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978-0-521-86817-4 - The OECD Convention on Bribery: A Commentary

Edited by Mark Pieth, Lucinda A. Low and Peter J. Cullen

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THE OECD CONVENTION ON BRIBERY

The OECD Convention is the first major international treaty specifically to address ‘supply-side bribery’ by sanctioning the briber. The OECD Convention establishes an international standard for compliance with anti-corruption rules by 36 countries, including the 30 OECD members and six non-member countries, with the leading OECD exporting countries receiving particular attention. This book is an article-by-article commentary which gives particular attention to the results of the OECD monitoring process as applied to state implementation.

Companies in particular are at ever greater risk of legal and ‘reputational’ damage resulting from failure to comply with the anti-corruption standards, set inter alia, by the OECD Convention. This book provides them with comprehensive guidance on the OECD standards.

The commentary also constitutes a significant work of comparative criminal law. It is written and edited by persons who include experts involved in development of the Convention standards as well as academics and legal practitioners.

MARK PIETH is Professor of Criminal Law at Basel University, chairman of the OECD Working Group on Bribery in International Business Transactions, and member of the Swiss Federal Gaming Commission, chairman of the board of the Basel Institute on Governance and member of the UN Independent Inquiry Committee into the Iraq Oil-for-Food Programme. He was formerly member of Financial Action Task Force (FATF) and head of section of Economic and Organised Crime at the Swiss Ministry of Justice and Police, member of the Chemical Action Task Force on Precursor Chemicals and chairman of the UN Intergovernmental Expert Group Commission to determine the extent of illicit trafficking in drugs. He has published in the fields of economic and organised crime, money laundering, corruption, sentencing and criminal procedure.

LUCINDA A. LOW is a partner at Steptoe & Johnson LLP, Washington DC, with a practice focusing on US and international anti-corruption laws and assisting US and foreign companies with compliance with international business laws and regulations. She is a widely recognised authority on the Foreign Corrupt Practices Act and related international conventions from

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the OECD, OAS, United Nations, and European Union. In addition to her legal practice in these fields, she has published widely on anti-corruption laws. Ms Low is also a member of the US Secretary of State's Advisory Committee on International Law and a member of the Board of Directors of Transparency International-USA.

PETER J. CULLEN is head of section for European public and criminal law at the Academy of European Law in Trier, Germany. He qualified as a solicitor in Scotland in 1990. From 1990 to 1999, he held the position of Jean Monnet Lecturer in European Community Law at the University of Edinburgh. He has previously published on EU law and German constitutional law.

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The OECD Convention on Bribery

A COMMENTARY

*A Commentary on the Convention on Combating Bribery of
Foreign Public Officials in International Business Transactions of
21 November 1997*

Edited by

MARK PIETH, LUCINDA A. LOW AND PETER J. CULLEN



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MARK PIETH is Professor of Criminal Law at Basel University, Chairman of the OECD Working Group on Bribery in International Business Transactions, and member of the Swiss Federal Gaming Commission, chairman of the board of the Basel Institute on Governance and member of the UN Independent Inquiry Committee into the Iraq Oil-for-Food Programme. He was formerly member of the Financial Action Task Force (FATF) and head of the Section of Economic and Organised Crime at the Swiss Ministry of Justice and Police, member of the Chemical Action Task Force on Precursor Chemicals and chairman of the UN Intergovernmental Expert Group Commission to determine the extent of illicit trafficking in drugs. He has published in the fields of economic and organised crime, money laundering, corruption, sentencing, and criminal procedure.

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PREFACE

In recent years there has finally been a global awakening to the need to fight corruption in order to promote development and preserve respect for public institutions.

I watched from side-stage when the problem of international corruption first broke in the mid-1970s. I was a practicing lawyer in Canada representing Lockheed Aircraft Corporation in what was then the largest military procurement in Canadian history. Suddenly Lockheed was caught up in scandals related to bribery of foreign public officials in several jurisdictions outside Canada. These scandals gave rise to the U.S. Foreign Corrupt Practices Act, a pioneering effort to curb international bribery and severely penalise the senior management of corporations who engaged in it. (As it turned out, Lockheed was the first to be exposed, but many more followed.)

I am proud that OECD and other countries joined this battle in 1997 with the negotiation of the Convention on Fighting Bribery of Foreign Public Officials in International Business Transactions. This binding treaty obliges signatories to take responsibility for corrupt practices of the companies operating from their territory – wherever in the world they may bribe.

