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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

STUART CARSON, et al.,

Defendants.

CASE NO. SA CR 09-00077-JVS

DEFENDANTS' PROPOSED JURY INSTRUCTION REGARDING "FOREIGN OFFICIAL" AND "INSTRUMENTALITY"; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES

Hearing
Date: August 12, 2011
Time: 1:30 p.m.
Courtroom: 10C
Trial Date: June 5, 2012
The Honorable James V. Selna

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On May 18, 2011, this Court entered an Order Denying Defendants' Motion to Dismiss Counts One Through Ten Of The Indictment on the basis that "the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact." 5-18-11 Order (Docket No. 373) at 5. The Court recognized, however, that (1) there needed to be a *legal* yardstick against which this question of fact would be measured by a jury, and (2) Defendants needed to know what that yardstick was sooner rather than later – well in advance of the trial date, not on the eve of the trial as the government suggested. *See* Declaration of Nicola T. Hanna ("Hanna Decl."), Exh. A (5-9-11 Hearing Transcript) at 57:9-11 ("The government anticipates there will be lengthy briefing over the jury instruction going to the definition of 'instrumentality.'). The government and Defendants subsequently stipulated, and the Court ordered, that the parties would submit their proposed "instrumentality" jury instructions and the legal support for those instructions on June 30, 2011, with objections to follow on July 25, 2011, and a hearing to be conducted on August 12, 2011. *See* Docket No. 371. Trial is currently scheduled for June 5, 2012.

Defendants respectfully disagree with the Court's May 18 Order denying their Motion to Dismiss ("the May 18 Order") and continue to believe, as set forth in their Motion to Dismiss (the "Motion") and the supporting Declaration of Professor Michael J. Koehler, that the FCPA does not criminalize payments made to employees of state-owned enterprises ("SOEs"). Defendants reserve all of their rights to challenge the May 18 Order, if necessary, on appeal. Were it not for the existence of the Court's May 18 Order, Defendants would propose a jury instruction that states that "a state-owned enterprise is not a foreign government instrumentality within the meaning of the FCPA, and officers and employees of a state-owned enterprise therefore are not 'foreign officials' under the FCPA." But given the existence of the Court's May 18

Order, and without waiver of their right to challenge all aspects of that Order on appeal, Defendants herein propose a jury instruction that accepts the Court's premise that "state-owned companies may be considered 'instrumentalities' under the FCPA, but whether such companies qualify as 'instrumentalities' is a question of fact." 5-18-11 Order at 13.

In preparing their proposed "instrumentality" jury instruction, Defendants have been guided by three overarching principles:

First, it will not be sufficient to merely provide the jury with a list of non-exclusive, unweighted factors – none of which is dispositive – and ask the jury to "figure it out," as the government seems to suggest. That will provide the jury with no real standard for making an "instrumentality" determination and will be tantamount to giving the jury no instruction at all on the "instrumentality" issue. *See, e.g.*, *Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333, 1337 (7th Cir. 1988) (Posner, J.) ("It is not true that the law is what a jury might make out of statutory language. The law is the statute as interpreted. The duty of interpretation is the judge's. Having interpreted the statute he must then convey the statute's meaning, as interpreted, in words the jury can understand.").

Second, in determining an appropriate jury instruction, the Court should not accept any invitation from the government to borrow *wholesale* from an "instrumentality" analysis used under another statute – such as the "organ" prong of the Foreign Sovereign Immunities Act ("FSIA"), a provision the government highlighted at the hearing on Defendants' Motion. *See* Hanna Decl., Exh. A at 60:4-10 ("What [Defendants] did not discuss was the organ prong of the Foreign Sovereign Immunities Act, which discusses at greater length and identifies a number of the factors which the government drew upon in identifying the various factors of what an instrumentality is and which are relevant for determining what an instrumentality of a foreign government is."). The FSIA may provide some guidance (indeed, Defendants have had to consult FSIA case law, because the FCPA legislative history is devoid of

any discussion of SOEs as "instrumentalities," much less any discussion of which SOEs qualify and which do not qualify), but because it is a different statute than the FCPA – the FSIA is a civil statute aimed at determining, *inter alia*, when a foreign entity will be considered to be part of a foreign government for purposes of sovereign immunity – its applicability to interpreting the "instrumentality" provision of the FCPA, a criminal statute that by definition must be strictly construed, is necessarily limited. *Compare USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 206 (3d Cir. 2003) (noting with approval that the Ninth Circuit has "developed a *flexible approach* to determine whether an entity qualifies as an organ of a foreign state under the FSIA") (emphasis added) *with United States v. Napier*, 861 F.2d 547, 548 (9th Cir. 1988) ("It has long been settled that penal statutes are to be construed strictly, and that one is not to be subjected to a penalty unless the words of the statute plainly impose it."). *See also United States v. Goyal*, 629 F.3d 912, 922 (9th Cir. 2010) (Kozinski, C.J., concurring) ("Civil law often covers conduct that falls in a gray area of arguable legality. But criminal law should clearly separate conduct that is criminal from conduct that is legal.").

Third, in determining the correct "instrumentality" jury instruction, the goals and structure of the FCPA must be considered. The FCPA is aimed at combating foreign bribery, but it is *not* a general commercial anti-bribery statute. Rather, the FCPA is aimed at preventing the special harm caused by the bribery of foreign *government* officials. Accordingly, Congress criminalized payments only to a "foreign official," a term expressly and narrowly defined in pertinent part as an "officer or employee of a foreign government or any department, agency, or instrumentality thereof." The Court should provide the jury with an "instrumentality" instruction that accurately reflects Congress's desire to criminalize payments made to foreign *government* officials, not payments made to employees of a company that is not, in both form and substance, actually part of the foreign government.

II.
PROPOSED "FOREIGN OFFICIAL"/ "INSTRUMENTALITY" JURY INSTRUCTION

Defendants propose that the Court adopt the following jury instruction, the text of which is also attached hereto as Exhibit A:

* * *

The FCPA does not criminalize all payments made to foreign nationals, but only corrupt payments made to a "foreign official." Therefore, in order for a defendant to be found guilty of an FCPA violation, the government must, among other things, prove beyond a reasonable doubt that the intended recipient of the corrupt payment at issue was a "foreign official" at the time of the alleged payment.

The term "foreign official" means any officer or employee of a foreign government (or any department, agency, or instrumentality thereof), or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.

A "state-owned" business enterprise may, under certain circumstances, qualify as an "instrumentality" of a foreign government. On the other hand, not all "state-owned" business enterprises qualify as "instrumentalities" of a foreign government. It is up to you to determine, weighing all of the evidence, whether a particular business enterprise is or is not an "instrumentality" of a foreign government, and whether the officers and employees of that enterprise therefore are – or are not – "foreign officials" under the statute.

To conclude that a business enterprise is an "instrumentality" of a foreign government, you must conclude beyond a reasonable doubt that the business enterprise is part of the foreign government itself. In order to conclude that a business enterprise is part of the foreign government itself, you must find that the government has established, beyond a reasonable doubt, each of the following four elements:

First, the foreign government itself directly owns at least a majority of the business enterprise's shares.

Second, the foreign government itself controls the day-to-day operations of the business enterprise, including the appointment of key officers and directors (who themselves may be government officials); the hiring and firing of employees; the financing of the enterprise through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties; and the approval of contract specifications and the awarding of contracts.

Third, the business enterprise exists for the sole and exclusive purpose of performing a public function traditionally carried out by the government. A "public function" is a function that benefits only the foreign government (and its citizens), not private shareholders. A business enterprise that exists to maximize profits rather than pursue public objectives does not perform a public function and therefore is not a foreign government instrumentality.

Fourth, employees of the business enterprise are considered to be public employees or civil servants under the law of the foreign country.

If the government fails to prove each of these four elements beyond a reasonable doubt for the "state-owned" business enterprise at issue in a particular count, and therefore fails to prove that the intended recipient of the alleged corrupt payment was a "foreign official," you must find the defendant "not guilty" on that count.

A business enterprise is not a foreign government instrumentality if it is a mere subsidiary of a state-owned company. To qualify as a foreign government instrumentality, the business enterprise must, as set forth above, be directly and majority owned by the foreign government itself. Therefore, an employee of a business enterprise that is merely a subsidiary of another entity that is majority owned by the foreign government is not an employee of a foreign government instrumentality and is not a "foreign official."

A business enterprise that 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,

is not a foreign government instrumentality, and its employees therefore are not "foreign officials."

III.
INDIVIDUAL COMPONENTS OF PROPOSED INSTRUCTION

Set forth below are the individual components of Defendants' proposed instruction and the legal authority in support of each component.

A. Paragraph One

1. Text

"The FCPA does not criminalize all payments made to foreign nationals, but only corrupt payments made to a 'foreign official.' Therefore, in order for a defendant to be found guilty of an FCPA violation, the government must, among other things, prove beyond a reasonable doubt that the intended recipient of the corrupt payment at issue was a 'foreign official' at the time of the alleged payment."

2. Authority

This paragraph sets forth a clear statement of law that the government does not and cannot dispute, *i.e.*, that the FCPA anti-bribery provisions proscribe payments made only to a "foreign official." The government similarly cannot dispute that "foreign official" is an element of the offense that the government must prove beyond a reasonable doubt. *See* 15 U.S.C. § 78dd-2(a).

B. Paragraph Two

1. Text

"The term 'foreign official' means any officer or employee of a foreign government (or any department, agency, or instrumentality of that government), or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality."

2. Authority

This paragraph comes directly from the relevant portions of the FCPA's definition of "foreign official," *see* 15 U.S.C. § 78dd-2(h)(2)(A), and is the same

instruction given to the jury in *United States v. Aguilar*, Case No. CR 10-1031 (C.D. Cal.). *See* Hanna Decl., Exh. B.[1]

C. Paragraph Three

1. Text

"A 'state-owned' business enterprise may, under certain circumstances, qualify as an 'instrumentality' of a foreign government. On the other hand, not all 'state-owned' business enterprises qualify as 'instrumentalities' of a foreign government. It is up to you to determine, weighing all of the evidence, whether a particular business enterprise is or is not an 'instrumentality' of a foreign government, and whether the officers and employees of that enterprise therefore are – or are not – 'foreign officials' under the statute."

2. Authority

This paragraph reflects the Court's holding in its May 18 Order. *See, e.g.*, 5-18-11 Order at 5 ("[T]he Court concludes that the question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact."); *id.* at 13 ("[S]tate-owned companies may be considered 'instrumentalities' under the FCPA, but whether such companies qualify as 'instrumentalities' is a question of fact."); *id.* at 14 ("[T]he ordinary meaning of 'instrumentality' indicates that state-owned companies could fall under the ambit of the FCPA. Whether such companies do, in fact, qualify as an instrumentality is a question of fact.").

D. Paragraph Four, First Sentence

1. Text

"To conclude that a business enterprise is an 'instrumentality' of a foreign government, you must conclude beyond a reasonable doubt that the business enterprise is part of the foreign government itself."

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[1] Defendants disagree with the portion of the instruction in *United States v. Aguilar* stating, "An 'instrumentality' of a foreign government can include certain state-owned or state-controlled companies." Hanna Decl., Exh. B.

2. Authority

In *Hall v. American National Red Cross*, 86 F.3d 919 (9th Cir. 1996), the Ninth Circuit stated:

> [C]ourts sometimes use the phrase "agency or instrumentality" when they are actually asking whether a particular institution is part of the government itself. . . . Congress's incorporation of words which are sometimes used to refer to those entities simply indicates a desire to encompass all parts of the government itself within the Act. Thus, the use of the word "instrumentality" in a general, inclusionary definition does not indicate an intention to encompass entities which are not a part of the government, even though they may be governmental "instrumentalities" in some sense.

Id. at 921. In its May 18 Order, this Court said that it did "not discern any tension between" *Hall's* language (which the Court described as dicta) "and the Court's conclusion that state-owned companies could be an 'instrumentality' of a foreign government" because "some state-owned companies are undoubtedly 'part of the government.'" 5-18-11 Order at 10 n. 9. The word "instrumentality" in the FCPA is contained in what the *Hall* court characterized as a "general, inclusionary definition," and there is no evidence that Congress intended the word "instrumentality" in the FCPA to extend to entities that were not "part of the government itself." Accordingly, the jury instruction should reflect this standard.

This instruction is appropriate for two additional reasons. First, the terms that precede "instrumentality" in the statute – "department" and "agency" – are both indisputably "part of the government itself"; "instrumentality" should not be construed in a manner that is fundamentally different than those terms. *See* Order at 7 ("The Court agrees that the meaning of 'instrumentality' should be considered both within the context of the preceding terms of the FCPA and in view of the FCPA as a whole."); *United States v. Williams*, 553 U.S. 285, 294 (2008) (stating that "the commonsense

canon of *noscitur a sociis* . . . counsels that a word is given more precise content by the neighboring words with which it is associated"); *see also* Defendants' Motion to Dismiss ("2-28-11 Mot.") at 12-15.[2] Second, as explained in Defendants' Motion to Dismiss, there is overwhelming support in both the text and structure of the FCPA and the legislative history that the statute was aimed at preventing improper payments to traditional government officials. *See* 2-28-11 Mot. at 16-30. Indeed, the terms "foreign government official," "foreign public official," and "foreign official" were used interchangeably throughout the legislative history. *See id*. at 26-27. Defendants disagree that the term "foreign official" extends to employees of stated-owned companies, but if it does, it must extend only to employees of those companies that are actually "part of the foreign government itself."

E. Paragraph Four, Second Sentence

1. Text

"In order to conclude that a business enterprise is part of the foreign government itself, you must find that the government has established, beyond a reasonable doubt, each of the following four elements:"

2. Authority

As explained in additional detail in the four paragraphs that follow, this instruction proposes that the government be required to prove four things to establish that a business enterprise is an "instrumentality" within the meaning of the FCPA: (1) ownership; (2) control; (3) public function, and (4) public-employee status. These four elements are the hallmarks of government "departments" and "agencies" – which are owned by governments, controlled by governments, exist for the sole and exclusive purpose of performing public functions, and whose employees are considered to be

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[2] Defendants are aware that the Court did not accept the *noscitur a sociis* argument made in their Motion to Dismiss and held that excluding SOEs from the definition of "instrumentality" would "impermissibl[y] narrow[] a statute intended to mount a broad attack on government corruption." Order at 8. As the Court recognized, however, the FCPA is aimed at *government* corruption.

public employees – and they should similarly define government "instrumentalities." Indeed, the Court's May 18 Order recognized the importance of each of these factors. *See, e.g.*, 5-18-11 Order at 7 (noting that a business enterprise may qualify as an "instrumentality" when "a monetary investment **[ownership]** is combined with additional factors that objectively indicate that the entity is being used **[control]** as an instrument to carry out governmental objectives **[public function]**"); *id.* at 5 (noting the "foreign state's characterization of the entity and its employees" as a factor that "bear[s] on the question of whether a business entity constitutes a government instrumentality"). The government also has recognized the importance of these factors. *See* Hanna Decl., Exh. C (U.S. Response to OECD Questions Concerning Phase I, at § A.1.1) ("Among the factors that [the Department of Justice] considers are the foreign state's own characterization of the enterprise and its employees, *i.e.*, whether it prohibits and prosecutes bribery of the enterprise's employees as public corruption, the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government.").

F. Paragraph Five

1. Text

"***First***, the foreign government itself directly owns at least a majority of the business enterprise's shares."

