

Organization For Economic  
Development And Cooperation

Convention On Combating Bribery Of  
Foreign Public Officials In  
International Business Transactions

**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, *in*fer **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 I 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 in instrument
- 2 If, after 31 **December 1998**, the Convention has not **entered** into **force** under paragraph 1 above, **any** Signatory which has deposited its **in** **strument** 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 **011 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 thii **seventeenth** day of December. **Nineteen Hundred** and Ninety-Seven ii the French and English **languages**, each text being equally authentic.

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

*Das Konferenzprotokoll*

*Gerhard Schröder*

Pour la République Argentine  
For the Argentine Republic



Pour l'Australie  
For Australia

Pour la République d'Autriche  
For the Republic of Austria

A handwritten signature in black ink, appearing to read "Heinrich Kissene". The signature is written in a cursive style with a long vertical stroke at the end.

Pour le Royaume de Belgique  
For the Kingdom of Belgium

A handwritten signature in black ink, consisting of a large, stylized initial 'R' followed by a horizontal line.

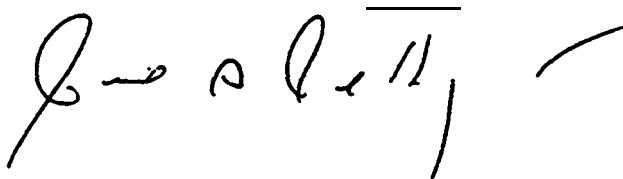
Pour la République Fédérative du Brésil  
For the Federative Republic of Brazil

A handwritten signature in black ink, consisting of a stylized 'B' followed by a horizontal line.


Pour la République de Bulgarie  
For the Republic of Bulgaria



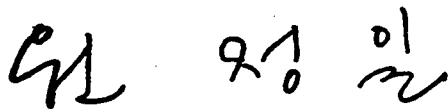
Pour le Canada  
For Canada



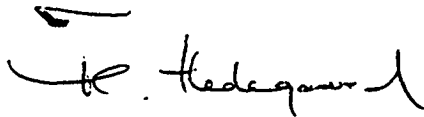
Pour le Chili  
For Chile



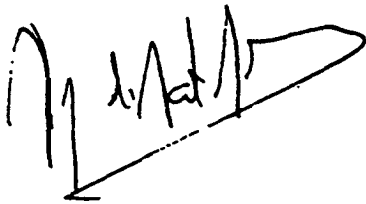
Pour la République de Corée  
For the Republic of Korea



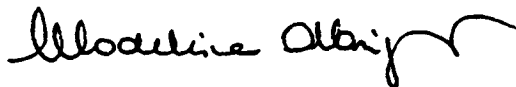
Pour le Royaume du Danemark  
For the Kingdom of Denmark

A handwritten signature in black ink, appearing to read "J. Hedeqvist". The signature is written in a cursive style with a small flourish above the first letter.

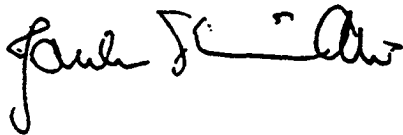
Pour le Royaume d'Espagne  
For the Kingdom of Spain

A handwritten signature in black ink, appearing to read "M. de Adal". The signature is written in a cursive style with a large, sweeping flourish at the end.

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

A handwritten signature in black ink, appearing to read "Madeleine Albright". The signature is written in a cursive style with a large, sweeping flourish at the end.

Pour la République de Finlande  
For the Republic of Finland

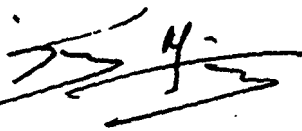
A handwritten signature in black ink, appearing to read "Pauliina". The signature is written in a cursive style with a large, sweeping flourish at the end.

