

105TH CONGRESS }
2d Session

SENATE

{ TREATY DOC.
105-43

CONVENTION ON COMBATING BRIBERY OF FOREIGN
PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS
TRANSACTIONS

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS, ADOPTED AT PARIS ON NOVEMBER 21, 1997, BY A CONFERENCE HELD UNDER THE AUSPICES OF THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD). CONVENTION SIGNED IN PARIS ON DECEMBER 17, 1997, BY THE UNITED STATES AND 32 OTHER NATIONS



MAY 4, 1998.—Convention was read the first time and, together with the accompanying papers, referred to the Committee on Foreign Relations and ordered to be printed for the use of the Senate.

U.S. GOVERNMENT PRINTING OFFICE

59-118

WASHINGTON : 1998

LETTER OF TRANSMITTAL

THE WHITE HOUSE, *May 1, 1998.*

To the Senate of the United States:

With a view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"), adopted at Paris on November 21, 1997, by a conference held under the auspices of the Organization for Economic Cooperation and Development (OECD). The Convention was signed in Paris on December 17, 1997, by the United States and 32 other nations.

I transmit also, for the information of the Senate, interpretive Commentaries on the Convention, adopted by the negotiating conference in conjunction with the Convention, that are relevant to the Senate's consideration of the Convention. I transmit also, for the information of the Senate, the report of the Department of State with respect to the Convention.

Since the enactment in 1977 of the Foreign Corrupt Practices Act (FCPA), the United States has been alone in specifically criminalizing the business-related bribery of foreign public officials. United States corporations have contended that this has put them at a significant disadvantage in competing for international contracts with respect to foreign competitors who are not subject to such laws. Consistent with the sense of the Congress, as expressed in the Omnibus Trade and Competitiveness Act of 1988, encouraging negotiation of an agreement within the OECD governing the type of behavior that is prohibited under the FCPA, the United States has worked assiduously within the OECD to persuade other countries to adopt similar legislation. Those efforts have resulted in this Convention that once in force, will require that the Parties enact laws to criminalize the bribery of foreign public officials to obtain or retain business or other improper advantage in the conduct of international business.

While the Convention is largely consistent with existing U.S. law, my Administration will propose certain amendments to the FCPA to bring it into conformity with and to implement the Convention. Legislation will be submitted separately to the Congress.

I recommend that the Senate give early and favorable consideration to the Convention, and that it give its advice and consent to ratification.

WILLIAM J. CLINTON.

LETTER OF SUBMITTAL

DEPARTMENT OF STATE,
Washington, April 9, 1998.

The PRESIDENT,
The White House.

THE PRESIDENT: I have the honor to submit to you, with a view to transmittal to the Senate for its advice and consent to ratification, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention was adopted on November 21, 1997 by a conference held in Paris under the auspices of the Organization for Economic Cooperation and Development (OECD). It was signed in Paris on December 17, 1997 on behalf of 33 countries, including the United States: 28 of the 29 OECD Member States (all except Australia) and five non-OECD Members who are participants in the OECD's Working Group on Bribery in International Business Transactions.

The signatories include Argentina, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Switzerland, Sweden, Turkey, the United Kingdom, and the United States.

I transmit also, for the information of the Senate, interpretive Commentaries on the Convention that were adopted by the negotiating conference in conjunction with the Convention. Although not submitted for the advice and consent of the Senate, the Commentaries are relevant to the Senate's consideration of the Convention.

The Convention is a historic achievement in the fight against bribery. It represents the fruit of many years of efforts by the United States to persuade other industrialized countries to adopt laws, similar to the U.S. Foreign Corrupt Practices Act (FCPA), to criminalize the business-related bribery of foreign public officials. In May 1997 the OECD Council approved the opening of negotiations of this Convention, with a view to its signature by the end of 1997 and its entry into force by the end of 1998. The Council also recommended that Member States submit relevant legislative proposals to their parliaments by April 1, 1998, and seek the enactment of such laws by the end of 1998.