2. Authority

No business enterprise that is not at least directly majority owned by a foreign government should qualify as a government "instrumentality." There is authority for this standard in the OECD Convention's definition of "public enterprise," which recognizes that a government will be considered to exercise a "dominant influence" over an enterprise, *inter alia*, "when the government or governments hold the majority of the enterprise's subscribed capital . . . ." *See* Hanna Decl., Exh. D (OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents) at 15, ¶ 14. A direct majority-

ownership standard is also supported by the Foreign Sovereign Immunities Act's definition of "agency or instrumentality of a foreign state," which means "an organ of a foreign state or political subdivision thereof, *or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof*." 28 U.S.C. § 1603(b) (emphasis added). *See also Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003) ("The better rule is the one supported by the statutory text and elementary principles of corporate law. A corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares."). Finally, although it has brought a handful of FCPA cases involving entities with less than majority government ownership (*see* Motion to Dismiss at 8-9), the government appears to have generally recognized the majority-ownership threshold in its enforcement actions. *See, e.g.*, Docket No. 335 at Exh. I. *Compare* 15 U.S.C. § 78m(b)(6) ("Where an issuer . . . holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, . . . the issuer [shall] proceed in good faith to use its influence . . . to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls.").

G. Paragraph Six

1. Text

"***Second***, the foreign government itself controls the day-to-day operations of the business enterprise, including the appointment of key officers and directors (who themselves may be government officials); the hiring and firing of employees; the financing of the enterprise through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties; and the approval of contract specifications and the awarding of contracts."

2. Authority

Majority ownership should be a necessary but by no means sufficient condition for "instrumentality" status under the FCPA. A high degree of control in the daily operations of the enterprise also should be required. This will effectuate the goal of

the FCPA, which is not to criminalize all overseas bribery but rather to prevent the special harm presented by the bribery of foreign *government* officials. *See* 2-28-11 Mot. at 23-26. When the daily operations of a business enterprise are managed by a foreign government, this goal may be implicated (accepting, for the sake of argument, the Court's premise that an SOE can be an FCPA "instrumentality"). But the goal is not implicated when a business enterprise merely has a foreign government as one of many shareholders.

The Ninth Circuit's decision in *Patrickson v. Dole Food Company, Inc*., 251 F.3d 795 (9th Cir. 2001), which was subsequently affirmed by the Supreme Court, is instructive. *Patrickson* concerned, *inter alia*, whether certain Israeli companies – the so-called "Dead Sea Companies" – were organs of the Israeli government for purposes of the FSIA. The Dead Sea Companies argued that they *were* government organs:

> The Dead Sea Companies argue that . . . the Companies were government organs created by Israel for the purpose of exploiting the Dead Sea resources owned by the government. The Dead Sea Companies were classified as "government companies" under Israeli law, which gave the government certain privileges reflecting its ownership stake. The government had the right to approve the appointment of directors and officers, as well as any changes in the capital structure of the Companies, and the Companies were obliged to present an annual budget and financial statement to various government ministries. The government could constrain the use of the Companies' profits as well as the salaries of the directors and officers.

Id. at 808. The Ninth Circuit disagreed that the entities were government instrumentalities, however, noting that this type of control was "not considerably different from the control a majority shareholder would enjoy under American corporate law." *Id.* "[T]he Dead Sea Companies were not run by government appointees; their employees were not treated as civil servants; nor were the Companies

wholly owned by the government of Israel. The Companies could sue and be sued, and . . . the Companies [did not] exercise any regulatory authority[.]" *Id.* The Court concluded that "[t]hese factors support the district court's view of the Companies as independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives. Although the question is close, we hold that the Dead Sea Companies were not organs of the Israeli government, but indirectly owned commercial operations, which do not qualify as instrumentalities under the FSIA." *Id.*

The importance of a high degree of government control in determining instrumentality status has also been recognized by the Supreme Court and the Ninth Circuit in the context of the Federal Tort Claims Act ("FTCA"). The FTCA "is a limited waiver of sovereign immunity, making the Federal Government liable to the same extent as a private party for certain torts of federal employees acting within the scope of their employment." *United States v. Orleans*, 425 U.S. 807, 813 (1976). In *Orleans*, the issue was whether "a community action agency funded under the Economic Opportunity Act of 1964 [was] a federal instrumentality or agency for purposes of [FTCA] liability." *Id.* at 809. Noting that the issue turned "not [on] whether the community action agency receiv[ed] federal money and [was required to] comply with federal standards and regulations, but [on] whether its *day-to-day operations [were] supervised by the Federal Government*" (*id.* at 815) (emphasis added), the Supreme Court concluded that the entity was not a "federal agenc[y] or instrumentalit[y]," nor were its "employees federal employees within the meaning of the [FTCA]." *Id.* at 819; *see also id.* at 816 n.5 ("[T]he issue in this case is whether or not there was day-to-day control of a program[.]"). Ninth Circuit FTCA case law is in accord. *See, e.g.*, *Autery v. United States*, 424 F.3d 944, 956 (9th Cir. 2005) ("The critical test for distinguishing an agent from a contractor is the existence of federal authority to control and supervise the 'detailed physical performance' and 'day to day operations' of the contractor.") (quoting *Hines v. United States*, 60 F.3d 1442, 1446 (9th Cir. 1995)). Accordingly, an entity should not be considered a foreign

government "instrumentality" under the FCPA unless the foreign government itself controls the day-to-day operations of the business enterprise.

It is similarly important that the concept of control extend to the actual involvement of the government in the approval of contract specifications and the awarding of contracts – *i.e.*, in the activities that allegedly prompted the corrupt payments. Simply put, if the government has control of these matters, the policies of the FCPA are furthered by criminalizing payments made to influence these decisions; if the government does not have control of these matters, however, any alleged bribery is akin to commercial bribery, which the FCPA simply does not criminalize.

Finally, both this Court and Judge Matz have recognized the importance of control to any "instrumentality" determination. *See* 5-18-11 Order at 5 (noting the "foreign state's degree of control over the entity" as a factor that "bear[s] on the question of whether a business entity constitutes a government instrumentality"); Hanna Decl., Exh. E (4-20-11 *Aguilar* Order) at 9 (suggesting that in a government instrumentality "[t]he key officers and directors of the entity are, or are appointed by, government officials," and "[t]he entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such an entrance fees to a national park"); *see also California v. NRG Energy Inc*., 391 F.3d 1011, 1026 (9th Cir. 2004), *vacated in part and remanded on other grounds in PowerEx Corp. v. Reliant Energy Servs*., 551 U.S. 224 (2007) (finding that PowerEx was not an "organ" under the FSIA in part because it "was not run by government appointees," and because of its "high degree of independence").

H. Paragraph Seven

1. Text

"***Third,*** the business enterprise exists for the sole and exclusive purpose of performing a public function traditionally carried out by the government. A 'public function' is a function that benefits only the foreign government (and its citizens), not

private shareholders. A business enterprise that exists to maximize profits rather than pursue public objectives does not perform a public function and therefore is not a foreign government instrumentality."

2. Authority

To qualify as a foreign government instrumentality under the FCPA, an enterprise should be required to exist for the sole and exclusive purpose of performing a public function traditionally carried out by the government. *See, e.g.*, *EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992, 997 (9th Cir. 2001) ("In determining whether an entity is an organ [under the FSIA], we consider whether the entity 'engages in a public activity on behalf of the foreign government.'") (quoting *Patrickson*, 251 F.3d at 807). Companies that exist to increase profits and maximize shareholder value cannot be considered to be performing a public function, even if they have some component of government ownership. *See, e.g.*, *NRG Energy Inc.*, 391 F.3d at 1026 (holding that a power company was not an instrumentality under the organ prong of the FSIA where the entity "acted not in the public interest, but rather as an independent commercial enterprise pursuing its own profits," and "any profits and losses from its sales of power are solely the responsibility of PowerEx and are in no way guaranteed or subsidized by the [Canadian] government"); *Patrickson*, 251 F.3d at 808 (Israeli corporations indirectly owned by the Israeli government were not "instrumentalities" under the organ prong of the FSIA where the companies were "independent commercial enterprises, heavily regulated, but acting to maximize profits rather than pursue public objectives."); *cf. EOTT Energy*, 257 F.3d at 998 ("Favoring organ status is that it appears Ireland acquired [the entity] not for profit-making purposes, but to serve the public interest.").

This Court has recognized the importance of a "public function" requirement. *See, e.g.*, 5-18-11 Order at 7 ("The Court also agrees that the term 'instrumentality' was intended to capture entities that are not 'departments' or 'agencies' of a foreign government, but nevertheless carry out governmental functions or objectives."). So

has Judge Matz. *See* Hanna Decl., Exh. E at 9 (suggesting that a government instrumentality will be an "entity [that] is widely perceived and understood to be performing official (*i.e.*, governmental) functions." So has the government. *See* Opposition to Defendants' Motion to Dismiss (Docket No. 332) at 16 (contending that "instrumentality" should be construed to mean an entity "though which a government achieves an end or purpose or carries out the functions or policies of the government"). The OECD Convention is also in accord. *See* Hanna Decl., Exh. D, Art. I, ¶ 4(a) (defining "foreign public official" to mean, *inter alia*, "any person exercising a *public function* for a foreign country, including for a . . . *public enterprise*") (emphasis added).

Finally, like the other components of Defendants' proposed "instrumentality" jury instruction, a "public function" requirement must exist to comply with the Due Process Clause of the United States Constitution because such a requirement serves to put the world on notice that a particular entity is a government entity and its employees thus "foreign officials" (again accepting, solely for purposes of argument, the premise of the Court's May 18 Order). *See, e.g.*, *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (The Due Process Clause of the United States Constitution requires that "fair warning . . . be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.").

I. Paragraph Eight

1. Text

"***Fourth***, employees of the business enterprise are considered to be public employees or civil servants under the law of the foreign country."

2. Authority

Because the FCPA is aimed at combating public, not private, corruption, foreign nationals who are not considered to be public employees in their own countries should not be considered to be "foreign officials" under the FCPA. *See, e.g.*, Hanna Decl., Exh. F (FCPA Opinion Procedure Release No. 10-03 (Sept. 1, 2010)) (concluding that

a consultant that was a "registered agent of a foreign government" did not qualify as a "foreign official" under the disclosed facts and relying in part on local law to reach this conclusion; "As a matter of local law, the Consultant and its employees are not employees or otherwise officials of the foreign government, and the Requestor has secured a local law opinion that it is permissible for the Consultant to represent both the foreign government and the Requestor at the same time."); *see also Patrickson*, 251 F.3d at 808 (holding that the Dead Sea Companies were not FSIA instrumentalities where, *inter alia*, "their employees were not treated as civil servants"); *id.* (contrasting outcome in another FSIA case where the entity, a Mexican oil refinery, was determined to be an organ where it was "entirely owned by the government; controlled by government appointees; employed only public servants; and had the exclusive responsibility for refining and distributing Mexican government property") (citing *Corporacion Mexicana de Servicios Martimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996)).

J. Paragraph Nine

1. Text

"If the government fails to prove each of these four elements beyond a reasonable doubt for the 'state-owned' business enterprise at issue in a particular count, and therefore fails to prove that the intended recipient of the alleged corrupt payment was a 'foreign official,' you must find the defendant 'not guilty' on that count."

2. Authority

This provision makes clear that if the government cannot establish the criteria necessary to prove that a business enterprise is an "instrumentality" of a foreign government, the defendant(s) must be acquitted of that particular FCPA count.

K. Paragraph Ten

1. Text

"A business enterprise is not a foreign government instrumentality if it is a mere subsidiary of a state-owned company. To qualify as a foreign government instrumentality, the business enterprise must, as set forth above, be directly and majority owned by the foreign government itself. Therefore, an employee of a business enterprise that is merely a subsidiary of another entity that is majority owned by the foreign government is not an employee of a foreign government instrumentality and is not a 'foreign official.'"

2. Authority

The first two sentences of this paragraph are rooted in the holding of the United States Supreme Court in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). *Dole Food*, which concerned whether the Dead Sea Companies discussed above were FSIA "instrumentalities," held that "[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares." *Id.* at 477. The holding in *Dole Food* was based not only on the express language of the FSIA – an "agency or instrumentality of a foreign state," means "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," 28 U.S.C. § 1603(b) – but also on basic principles of corporate law concerning the separate identities of a parent corporation and its subsidiary corporations. *See Dole Food Co.*, 538 U.S. at 474 ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."); *id.* at 475 ("An individual shareholder, by virtue of his ownership of shares, does not own the corporation's assets and, as a result, does not own subsidiary corporations in which the corporation holds an interest … A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have

legal title to the subsidiaries of the subsidiary."); *see also United States v. Bennett,* 621 F.3d 1131, 1136 (9th Cir. 2010) ("As early as 1926, the Supreme Court recognized that '[t]he owner of the shares of stock in a company is not the owner of the corporation's property'…While the shareholder has a right to share in corporate dividends, 'he does not own the corporate property.'") (quoting *R.I. Hosp. Trust Co. v. Doughton*, 270 U.S. 69, 81 (1926)).

By the same token, the employees of a subsidiary corporation generally are not considered to be employees of the parent corporation. *See, e.g.*, *City of Los Angeles v. San Pedro Boat Works*, 635 F.3d 440, 453 (9th Cir. 2011) ("[T]here is a strong presumption that a parent company is not the employer of its subsidiary's employees.") (quoting *Laird v. Capital Cities/ABC, Inc*., 68 Cal. App. 4th 727, 737 (1998)); *Ass'n of Mexican-American Educators v. California*, 195 F.3d 465, 482 (9th Cir. 1999) ("It is well established that a parent company will not usually be considered the 'employer' under Title VII for the employees of its subsidiary."); *Johnson v. Flowers Indus., Inc*., 814 F.2d 978, 980 (4th Cir.1987) ("A parent company is the employer of a subsidiary's personnel only if it controls the subsidiary's employment decisions or so completely dominates the subsidiary that the two corporations are the same entity.").

For each of these reasons, a mere subsidiary of a state-owned company should not be considered to be an "instrumentality" of a foreign government for purposes of the FCPA. In other words, an "instrumentality of an instrumentality" should not count. As the Ninth Circuit explained in 1995, eight years before the Supreme Court's decision in *Dole Food*, in the FSIA context:

> [The FSIA] provides potential immunity to entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision. *To add to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far*

> *down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision.* Although such a broad view of sovereign immunity may very well be desirable, we cannot assume that Congress intended such a result when a literal reading of the statute leads to the opposite conclusion.

Gates v. Victor Fine Foods, 54 F.3d 1457, 1462 (9th Cir. 1995) (emphasis added). A similar rationale should limit the definition of "instrumentality" in the FCPA because Congress purposely limited the anti-bribery provisions of the FCPA to "foreign officials." Thus, even if "instrumentalities" *can* include SOEs (and their employees can be "foreign officials"), there is no indication in the text of the FCPA or its legislative history that companies owned by instrumentalities – *i.e.*, "instrumentalities of instrumentalities" – may themselves qualify as "instrumentalities." Moreover, if a contrary rule were adopted, there would be no logical stopping point. *Cf. Skilling v. United States*, 561 U.S. ___, 130 S. Ct. 2896, 2933 (2010) ("[W]e resist the Government's less constrained construction absent Congress' clear instruction otherwise. . . . If Congress desires to go further . . . it must speak more clearly than it has.").

Finally, the last sentence of this proposed paragraph reflects the logical outcome of the first two sentences: If a business enterprise that is merely a subsidiary of another entity that is majority owned by a foreign government is not an "instrumentality" under the FCPA, its employees by definition are not "foreign officials."