What changed to enable the OECD to draft and conclude a convention against bribery in the late 1990s? The answer is globalisation. In the 1970s, countries still saw themselves as competing with each other, promoting the interests of their companies abroad. Globalisation changed the perception. It was clear that companies, not governments, were the competitors – and they needed a level playing field. During the same period several major bribery scandals in the OECD countries roused public indignation and led to the formation of non-governmental groups like Transparency International which pressed for cleaner government. Since it came into force in 1999, a hallmark of the Convention has been rigorous monitoring

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of its implementation in law and its enforcement. This has been absolutely necessary since the stakes are so high. The monitoring has demonstrated that the Convention has indeed inspired many positive changes in the legal and law enforcement capacities of the Parties to the Convention. But the monitoring has also shown that many Parties still fall short of fully implementing the Convention and fulfilling their commitment to stop international bribery.

The battle against corruption will last many years. We must not diminish our efforts. I hope that the present book will increase public awareness of the Convention and of what should be expected of the countries that signed it.

MR. DONALD J. JOHNSON, P. C. Q. C.

Secretary General of the OECD (until Spring 2006)

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It has been a great satisfaction after sixteen years as Chairman of the OECD Working Group on Bribery to see through this book on the core piece of our efforts, the OECD 1997 Convention on Corruption.

All contributors, including those such as Nicola Bonucci who have played a central role in the development of OECD anti-corruption standards are, however, intervening in a personal capacity.

These preliminary remarks give me a welcome opportunity to mention that this project would not have been possible without the generous funding of the Swiss National Fund (SNF) and the Freiwillige Akademische Gesellschaft (FAG) in Basel. Furthermore I would like to thank all who have made this critical analysis possible.

First, I would like to thank the authors of the chapters. I am confident that we have been able to strike a fair geographic balance by inviting contributions from the United States (Gregory Bruch, Akita Atkins, and Lucinda Low), the United Kingdom (Peter Cullen) and continental Europe (here again the French and Italian speakers Nicola Bonucci, Maurice Harari, and Anne Valérie Julien Berthod) and the German speakers (Ingeborg Zerbes and Mark Pieth). A further attempt to balance the contributions between academics (Ingeborg Zerbes, Peter Cullen, Mark Pieth) practitioners (Gregory Bruch/Akita Atkins, Maurice Harari/Anne Valérie Julien Berthod, Lucinda Low) and representatives of institutions (Nicola Bonucci) has proved rather successful.

Second, I would like to thank my co-editors for their support, especially Peter Cullen for donating a sabbatical year from the Academy of European Law (ERA) in Trier for an intensive year on this project. The Academy's Director, Wolfgang Heusel, kindly agreed to Peter's release for this period.

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MARK PIETH

Co-ordinating Editor

OECD texts, national laws and cases have been included in this book up to 31 December 2005.

ABBREVIATIONS

General abbreviations

ADB	Asian Development Bank
AI	Amnesty International
ASEAN	Association of South-East Asian Nations
APG	Asia/Pacific Group on Money Laundering (OECD)
ASIL	American Society of International Law
BCBS	Basel Committee on Banking Supervision
BG	Bundesgericht (Federal Court, Switzerland)
BGE	Bundesgerichtsentscheid (Federal Court Decision, Switzerland)
BGH	Bundesgerichtshof (Federal High Court, Germany)
BIAC	Business Advisory Committee (OECD)
BIS	Bank for International Settlements
BVerfG	Bundesverfassungsgericht (Federal Constitutional Court, Germany)
BVerfGE	Bundesverfassungsgerichtsentscheid (Federal Constitutional Court Decision, Germany)
CATF	Caribbean Action Task Force
CBCA	Canada Business Corporations Act
CDU	Christlich Demokratische Union (Christian Democratic Union) (Germany)
CDD	Customer Due Diligence
CEO	Chief Executive Officer
CFA	Committee on Fiscal Affairs (OECD)
CFO	Chief Financial Officer