Article 1(1) of the Convention requires each Party to establish bribery of a foreign public official as a criminal offense under its laws. Such bribery is defined as the intentional offer, promise, or giving of any undue pecuniary or other advantage by any person, whether directly or through intermediaries, to a foreign public offi-

cial, for that official or for a third party, to induce that official to act or to refrain from acting in relation to the performance of official duties in order to obtain or retain business or other improper advantage in the conduct of international business. Such bribery is further defined in Article 1(2) to include complicity in, including incitement, aiding and abetting, or authorization of an act of bribery of a foreign public official. Attempt and conspiracy to bribe a foreign public official must also be criminalized by each Party to the same extent that attempt and conspiracy to bribe a public official of such Party are criminal offenses. This language is generally consistent with U.S. law. However, to comply fully with the Convention, which covers bribes by “any person,” the United States will have to expand the scope of the FCPA to encompass bribes paid by foreign persons who are not affiliated with issuers that have securities registered under the Exchange Act.

“Foreign public official” is defined by Article 1(4) as any person holding a legislative, administrative, or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization. Paragraph 14 of the Commentaries states that a “public enterprise” is any enterprise, regardless of form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. Under Paragraph 15 of the Commentaries, an official of a public enterprise is deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges. Paragraph 17 of the Commentaries notes that “public international organization” includes any international organization formed by states, governments, or other public international organizations, including a regional economic integration organization such as the European Community. The FCPA does not cover bribery of officials of “public international organizations.” To conform with the Convention, the FCPA will have to be amended to encompass bribery of such officials.

The Convention does not apply to bribes to foreign political parties or party officials *per se*, although it would cover, by its terms, business-related bribes to foreign public officials made through political parties or party officials, as well as bribes directed by corrupt foreign public officials to political parties or party officials. Paragraph 16 of the Commentaries notes that persons that hold *de facto* public authority, such as political-party officials in single-party states, may be considered to be foreign public officials under the legal principles of some countries. The United States has urged that bribes paid to foreign political parties and party officials be covered under the Convention, as they are under the FCPA, and such coverage will be a topic of future negotiations within the OECD Working Group on Bribery.

“Foreign country” is defined by Article 1(4) to include all levels and subdivisions of government, from national to local. “Act or refrain from acting in relation to the performance of official duties” is defined to include any use of the public official’s position, whether or not within the official’s authorized competence.

VII

Article 2 provides that each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish that legal persons are liable for the bribery of foreign public officials. Paragraph 20 of the Commentaries explains that Parties are not required to establish such criminal responsibility (as opposed to civil liability) if legal persons cannot be subjected to criminal responsibility under a given Party's legal system.

Article 3(1) provides that bribery of foreign public officials shall be punishable by "effective, proportionate and dissuasive criminal penalties." If a Party's legal system does not provide for criminal responsibility of legal persons, under Article 3(2) that Party must ensure that legal persons are subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials. Under Article 3(3), the bribe and the proceeds of the bribery of a foreign public official, or property corresponding in value to that of such proceeds, are subject to seizure and confiscation, or comparable monetary sanctions are applicable. Parties are required by Article 3(4) to consider imposing additional civil or administrative sanctions upon persons subject to sanctions for bribery of foreign public officials.

Article 4(1) requires that each Party take necessary measures to establish its jurisdiction over bribery of a foreign public official when such offense is committed in whole or in part in its territory. Paragraph 25 of the Commentaries states that the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the act of bribery is not required. Under Article 4(2), those Parties that have jurisdiction to prosecute their nationals for offenses committed abroad must take the necessary measures to establish such jurisdiction, according to the same principles, with respect to the bribery of foreign public officials. Article 4(3) provides that the concerned Parties shall, at the request of one, consult with a view to determining the most appropriate jurisdiction for prosecution if more than one Party has jurisdiction over an offense covered by the Convention. Parties are required, under Article 4(4), to review whether their current basis for jurisdiction are effective with regard to bribery of foreign public officials and, if not, to take remedial steps. Current U.S. law governing foreign bribery contains a territorial element and is generally limited to bribery by U.S. persons and foreign persons affiliated with issuers that have securities registered under the Exchange Act. To implement fully the Convention, the United States will have to expand the FCPA to encompass acts within its territory by other foreign persons. The United States also proposes to assert jurisdiction over the acts of U.S. persons outside the United States.

Article 5 states that investigation and prosecution of the bribery of a foreign public official is subject to the applicable rules and principles of each Party. It further provides that considerations of national economic interest, the potential effect upon relations with another State, or the identity of the persons involved shall not influence such investigation and prosecution.