L. Paragraph Eleven

1. Text

A business enterprise that 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,

is not a foreign government instrumentality, and its employees therefore are not "foreign officials."

2. Authority

This language comes from Paragraph 15 of the Commentaries to the OECD Convention, which states that "[a]n 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." Hanna Decl., Exh. D at 15, ¶ 15. In its Opposition to Defendants' Motion to Dismiss, the government argued that instrumentality "should be interpreted to comply with U.S. treaty obligations." Docket No. 332 at 28.

IV.
CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court adopt their proposed "foreign official"/"instrumentality" jury instruction.

Dated: June 30, 2011

Respectfully submitted,

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By: s/David W. Wiechert
David W. Wiechert

Attorneys for Defendant DAVID EDMONDS

Exhibit A

DEFENDANTS' PROPOSED "FOREIGN OFFICIAL" / "INSTRUMENTALITY" JURY INSTRUCTION

The FCPA does not criminalize all payments made to foreign nationals, but only corrupt payments made to a "foreign official." Therefore, in order for a defendant to be found guilty of an FCPA violation, the government must, among other things, prove beyond a reasonable doubt that the intended recipient of the corrupt payment at issue was a "foreign official" at the time of the alleged payment.

The term "foreign official" means any officer or employee of a foreign government (or any department, agency, or instrumentality thereof), or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality.

A "state-owned" business enterprise may, under certain circumstances, qualify as an "instrumentality" of a foreign government. On the other hand, not all "state-owned" business enterprises qualify as "instrumentalities" of a foreign government. It is up to you to determine, weighing all of the evidence, whether a particular business enterprise is or is not an "instrumentality" of a foreign government, and whether the officers and employees of that enterprise therefore are – or are not – "foreign officials" under the statute.

To conclude that a business enterprise is an "instrumentality" of a foreign government, you must conclude beyond a reasonable doubt that the business enterprise is part of the foreign government itself. In order to conclude that a business enterprise is part of the foreign government itself, you must find that the government has established, beyond a reasonable doubt, each of the following four elements:

First, the foreign government itself directly owns at least a majority of the business enterprise's shares.

Second, the foreign government itself controls the day-to-day operations of the business enterprise, including the appointment of key officers and directors (who themselves may be government officials); the hiring and firing of employees; the

financing of the enterprise through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties; and the approval of contract specifications and the awarding of contracts.

Third, the business enterprise exists for the sole and exclusive purpose of performing a public function traditionally carried out by the government. A "public function" is a function that benefits only the foreign government (and its citizens), not private shareholders. A business enterprise that exists to maximize profits rather than pursue public objectives does not perform a public function and therefore is not a foreign government instrumentality.

Fourth, employees of the business enterprise are considered to be public employees or civil servants under the law of the foreign country.

If the government fails to prove each of these four elements beyond a reasonable doubt for the "state-owned" business enterprise at issue in a particular count, and therefore fails to prove that the intended recipient of the alleged corrupt payment was a "foreign official," you must find the defendant "not guilty" on that count.

A business enterprise is not a foreign government instrumentality if it is a mere subsidiary of a state-owned company. To qualify as a foreign government instrumentality, the business enterprise must, as set forth above, be directly and majority owned by the foreign government itself. Therefore, an employee of a business enterprise that is merely a subsidiary of another entity that is majority owned by the foreign government is not an employee of a foreign government instrumentality and is not a "foreign official."

A business enterprise that 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, is not a foreign government instrumentality, and its employees therefore are not "foreign officials."

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2011, I electronically filed the foregoing **DEFENDANTS' PROPOSED JURY INSTRUCTION REGARDING "FOREIGN OFFICIAL" AND "INSTRUMENTALITY"; SUPPORTING MEMORANDUM OF POINTS AND AUTHORITIES** with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

STUART CARSON, et al.,

Defendants.

CASE NO. SA CR 09-00077-JVS

DECLARATION OF NICOLA T. HANNA IN SUPPORT OF DEFENDANTS' PROPOSED JURY INSTRUCTION REGARDING "FOREIGN OFFICIAL" AND "INSTRUMENTALITY"

Hearing
Date: August 12, 2011
Time: 1:30 p.m.
Courtroom: 10C
Trial Date: June 5, 2012
The Honorable James V. Selna

I, Nicola T. Hanna, declare as follows:

1. I am an attorney licensed to practice law in all courts in the State of California and am admitted to practice before the United States District Court, Central District of California. I am a partner in the law firm of Gibson, Dunn & Crutcher LLP and am one of the attorneys responsible for the representation of Defendant Stuart Carson in this matter. I make this declaration of my own personal knowledge, unless the context indicates otherwise, and, if called as a witness, I could and would testify competently to the facts stated herein.

2. Attached hereto as **Exhibit A** is a true and correct copy of relevant portions of the Reporter's Transcript of Proceedings from the May 9, 2011 hearing on Defendants' Motion to Dismiss Counts One Through Ten Of The Indictment.

3. Attached hereto as **Exhibit B** is a true and correct copy of relevant portions of the jury instructions given in *United States v. Aguilar*, Case No. CR 10-1031 (C.D. Cal.).

4. Attached hereto as **Exhibit C** is a true and correct copy of relevant portions of the United States' Response to OECD Questions Concerning Phase I, dated October 30, 1998.

5. Attached hereto as **Exhibit D** is a true and correct copy of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents.

6. Attached hereto as **Exhibit E** is a true and correct copy of Judge Matz's order dated April 20, 2011 denying defendants' motion to dismiss in *United States v. Aguilar*, Case No. CR 10-1031 (C.D. Cal.).

7. Attached hereto as **Exhibit F** is a true and correct copy of FCPA Opinion Procedure Release No. 10-03, dated September 1, 2010.

I declare under penalty of perjury under the laws of the United States of

America that the foregoing is true and correct and that this declaration was executed on June 30, 2011, at Irvine, California.

/s/Nicola T. Hanna
Nicola T. Hanna

101107872.1

Exhibit A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

- - -

THE HONORABLE JAMES V. SELNA, JUDGE PRESIDING

UNITED STATES OF AMERICA,
Plaintiff,
vs.

SACR-09-00077-JVS

STUART CARSON, et al.,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Santa Ana, California

May 9, 2011

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ALSO PRESENT:

Mandarin Interpreter

coverage that is out there -- there has been and always will be a focus on what is meant -- what the government interprets the term "instrumentality" means, and what is the application of that to the law?

Mr. Wiechert's question is what is the definition of "instrumentality"? I would suggest that there are many times where that is appropriate to ask, but at a Motion to Dismiss state, that is not the appropriate time. That is a question for the jury. The government anticipates there will be lengthy briefing over the jury instruction going to the definition of "instrumentality."

The government would submit that the various factors that Your Honor has identified are pretty coextensive with those that Judge Matz has identified, with those that the OCED has identified, those that the government offered in stipulation with the defendants. We think that this is a typical standard for various juries to consider, whether -- in the Ninth Circuit, there was a case where they looked at intimidation in a bank robbery statute. There are a number of different factors that a jury must look to in terms of identifying that. The cite there is 56 F.3d 175.

Similarly, in gift and income tax laws, what is -- a question whether it is a gift or whether it is income. There is a wide variety of factors that must be looked at by

The second prong is majority ownership. If you hit majority ownership, then automatically you are considered an instrumentality.

What they did not discuss was the organ prong of the Foreign Sovereign Immunities Act, which discusses at greater length and identifies a number of the factors which the government drew upon in identifying the various factors of what an instrumentality is and which are relevant for determining what an instrumentality of a foreign government is. I think the subsidiary point focuses specifically on the majority ownership and not necessarily on the organ prong of the Foreign Sovereign Immunities Act.

In terms of what the various factors are that are necessary for a jury to determine, the government respectfully submits that that will be extensively briefed, and that is something which is appropriate at the time to discuss but is not appropriate at this stage and is not necessary in an as-applied challenge, because with the facts that are present in this case, we are not discussing the Sico case. We are making very clear the characteristics of the entity, the control of the entity, and that the purpose of those activities being the delivery of power, the creation and generation of power, are squarely within the FPCA itself. I would point to that routine governmental exception, whereas, they call it the facilitation payments

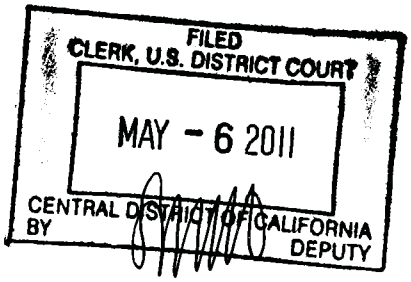
CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: May 17, 2011

Sharon A. Seffens 5/17/11
_____
SHARON A. SEFFENS, U.S. COURT REPORTER

Exhibit B



UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA Plaintiff, v. ENRIQUE FAUSTINO AGUILAR NORIEGA, ANGELA MARIA GOMEZ AGUILAR, KEITH E. LINDSEY, STEVE K. LEE, AND LINDSEY MANUFACTURING COMPANY, Defendants.	CASE NO. CR 10-1031 AHM JURY INSTRUCTIONS

COURT'S INSTRUCTION NO. 31 (CONT'D)

Transmitting or receiving funds through use of a bank that does business in the United States constitutes the use of a means or instrumentality of interstate commerce.

"Payment"

The defendant must have intended to further a payment, or an offer, promise, or authorization of payment, of money or of anything of value. However, it is not required that the payment actually be made, because an offer or promise to pay and the authorization of payment by the defendant are also prohibited by the FCPA. Thus, if the defendant authorized another person to pay a bribe, that authorization alone is sufficient for you to find that this element has been proven.

"Knowledge"

A person has "knowledge" for purposes of the FCPA if: (a) he is aware that he is engaging in conduct, or that a circumstance exists, or that a result is substantially certain to occur; or (b) he has a firm belief that such circumstance exists or that such result is substantially certain to occur. A person is deemed to have such knowledge if the evidence shows he was aware of a high probability of the existence of such circumstance, unless he actually believes such circumstance does not exist.

"Foreign Official"

The term "foreign official" means any officer or employee of a foreign government (or any department, agency, or instrumentality of that government), or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality. An "instrumentality" of a foreign government can include certain state-owned or state-controlled companies.

Exhibit C

(OECD) U.S. RESPONSE TO PHASE 1 QUESTIONNAIRE

Response of the United States

to the Phase I Questionnaire

DAFFE/IME/BR(98)8/ADD1/FINAL

October 30, 1998

QUESTIONNAIRE 1999: FIRST SELF-EVALUATION AND MUTUAL REVIEW

A. QUESTIONS CONCERNING THE CONVENTION

Formal Issues

F.1. Signature of the Convention:

The United States signed the Convention on December 17, 1997.

F.2. Ratification of the Convention:

The President of the United States sent the Convention to the Senate on May 1, 1998 for its advice and consent to ratification. The Senate voted its advice and consent on July 31, 1998, and the President is expected to sign the instrument of ratification in early November.

F.3 Enactment of any necessary implementing legislation:

The Administration sent draft legislation implementing the Convention to the Congress on May 4, 1998. The Congress passed implementing legislation on October 21, 1988, and it is expected that the President will sign it into law in early November. A copy of the implementing legislation is attached at Tab 1 and a copy of the amended FCPA is attached at Tab 2.

F.4. Entry into force of any necessary implementing legislation:

The implementing legislation will enter into force upon signature by the President.

Substantive issues

0. The Convention as a whole

0.1 Describe the general approach of your national law to implementing the Convention (1 page maximum length). (Note Commentaries 1 and 2.)

The United States believes the bribery of foreign government officials in international business transactions is a serious threat to the development and preservation of democratic institutions and strongly supports effective implementation of the Convention to assure fair and open competition in international business. Since 1977, the United States has outlawed bribery of foreign officials in commercial transactions by its nationals and companies organized under its laws. In addition, the United States has worked with other countries and in various international fora, including the OECD, the United Nations, the Council of Europe, and the Organization of American States, to encourage the enactment of similar prohibitions by other major trading countries.

The Convention approved by this Working Group and signed by representatives of the OECD member States and five other countries in December 1997closely parallels the United States Foreign Corrupt Practices Act (the "FCPA"). In a few areas, *e.g.*, coverage of bribes by non-nationals and coverage bribes to officials of international organizations, the Convention was broader than the FCPA, and the United States has enacted legislation to conform the FCPA to those provisions of the Convention. In other areas, *e.g.*, coverage of political parties, party officials, and candidates for public office, the Convention is narrower than the FCPA, and the United States continues to encourage that these areas be addressed.

1. Article 1. The Offence of Bribery of Foreign Public Officials

1.1 Describe how your national law and legal system implement the requirements of Article 1, concerning the offence of bribery of foreign public officials. In this description pay particular attention to explaining how your law treats the elements in the following checklist. The Commentaries corresponding to the Article provide guidance on the interpretation of certain elements.

The Foreign Corrupt Practices Act of 1977 (the "FCPA"), as amended, 15 U.S.C. §§78m, 78dd-1, *et seq.*, requires all publicly-traded corporations to maintain transparent books and records and prohibits *all* U.S. companies and nationals from making any payment or gift, or offering to do so, to a broad range of foreign public officials. Specifically, the FCPA prohibits:

1. the use of the mails or other means or instrumentality of interstate commerce

2. corruptly

3. in furtherance of an offer, payment, promise to pay or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value

4. to any foreign official, foreign political party, foreign political party official, or any other person knowing that all or a portion of such gift will be offered, given or promised, directly or indirectly, to such persons

5. for the purpose of:

- influencing any act or decision of such officials,

- inducing such officials to do or omit to do any act in violation of the lawful duty of such officials,

- obtaining an improper advantage, or

- inducing such officials to use their influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality

6. to assist the payer of such payment or gift in obtaining or retaining business for or with, or directing any business to, any person.

Prior to its 1998 amendments, the FCPA substantially implemented Article 1 of the Convention. It established a criminal offense for U.S. nationals and businesses to bribe, or attempt to bribe, foreign officials in connection with obtaining or retaining business. To fully implement the Convention, the United States has amended the FCPA to cover prohibited acts by "any person," including foreign nationals who take any act within the United States in furtherance of a bribe or attempted bribe; to assert nationality jurisdiction over U.S. nationals and businesses for acts taken outside the United States; to expand the definition of foreign public official to include officials of international

organizations; and to explicitly incorporate the Convention's terminology with respect to "other improper advantage."

In addition to the subjecting American companies to criminal prosecutions, the passage of the FCPA encouraged American businesses engaged in international business to develop comprehensive corporate compliance programs, in which corporations establish procedures to prevent the payment of bribes, conduct internal investigations when allegations of bribery are brought to management's attention, and voluntarily disclose to the government any bribery uncovered as a result of their investigation. The combination of vigilant enforcement by the government and voluntary compliance programs by the private sector, in our view, has significantly reduced the payment of bribes by American businesses.

In addition to criminal penalties, the FCPA provides for significant civil and penal remedies, including injunctions, fines, and imprisonment. Civil enforcement responsibility over public companies is entrusted to the United States Securities and Exchange Commission (the "SEC"), and criminal enforcement over all companies and individuals, as well as civil enforcement over non-public companies, is entrusted to the Department of Justice.