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CIHEAM	Centre International de Hautes Études Agronomiques Méditerranéennes (International Centre for Advanced Mediterranean Agronomic Studies)
CIME	Committee on Investment and Multinational Enterprises (OECD)
COE	Council of Europe
COSO	Committee of Sponsoring Organizations of the Treadway Committee
CPS	Code for Crown Prosecutors (England and Wales) (see List of Selected Documentation)
DAC	Development Assistance Committee (OECD)
DAFFE	Directorate for Financial, Fiscal, and Enterprise Affairs (OECD)
EC	European Communities
ECGD	Export Credit Guarantee Department (UK)
ECG	Export Credits Group (OECD)
ECOSOC	Economic and Social Council (UN)
ERA	Europäische Rechtsakademie Trier (Academy of European Law Trier)
ESAAMLG	Eastern and Southern African Anti-Money Laundering Group
EU	European Union
FATF	Financial Action Task Force
FCPA	Foreign Corrupt Practices Act (USA)
FIFA	Fédération Internationale de Football Association
FINTRAC	Financial Transactions Reports Analysis Centre of Canada
FIU	Financial Intelligence Unit
FSF	Financial Stability Forum
GAFISUD	Grupo de Acción Financiera Internacional Sudamericano (South American Financial Action Task Force)
GATT	General Agreement on Tariffs and Trade (WTO)
GCA	Global Coalition for Africa
GRECO	Group of States Against Corruption
HRW	Human Rights Watch
IACC	International Anti-Corruption Conference
IBC	International Business Corporation
IAP	International Association of Prosecutors
IAPAC	International Auditing Practices Committee (International Federation of Accountants)
IAS	International Accounting Standards

Abbreviations		xvii
IBT	International Business Transactions	
ICC	International Chamber of Commerce	
ICFTU	International Confederation of Free Trade Unions	
ICRC	International Committee of the Red Cross	
IDRC	International Development Research Centre	
IGO	Intergovernmental Organisation	
IIC-OFFP	Independent Inquiry Committee into the United Nations Oil-for-Food Programme	
ILA	International Law Association	
ILC	International Law Commission	
IMAC	(Federal Act on) International Mutual Assistance in Criminal Matters (Switzerland)	
IMF	International Monetary Fund	
IOC	International Olympic Committee	
IOSCO	International Organisation of Securities Commissions	
IPU	Interparliamentary Union	
ISO	International Organization for Standardization	
MDB	Multilateral Development Banks	
MDP	Ministry of Defence Police (UK)	
MENAFATF	Middle East and North Africa Financial Action Task Force	
MLA	Mutual Legal Assistance	
MLLA	Mutual Legal Assistance Agreements	
MLAT	Mutual Legal Assistance Treaties	
MNE	Multinational Enterprise	
NATO	North Atlantic Treaty Organization	
NEPAD	New Partnership for Africa's Development	
OAS	Organization of American States	
OECD	Organization for Economic Co-operation and Development	
OFC	Off-Shore Centre	
OI	Oxfam International	
OSCE	Organisation for Security and Cooperation in Europe	
PACI	Partnering Against Corruption Initiative (WEF)	
PEP	Politically Exposed Person	
POCA	Proceeds of Crime Act (UK)	
POLISARIO	Frente Popular de Liberación de Seguía el Hamra y Río de Oro (Polisario Font)	
PUMA	Public Management Group (OECD)	
Rn.	Randnummer (marginal number)	
SEC	Securities and Exchange Commission (US)	
SFO	Serious Fraud Office (UK)	

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SIDA	Swedish International Development Cooperation Committee
SIGMA	Support for Improvement in Governance and Management
SME	Small and Medium-Sized Enterprise
SPAI	Stability Pact for South-Eastern Europe
TI	Transparency International
TRACE	Transparent Agents and Contraction Entities
TRACFIN	Traitement du Renseignement et Action Contre les Circuits Financiers Clandestins (France)
TRNC	Turkish Republic of Northern Cyprus
TUAC	Trade Union Advisory Committee (OECD)
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN ODCCP	United Nations Office for Drug Control and Crime Prevention
UNICORN	Global Unions Anti-Corruption Network
US GAAP	US Generally Accepted Accounting Principles
WCL	World Confederation of Labour
WEF	World Economic Forum
WGB	Working Group on Bribery (OECD)
WTO	World Trade Organisation

Country abbreviations¹

AR	Argentina
AU	Australia
AT	Austria
BE	Belgium
BG	Bulgaria
BR	Brazil
CA	Canada
CH	Switzerland
CL	Chile
CZ	Czech Republic
DE	Germany
DK	Denmark

¹ Based on the list of the International Organization for Standardization (ISO).

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Abbreviations xix

EE	Estonia
ES	Spain
FI	Finland
FR	France
GR	Greece
HU	Hungary
IE	Ireland
IS	Iceland
IT	Italy
JP	Japan
KR	Korea, Republic of
LU	Luxembourg
MX	Mexico
NL	Netherlands
NO	Norway
NZ	New Zealand
PL	Poland
PT	Portugal
SE	Sweden
SI	Slovenia
SK	Slovakia
TR	Turkey
UK	United Kingdom
US	United States

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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.

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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 DAFE/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten

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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.

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

Note: *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

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instruments of acceptance, approval, or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 percent of combined total exports of those ten countries, which is required for entry into force under this provision.

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.

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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.

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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.