Center for Global Development

# COMBATING CORRUPT PAYMENTS IN FOREIGN INVESTMENT CONCESSIONS:

## CLOSING THE LOOPHOLES, EXTENDING THE TOOLS

THEODORE H. MORAN

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# Preface

At the tenth anniversary celebration of the Anti-Bribery Convention of the Organisation for Economic Co-operation and Development (OECD), Angel Gurria, OECD's Secretary-General, summed up the state of play in today's fight against international corruption by saying, "Now, I do not want to spoil the birthday party, but I do have to say that what we have achieved is still not good enough….There will be big risks that countries will go back to doing 'business as usual,' including corruption." This report, the product of a year-long process involving a study group of experts on corruption and international business, comes to much the same conclusion: there has been progress over the past decade, but more needs to be done.

As part of its ongoing study of the causes and consequences of corruption as they impact developing countries, the Center for Global Development (CGD) brought together a group of experts to consider whether or not the world's efforts, and especially those of the United States, to control corruption in international transactions are working. The Experts' Group, which I had the privilege of chairing, was organized and managed by Ted Moran, who also wrote this final report. Ted holds the Marcus Wallenberg Chair at the School of Foreign Service at Georgetown University and has written extensively on international business, especially on ways in which rich-country-based multinationals have found ways around national and international efforts to fight bribery.

The report makes two key points. First, it argues that the language of both the OECD Convention and the U.S. Foreign Corrupt Practices Act (FCPA) need tightening. Second, it states that even with a redrafting of these laws and conventions, the world needs other tools in the fight against international corruption, including an improved international arbitration process and an extension of the Extractive Industries Transparency Initiative (EITI) to other sectors and industries. This package of recommendations reflects the realities of today's international business world in which new players, such as Brazil, China, India, Mexico, Russia, and Turkey, are increasingly important sources of investment in developing countries.

The experts brought a wide spectrum of views to the table, representing as they did academics as well as practitioners, both from the private and public sectors. The debates and discussions were lively, both in person and online, and I thank all involved for their commitment and engagement. No one among the experts we spoke to denied the importance of getting the fight against corruption in international transactions right, but not all endorsed the views in this paper. Some felt that it was not the wording of the OECD Convention and the FCPA, but enforcement that was the key issue. Others questioned the practicality of some of the suggested changes. These concerns aside, a core group of the experts consulted agreed with the paper's conclusions.

The main bone of contention was whether the OECD Convention and the FCPA, as they are now written, rule out so-called "gift" partnerships to family members and business associates aimed at influencing investment and concession decisions. Most experts agreed that this was a problem in

the past, but there was much discussion over whether or not things have changed since the mid- to late 1990s when, as Ted and others (most especially, group expert Lou Wells of the Harvard Business School) have shown, there were egregious cases where rich country firms appear to have found ways to bypass the intent of the OECD Convention and the FCPA. Certainly enforcement is up but similar cases from Africa and elsewhere continue to emerge. Moreover, it remains true, as the report points out, that the same legal language that allowed U.S. firms to escape prosecution for corrupt acts (by any commonsense definition of the term) in the 1990s is still there.

There was also debate over the extent to which international arbitration could fill in for the reality that we do not have an international court to which corruption cases can be referred. Without an international court, companies in countries that have stringent domestic anti-bribery laws and tough enforcement could find themselves at a disadvantage relative to companies in countries where these are lax in the procurement of contracts and business deals in developing countries. The report argues that the growing practice within international tribunals to refuse to enforce contracts that were obtained via corrupt means is one way the world can level the playing field and hold all international players to the same anti-bribery standards, regardless of domestic anti-bribery stances.

Expanding the reach of the EITI, with its focus on transparency, is another way to keep playing fields level. More transparency in international business transactions in the developing world will give the citizens of these countries the information they need to understand what their governments are doing with the money received from the international business community.

This report should be required reading for anyone concerned about the impact of international business on developing countries. I thank Ted for his excellent and patient management of the Experts' Group, and the members of the group for their engagement and insights. The report also benefitted from comments by an external reviewer, Roberto Danino, currently Deputy Chairman of the Board and Executive Director of Hochschild Mining plc, and former Prime Minister of Peru and also formerly Senior Vice President and General Counsel of the World Bank. The views expressed in this report remain those of the author. I want as well to thank Ruth Coffman for her help in managing the Experts' Group and CGD's Communications and Outreach staff for help in getting the report out.