- **any person**

As amended, the FCPA covers bribes paid by "any person." Prior to its 1998 amendments, the FCPA prohibited bribes and attempted bribes by "issuers" and "domestic concerns," as well as their officers, directors, employees, agents, and their shareholders acting on behalf of the issuer. 15 U.S.C. §§ 78dd-1, 78dd-2. "Issuers" included any corporation, domestic or foreign, that had registered a class of securities with the SEC or is required to file reports with the SEC, *i.e.*, any corporation with its stocks, bonds, or American depository receipts traded on U.S. stock exchanges or the NASDAQ Stock Market. "Domestic concerns" included all citizens, nationals, and residents of the United States as well as all business entities, other than issuers, that had their principal place of business in the United States or which were organized under the laws of the United States or a political subdivision thereof. *See* 15 U.S.C. § 78dd-2(h)(1). The 1998 amendments extended coverage of the FCPA to all other persons, natural or juridical, who do any act in furtherance of a bribe while in the territory of the United States. *See* 15 U.S.C. § 78dd-3.

- **intentionally**

The FCPA requires that the person charged have undertaken an act in furtherance of the unlawful payment "corruptly." "Corruptly" requires intent. As stated in the legislative history of the FCPA:

The word 'corruptly' is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payer or his client, or to obtain preferential legislation or a favorable regulation. The word 'corruptly' connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not require that the act be fully consummated, or succeed in producing the desired outcome.

See Senate Report No. 114, 95th Cong., 1st Sess. 10, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4098, 4108.

- **to offer, promise, or give**

The FCPA covers acts in furtherance of "an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value." *See* 18 U.S.C. §§ 78dd-1(a); 78dd-2(a); 78dd-3(a).

- **any undue pecuniary or other advantage**

The FCPA covers both the payments of money or the gift "of anything of value." *See* 18 U.S.C. §§ 78dd-1(a); 78dd-2(a); 78dd-3(a).

- **whether directly or through intermediaries**

The FCPA prohibits payments or gifts (or offers thereof) either directly or through intermediaries. An unlawful payment under the FCPA includes payments made to "*any* person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly" to a foreign official. 15 U.S.C. §§ 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3).

- **to a foreign official**

As amended, the FCPA definition of "foreign official" includes "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." *See* 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2), 78dd-3(f)(2).

The FCPA thus applies to payments to foreign officials who are employees of "instrumentalities" of foreign governments and public international organizations. Although the FCPA does not contain an explicit reference to "public enterprises" or any definition thereof, the United States has consistently applied to the FCPA to cover bribery of officials of public enterprises. State-owned business enterprises may, in appropriate circumstances, be considered instrumentalities of a foreign government and their officers and employees to be foreign officials. The Department of Justice, which enforces the criminal provisions of the FCPA, has not adopted a bright-line test for determining which enterprises are instrumentalities. Among the factors that it considers are the foreign state's own characterization of the enterprise and its employees, *i.e.*, whether it prohibits and prosecutes bribery of the enterprise's employees as public corruption, the purpose of the enterprise, and the degree of control exercised over the enterprise by the foreign government.

The FCPA also prohibits payments to "any candidate for foreign political office" and "any foreign political party or official thereof" to influence that party's or individual's decision-making or to induce that party or individual to take any act or to use its or his influence in connection with obtaining or retaining business.

Although the FCPA does not define "foreign country," Other provisions of the U.S. Code provide guidance. For instance, the Foreign Agent Registration Act, which has been incorporated into other statutes, provides:

The term "government of a foreign country" includes any person or group of persons exercising sovereign de facto or de jure political jurisdiction over any country, other than the United States, or over any part of such country, and includes any subdivision of any such group and any group or agency to which such sovereign de facto or de jure authority or functions are directly or indirectly delegated. Such term shall include any faction or body of insurgents within a country assuming to exercise governmental authority whether such faction or body of insurgents has or has not been recognized by the United States.

22 U.S.C. § 611(e). *See also* 5 U.S.C. § 7342(a)(2) (gifts from foreign governments). Title 18 of the United States Code, which contains most federal criminal offenses (but not the FCPA), provides:

The term "foreign government" . . . includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.

Finally, the United States has made specific provisions for certain governments. For instance, although the United States does not recognize Taiwan as an independent sovereign state, the U.S. Code provides that wherever U.S. laws refer to foreign countries or governments such terms should be read to include Taiwan and such laws, including the FCPA, should apply with respect to Taiwan. *See* 22 U.S.C. § 3303.

- **for that official or for a third party**

Whether the public official benefitted personally from an unlawful payment or gift or directed that the payment or gift be directed to a third person is irrelevant under the FCPA. The sole issue is whether the payment or gift (or offer or promise) of money or anything of value was made to the public official.

- **in order that the official act or refrain from acting in relation to the performance of official duties**

The FCPA prohibits payments that are intended to "influenc[e] any act or decision of [a] foreign official in his official capacity, or [to] induc[e] such foreign official to do or omit to do any act in violation of the lawful duty of such official, or [to] induc[e] such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality." *See* 18 U.S.C. §§ 78dd-1(a); 78dd-2(a); 78dd-3(a).

The FCPA includes payments to induce a foreign public official to use his influence, whether or not the award of specific business is within his authorized duties.

- **in order to obtain or retain business or other improper advantage**

The FCPA prohibits payments made to influence a foreign public official's decision or to induce him to do or omit to do an act "to assist such [issuer, domestic concern, or other person] in obtaining or retaining business for or with, or directing business to, any person." *See* 18 U.S.C. § 78dd-1(a), 78dd-2(a), 78dd-3(a). The 1998 amendments to the FCPA clarify that the FCPA covers payments to "secure any improper advantage" in connection with obtaining or retaining such business. *See id.*

Exhibit D

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

and Related Documents

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Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Negotiating Conference on 21 November 1997

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 1

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 DAFFE/IME/BR(97)18/FINAL (annexed), 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.

Annex
Statistics on OECD Exports

	1990-1996 US$ million	1990-1996	1990-1996
		% of Total OCDE	% 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 OCDE	**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 per cent of combined total exports of those ten countries, which is required for entry into force under this provision.

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.

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. 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.

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.

Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Council on 26 November 2009

THE COUNCIL,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997 (hereinafter "the OECD Anti-Bribery Convention");

Having regard to the Revised Recommendation of the Council on Bribery in International Business Transactions of 23 May 1997 [C(97)123/FINAL] (hereinafter "the 1997 Revised Recommendation") to which the present Recommendation succeeds;

Having regard to the Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 25 May 2009 [C(2009)64], the Recommendation of the Council on Bribery and Officially Supported Export Credits of 14 December 2006 [C(2006)163], the Recommendation of the Development Assistance Committee on Anti-corruption Proposals for Bilateral Aid Procurement of 7 May 1996 [DCD/DAC(96)11/FINAL], and the OECD Guidelines for Multinational Enterprises of 27 June 2000 [C(2000)96/REV1];

Considering the progress which has been made in the implementation of the OECD Anti-Bribery Convention and the 1997 Revised Recommendation and reaffirming the continuing importance of the OECD Anti-Bribery Convention and the Commentaries to the Convention;

Considering that bribery of foreign public officials is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns, undermining good governance and sustainable economic development, and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery of foreign public officials in international business transactions;

Reiterating the importance of the vigorous and comprehensive implementation of the OECD Anti-Bribery Convention, particularly in relation to enforcement, as reaffirmed in the Statement on a Shared Commitment to Fight Against Foreign Bribery, adopted by Ministers of the Parties to the OECD Anti-Bribery Convention on 21 November 2007, the Policy Statement on Bribery in International Business Transactions, adopted by the Working Group on Bribery on 19 June 2009, and the Conclusions adopted by the OECD Council Meeting at Ministerial Level on 25 June 2009 [C/MIN(2009)5/FINAL];

Recognising that the OECD Anti-Bribery Convention and the United Nations Convention against Corruption (UNCAC) are mutually supporting and complementary, and that ratification and implementation of the UNCAC supports a comprehensive approach to combating the bribery of foreign public officials in international business transactions;

Welcoming other developments which further advance international understanding and co-operation regarding bribery in international business transactions, including actions of the Council of Europe, the European Union and the Organisation of American States;

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

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

General

I. **NOTES** that the present Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions shall apply to OECD Member countries and other countries party to the OECD Anti-Bribery Convention (hereinafter "Member countries").

II. **RECOMMENDS** that Member countries continue taking effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

III. **RECOMMENDS** that each Member country take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine the following areas:

i) awareness-raising initiatives in the public and private sector for the purpose of preventing and detecting foreign bribery;

ii) criminal laws and their application, in accordance with the OECD Anti-Bribery Convention, as well as sections IV, V, VI and VII, and the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as set out in Annex I to this Recommendation;

iii) tax legislation, regulations and practice, to eliminate any indirect support of foreign bribery, in accordance with the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, and section VIII of this Recommendation;

iv) provisions and measures to ensure the reporting of foreign bribery, in accordance with section IX of this Recommendation;

v) company and business accounting, external audit, as well as internal control, ethics, and compliance requirements and practices, in accordance with section X of this Recommendation;

vi) laws and regulations on banks and other financial institutions to ensure that adequate records would be kept and made available for inspection and investigation;

vii) public subsidies, licences, public procurement contracts, contracts funded by official development assistance, officially supported export credits, or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with sections XI and XII of this Recommendation;

viii) civil, commercial, and administrative laws and regulations, to combat foreign bribery;

ix) international co-operation in investigations and other legal proceedings, in accordance with section XIII of this Recommendation.

Criminalisation of Bribery of Foreign Public Officials

IV. **RECOMMENDS,** in order to ensure the vigorous and comprehensive implementation of the OECD Anti-Bribery Convention, that Member countries should take fully into account the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, set forth in Annex I hereto, which is an integral part of this Recommendation.

V. **RECOMMENDS** that Member countries undertake to periodically review their laws implementing the OECD Anti-Bribery Convention and their approach to enforcement in order to effectively combat international bribery of foreign public officials.

VI. **RECOMMENDS**, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should:

i) undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;

ii) encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records.

VII. **URGES** all countries to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of small facilitation payments.

Tax Deductibility

VIII. **URGES** Member countries to:

i) fully and promptly implement the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which recommends in particular "that Member countries and other Parties to the OECD Anti-Bribery Convention explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner", and that "in accordance with their legal systems" they "establish an effective legal and administrative framework and provide guidance to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities";

ii) support the monitoring carried out by the Committee on Fiscal Affairs as provided under the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

Reporting Foreign Bribery

IX. **RECOMMENDS** that Member countries should ensure that:

i) easily accessible channels are in place for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities, in accordance with their legal principles;

ii) appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery of foreign public officials in international business transactions detected in the course of their work, in accordance with their legal principles;

iii) appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.

Accounting Requirements, External Audit, and Internal Controls, Ethics and Compliance

X. **RECOMMENDS** that Member countries take the steps necessary, taking into account where appropriate the individual circumstances of a company, including its size, type, legal structure and geographical and industrial sector of operation, so that laws, rules or practices with respect to accounting requirements, external audits, and internal controls, ethics and compliance are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business, according to their jurisdictional and other basic legal principles.

A. Adequate accounting requirements

i) Member countries shall, in accordance with Article 8 of the OECD Anti-Bribery Convention, take such measures as may be necessary, within the framework of their 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;

ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities;

iii) Member countries shall, in accordance with Article 8 of the OECD Anti-Bribery Convention, 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.

B. Independent External Audit

i) Member countries should consider whether requirements on companies to submit to external audit are adequate;

ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls;

iii) Member countries should require the external auditor who discovers indications of a suspected act of bribery of a foreign public official to report this discovery to management and, as appropriate, to corporate monitoring bodies;

iv) Member countries should encourage companies that receive reports of suspected acts of bribery of foreign public officials from an external auditor to actively and effectively respond to such reports;

v) Member countries should consider requiring the external auditor to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and for those countries that permit such reporting, ensure that auditors making such reports reasonably and in good faith are protected from legal action.

C. Internal controls, ethics, and compliance

Member countries should encourage:

i) companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance, set forth in Annex II hereto, which is an integral part of this Recommendation;

ii) business organisations and professional associations, where appropriate, in their efforts to encourage and assist companies, in particular small and medium size enterprises, in developing internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance, set forth in Annex II hereto;

iii) company management to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those which contribute to preventing and detecting bribery;

iv) the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards;

v) companies to provide channels for communication by, and protection of, persons not willing to violate professional standards or ethics under instructions or pressure from

hierarchical superiors, as well as for persons willing to report breaches of the law or professional standards or ethics occurring within the company in good faith and on reasonable grounds, and should encourage companies to take appropriate action based on such reporting;

vi) their government agencies to consider, where international business transactions are concerned, and as appropriate, internal controls, ethics, and compliance programmes or measures in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits.

Public Advantages, including Public Procurement

XI. **RECOMMENDS**:

i) Member countries' laws and regulations should permit authorities to suspend, to an appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance, enterprises determined to have bribed foreign public officials in contravention of that Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials;[1]

ii) In accordance with the 1996 Development Assistance Committee Recommendation on Anti-corruption Proposals for Bilateral Aid Procurement, Member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts;[2]

iii) Member countries should support the efforts of the OECD Public Governance Committee to implement the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement [C(2008)105], as well as work on transparency in public procurement in other international governmental organisations such as the United Nations, the World Trade Organisation (WTO), and the European Union, and are encouraged to adhere to relevant international standards such as the WTO Agreement on Government Procurement.

1 Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.

2 This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD Members and eventually non-member countries which adhere to the Recommendation.

Officially Supported Export Credits

XII. **RECOMMENDS**:

i) Countries Party to the OECD Anti-Bribery Convention that are not OECD Members should adhere to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits;

ii) Member countries should support the efforts of the OECD Working Party on Export Credits and Credit Guarantees to implement and monitor implementation of the principles contained in the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits.

International Co-operation

XIII. **RECOMMENDS** that Member countries, in order to effectively combat bribery of foreign public officials in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

i) consult and otherwise co-operate with competent authorities in other countries, and, as appropriate, international and regional law enforcement networks involving Member and non-Member countries, in investigations and other legal proceedings concerning specific cases of such bribery, through such means as the sharing of information spontaneously or upon request, provision of evidence, extradition, and the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials;

ii) seriously investigate credible allegations of bribery of foreign public officials referred to them by international governmental organisations, such as the international and regional development banks;

iii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

iv) ensure that their national laws afford an adequate basis for this co-operation, in particular in accordance with Articles 9 and 10 of the OECD Anti-Bribery Convention;

v) consider ways for facilitating mutual legal assistance between Member countries and with non-Member countries in cases of such bribery, including regarding evidentiary thresholds for some Member countries.

Follow-up and institutional arrangements

XIV. **INSTRUCTS** the Working Group on Bribery in International Business Transactions, to carry out an ongoing programme of systematic follow-up to monitor and promote the full implementation of the OECD Anti-Bribery Convention and this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee, the Investment Committee, the Public Governance Committee, the Working Party on Export Credits and Credit Guarantees, and other OECD bodies, as appropriate. This follow-up will include, in particular:

i) continuation of the programme of rigorous and systematic monitoring of Member countries' implementation of the OECD Anti-Bribery Convention and this Recommendation to promote the full implementation of these instruments, including through an ongoing system of mutual evaluation, where each Member country is 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 Member country in implementing the OECD Anti-Bribery Convention and this Recommendation, and which will be made publicly available;

ii) receipt of notifications and other information submitted to it by the Member countries concerning the authorities which serve as channels of communication for the purpose of facilitating international cooperation on implementation of the OECD Anti-Bribery Convention and this Recommendation;

iii) regular reporting on steps taken by Member countries to implement the OECD Anti-Bribery Convention and this Recommendation, including non-confidential information on investigations and prosecutions;

iv) voluntary meetings of law enforcement officials directly involved in the enforcement of the foreign bribery offence to discuss best practices and horizontal issues relating to the investigation and prosecution of the bribery of foreign public officials;

v) examination of prevailing trends, issues and counter-measures in foreign bribery, including through work on typologies and cross-country studies;

vi) development of tools and mechanisms to increase the impact of monitoring and follow-up, and awareness raising, including through the voluntary submission and public reporting of non-confidential enforcement data, research, and bribery threat assessments;

vii) provision of regular information to the public on its work and activities and on implementation of the OECD Anti-Bribery Convention and this Recommendation.

