrorism by funding – directly or indirectly – criminal and terrorist organizations. By criminalizing domestic and foreign bribery and related offenses, this Convention will reduce or cut off a critical funding source for terrorists, drug traffickers, money launderers and other criminals.

At this point Mr. Chairman, I would like to briefly note that the Secretary of State has recommended two reservations and one declaration relevant to the core criminalization provisions. Principally, the Secretary of State has recommended that the United States take a reservation to the Convention to accommodate federalism concerns. As the Committee may know, federal criminal law does not apply where the criminal conduct does not implicate interstate or foreign commerce or another federal interest. There are conceivable situations involving offenses of a purely local character where U.S. federal and state criminal law may not be entirely adequate to satisfy an obligation under

the Convention. Accordingly, the Secretary of State has recommended that the U.S. reserve to the obligations set forth in the Convention “to the extent they address conduct that would fall within this narrow category of highly localized activity.” In light of this reservation, as noted by the accompanying understanding, the Convention does not require any legislative or other measures. The Justice Department supports this reservation.

Additionally, the Secretary of State has recommended that the Senate include a declaration in its resolution of advice and consent that makes clear that the provisions of the Convention, with the exception of Articles 44 and 46 regarding extradition and mutual legal assistance, are not self-executing. This is particularly relevant to Article 35 of the criminalization chapter, which requires that “each State Party shall take such measures as may be necessary . . . to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage . . . .”

Under U.S. law, private parties damaged by corruption already have private rights of action under various theories, *e.g.*, fraud claims, tort claims, contract claims, antitrust theories, shareholder class actions or derivative suits. The U.S. is therefore already in compliance with Article 35. The Secretary of State recommends this declaration, however, to clarify that none of the provisions, including Article 35, creates an independent private right of action that could open U.S. courts to civil lawsuits that would not otherwise lie under U.S. law. The Justice Department fully supports such a declaration.

### **III. INTERNATIONAL COOPERATION**

I would now like to briefly describe Chapter IV of the Convention, which governs international law enforcement cooperation. Mr. Chairman, the provisions of this Chapter provide critical new tools to federal law enforcement by creating new mechanisms for extradition and mutual legal assistance.

At the same time, these provisions provide the U.S. government with all of the safeguards found in

modern bilateral mutual legal assistance treaties, including options for non-compliance where assistance would offend the “essential interests” of the United States.

These provisions are closely modeled after similar provisions in the United Nations Convention Against Transnational Organized Crime, to which, as you know, the United States Senate gave its advice and consent. Article 44, for example, creates an extradition regime for offenses established pursuant to this Convention where dual criminality exists (*i.e.*, where the offense is criminalized under the laws of both the requesting and the requested State). Article 44 provides that States Parties may make extradition conditional upon the existence of a bilateral extradition treaty (which is the practice in the United States). It also provides that “each of the offenses to which this article applies shall be deemed to be included as an extraditable offenses” in any existing treaty. Thus, the practical effect of this Article is to expand the substantive scope of existing bilateral extradition treaties to new offenses such as money laundering, obstruction of justice, foreign and domestic bribery, and embezzlement. This Article does not create obligations with countries with which we do not already have bilateral extradition treaties (nor does it alter the requirement of dual criminality under those treaties).

Additionally, Article 46 creates a framework for mutual legal assistance in corruption-related cases where the States Parties do not otherwise have mutual legal assistance obligations. Parties with bilateral mutual legal assistance treaties can continue to use those existing agreements. Parties that do not have existing bilateral mutual legal assistance treaties can use Article 46 as an independent legal basis for requesting or providing assistance. Article 46 is effectively a “treaty within a treaty” governing in great detail cooperation between the States Parties for offenses covered by the Convention.

Specifically, Article 46 sets forth various types of assistance that States Parties may request under the Convention (including taking evidence or statements from persons, effecting service of judicial documents, executing searches and seizures, and other activities). Paragraphs 9 and 21,

however, list various grounds upon which assistance may be refused, providing strong safeguards for the United States. For example, a State Party can deny assistance when the request is not made in conformity with the provisions of the Article; if the requested State Party considers that execution of the request is likely to prejudice the sovereignty, security or other essential interest; if the authorities of the requested Party would be prohibited by its domestic law from carrying out the action; and if it would be contrary to the legal system of the requested Party relating to mutual legal assistance. In addition, a State may deny assistance based on lack of dual criminality where the assistance would involve a coercive measure such as a search warrant or subpoena. Even where non-coercive measures are at issue, a State may deny assistance on dual criminality grounds if granting the assistance is inconsistent with its basic legal principles or the request involves *de minimus* matters.

I would also briefly note that Article 46 requires on a global scale measures that have long been a standard aspect of U.S. mutual legal assistance practice but that are not always applicable in other countries, such as the prohibition on invoking bank secrecy to bar cooperation in Paragraph 8.