Dennis de Tray
Vice President, Special Initiatives
January 2008

# COMBATING CORRUPT PAYMENTS IN FOREIGN INVESTMENT CONCESSIONS:

## CLOSING THE LOOPHOLES, EXTENDING THE TOOLS

### 1. Introduction: The Discovery of Loopholes

On November 21, 2007, the OECD celebrated the tenth anniversary of its Anti-Bribery Convention — officially, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions — which has been the principal vehicle of the developed world to prevent international investors from using "corrupt payments" to obtain concessions and secure favorable treatment in developing countries.

Prior to 1997, bribes had been so common in international business transactions that many developed countries routinely allowed them to be deducted as an ordinary expense of doing business. The United States was a notable exception, having passed the Foreign Corrupt Practices Act (FCPA) as early as in 1976. In 1997 the OECD Anti-Bribery Convention entered into force. OECD member states assumed the responsibility to enact domestic anti-bribery legislation consistent with the Convention.

***Some multinational corporations use gaping loopholes in both the OECD Convention and the FCPA to win contracts and enjoy special advantages without fear of prosecution.***

How effective have the OECD Convention and the FCPA been in countering corruption? How might they be strengthened, moving into the future? What else can and should the developed world be doing to fight corruption on the payers' side of the transaction?

New research — including investigations carried out under CGD auspices — shows that some multinational corporations use gaping loopholes in both the OECD Convention and the FCPA to win contracts and enjoy special advantages without fear of prosecution.[1] U.S., European, and Japanese companies have devised sophisticated current-payoff-and-deferred-gift structures with relatives and friends of host country officials to acquire investment concessions without competitive bidding that do not appear to have put them at risk under OECD-consistent home country anti-bribery laws, or the US Foreign Corrupt Practices Act.

These insider partnerships with sons, daughters, business associates, and cronies of developing country leaders appear in Africa, Asia, and Latin America, and are particularly prevalent in natural resource and infrastructure investments.[2] The most detailed investigations come from projects in

[1] Louis T. Wells, Jr., and Rafiq Ahmed. 2007. *Making Foreign Investment Safe: Property Rights and National Sovereignty.* New York: Oxford University Press. Also, Theodore H. Moran. 2006. *Harnessing Foreign Direct Investment for Development: Policies for Developed and Developing Countries*. Washington, D.C.: Center for Global Development.

Indonesia, where extensive corporate records, contract data, and ownership information have been brought to light.

To obtain electric power generation concessions in Indonesia, U.S., European, and Japanese companies formed joint ventures with family members and personal associates of the country's leadership, lending the family members and personal associates the funds necessary to take an equity position in the partnership. The terms of the loan provided that the partners would service the loans only out of future dividends and that they would incur no other obligations for debt service. The terms were such that the partners could anticipate a regular excess cash stream from the outset, on top of the portion of dividends withheld to repay the debt. The added costs from these arrangements were passed on to Indonesian businesses and consumers in the form of higher electricity prices.

The family members and personal associates put up no capital of their own, had no resources at risk, and no obligations to either service the debt beyond surrendering a proportion of the dividend flow, or to provide any appreciable services to the international companies, except access to the concessions on favorable terms. By any commonsense test — such as the OECD Guidelines for Multinational Enterprises (see below) — the equity position they received was a "gift" in return for preferential treatment of the investor.

The impact of these arrangements on the Indonesian economy was more damaging than if the family members and associates had simply been given straight "commissions" of several million dollars, since their returns as equity-holders varied as a function of the profits generated by the infrastructure project. The arrangements provided incentives for the partners to support terms that would result in high profits over the thirty year-plus life of the concessions.

***Several of the companies, after vetting the partnership arrangements with independent counsel and auditing firms, informed the U.S. Ex-Im Bank, OPIC, and the SEC about the details, and encountered no objections.***

Several of the companies, after vetting the partnership arrangements with independent counsel and auditing firms, informed the U.S. Export-Import Bank, the Overseas Private Investment Corporation, and the Securities and Exchange Commission about the details, and encountered no objections.

Thus, large multinational corporations were able to use these financial gifts to the families and friends of developing country leaders to secure investment contracts on favorable terms, without being challenged under home-country legislation based on the OECD Convention or FCPA.

How could this happen? Were these partnership arrangements clearly illegal, constituting "corrupt payments" under the OECD Convention and FCPA, but the anticorruption laws were simply not enforced? Or did these arrangements pass muster because they met the letter of these laws, if not their intent?