XV. **NOTES** the obligation of Member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960, and Article 12 of the OECD Anti-Bribery Convention.

Co-operation with non Members

XVI. **APPEALS** to non-Member countries that are major exporters and foreign investors to adhere to and implement the OECD Anti-Bribery Convention and this Recommendation and participate in any institutional follow-up or implementation mechanism.

XVII. **INSTRUCTS** the Working Group on Bribery in International Business Transactions to provide a forum for consultations with countries which have not yet adhered, in order to promote wider participation in the OECD Anti-Bribery Convention and this Recommendation, and their follow-up.

Relations with international governmental and non-governmental organisations

XVIII. **INVITES** the Working Group on Bribery in International Business Transactions, to consult and co-operate with the international organisations and international financial institutions active in the fight against bribery of foreign public officials in international business transactions, and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

Annex I:
Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

Having regard to the findings and recommendations of the Working Group on Bribery in International Business Transactions in its programme of systematic follow-up to monitor and promote the full implementation of the OECD Convention on Combating Bribery in International Business Transactions (the OECD Anti Bribery Convention), as required by Article 12 of the Convention, good practice on fully implementing specific articles of the Convention has evolved as follows:

A) Article 1 of the OECD Anti Bribery Convention: The Offence of Bribery of Foreign Public Officials

Article 1 of the OECD Anti-Bribery Convention should be implemented in such a way that it does not provide a defence or exception where the foreign public official solicits a bribe.

Member countries should undertake public awareness-raising actions and provide specific written guidance to the public on their laws implementing the OECD Anti-Bribery Convention and the Commentaries to the Convention.

Member countries should provide information and training as appropriate to their public officials posted abroad on their laws implementing the OECD Anti-Bribery Convention, so that such personnel can provide basic information to their companies in foreign countries and appropriate assistance when such companies are confronted with bribe solicitations.

B) Article 2 of the OECD Anti Bribery Convention: Responsibility of Legal Persons

Member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted.

Member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:

a. the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or

b. the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:

   – A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;

   – A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and

– A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

C) Responsibility for Bribery through Intermediaries

Member countries should ensure that, in accordance with Article 1 of the OECD Anti Bribery Convention, and the principle of functional equivalence in Commentary 2 to the OECD Anti-Bribery Convention, a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf.

D) Article 5: Enforcement

Member countries should be vigilant in ensuring that investigations and prosecutions of the bribery of foreign public officials in international business transactions are not 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, in compliance with Article 5 of the OECD Anti Bribery Convention.

Complaints of bribery of foreign public officials should be seriously investigated and credible allegations assessed by competent authorities.

Member countries should provide adequate resources to law enforcement authorities so as to permit effective investigation and prosecution of bribery of foreign public officials in international business transactions, taking into consideration Commentary 27 to the OECD Anti Bribery Convention.

Annex II
Good practice guidance on internal controls, ethics, and compliance

This Good Practice Guidance acknowledges the relevant findings and recommendations of the Working Group on Bribery in International Business Transactions in its programme of systematic follow-up to monitor and promote the full implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter "OECD Anti-Bribery Convention"); contributions from the private sector and civil society through the Working Group on Bribery's consultations on its review of the OECD anti-bribery instruments; and previous work on preventing and detecting bribery in business by the OECD as well as international private sector and civil society bodies.

Introduction

This Good Practice Guidance (hereinafter "Guidance") is addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting the bribery of foreign public officials in their international business transactions (hereinafter "foreign bribery"), and to business organisations and professional associations, which play an essential role in assisting companies in these efforts. It recognises that to be effective, such programmes or measures should be interconnected with a company's overall compliance framework. It is intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery.

This Guidance is flexible, and intended to be adapted by companies, in particular small and medium sized enterprises (hereinafter "SMEs"), according to their individual circumstances, including their size, type, legal structure and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.

A) Good Practice Guidance for Companies

Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures. Companies should consider, *inter alia*, the following good practices for ensuring effective internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery:

1. strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery;

2. a clearly articulated and visible corporate policy prohibiting foreign bribery;

3. compliance with this prohibition and the related internal controls, ethics, and compliance programmes or measures is the duty of individuals at all levels of the company;

4. oversight of ethics and compliance programmes or measures regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority;

5. ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, *inter alia*, the following areas:

   i) gifts;
   ii) hospitality, entertainment and expenses;
   iii) customer travel;
   iv) political contributions;
   v) charitable donations and sponsorships;
   vi) facilitation payments; and
   vii) solicitation and extortion;

6. ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter "business partners"), including, *inter alia*, the following essential elements:

   i) properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners;
   ii) informing business partners of the company's commitment to abiding by laws on the prohibitions against foreign bribery, and of the company's ethics and compliance programme or measures for preventing and detecting such bribery; and
   iii) seeking a reciprocal commitment from business partners.

7. a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;

8. measures designed to ensure periodic communication, and documented training for all levels of the company, on the company's ethics and compliance programme or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries;

9. appropriate measures to encourage and provide positive support for the observance of ethics and compliance programmes or measures against foreign bribery, at all levels of the company;

10. appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company's ethics and compliance programme or measures regarding foreign bribery;

11. effective measures for:
    i) providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company's ethics and compliance programme or measures, including when they need urgent advice on difficult situations in foreign jurisdictions;
    ii) internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and
    iii) undertaking appropriate action in response to such reports;

12. periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards.

B) Actions by Business Organisations and Professional Associations

Business organisations and professional associations may play an essential role in assisting companies, in particular SMEs, in the development of effective internal control, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. Such support may include, *inter alia*:

1. dissemination of information on foreign bribery issues, including regarding relevant developments in international and regional forums, and access to relevant databases;

2. making training, prevention, due diligence, and other compliance tools available;

3. general advice on carrying out due diligence; and

4. general advice and support on resisting extortion and solicitation.

Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions

Adopted by the Council on 25 May 2009

THE COUNCIL,

Having regard to Article 5, b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to the Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials [C(96)27/FINAL] (hereafter the "1996 Recommendation"), to which the present Recommendation succeeds;

Having regard to the Revised Recommendation of the Council on Bribery in International Business Transactions [C(97)123/FINAL];

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to which all OECD Members and eight non-Members are Parties, as at the time of the adoption of this Recommendation (hereafter the "OECD Anti-Bribery Convention");

Having regard to the Commentaries on the OECD Anti-Bribery Convention;

Having regard to the Recommendation of the Council concerning the Model Tax Convention on Income and on Capital (hereafter the "OECD Model Tax Convention") [C(97)195/FINAL];

Welcoming the United Nations Convention Against Corruption to which most parties to the OECD Anti-Bribery Convention are State parties, and in particular Article 12.4, which provides that "Each State Party shall disallow the tax deductibility of expenses that constitute bribes"

Considering that the 1996 Recommendation has had an important impact both within and outside the OECD, and that significant steps have already been taken by governments, the private sector and non-governmental agencies to combat the bribery of foreign public officials, but that the problem still continues to be widespread and necessitates strengthened measures;

Considering that explicit legislation disallowing the deductibility of bribes increases the overall awareness within the business community of the illegality of bribery of foreign public officials and within the tax administration of the need to detect and disallow deductions for payments of bribes to foreign public officials; and

Considering that sharing information by tax authorities with other law enforcement authorities can be an important tool for the detection and investigation of transnational bribery offences;

On the proposal of the Committee on Fiscal Affairs and the Investment Committee;

I. RECOMMENDS that:

(i) Member countries and other Parties to the OECD Anti-Bribery Convention explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner. Such disallowance should be established by law or by any other binding means which carry the same effect, such as:

- prohibiting tax deductibility of bribes to foreign public officials;
- prohibiting tax deductibility of all bribes or expenditures incurred in furtherance of corrupt conduct in contravention of the criminal law or any other laws of the Party to the Anti-Bribery Convention.

Denial of tax deductibility is not contingent on the opening of an investigation by the law enforcement authorities or of court proceedings.

(ii) Each Member country and other Party to the OECD Anti-Bribery Convention review, on an ongoing basis, the effectiveness of its legal, administrative and policy frameworks as well as practices for disallowing tax deductibility of bribes to foreign public officials. These reviews should assess whether adequate guidance is provided to taxpayers and tax authorities as to the types of expenses that are deemed to constitute bribes to foreign public officials, and whether such bribes are effectively detected by tax authorities.

(iii) Member countries and other Parties to the OECD Anti-Bribery Convention consider to include in their bilateral tax treaties, the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention, which allows "*the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g. to combat money laundering, corruption, terrorism financing)*" and reads as follows:

"*Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.*"

II. further RECOMMENDS Member countries and other Parties to the OECD Anti-Bribery Convention, in accordance with their legal systems, to establish an effective legal and administrative framework and provide guidance to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities.

III. INVITES non-Members that are not yet Parties to the OECD Anti-Bribery Convention to apply this Recommendation to the fullest extent possible.

IV. INSTRUCTS the Committee on Fiscal Affairs together with the Investment Committee to monitor the implementation of the Recommendation and to promote it in the context of contacts with non-Members and to report to Council as appropriate.

Recommendation of the Council on Bribery and Officially Supported Export Credits

Adopted by the Council on 14 December 2006

THE COUNCIL

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960 and, in particular, to Article 5 b) thereof;

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter the Anti-Bribery Convention) and to the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions [C(97)123] (hereafter the 1997 Recommendation);

Having regard to the 2006 Action Statement on Bribery and Officially Supported Export Credits;

Considering that combating bribery in international business transactions is a priority issue and that the Working Party on Export Credits and Credit Guarantees is the appropriate forum to ensure the implementation of the Anti-Bribery Convention and the 1997 Recommendation in respect of international business transactions benefiting from official export credit support;

Noting that the application by Members of the measures set out in Paragraph 2 in no way mitigates the responsibility of the exporter and other parties in transactions benefiting from official support to: (i) comply with all applicable laws and regulations, including national provisions for combating bribery of foreign public officials in international business transactions, or (ii) provide the proper description of the transaction for which support is sought, including all relevant payments;

On the proposal of the Working Party on Export Credits and Credit Guarantees (hereafter the ECG):

1. RECOMMENDS that Members take appropriate measures to deter bribery[1] in international business transactions benefiting from official export credit support, in accordance with the legal system of each member country and the character of the export credit[2] and not prejudicial to the rights of any parties not responsible for the illegal payments, including:

a) Informing exporters and, where appropriate, applicants, requesting support about the legal consequences of bribery in international business transactions under its national legal system including its national laws prohibiting such bribery and encouraging them to develop, apply and document appropriate management control systems that combat bribery.

1 As defined in the Anti-Bribery Convention.

2 It is recognised that not all export credit products are conducive to a uniform implementation of the Recommendation. For example, on short-term whole-turnover and multi-buyer export credit insurance policies, Members may, where appropriate, implement the Recommendation on an export credit policy basis rather than on a transaction basis.

b) Requiring exporters and, where appropriate, applicants, to provide an undertaking/ declaration that neither they, nor anyone acting on their behalf, such as agents, have been engaged or will engage in bribery in the transaction.

c) Verifying and noting whether exporters and, where appropriate, applicants, are listed on the publicly available debarment lists of the following international financial institutions: World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development and the Inter-American Development Bank[3].

d) Requiring exporters and, where appropriate, applicants, to disclose whether they or anyone acting on their behalf in connection with the transaction are currently under charge in a national court or, within a five-year period preceding the application, have been convicted in a national court or been subject to equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country.

e) Requiring that exporters and, where appropriate, applicants, disclose, upon demand: (i) the identity of persons acting on their behalf in connection with the transaction, and (ii) the amount and purpose of commissions and fees paid**,** or agreed to be paid**,** to such persons.

f) Undertaking enhanced due diligence if: (i) the exporters and, where appropriate, applicants, appear on the publicly available debarment lists of one of the international financial institutions referred to in c) above; or (ii) the Member becomes aware that exporters and, where appropriate, applicants or anyone acting on their behalf in connection with the transaction, are currently under charge in a national court, or, within a five-year period preceding the application, has been convicted in a national court or been subject to equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country; or (iii) the Member has reason to believe that bribery may be involved in the transaction.

g) In case of a conviction in a national court or equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country within a five-year period, verifying whether appropriate internal corrective and preventive measures[4] have been taken, maintained and documented.

[3] The implementation of paragraph 1 c) may take the form of a self-declaration from exporters and, where appropriate, applicants, as to whether they are listed on the publicly available IFI debarment lists.

[4] Such measures could include: replacing individuals that have been involved in bribery, adopting an appropriate anti-bribery management control systems, submitting to an audit and making the results of such periodic audits available.

h) Developing and implementing procedures to disclose to their law enforcement authorities instances of credible evidence[5] of bribery in the case that such procedures do not already exist.

i) If there is credible evidence at any time that bribery was involved in the award or execution of the export contract, informing their law enforcement authorities promptly.

j) If, before credit, cover or other support has been approved, there is credible evidence that bribery was involved in the award or execution of the export contract, suspending approval of the application during the enhanced due diligence process. If the enhanced due diligence concludes that bribery was involved in the transaction, the Member shall refuse to approve credit, cover or other support.

k) If, after credit, cover or other support has been approved bribery has been proven, taking appropriate action, such as denial of payment, indemnification, or refund of sums provided.

2. **INSTRUCTS** the ECG to continue to:

a) Exchange information on how the Anti-Bribery Convention and 1997 Recommendation are being taken into account in national official export credit systems.

b) Collate and map the information exchanged with a view to considering further steps to combat bribery in respect of officially supported export credits.

c) Exchange views with appropriate stakeholders.

3. **INVITES** the Parties to the Anti-Bribery Convention which are not OECD Members to adhere to this Recommendation.

5 For the purpose of this Recommendation, credible evidence is evidence of a quality which, after critical analysis, a court would find to be reasonable and sufficient grounds upon which to base a decision on the issue if no contrary evidence were submitted.

Recommendation of the Development Assistance Committee on Anti-Corruption Proposals for Bilateral Aid Procurement

Recommendation endorsed by the Development Assistance Committee at its High Level Meeting, 6-7 May 1996

1. DAC Members share a concern with corruption:

- It undermines good governance.
- It wastes scarce resources for development, whether from aid or from other public or private sources, with far-reaching effects throughout the economy.
- It undermines the credibility of, and public support for, development co-operation and devalues the reputation and efforts of all who work to support sustainable development.
- It compromises open and transparent competition on the basis of price and quality.

2. The DAC, therefore, firmly endorses the need to combat corruption through effective prohibition, co-ordinated in a multilateral framework to ensure harmonised implementation. Other meaningful and concrete measures are also required to ensure transparency, accountability and probity in the use of public resources in DAC Members' own systems and those of partner countries, who themselves are increasingly concerned with this problem.

3. In its efforts to curb corruption, the DAC recognises that opportunities may exist for corrupt practices in aid-funded procurement. Together with other efforts to deal with corruption, the DAC hereby expresses its firm intention to work to eliminate corruption in aid procurement.