Article 6 provides that any statute of limitations applicable to bribery of foreign public officials shall allow an adequate period of time for the investigation and prosecution of the offense.

VIII

Article 7 requires that each Party that has made bribery of its own public officials a predicate offense under its money laundering legislation do so on the same terms for bribery of foreign public officials, without regard to the place where the bribery occurred. The United States has already enacted such legislation.

Article 8(1) requires that each Party take necessary measures, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the following acts by companies for the purpose of bribing foreign public officials or of hiding such bribery: establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, or the use of false documents. Each Party must, under Article 8(2), provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications. This provision is consistent with the books and records and reporting requirements under U.S. securities laws.

Article 9(1) requires that each Party, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offenses within the scope of the Convention, as well as for the purpose of non-criminal proceedings within the scope of the Convention brought by a Party against a legal person. Pursuant to Article 9(2), where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality is deemed to exist if the offense for which the assistance is sought is within the scope of the Convention. Article 9(3) states that a Party may not, on the ground of bank secrecy, decline to render mutual legal assistance for criminal matters within the scope of the Convention. This provision is particularly important, because U.S. prosecutions have sometimes been frustrated by difficulty in obtaining foreign evidence because of lack of dual criminality.

Article 10(1) provides that bribery of a foreign public official shall be deemed to be included as an extraditable offense under the laws of the Parties and the extradition treaties between them. Under Article 10(2), a Party that receives a request for extradition regarding bribery of a foreign public official from another Party with which it has no extradition treaty may consider the Convention to be the legal basis for such extradition. Each Party must, pursuant to Article 10(3), ensure that it can either extradite or prosecute its nationals for bribery of a foreign public official. If a Party declines to extradite a person for bribery of a foreign public official solely on the ground that the person is its national, that Party is required to submit the case to its competent authorities for the purpose of prosecution. Article 10(4) states that extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the of-

fense for which extradition is sought is within the scope of Article 1 of the Convention.

Article 11 provides that each Party shall designate an authority or authorities responsible for making and receiving requests and serving as a channel of communication regarding consultations on overlapping jurisdiction under Article 4, mutual legal assistance under Article 9, or extradition under Article 10. The United States intends to designate the Department of Justice as the relevant authority for purposes of Articles 4 and 9, and the Department of State as the relevant authority for purposes of Article 10.

Article 12 states that the Parties shall cooperate in carrying out a program of systematic follow-up to monitor and promote implementation of the Convention. Unless the Parties decide otherwise by consensus, this is to be done within the framework of the OECD Working Group on Bribery in International Business Transactions or any successor to its functions, and the Parties will bear the costs of the program in accordance with the rules applicable to that body.

Article 13(1) provides that the Convention shall be open, until its entry into force, for signature by OECD members and by non-members that have been invited to become full participants in the Working Group on Bribery in International Business Transactions. Under Article 13(2), after the Convention enters into force, it shall be open to accession by any non-signatory that is an OECD member or that has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of the deposit of its instrument of accession. OECD members contemplate an active outreach program to encourage non-members to accede to the Convention.

Article 14(1) provides that the Convention is subject to acceptance, approval or ratification by signatories in accordance with their respective laws. Article 14(2) states that instruments of acceptance, approval, ratification, or accession shall be deposited with the OECD Secretary-General.

Article 15 sets forth a two-track process for entry into force of the Convention. Under Article 15(1), the Convention will enter into force on the sixtieth day following the date on which five of the ten OECD countries with the ten largest export shares for 1990–1996, as set forth in the Annex, and which by themselves represent at least sixty percent of the combined total exports of those ten countries, deposit their instruments of acceptance, approval or ratification. For each signatory depositing its instrument after such entry into force, the Convention will enter into force on the sixtieth day following the date of deposit.

If, after December 31, 1998, the foregoing requirement has not been satisfied, under Article 15(2) any signatory that has deposited its instrument of acceptance, approval, or ratification may declare in writing to the OECD Secretary-General its readiness to accept entry into force of the Convention. For such a signatory, the Convention will enter into force on the sixtieth day following the date on which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such

entry into force, the Convention will enter into force on the sixtieth day following the date of deposit.