Pour la **République Française**  
For the Republic of France

Éliette Guizon

Dominique Strauss-Kahn

Pour la **République Hellénique**  
For **the Hellenic** Republic



Pour la **République de Hongrie**  
For **the** Republic of Hungary

Viktor Orbán

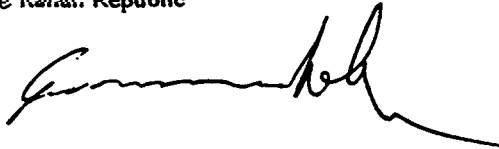
Pour l'**Irlande**  
For **Ireland**

Mary Wallone

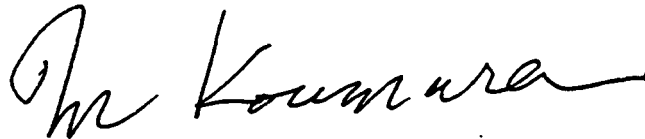
Pour la République d'Islande  
For the Republic of Iceland

A highly stylized and somewhat illegible handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.


Pour la République Italienne  
For the Italian Republic

A handwritten signature in black ink, appearing to be a cursive name with a long, sweeping tail that extends to the right.

Pour le Japon  
For Japan

A handwritten signature in black ink, clearly legible as 'Mr. Koumura', written in a cursive style.

Pour le Luxembourg  
For Luxembourg

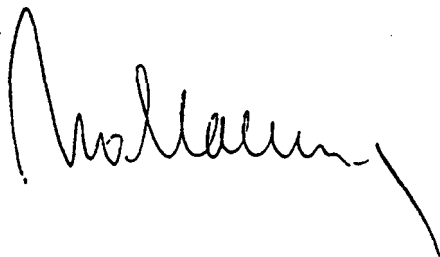
Two handwritten signatures in black ink, one above the other, both appearing to be cursive names.



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



---

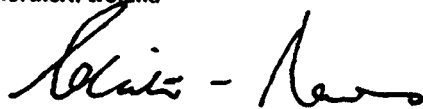
Pour la **République de Pologne**  
For the Republic of Poland



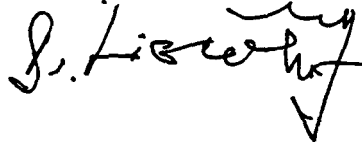
Pour la **République Portugaise**  
For the Republic of Portugal



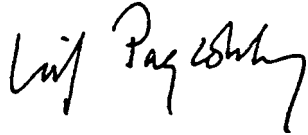
Pour le **Royaume-Uni de Grande-Bretagne**  
et **d'Irlande** du Nord  
For the United Kingdom of Great Britain  
and Northern Ireland



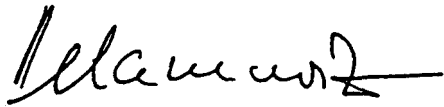
Pour la **République Slovaque**  
For the **lovak Republic**



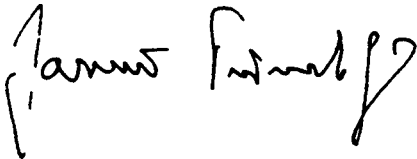
Pour le Royaume de Suède  
For the Kingdom of Sweden



Pour la Confédération Suisse  
For the Swiss Confederation



Pour la République Tchèque  
For the Czech Republic



Pour la Turquie  
For Turkey



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

Paris, 4 February 1998



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 (I)	81 364	4,5%	5,6%
Netherlands	81 264	4,5%	5,6%
Belgium-Luxembourg	78 598	4,4%	5,4%
<b>Total 10 largest</b>	<b>1 459 148</b>	<b>81,0%</b>	<b>100%</b>
Spain	42 469	2,4%	
Switzerland	40 395	2,2%	
Sweden	36 710	2,0%	
Mexico (I)	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 (I) **	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%	
<b>Total OECD</b>	<b>1 801 661</b>	<b>100%</b>	

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

Source: OECD, (I) 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

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.

**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 acts are 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 5, 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 5 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**.

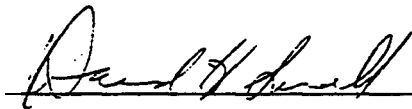
36. The follow-up of any aspect of the **Convention, which** is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention **and**, as appropriate, the participants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

Acting Legal Counsel and Head of the Legal Directorate

Paris *21 February 1998*