4. **The DAC therefore recommends that Members introduce or require anti-corruption provisions governing bilateral aid-funded procurement. This work should be carried out in co-ordination with other work being undertaken in the OECD and elsewhere to eliminate corruption, and in collaboration with recipient countries. The DAC also recommends that its Members work to ensure the proper implementation of their anti-corruption provisions and that they draw to the attention of the international development institutions to which they belong, the importance of proper implementation of the anti-corruption provisions envisaged in their rules of operation.**

5. **The DAC will follow up on the effect given to this Recommendation within one year.**

6. **DAC Members will work closely with development partners to combat corruption in all development co-operation effort**s.

OECD Guidelines for Multinational Enterprises – Section VII

VII. Combating Bribery, Bribe Solicitation and Extortion

Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion. In particular, enterprises should:

1. Not offer, promise or give undue pecuniary or other advantage to public officials or the employees of business partners. Likewise, enterprises should not request, agree to or accept undue pecuniary or other advantage from public officials or the employees of business partners. Enterprises should not use third parties such as agents and other intermediaries, consultants, representatives, distributors, consortia, contractors and suppliers and joint venture partners for channelling undue pecuniary or other advantages to public officials, or to employees of their business partners or to their relatives or business associates

2. Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation). These internal controls, ethics and compliance programmes or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of bribing or hiding bribery. Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise's internal controls, ethics and compliance programme or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation and extortion.

3. Prohibit or discourage, in internal company controls, ethics and compliance programmes or measures, the use of small facilitation payments, which are generally illegal in the countries where they are made, and, when such payments are made, accurately record these in books and financial records.

4. Ensure, taking into account the particular bribery risks facing the enterprise, properly documented due diligence pertaining to the hiring, as well as the appropriate and regular oversight of agents, and that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents engaged in connection with transactions with public bodies and State-owned enterprises should be kept and made available to competent authorities, in accordance with applicable public disclosure requirements.

5. Enhance the transparency of their activities in the fight against bribery, bribe solicitation and extortion. Measures could include making public commitments against bribery, bribe solicitation and extortion, and disclosing the management systems and the internal controls, ethics and compliance programmes or measures adopted by enterprises in order to honour these commitments. Enterprises should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery, bribe solicitation and extortion.

6. Promote employee awareness of and compliance with company policies and internal controls, ethics and compliance programmes or measures against bribery, bribe solicitation and extortion through appropriate dissemination of such policies, programmes or measures and through training programmes and disciplinary procedures.

7. Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management.

Commentary on Combating Bribery, Bribe Solicitation and Extortion

Bribery and corruption are damaging to democratic institutions and the governance of corporations. They discourage investment and distort international competitive conditions. In particular, the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare, and it impedes efforts to reduce poverty. Enterprises have an important role to play in combating these practices.

Propriety, integrity and transparency in both the public and private domains are key concepts in the fight against bribery, bribe solicitation and extortion. The business community, non-governmental organisations, governments and inter-governmental organisations have all co-operated to strengthen public support for anticorruption measures and to enhance transparency and public awareness of the problems of corruption and bribery. The adoption of appropriate corporate governance practices is also an essential element in fostering a culture of ethics within enterprises.

The *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the *Anti-Bribery Convention*) entered into force on 15 February 1999. The *Anti-Bribery Convention*, along with the *2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (the *2009 Anti-Bribery Recommendation*), the *2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, and the *2006 Recommendation on Bribery and Officially Supported Export Credits*, are the core OECD instruments which target the offering side of the bribery transaction. They aim to eliminate the "supply" of bribes to foreign public officials, with each country taking responsibility for the activities of its enterprises and what happens within its own jurisdiction.[1] A programme of rigorous and systematic monitoring of countries' implementation of the *Anti-Bribery Convention* has been established to promote the full implementation of these instruments.

The 2009 *Anti-Bribery Recommendation* recommends in particular that governments encourage their enterprises to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the *Good Practice Guidance on Internal Controls, Ethics and Compliance*, included as Annex II to the *2009 Anti-Bribery Recommendation.* This *Good Practice Guidance* is addressed to enterprises as well as business organisations and professional associations, and highlights good practices for ensuring the effectiveness

1. For the purposes of the Convention, a "bribe" is defined as an "…offer, promise, or giv(ing) of 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". The Commentaries to the Convention (paragraph 9) clarify that "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. …".

of their internal controls, ethics and compliance programmes or measures to prevent and detect foreign bribery.

Private sector and civil society initiatives also help enterprises to design and implement effective anti-bribery policies.

The *United Nations Convention against Corruption* (*UNCAC*), which entered into force on 14 December 2005, sets out a broad range of standards, measures and rules to fight corruption. Under the *UNCAC*, States Parties are required to prohibit their officials from receiving bribes and their enterprises from bribing domestic public officials, as well as foreign public officials and officials of public international organisations, and to consider disallowing private to private bribery. The *UNCAC* and the *Anti-Bribery Convention* are mutually supporting and complementary.

To address the demand side of bribery, good governance practices are important elements to prevent enterprises from being asked to pay bribes. Enterprises can support collective action initiatives on resisting bribe solicitation and extortion. Both home and host governments should assist enterprises confronted with solicitation of bribes and with extortion. The *Good Practice Guidance on Specific Articles of the Convention* in Annex I of the *2009 Anti-Bribery Recommendation* states that the *Anti-Bribery Convention* should be implemented in such a way that it does not provide a defence or exception where the foreign public official solicits a bribe. Furthermore, the *UNCAC* requires the criminalisation of bribe solicitation by domestic public officials.

www.oecd.org/bribery

Exhibit E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No.	CR10-01031-AHM	Date	April 20, 2011

Present: The Honorable	A. HOWARD MATZ
Interpreter	N/A

Stephen Montes	Cindy Nirenberg	Douglas Miller – Not Present Nicola Mrazek, DOJ – Not Present Jeffrey Goldberg, DOJ – Not Present
Deputy Clerk	*Court Reporter/Recorder, Tape No.*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond	Attorneys for Defendants:	Present	App.	Ret.
(2) Angela Maria Gomez Aguilar		√		Stephen Larson			√
(3) Lindsey Manufacturing Company				Jan L. Handzlik			√
(4) Keith E. Lindsey			√	Jan L. Handzlik			√
(5) Steve K. Lee			√	Janet Levine			√

Proceedings: **IN CHAMBERS (No Proceedings Held)**

I. INTRODUCTION

On October 21, 2010, the Government filed a First Superseding Indictment ("FSI") charging defendants Keith E. Lindsey, Steve K. Lee, and Lindsey Manufacturing Company ("the Lindsey Defendants") with conspiracy to violate the Foreign Corrupt Practices Act ("FCPA"), as well as substantive violations of the FCPA.[1] The gist of the allegations in the FSI is that the Lindsey Defendants paid bribes to two high-ranking employees of the Comisión Federal de Electricidad ("CFE"), an electric utility company wholly-owned by the Mexican government. Lindsey Manufacturing Company ("LMC") funneled the alleged bribes to these employees (Nestor Moreno and Arturo Hernandez) by making payments to Grupo International

[1] The FSI also charges two Mexican citizens with related crimes. Enrique Faustino Aguilar Noriega ("Enrique Aguilar") is charged with conspiracy to violate the FCPA, substantive FCPA violations, conspiracy to commit money laundering, and substantive money laundering violations. Mr. Aguilar is a fugitive. Angela Maria Gomez Aguilar ("Angela Aguilar"), Enrique Aguilar's wife, is charged with conspiracy to commit money laundering and substantive money laundering violations. Enrique Aguilar and Angela Aguilar are referred to collectively herein as the "Aguilar Defendants."

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("Grupo"), a company owned and controlled by the Aguilar Defendants. The payments from LMC to Grupo ostensibly were commissions for services performed by Enrique Aguilar in his capacity as LMC's sales representative in Mexico. In reality, according to the Government, large portions of those payments were used to bribe Messrs. Moreno and Hernandez.

The Government claims these alleged bribes violated the FCPA. As relevant here, the FCPA makes it unlawful for any American company or person acting on behalf of such company to provide money or other benefits to any foreign official in order to obtain or retain business. The FCPA defines a "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality, or for or on behalf of any such public international organization." 15 U.S.C. § 78dd-2(h)(2)(A).

The Lindsey Defendants have moved to dismiss the charges against them. Angela Aguilar has joined their motion. The question presented by the motion is whether an officer or employee of a state-owned corporation can be a "foreign official" for purposes of FCPA liability.[2] Defendants argue that under no circumstances can such a person be a foreign official, because under no circumstances can a state-owned corporation be a department, agency, or instrumentality of a foreign government.[3]

The Court DENIES the motion to dismiss, because a state-owned corporation having the attributes of CFE may be an "instrumentality" of a foreign government within the meaning of the FCPA, and officers of such a state-owned corporation, as Messrs. Nestor Moreno and Arturo Hernandez are alleged to be, may therefore be "foreign officials" within the meaning of

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[2] Defendants have assumed, for purposes of their motion, that CFE is a state-owned corporation. As discussed in the Addendum to this order, the Government never directly challenged that assumption until more than two weeks *after* the Court had issued its oral ruling denying Defendants' motion to dismiss and trial had commenced.

[3] At the hearing on this motion, counsel for Defendant Lee intimated that there is a difference between state-owned corporations that act "as part of the state *qua* state" – whatever that may mean – and those state-owned corporations that engage in commercial activities. Even if that distinction had been explicit in the Defendants' motion to dismiss, however, it would not affect this ruling.

the FCPA.[4]

II. THE FIRST SUPERSEDING INDICTMENT

For purposes of this motion, Defendants "do not dispute the factual allegations in the FSI . . . ." Reply at 2 (emphasis removed). The FSI alleges that "Comisión Federal de Electricidad ('CFE') was an electric utility company owned by the government of Mexico. During the time period relevant to this Indictment, CFE was responsible for supplying electricity to all of Mexico other than Mexico City. CFE contracted with Mexican and foreign companies for goods and services to help supply electricity services to its customers." FSI at 2.

"Official 1 [now known to be Nestor Moreno] was a Mexican citizen who held a senior level position at CFE. Official 1 became the Sub-Director of Generation for CFE in 2002 and the Director of Operations in 2007. Official 1's position at CFE made him a 'foreign official,' as that term is defined in the FCPA, 15 U.S.C. § 78dd-2 (h) (2). . . . Official 2 [now known to be Arturo Hernandez] was a Mexican citizen who also held a senior level position at CFE. Official 2 was the Director of Operations at CFE until that position was taken over by Official 1 in 2007. Official 2's position at CFE made him a 'foreign official,' as that term is defined in the FCPA, 15 U.S.C. § 78dd-2 (h) (2)." *Id.* at 2-3.

"Defendant Lindsey Manufacturing Company . . . was a privately held company incorporated in California and headquartered in Azusa, California. . . . Defendant Lindsey Manufacturing manufactured emergency restoration systems . . . and other equipment that was used by electrical utility companies. . . . Many of defendant Lindsey Manufacturing's clients were foreign, state-owned utilities, including CFE . . . ." *Id.* at 3.

"Defendant Keith E. Lindsey . . . was the President of defendant Lindsey Manufacturing.

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[4] The Government argues that this motion should be denied because it is "premature," in that it should not have been made until after the Government had been given the opportunity (at trial) to prove the allegations about CFE in the FSI. Consistent with that contention is the Government's related argument that under Federal Rule of Criminal Procedure 7(c)(1) the allegations in the FSI are plenty sufficient to withstand a motion to dismiss. In principle, both contentions are sound, but because Defendants have chosen to treat their motion as one not requiring any factual determinations about CFE, the Court will address the merits of the motion. In doing so, the Court recognizes that the Government reserved the right to prove at trial that CFE is not only an "instrumentality" of Mexico within the meaning of the FCPA, but also an "agency."

In that position, defendant Lindsey had ultimate authority over all of defendant Lindsey Manufacturing's operations. Defendant Lindsey also had a majority ownership interest in defendant Lindsey Manufacturing . . . . Defendant Steve K. Lee . . . was the Vice President and Chief Financial Officer of defendant Lindsey Manufacturing. In that position, defendant Lee controlled defendant Lindsey Manufacturing's finances . . . ." *Id.* at 3, 4.

"Grupo Internacional De Asesores S.A. ('Grupo') was a company incorporated in Panama and headquartered in Mexico. . . . Grupo's purported business was to provide sales representation services for companies like defendant Lindsey Manufacturing that had business with CFE. Grupo was defendant Lindsey Manufacturing's sales representative in Mexico and received a percentage of the revenue Lindsey Manufacturing received from its contracts with CFE. . . . Defendant Enrique Aguilar . . . was a Director of Grupo and was hired by defendant Lindsey Manufacturing to obtain contracts from CFE. . . . Defendant [Angela Aguilar] was a citizen of Mexico and was married to defendant Enrique Aguilar. [She] served as an Officer and Director of Grupo. In that position, [she] managed Grupo's finances . . . ." *Id.* at 4, 5.

"[D]efendants Enrique Aguilar, Lindsey Manufacturing, Lindsey, and Lee, together with . . . others known and unknown . . . conspired, and agreed to [violate the FCPA]. . . . The object of the conspiracy was carried out . . . as follows: . . . Defendants Lindsey Manufacturing, Lindsey and Lee would agree to pay defendant Enrique Aguilar a thirty percent commission on all of the goods and services defendant Lindsey Manufacturing sold to CFE . . . knowing that all or a portion of that money would be used to pay Official 1 and others at CFE bribes in exchange for CFE awarding defendant Lindsey Manufacturing contracts." *Id.* at 6, 7. The FSI further alleges five substantive FCPA violations committed by these defendants. *Id.* at 16-17. The FSI also alleges that Enrique Aguilar and Angela Aguilar conspired to commit money laundering and did launder money. *Id.* at 18-24.

III. ANALYSIS

A. The Foreign Corrupt Practices Act

The FCPA states: "It shall be unlawful for any domestic concern . . . or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of value to – (1) any foreign official for purposes of . . . (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such

domestic concern in obtaining or retaining business for or with, or directing business to, any person . . . ." 15 U.S.C. § 78dd-2(a).

As noted above, the FCPA defines "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization." *Id.* at § 78dd-2(h)(2)(A). The FCPA does *not* define "instrumentality."

B. The Comisión Federal de Electricidad

For purposes of this motion, the Lindsey Defendants have not disputed the following facts, which were set forth in the Government's opposition papers ("Opp."), as follows:

"Under the Mexican Constitution, the supply of electricity is *solely* a government function. . . . Specifically, Article 27 provides:

> It is exclusively a function of the general Nation to conduct, transform, distribute, and supply electric power which is to be used for public service. No concessions for this purpose will be granted to private persons and the Nation will make use of the property and natural resources which are required for these ends.

Opp. at 3.

"Under [Mexico's] Public Service Act of Electricity of 1975, the organic law that created CFE, CFE is defined as 'a decentralized public entity with legal personality and its own patrimony.' . . . Article 10 provides that CFE's Governing Board is composed of the Secretaries of Finance and Public Credit, Social Development, Trade and Industrial Development of Agriculture and Water Resources, and Energy, Mines, and State Industry, and Article 14 provides that the 'President of the Republic shall appoint the Director General.'" *Id.* at 3-4.

Defendants further acknowledge that CFE is described as a governmental "agency" on its website, which also states that CFE is "a company created and owned by the Mexican government." Motion at 2 n.2, 3 n.3.