Article 16 provides that any Party may propose, through submission to the OECD Secretary-General, an amendment of the Convention. The Secretary-General shall communicate the proposed amendment to the other Parties at least sixty days before convening a meeting of the Parties to consider it. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force for all Parties sixty days after the deposit of an instrument of ratification, acceptance, or approval by all Parties, or in such other circumstances as the Parties may specify at the time of adoption of the amendment.

Article 17 provides that a Party may withdraw from the Convention, effective one year after the OECD Secretary-General's receipt of written notification thereof. After withdrawal, cooperation shall continue between the withdrawing Party and other Parties on all pending requests for assistance or extradition made before the effective date of withdrawal.

The final clauses of the Convention do not contain a provision prohibiting reservations. However, the Preamble recognizes that achieving equivalence among measures to be taken by the Parties is an essential object and purpose of the Convention, and that this requires that the Convention be ratified "without derogations affecting this equivalence." This is a call upon Parties to refrain from entering reservations that would affect such equivalence, and it is consistent with the international practice that States may not formulate a reservation that is incompatible with the object and purpose of the treaty.

The Annex includes OECD and International Monetary Fund (IMF) statistics, in absolute and percentage terms, on the value of exports for each OECD member for the period 1990-96. These figures will be used in determining whether the entry into force requirements of Article 15(1) have been satisfied.

The Convention is largely consistent with existing U.S. law. However, as set forth above, certain amendments to the FCPA are proposed in order to conform with and to implement the Convention. Proposed legislation is being prepared and is expected to be submitted to the Congress at an early date.

The Department of Justice, the Department of Commerce, the Department of the Treasury, the Securities and Exchange Commission, and the Office of the United States Trade Representative join the Department of State in recommending that the Convention be transmitted to the Senate at an early date for its advice and consent to ratification.

Respectfully submitted,

STROBE TALBOT.

CONVENTION
SUR LA LUTTE CONTRE LA CORRUPTION
D'AGENTS PUBLIC ETRANGERS DANS
LES TRANSACTIONS COMMERCIALES INTERNATIONALES

CONVENTION
ON COMBATING BRIBERY OF
FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS

**CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC
OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS**

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

Have agreed as follows:

Article I

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".
4. For the purpose of this Convention:
 - a. "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
 - b. "foreign country" includes all levels and subdivisions of government, from national to local;
 - c. "act or refrain from acting in relation to the performance of official duties" includes any use of the public official's position, whether or not within the official's authorised competence.

Article 2**Responsibility of Legal Persons**

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3**Sanctions**

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4**Jurisdiction**

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.
2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5

Enforcement

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.

Article 6

Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7

Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8

Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

2. Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Article 9

Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.
2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.
3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10

Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.
2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.
3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

Article 11

Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12

Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Article 13

Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD members and by non-members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.

2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14**Ratification and Depositary**

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.
2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

Article 15**Entry into Force**

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in the annexed document, and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each Signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.
2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any Signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a Signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two Signatories. For each Signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16**Amendment**

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17**Withdrawal**

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

Fait à Paris ce dix-sept décembre, mil neuf cent quatre-vingt dix-sept, en langues française et anglaise, chaque version faisant également foi.

Done in Paris this seventeenth day of December, Nineteen Hundred and Ninety-Seven in the French and English languages, each text being equally authentic.

Pour la République Fédérale d'Allemagne
For the Federal Republic of Germany

W. L. ...

Heinrich ...

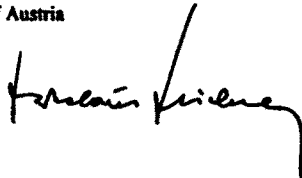
Pour la République Argentine
For the Argentine Republic



Pour l'Australie
For Australia



Pour la République d'Autriche
For the Republic of Austria



Pour le Royaume de Belgique
For the Kingdom of Belgium



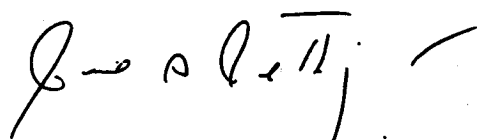
Pour la République Fédérative du Brésil
For the Federative Republic of Brazil



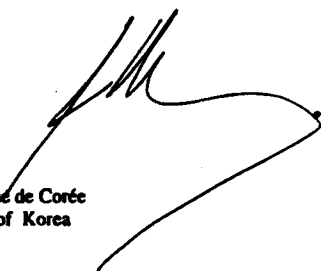
Pour la République de Bulgarie
For the Republic of Bulgaria



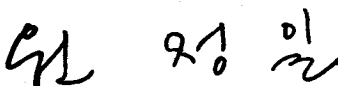
Pour le Canada
For Canada



Pour le Chili
For Chile



Pour la République de Corée
For the Republic of Korea



Pour le Royaume du Danemark
For the Kingdom of Denmark

A handwritten signature in dark ink, appearing to read "J. Hedeager".