Finally, Chapter IV contains several other non-mandatory but helpful cooperation provisions, including Article 48 (encouraging States Parties to cooperate closely to enhance the effectiveness of law enforcement action) and Article 49 (whereby States Parties shall consider concluding bilateral or multilateral joint investigation agreements).

We believe that all of these provisions provide important new tools to U.S. law enforcement. Let me give you a practical example. As I stated earlier, enforcing the Foreign Corrupt Practices Act is a major priority for the Justice Department's Criminal Division. The very nature of FCPA investigations, however, is that many of the relevant witnesses and evidence often are located in foreign countries. The Justice Department believes that the international cooperation provisions in this Convention will increase our ability to obtain evidence from foreign countries, leading to more effective enforcement of the FCPA and other offenses. And by providing us with the tools to more



effectively investigate and prosecute the FCPA, the Convention helps us to preserve the integrity, stability and transparency of our political and economic systems.

#### **IV. ASSET RECOVERY**

I would now like to discuss a few of the key asset recovery provisions of the Convention, which can be found at Articles 51-59. The asset recovery provisions establish new mechanisms for the recovery of illicitly acquired assets and for international cooperation regarding asset forfeiture. These provisions are important from a law enforcement perspective because they will help to deprive corrupt officials of their ill-gotten gains and may, in some cases, require the property to be returned to the nation from which it was taken.

Article 52, for example, requires States Parties to have adequate procedures in place to detect suspicious transactions. Article 53 provides that a State Party that has been harmed by corruption can participate as a private litigant to recover the proceeds of embezzlement and other crimes in a forfeiture proceeding, or as a victim for purposes of court ordered restitution. And in Article 54, the Convention requires States Parties to establish a legal framework for providing assistance in the recovery of assets acquired through one of the core criminalized offenses. Under this provision, countries must enact legislation to enable them either to freeze or seize the illicit property or to recognize a foreign judgment against the property. The Department currently anticipates that in the event the United States requests assistance from another Party under Article 54, the United States would seek to have both *in rem* civil forfeiture and post-conviction criminal forfeiture judgments enforced.

Finally, Article 57 sets forth a framework for the disposition of property confiscated by one State Party at the request of another. Although Article 57 is a powerful new tool for returning ill-gotten gains to victim States, it is narrow in scope and thus will not burden the U.S. judicial system. First, Article 57 applies only in cases in which one country has successfully recovered the proceeds of foreign corruption through enforcement of a foreign forfeiture order (*i.e.*, pursuant to Article 55(1)(b)).

Second, Article 57 reaffirms the principle that repatriation of forfeited assets is subject to the requirements and procedures of domestic law. Third, the obligation is subject to the same safeguards as provided in Article 46. The U.S. government could therefore refuse a request to repatriate funds under this Article where assistance would offend the “essential interests” of the United States. The United States has ample authority through its asset sharing and remission statutes to execute the obligations under Article 57.

## **V. TECHNICAL ASSISTANCE AND IMPLEMENTATION**

Finally Mr. Chairman, I would like to say a brief word about the technical assistance and implementation provisions of the Convention. The Convention, in Chapter VI, calls for States Parties to provide each other with technical assistance in implementing the various provisions of the Convention. In Chapter VII, the Convention creates a Conference of the States Parties to the Convention, the purpose of which is to “improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.”

The first meeting of the Conference of the States Parties, or COSP, is tentatively scheduled to occur in December of this year. The COSP will determine the substance and scope of any technical assistance and implementation programs, including any mechanism for “peer review” or “monitoring.” In the months leading up to the COSP, States will be working informally to develop an agenda for the COSP and to begin to discuss the substantive issues that the COSP will address. For example, the Criminal Division and other U.S. government components have already been assisting the United Nations Office on Drugs and Crime with the drafting of legislative and technical guides for the Convention.

Critically, the United States will have more influence as a participant in the COSP as a State Party than a mere signatory. Participating in the COSP as a State Party will benefit the United States.

Among other things, as a State Party we will be in a better position to influence the scope of any peer review mechanism that may emerge from the COSP to ensure that it is not unduly burdensome or otherwise unreasonable.

Accordingly, I respectfully urge the Committee to report the Convention favorably and the Senate to provide its advice and consent to ratification as soon as practicable, but in any event prior to November 2006.

## **VI. CONCLUSION**

Mr. Chairman, by combating global corruption, we restore confidence in democracy and the rule of law. We bolster the global economy by encouraging open trade and investment. We strengthen the stability, integrity and transparency of government and economic systems worldwide. The United Nations Convention Against Corruption helps us do all of those things.

But above all, Mr. Chairman, the Convention significantly and directly advances the national security and law enforcement interests of the United States of America. On behalf of the Department of Justice, I therefore urge the U.S. Senate to provide its advice and consent to ratification to this important treaty. I would be pleased to respond to any questions the Committee may have.