C. Defendants' Categorical Motion

Defendants themselves acknowledge that, "[n]one of the issues raised by the instant motion rests on disputed facts and none is dependent on further finding of fact. Defendants argue that, *no matter what other characteristics of CFE the government may attempt to prove at trial*, and assuming that all of the allegations in the FSI are true, as a matter of law no state-owned corporation is an 'instrumentality,' meaning that no CFE employee is a 'foreign official' under the FCPA." *Id.* at 6 (emphasis added). Ergo, contend Defendants, the bribes allegedly paid to Messrs. Moreno and Hernandez could not and did not constitute a violation of the FCPA.

Thus, the question posed by Defendants' motion is not whether CFE itself does or does not have characteristics in common with a department, agency, or instrumentality. Indeed, according to Defendants, CFE's specific characteristics are irrelevant here. Instead, the dispositive question they pose is purely legal: whether *any* entity's status as a state-owned corporation – of any kind, with any characteristics – "disqualifies it as an entity properly addressed by an FCPA indictment." Reply at 2.

D. Defendants' Various Arguments

1. The Plain Meaning of "Instrumentality"

According to Defendants, "[i]t is plain from the definition of 'foreign official' that Congress did not intend for FCPA liability to be based on payments made to employees of state-owned corporations like CFE." Motion at 6. They argue that "[w]hat one of these entities calls itself in a particular case, and into which prong of the 'foreign official' definition the government claims a particular corporation falls, is irrelevant" to the central issue of their motion. *Id.* at 3 n.3. Defendants then proceed to focus on the plain meaning of the term "instrumentality," because they conclude that the "instrumentality" prong of the "foreign official" definition is the most likely fit for state-owned corporations as a whole. *Id.* at 3.

a. Defining instrumentality

"Statutory interpretation begins with the language of the statute. When the plain meaning of a statutory provision is unambiguous, that meaning is controlling." *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 633 F.3d 1158, 1171 (9th Cir. 2011) (citations omitted). "Instrumentality" is a noun having an inherently broad scope, but it is unnecessary for this Court to choose a particularly elastic dictionary definition of that word. Instead, the Court will adopt the very definition that Defendants themselves proffer. Having asserted that it is plain

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that "instrumentality" cannot and does not encompass a state-owned corporation, here is how they define "instrumentality":

> "[T]he ordinary meaning of instrumentality is 'the quality or state of being instrumental,' which, in turn, means 'serving as a means or agency: implemental,' or 'of, relating to, or done with an instrument or tool.' *Webster's II New College Dictionary* ('*Webster's II*') 589 (3d ed. 2005)."
>
> "*See also American Heritage Dictionary* 908 (4th ed. 2000) (defining instrumentality as '[a] means; an agency,' or '[a] subsidiary branch, as of a government, by means of which functions or policies are carried out'); *Black's Law Dictionary* 870 (9th ed. 2009) (defining instrumentality as '[a] thing used to achieve an end or purpose,' or '[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body')."

Motion at 7, 7-8 n.6.

Purporting to apply two canons of construction – *noscitur a sociis* and *ejusdem generis*[5] – Defendants argue that "the most ordinary meaning of an 'instrumentality of the government,' is an entity the government uses to accomplish its functions of setting forth and administering public policy or public affairs or exercising political authority." *Id.* at 8. They go on to assert that "'instrumentalities' most likely would include entities like government branches . . . administrations, [and] *commissions* . . . among others." *Id.* (emphasis added).[6] According to

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[5] *Noscitur a sociis* provides that "a word is known by the company it keeps . . . ." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). The Ninth Circuit has "similarly recognized that words are to be judged by their context and that words in a series are to be understood by neighboring words in the series." *United States v. King*, 244 F.3d 736, 740-41 (9th Cir. 2001) (quotation marks and citation omitted). *Ejusdem generis* provides that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001) (quotation marks and citation omitted).

[6] The entity at issue here is named the "Comisión Federal de Electricidad" – the Federal Electricity Commission.

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Defendants, "[c]orporations, *as a category*, have no place in this group. Unlike agencies and departments, corporations can take myriad forms and are created and operated in innumerable ways and for infinitely variable purposes." *Id.* (emphasis added).

Defendants argue that the claimed "lack of uniformity in how state-owned corporations are formed and operated contrasts starkly with the defined scope of the terms that precede 'instrumentality,' and it is impossible to identify any characteristic that the first two categories (departments, agencies) necessarily have in common with government/state-owned corporations." *Id.* at 9. In other words (according to Defendants), state-owned corporations as a category do not necessarily share *any* characteristics in common with departments or agencies. Based on this unsupported and unsupportable assertion, Defendants conclude that "instrumentalities must mean something different than state-owned corporations." *Id.*

The Government agrees with Defendants' proposition that "instrumentality" should be interpreted in light of the two words preceding it, "department" and "agency."[7] According to the Government, however, Defendants are wrong to assert that instrumentality "'must be understood to capture *only* entities that share qualities both agencies and departments share.'" Opp. at 24. Indeed, the Government argues, state-owned corporations *do* share various qualities with both agencies and departments, such as existing at the pleasure of the government and being oriented to public policy. Moreover, as the Government sensibly points out, if an instrumentality *must* share *all* of its characteristics with both a department and an agency, then the term "instrumentality" would be robbed of independent meaning. Canons of statutory construction counsel against this outcome, which would turn "instrumentality" into surplusage.

In reply, Defendants attempt to refine their argument by contending that "instrumentality" must be "interpreted not in light of *any* characteristic of departments and agencies, but rather in light of what is *consistent between* and what *defines* 'departments' and 'agencies.' . . . That is, only entities that have characteristics like those that are the *sine qua non* of both agencies and departments qualify as 'instrumentalities.'" Reply at 3. Defendants go on to argue that "[f]oreign government agencies and departments exist *only* when created by governments, and are *always* funded solely by governments or by exercise of their power to enforce government policies and laws. They *always* and *only* exist to execute, administer and enforce government policies. . . . In contrast, corporations, even corporations in which governments have an interest, are not always created by governments . . . . Such corporations

[7] The Government makes several other arguments in support of its interpretation of the plain meaning of "instrumentality," none of which is dispositive or need be addressed by the Court.

are not always funded solely by governments . . . . Such corporations often do more than execute policy . . . ." *Id.* at 3-4. Defendants conclude that "the Court should look for defining similarities between agencies and departments and consider only entities that share these qualities to fall within the definition of 'instrumentality.'" *Id.* at 5.

Defendants' very language reveals an illogical flaw in their "all or nothing" approach. That is, they argue that a state-owned corporation can never be an "instrumentality" because state-owned corporations "do not always" share the characteristics of departments and agencies. This formulation implicitly concedes that *some* state-owned corporations can and do share the characteristics of departments and agencies. And Defendants never explain why those corporations must be excluded from the definition of "instrumentality."

In any event, the Court will respond to Defendants' invitation to "look for defining similarities between agencies and departments and consider only entities that share these qualities to fall within the definition of 'instrumentality.'" Although Defendants have not explained what they mean when they posit that "only entities that have characteristics like those that are the *sine qua non* of both agencies and departments qualify as 'instrumentalities'", it is not difficult to point to various characteristics of government agencies and departments that fall within that description. Here is a non-exclusive list:

- The entity provides a service to the citizens – indeed, in many cases to all the inhabitants – of the jurisdiction.
- The key officers and directors of the entity are, or are appointed by, government officials.
- The entity is financed, at least in large measure, through governmental appropriations or through revenues obtained as a result of government-mandated taxes, licenses, fees or royalties, such as entrance fees to a national park.
- The entity is vested with and exercises exclusive or controlling power to administer its designated functions.
- The entity is widely perceived and understood to be performing official (*i.e.*, governmental) functions.

As shown above, CFE has all these characteristics. It was created by statute as a "decentralized *public* entity" (emphasis added); its governing Board is comprised of various

high-ranking governmental officials; it describes itself as a government agency; and it performs a function the Mexican nation has described as a quintessential government function – the supply of electricity. Indeed, the Mexican Constitution recognizes the supply of electric power as "exclusively a function of the general nation."

b. How the FCPA uses the term "instrumentality"

"To determine the plain meaning of a statutory provision, we examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Levi Strauss*, 633 F.3d at 1171 (citation omitted). Defendants contend that the structure and purpose of the FCPA, as illuminated by Congressional history, demonstrate that Congress did not intend the statute to include state-owned corporations. They argue that the FCPA's focus is on government and politics, which is consistent with the purpose of Congress in enacting the FCPA. "Congress could have criminalized and thus limited *all* bribery abroad. It chose not to do so and instead, when it passed the FCPA, had in mind only the relatively narrow – albeit serious – problem of the impact of bribery on governmental affairs. The language it chose to address this narrow issue should, accordingly, be construed narrowly." Motion at 12 (emphasis added).

The Government, unsurprisingly, counters that the FCPA should be construed broadly. Among other arguments, the Government relies on the so-called *Charming Betsy* doctrine, which posits that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804). Thus, "[w]here fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Restatement (Third) of Foreign Relations Law of the United States § 114 (1987); *see also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.")

According to the Government, the United States' treaty obligations "require it to criminalize bribes made to officials of state-owned enterprises, and Congress clearly indicated its conformity with those obligations through the FCPA." Opp. at 15. Specifically, "Congress could not have been clearer that it intended for the FCPA to fully comport with the [Organization for Economic Co-operation and Development ("OECD")] Convention [on Combating Bribery of Foreign Officials in International Business Transactions]." *Id.* at 16.

The members of the OECD adopted the Convention on November 21, 1997, 20 years

after the enactment of the FCPA. Congress ratified the OECD Convention and "implemented it through various amendments to the FCPA" in 1998. *Id.* at 15-16. The Defendants are charged with conspiracies and FCPA violations during the years 2002-2009. So the OECD Convention had legal effect at the time.

The OECD Convention prohibits "any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official . . . ." OECD Convention, art. 1.1. "Foreign public official" is defined to include "any person exercising a public function for a foreign country, including for a public agency or public enterprise . . . ."[8] *Id.* at art. 1.4.a. The OECD Convention's Commentaries define "public enterprise" to include "any enterprise, *regardless of its legal form*, over which a government, or governments, may, directly or indirectly, exercise a dominant influence." *Id.* at Commentary 14.

When Congress amended the FCPA in 1998, it meant "to conform it to the requirements of and to implement the OECD Convention." S. Rep. No. 105-2177 (1998) at 2. In so doing, the *only* change Congress made to the FCPA's definition of "foreign official" was to add officials of public international organizations. According to the Government, if the FCPA is to be construed consistent with the OECD Convention, then the FCPA's definition of "foreign official" should be understood to *include* "any person . . . exercising a public function for a foreign country, including for a public agency or public enterprise . . . ." Thus, high-ranking employees of certain state-owned corporations could fall within the scope of the FCPA.

Defendants counter this argument with the observation that at no time – not in 1977 or in the later amendments (including those in 1998) – did Congress specifically include state-owned corporations within the scope of the statute.

Given the analysis and conclusion in the preceding section, it is unnecessary to resolve this dispute over the "structure" of the FCPA. The structure, object, and purpose of the FCPA – even as posited by Defendants – are consistent with a definition of "instrumentality" that includes at least some state-owned corporations. In any event, this Court does find that the Government's *Charming Betsy* analysis in light of Congress's embrace of the OECD Convention is persuasive, notwithstanding Congress's failure to include the phrase "state-

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[8] The OECD Convention's Commentaries defines "public function" as follows: "[A]ny 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." OECD Convention at Commentary 12. Providing power to the inhabitants of the land is such a function.

owned corporation" in the FCPA.

2. Legislative History of the FCPA

"If ambiguity exists, we may use legislative history as an aid to interpretation." *Levi Strauss*, 633 F.3d at 1171 (citations omitted). Defendants contend that the FCPA's legislative history (some of which was discussed above) shows that Congress deliberately chose not to target bribes intended to influence state-owned corporations. It is unnecessary to base this ruling upon the legislative history of the FCPA, given that the meaning of "instrumentality" under Defendants' definition of the term clearly encompasses CFE. Nevertheless, because legislative history was so central to Defendants' motion, the Court will summarize the parties' contentions.

a. Defendants argue the FCPA's legislative history shows that Congress deliberately chose not to target bribes intended to influence state-owned corporations

Prior to passage of the FCPA in 1977, Congress rejected proposed bills that explicitly addressed payments to employees of state-owned corporations. As one example, Defendants cite a Senate bill introduced on August 6, 1976, which defined "foreign public officials" as including "essentially, officers, employees or others acting on behalf of a foreign government." Motion at 15 (citing S. 3741, 94th Cong. § 2(e) (1976)). The bill also defined "foreign government" to include state-owned corporations. *Id.* ("(3) a corporation or other legal entity established or owned by, and subject to control by, a foreign government"). A House bill contained similar language. *Id.* at 16 (citing H.R. 15149, 94th Cong. §§ 2(e) & (h) (1976). These bills both died in committee. *Id.*

In 1977, the Senate considered S. 305, which "generally prohibited payments to 'official[s] of a foreign government or instrumentality' but did not define 'instrumentality.'" *Id.* (citing S. 305 § 30A, 95th Cong. (1977)). The parallel House bill, H.R. 3815, defined "foreign official" as:

> [A]ny officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of such government or department, agency or instrumentality. Such terms do not include any employee of a foreign government or any department, agency, or instrumentality thereof whose duties are ministerial or clerical.

Id. at 16-17 (citing H.R. 3815, 95th Cong. § 30A(e)(2) (1977)). The Senate agreed to include the House's definition in the final bill. *Id.* at 17 (citing H.R. Rep. No. 95-831, at 12 (1977) (Conf. Rep.)). The conference version of S. 305 and H.R. 3815 became the FCPA. *Id.* According to Defendants, this legislative history demonstrates that Congress was aware of state-owned corporations when it considered the scope of what eventually became the FCPA and ultimately did not include language in the FCPA addressing payments meant to influence such corporations.

b. FCPA amendments in 1988

In 1988, Congress amended the FCPA to emphasize that the FCPA's focus was "classic 'government action.'" *Id.* at 14. The original FCPA excluded from the definition of "foreign official" "'any employee of a foreign government or any department, agency or instrumentality *whose duties are essentially ministerial or clerical*.'" *Id.* at 17 (quoting the 1977 version of the FCPA) (emphasis added). This exclusion, which focused on an employee's duties, proved difficult to apply in practice. *Id.* at 17-18.

To make the FCPA clearer, Congress set about considering various amendments to define "facilitation payments" in terms of the *purpose* of such payments. *Id.* at 18. Finally, after years of debate, Congress added the following language to the FCPA: "[The FCPA's anti-bribery provisions] shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of *routine governmental action* by a foreign official, political party, or party official." Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107 (1988) (emphasis added).

According to Defendants, the fact that this amendment focused on "governmental action" "illustrates the point that is clear from the history of the original FCPA: When [Congress] enacted and amended the FCPA, Congress did not have in mind government corporations – or corporate action – it had in mind a discernible and definite universe of governmental action." Motion at 19.

c. The 1998 Amendment

The OECD Convention of 1998 required, among other things, that signatories criminalize payments to "foreign public officials," who were defined 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 organisation [sic]." OECD Convention, art. 1, 4(a) (emphasis added).