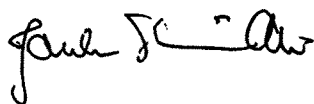
Pour le Royaume d'Espagne
For the Kingdom of Spain

A stylized handwritten signature in dark ink, possibly reading "J. M. A. L.".

Pour les États-Unis d'Amérique
For the United States of America

A handwritten signature in dark ink, appearing to read "Madeleine Albright".

Pour la République de Finlande
For the Republic of Finland

A handwritten signature in dark ink, appearing to read "J. V. A.".

Pour la République Française
For the Republic of France

Élisabeth Guigou

Dominique Strauss-Kahn.

Pour la République Hellénique
For the Hellenic Republic



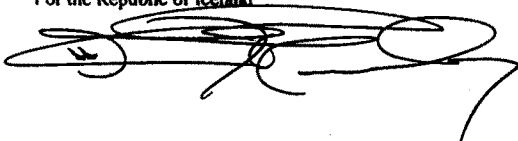
Pour la République de Hongrie
For the Republic of Hungary

Viktor Orbán

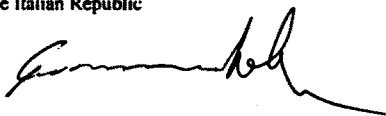
Pour l'Irlande
For Ireland

Mary Wallace

Pour la République d'Islande
For the Republic of Iceland



Pour la République Italienne
For the Italian Republic



Pour le Japon
For Japan



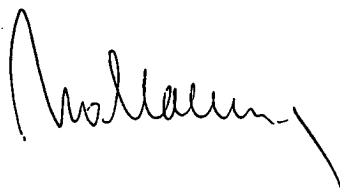
Pour le Luxembourg
For Luxembourg



Pour les États-Unis Mexicains
For the United Mexican States



Pour le Royaume de Norvège
For the Kingdom of Norway



Pour la Nouvelle-Zélande
For New Zealand



Pour le Royaume des Pays-Bas
For the Kingdom of the Netherlands



Pour la République de Pologne
For the Republic of Poland

M. Suchanek

Pour la République Portugaise
For the Republic of Portugal

António Amândio

Pour le Royaume-Uni de Grande-Bretagne
et d'Irlande du Nord
For the United Kingdom of Great Britain
and Northern Ireland

David - Davis

Pour la République Slovaque
For the Slovak Republic

J. Lichner

Pour le Royaume de Suède
For the Kingdom of Sweden

Luis Paz Estrella

Pour la Confédération Suisse
For the Swiss Confederation

Helmut

Pour la République Tchèque
For the Czech Republic

Jaroslav

Pour la Turquie
For Turkey

[Signature]

Certified true copy of the original
deposited with the Secretary-General
of the OECD