Defendants point out that when Congress added the "public international organization" element of the OECD Convention to the FCPA definition of "foreign official" it did *not* also add the "public enterprise" prong of the OECD Convention's definition of "foreign official." According to Defendants, "[t]his is yet another clear sign that Congress did not intend that individuals or corporations would be prosecuted [under the FCPA] for payments to state-owned corporations . . . ." Motion at 20.[9]

The Government counters that nowhere in the legislative history is there a single reference to the effect that Congress "intended to exclude state-owned companies from the definition of instrumentality." Opp. at 30. The Government argues, contrary to Defendants' conclusion, that "[t]here is no reason to presume that when Congress chooses a general term over a specific list it intends to exclude the specific items." *Id.* at 32. To the contrary, the Government argues, the legislative history "supports an interpretation in which bribes to officials of state-owned enterprises are criminalized." *Id.* at 30. Moreover, as the Government points out, Congress's decision not to add the OECD Convention's "public enterprise" language to the FCPA is equally consistent with the notion that Congress believed that the FCPA's term "instrumentality" already included the sort of state-owned corporations that fall within the OECD Convention's definition of "public enterprise."

The Court finds that the legislative history of the FCPA is inconclusive. Although it does not demonstrate that Congress intended to include *all* state-owned corporations within the ambit of the FCPA, neither does it provide support for Defendants' insistence that Congress intended to *exclude* all such corporations from the ambit of the FCPA.

Given that the legislative history does not clearly support either side's contentions, and because the parties devoted such extensive emphasis to the legislative history in their briefs, the Court attempted to divine what Congress could be deemed to have contemplated, by circulating a written hypothetical during the recent hearing on Defendants' motion to dismiss. Here is that hypothetical:

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[9] Defendants acknowledge in a footnote that the OECD Convention establishes "that not all state-owned corporations satisfy the OECD definition . . . . As the text makes clear, employees of public enterprises are contemplated only if they 'exercise a public function for' the foreign country at issue." Motion at 20 n.11. Defendants' very phrase "not all" state-owned corporations obviously suggests that *some* such corporations *do* fall within the ambit of the OECD Convention.

1. (a) The Mexican Constitution provides that the government of Mexico is the only entity that may own and exploit the country's natural resources, including all petroleum and hydrocarbons. The Constitution also permits the Mexican government to create entities to manage and distribute these natural resources. Under this authority, the Mexican government established Petróleos Mexicanos ("PEMEX"), a petroleum company (one of the largest oil exporters in the world), all of whose stock is owned by the federal government of Mexico.

   (b) Under Mexican law, the PEMEX governing board is composed entirely of appointed government officials and PEMEX employs only public servants.

   (c) The PEMEX website states that it is a government agency and that it was created and is owned by the Mexican government.

2. Exxon is an American petroleum company that, among other things, explores for oil in foreign offshore waters, pursuant to contracts and concessions awarded by foreign governments.

3. Occidental is an American petroleum company that competes with Exxon to obtain contracts to drill for oil in foreign waters.[10]

4. Exxon and Occidental competed for a concession to drill in Mexican waters.

5. PEMEX had the power and authority to award the drilling concession. The competing bids were to be disclosed and the winning bid was to be awarded in a televised, public ceremony.

6. Exxon's bid was for $95 million.

7. Occidental's bid was for $100 million.

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[10] Paragraphs 1, 2, and 3 actually are indisputable facts.

8. At a public, televised ceremony, in which the CEO of PEMEX was to announce the winning bid, Exxon's chairman and CEO walked up to the CEO of PEMEX and presented him with a certified check for $10 million, payable to the CEO, before the winner was announced.

9. The PEMEX CEO thanked Exxon for its generous gift to him and thereupon awarded the concession to Exxon.

10. Thereafter, Occidental demanded that the United States Department of Justice prosecute Exxon and its CEO for violating the FCPA.

11. The Department of Justice thereupon invited the leaders of both houses of Congress to state whether under the FCPA the Department of Justice would be authorized to prosecute Exxon and its CEO.

At the hearing on this motion, the Court asked lead counsel for the Defendants whether any responsible Congressional leader would respond to such a DOJ inquiry by saying "No, do not prosecute Exxon or its CEO, because PEMEX is a state-owned corporation and it was not the intention of Congress to consider any corporation an 'instrumentality' of any foreign government, regardless of the other facts warranting prosecution." The colloquy that ensued was enlightening. In a display of skillful advocacy, Defendants' counsel responded, "If you were to ask them in a truth serum way, as opposed to a way where they're going to be quoted and run for office, I think their answer would be 'we meant what we said, which is that we did not include state-owned corporations.'"

In fact, Congress did not say that. Moreover, in the Court's view, the question the Court posed at the end of the hypothetical answers itself. Whether injected with truth serum or not, members of Congress would not deem such a prosecution to be beyond the purview of the FCPA merely because PEMEX is a state-owned corporation.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' motion to dismiss.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

ADDENDUM

After the jury trial had been underway for more than two weeks, and just before this order was to be filed, the Government asked the Court to take judicial notice of what the Government claims is this fact: "CFE was created by Mexico as a decentralized public entity with its own legal status and assets." In a footnote the Government added, " . . .[U]nder Mexican law, CFE is a decentralized public entity, not a corporation." This request was astounding.

Throughout the hundreds of pages of argument and exhibits that were filed as part of motion practice, the Government never stated that CFE is not a corporation. Nor did it assert that view at the hearing on this motion. The First Superseding Indictment itself alleges that CFE is "an electric utility *company* owned by the government of Mexico." (Emphasis added.) Tucked away at the bottom of one page of its opposition papers, the Government did note that a Mexican statute defined CFE as a "decentralized public entity with legal personality and its own patrimony." But the Government's opposition papers consistently referred to CFE in other terms, such as: "a state-owned utility" (*e.g.*, Opp. at 9); a "state-owned entity" (*passim*); a "government instrumentality" (*e.g.*, *id.* at 19); and a "state-owned enterprise" (*e.g.*, *id.* at 15).

Indeed, in a lengthy footnote in its opposition papers the Government stressed that in more than a dozen FCPA prosecutions, "guilty pleas were accepted by U.S. District Courts, involved [sic] bribery of officials of *state-owned companies*." *Id.* at 19 n.6 (emphasis added). Elsewhere, it argued that this Court should take into account the definition of "instrumentality" in the Economic Espionage Act ("EEA") stressing, "Although, to date, no court has specifically interpreted 'foreign instrumentality' under the EEA, the statute's text is clear that the term *includes a 'corporation' that is 'substantially owned' by a foreign government*." *Id.* at 23 n.8 (emphasis added).

Furthermore, the Government cited two cases in which state-owned companies were found to fall within the scope of the FCPA. *Id.* at 27. Thereafter, it cited and attached jury instructions in yet two additional cases, to the effect that "the definition of government instrumentality *includes companies owned or controlled by the state*." *Id.* at 29 (emphasis added). Still later, the Government continued in this vein, purporting to refute the Defendants' legislative history analysis by stressing that the author of the declaration that the Defendants' cited "is unable to find a single reference . . . that Congress intended to exclude *state-owned companies* from the definition of instrumentality . . . ." *Id.* at 30 (emphasis added). Finally, the Government concluded, "[F]rom the FCPA's inception, *state-owned and state-controlled companies* were within Congress's intended definition of instrumentalities of a foreign government." *Id.* at 32 (emphasis added).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

There is nothing in the Government's peculiar request for judicial notice which warrants a change in the foregoing ruling.

_____ : _____

Initials of Deputy Clerk SMO

cc:

Exhibit F

No.: 10-03

Date: September 1, 2010

Foreign Corrupt Practices Act Review

Opinion Procedure Release

The Department has reviewed the Foreign Corrupt Practices Act ("FCPA") Opinion request of a U.S. limited partnership (the "Requestor") that was submitted on March 9, 2010, along with supplemental information submitted by the Requestor, most recently on August 2, 2010. The partnership is a "domestic concern" within the meaning of the FCPA and thus eligible to request an Opinion of the U.S. Attorney General, pursuant to 28 C.F.R. Section 80.4, regarding whether certain specified, prospective — not hypothetical — conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the FCPA. The Requestor represents that the facts and circumstances are as follows.

Relevant Facts and Circumstances

The Requestor, a limited partnership established under U.S. law and headquartered in the United States, is a "domestic concern" within the meaning of the FCPA and is engaged in development of natural resources trading and infrastructure. The Requestor is pursuing an initiative with a foreign government regarding a novel approach to particular natural resource infrastructure development. Because the approach is relatively novel and the market is dominated by a consortium of established companies, the Requestor determined that it required assistance in entering into discussions with the foreign government.

The Requestor plans to contract with a consultant (referred to herein as the "Consultant") and its sole owner to assist it. Consultant is a U.S. partnership, and its owner is a U.S. citizen. The Consultant, which has extensive contacts in the business community and the government in the foreign country, has previously and currently holds contracts to represent the foreign government and act on its behalf, including performing marketing on behalf of the Ministry of Finance, and lobbying efforts in the United States. The Consultant is a registered agent of a foreign government pursuant to the Foreign Agents Registration Act, 22 U.S.C. § 611 *et seq*. ("FARA"). The Consultant has represented ministries of the foreign government that will play a role in discussions of the Requestor's initiative. The Consultant will be paid a signing bonus by the Requestor at the time the consulting contract is signed, but the bulk of any payment by the Requestor to the Consultant under the contract will come in the form of success fees, should the Consultant's efforts result in the foreign government entering into a business relationship with the Requestor.

In light of the Consultant's prior role in representing the foreign government, and because the Consultant will continue to represent the foreign government subsequent to becoming a

consultant for the Requestor, the following safeguards have been put in place to ensure that no conflict of interest would arise between the Consultant's representation of the Requestor and the Consultant's separate and unrelated representation of the foreign government:

- For the duration of the consultancy, the owner of the Consultant will cease to lobby on behalf of the foreign government, although other employees of the Consultant will continue to represent the foreign government in the United States under FARA;

- Those working on lobbying efforts for the foreign government will be walled off from the representation of the Requestor;

- Neither the Consultant nor its owner represents the foreign government in any respect beyond the current contractual arrangements between the Consultant and the foreign government already disclosed to the Requestor, nor will any additional representation of the foreign government be undertaken for the duration of the consultancy;

- Neither the owner nor the Consultant have any decision-making authority on behalf of the foreign government;

- As a matter of local law, the Consultant and its employees are not employees or otherwise officials of the foreign government, and the Requestor has secured a local law opinion that it is permissible for the Consultant to represent both the foreign government and the Requestor at the same time;

- The proposed contract requires that the Consultant confirm that none of its employees or other individuals affiliated with the Consultant are foreign officials and that no employee or associated individual will become a foreign official during the term of the agreement;

- The arrangement will be disclosed to the Ministry of Finance of the foreign government;

- The Consultant and its owner will be required to secure the Requestor's written advance approval to contact or take other material action with respect to the foreign government's officials; and

- The Consultant and its owner will commit that they will not represent or have any other business relationship with the foreign government in connection with the project, nor will the Consultant and its owner work or communicate with the foreign government in any respect that is outside the scope of the services that they are providing to the Requestor under the agreement, with the exception of those communications related to the ongoing representation of the foreign government discussed above.

Analysis

The Department does not intend to take any enforcement action with regard to payments made to the Consultant under the proposed consultancy arrangement, as amended, for the reasons that follow.

The Department has in the past considered proposed business arrangements with individuals who act on behalf of foreign governments under the Opinion Procedure. Notably, the FCPA does not *per se* prohibit business relationships with, or payments to, foreign officials. In such cases, the Department typically looks to determine whether there are any indicia of corrupt intent, whether the arrangement is transparent to the foreign government and the general public, whether the arrangement is in conformity with local law, and whether there are safeguards to prevent the foreign official from improperly using his or her position to steer business to or otherwise assist the company, for example through a policy of recusal.

In the following instances, with appropriate protections, the Department issued favorable Opinion Releases with respect to business arrangements with foreign officials:

- In FCPA Opinion Release 80-02 (Oct. 29, 1980), the Department stated its lack of enforcement intent with regard to an employee of a foreign subsidiary of a U.S. corporation who planned to run for political office, because the employee would fully disclose his continuing relationship with the corporation to his political party, the electorate, and the government, and the employee would refrain from participating in any legislative matter or other governmental action that would affect the corporation.

- In FCPA Opinion Release 82-02 (Feb. 18, 1982), the Department stated its lack of enforcement intent when a U.S. firm proposed paying a "finder's fee" to a Nigerian citizen who was employed in Nigeria's foreign consulate because, among other things, the work to be performed for the firm was in no way related to the Nigerian citizen's governmental duties, and the contract between the firm and the Nigerian citizen contained adequate FCPA safeguards under the circumstances.

- In FCPA Opinion Release 86-01 (July 18, 1986), the Department stated its lack of enforcement intent in response to three requests from U.S. corporations that sought to employ foreign Members of Parliament ("MPs"), because the MPs agreed to fully disclose their representation relationships, not to vote or conduct any other legislative activity for the benefit of the corporations, and not to use their influence as MPs to benefit the corporations.

- In FCPA Opinion Release 94-01 (May 13, 1994), the Department stated its lack of enforcement intent regarding a U.S. company's proposal to hire a foreign official to provide consulting assistance, because, among other things, the official disclosed the proposed consulting activities to his state employer, agreed to abide by all applicable

reporting and disclosure laws, and agreed to several measures designed to prevent him from using his official influence to benefit the U.S. company.

The FCPA defines the term "foreign official" as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, *or any person acting in an official capacity for or on behalf of any such government* or department, agency, or instrumentality, or for or on behalf of any such public international organization." 15 U.S.C. § 78dd-2(h)(2)(A) (emphasis added). In the instant case, because the Consultant is an agent of the foreign government, there are situations in which the Consultant has and will act *on behalf of* the foreign government, which could in certain circumstances render the Consultant and its employees "foreign officials" for purposes of the FCPA. However, in the circumstances described above, the Department is satisfied that for purposes of the contract with the Requestor, the Consultant and its owner are not acting on behalf of the foreign government and therefore are not foreign officials. The steps taken to wall off the employees working on the various representations from each other, the full disclosure of the relationships to the relevant parties, the permissibility of the relationships under local law, and the contractual obligations to limit further representation of the foreign government by the Consultant are sufficient to ensure that the Consultant will not be acting on behalf of the foreign government in performing the consulting contract with the Requestor. Thus, the Consultant is not a foreign official as defined by the FCPA, 15 U.S.C. § 78dd-2, and the Department would not take enforcement action based solely on payments to the Consultant.

Based on the representations made by the Requestor in its request and recited above, as well as the Department's review of supplemental materials submitted by the Requestor, the Department does not presently intend to take enforcement action with respect to the proposed payments to the Consultant described in this request. However, the Department notes that its opinion is limited to the narrow question of whether the Consultant would be a "foreign official" for purposes of the payments under the consulting contract. The Department does not opine on any other aspect of the proposed contract or any other prospective conduct involved in the Request. Indeed, while the Consultant is not a foreign official for FCPA purposes under the limited facts and circumstances described by the Requestor, the proposed relationship increases the risk of potential FCPA violations. This opinion does not foreclose the Department from taking enforcement action should an FCPA violation occur during the execution of the consultancy.

This FCPA Opinion Release has no binding application to any party that did not join in the request, and can be relied upon by the Requestor only to the extent that the disclosure of facts and circumstances in its request is accurate and complete.

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2011, I electronically filed the foregoing **DECLARATION OF NICOLA T. HANNA IN SUPPORT OF DEFENDANTS' PROPOSED JURY INSTRUCTION REGARDING "FOREIGN OFFICIAL" AND "INSTRUMENTALITY"** with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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