Paris, 4 February 1998

David H. Small

David H. Small
Acting Legal Counsel and Head of the
Legal Directorate

ANNEX

DAFFE/IME/BR(97)18/FINAL

STATISTICS ON OECD EXPORTS

| OECD EXPORTS | | | |
|-------------------------|------------------|---------------|---------------|
| | 1990-1996 | 1990-1996 | 1990-1996 |
| | US\$ million | % | % |
| | | of Total OECD | of 10 largest |
| United States | 287 118 | 15,9% | 19,7% |
| Germany | 254 746 | 14,1% | 17,5% |
| Japan | 212 665 | 11,8% | 14,6% |
| France | 138 471 | 7,7% | 9,5% |
| United Kingdom | 121 258 | 6,7% | 8,3% |
| Italy | 112 449 | 6,2% | 7,7% |
| Canada | 91 215 | 5,1% | 6,3% |
| Korea (1) | 81 364 | 4,5% | 5,6% |
| Netherlands | 81 264 | 4,5% | 5,6% |
| Belgium-Luxembourg | 78 598 | 4,4% | 5,4% |
| Total 10 largest | 1 459 148 | 81,0% | 100% |
| Spain | 42 469 | 2,4% | |
| Switzerland | 40 395 | 2,2% | |
| Sweden | 36 710 | 2,0% | |
| Mexico (1) | 34 233 | 1,9% | |
| Australia | 27 194 | 1,5% | |
| Denmark | 24 145 | 1,3% | |
| Austria* | 22 432 | 1,2% | |
| Norway | 21 666 | 1,2% | |
| Ireland | 19 217 | 1,1% | |
| Finland | 17 296 | 1,0% | |
| Poland (1) ** | 12 652 | 0,7% | |
| Portugal | 10 801 | 0,6% | |
| Turkey * | 8 027 | 0,4% | |
| Hungary ** | 6 795 | 0,4% | |
| New Zealand | 6 663 | 0,4% | |
| Czech Republic *** | 6 263 | 0,3% | |
| Greece * | 4 606 | 0,3% | |
| Iceland | 949 | 0,1% | |
| Total OECD | 1 801 661 | 100% | |

Notes: * 1990-1995; ** 1991-1996; *** 1993-1996

Source: OECD, (1) IMF

Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 percent of combined total exports of those ten countries, which is required for entry into force under this provision.



For Official Use

DAFFE/IME/BR(97)17/FINAL

Organisation de Coopération et de Développement Economiques
 Organisation for Economic Co-operation and Development

OLIS : 09-Dec-1997
 Dist. : 10-Dec-1997

PARIS

Or. Eng.

DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
 COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES

DAFFE/IME/BR(97)17/FINAL
 For Official Use

Working Group on Bribery in International Business Transactions (CIME)

COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF
 FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

This is the final version of the Commentaries on the Convention. It includes all of the proposed technical corrections to which there were no objections.

59765

Document complet disponible sur OLIS dans son format d'origine
 Complete document available on OLIS in its original format

Or. Eng.

DAFFE/IME/BR(97)17/FINAL

**COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN
PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS**

Adopted by the Negotiating Conference on 21 November 1997

General:

1. This Convention deals with what, in the law of some countries, is called "active corruption" or "active bribery", meaning the offence committed by the person who promises or gives the bribe, as contrasted with "passive bribery", the offence committed by the official who receives the bribe. The Convention does not utilise the term "active bribery" simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party's legal system.

Article 1. The Offence of Bribery of Foreign Public Officials:**Re paragraph 1:**

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an "autonomous" definition not requiring proof of the law of the particular official's country.

4. It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.

5. "Other improper advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.
7. It is also an offence irrespective of, inter alia, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.
8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.
9. Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.
10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12. "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.
13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.
14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

DAFFE/IME/BR(97)17/FINAL

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.
16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.
17. "Public international organisation" includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.
18. "Foreign country" is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.
19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office -- though acting outside his competence -- to make another official award a contract to that company.

Article 2. Responsibility of Legal Persons:

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3. Sanctions:

Re paragraph 3:

21. The "proceeds" of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.
22. The term "confiscation" includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.
23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to "principles" includes the principles upon which such selection is based.

Article 5. Enforcement:

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD Recommendation"), which recommends, inter alia, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

28. In Article 7, "bribery of its own public official" is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8. Accounting:

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery.

DAFFE/IME/BR(97)17/FINAL

This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

30. Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31. Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

Article 10. Extradition

Re paragraph 2:

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Article 12. Monitoring and Follow-up:

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

- i) receipt of notifications and other information submitted to it by the [participating] countries;
- ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:
 - a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
 - a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.
- iii) examination of specific issues relating to bribery in international business transactions;
- ...
- v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For non-members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

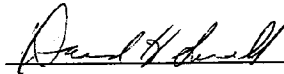
36. The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

DAFFE/IME/BR(97)17/FINAL

Article 13. Signature and Accession:

37. The Convention will be open to non-members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by non-members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to non-members to adhere to the 1997 OECD Recommendation and to participate in any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by non-members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

Certified true copy of the definitive text of the Commentaries adopted by the Negotiating Conference on 21 November 1997.



David H. Snall

Acting Legal Counsel and Head of the Legal Directorate

Paris 11 February 1998