To answer these questions, CGD convened an Experts' Group on Combating Corrupt Payments in Foreign Investment Concessions. The aim was to review the OECD Convention and FCPA to see if weaknesses exist that allow such behavior now and in the future, and, if so, to investigate how these flaws might be remedied. What might be done to prevent the ongoing use of such arrangements to secure contracts, concessions, and favorable treatment, on the part of international investors — including both investors from OECD home-countries and investors from non-OECD home-countries, such as China and Russia?

## 2. Redefining "Corrupt Behavior" under the OECD Convention, and the U.S. Foreign Corrupt Practices Act

Ten years ago, when the developed countries gathered to put an end to the use of corrupt payments in international transactions on the part of companies headquartered in their states, they issued two documents describing what constitutes improper behavior. The first — OECD Guidelines for Multinational Enterprises — is quite broad, and would almost surely disallow partnership arrangements structured like those outlined above.

The OECD Guidelines state that "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. Nor should enterprises be solicited or expected to render a bribe of other undue advantage. In particular, enterprises should not offer, nor give in to demands to pay public officials or the employees of business partners any portion of a contract payment. They should not use subcontracts, purchase orders or consulting agreements as a means of channeling payments to public officials, to employees of business partners or their relatives or business associates."

***International investors whose home-country legislation was based on the OECD Convention do not appear to put themselves at risk of prosecution when they offer to form partnerships with friends of developing country leaders and provide risk-free loans to finance those partnerships. The FCPA contains the same loophole.***

The second document — the Anti-Bribery Convention — forms the basis upon which OECD members agree to construct their domestic legislation to criminalize corrupt behavior. This Convention is much narrower than the Guidelines: "The Offence of Bribery of Foreign Public Officials: 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."

To contravene the Convention, some kind of pecuniary or other advantage must go to the foreign official; there is no mention of business associates, employees, business partners, or relatives. International investors whose home-country legislation was based on the OECD Convention — like the European and Japanese investors in Indonesia — do not appear to put themselves at risk of prosecution when they offer to form partnerships with friends of developing country leaders and provide risk-free loans to finance those partnerships.

The FCPA contains the same loophole. Its list of those who should not receive payments is more extensive than the OECD Convention, and includes party officials and candidates, as well as government officials, as shown in Appendix 1. But behavior impermissible under the FCPA must still involve payments to the official or the candidate, and does not explicitly include relatives or business associates. Indeed, the Department of Justice's *Layperson's Guide to the FCPA* is precise: "Recipient — The prohibition extends only to corrupt payments to a *foreign official*, a *foreign political party* or *party official*, or any *candidate* for foreign political office." The word "only" makes it clear to parties reading the Guide that arrangements that do not involve payments to

officials are not illegal. There must be a "pass-through" of something of value — or an intent for there to be a "pass-through" of something of value — to the covered official, for a U.S. company to be in violation of the FCPA.

When the U.S. Department of Justice was asked to explain why the present-payment-and-deferred-gift arrangements in Indonesia — some of which were reported to the U.S. Securities and Exchange Commission — were not considered illegal under the FCPA, the Department replied, "Whether a series of payments, or a loan, or a deferred gift would be a violation of FCPA would depend upon whether it occurred at the direction of the official, or other public official, and whether some form of benefit inured to the official."[3] There was no indication that equity shares given to President Suharto's daughter, son-in-law, or friends benefited him directly.

More recently — to double-check this interpretation — when all of the details about the partnership and payment structures of projects insured by the U.S. Overseas Private Investment Corporation (OPIC) in Indonesia were laid out to OPIC's legal department, the Vice President and General Counsel commented, "Please note that in regard to the Indonesian power projects that you mention in your working paper, OPIC is not aware of any evidence supporting any violations of anti-corruption laws."[4]

While the most intimate details of joint venture ownership shares, financial commitments, and cash flows that have entered the public domain involve infrastructure awards during the Suharto regime, the evidence of such arrangements is by no means limited to Indonesia. The practice of international companies winning concessions through forming joint ventures and holding companies with advisers, consultants, business intermediaries, sons, daughters, and wives of leaders permeates the U.S. Senate Report on Riggs Bank and the oil industry in Equatorial Guinea (2004), and the U.K. High Court Approved Judgment involving the sale of petroleum from the Republic of Congo (2005).[5] Press coverage of the privatization of the mobile phone sector in Kenya shows a similar use of minority joint ventures involving family members of the leadership.

***Might it be possible to end such practices simply by expanding the scope of what is prohibited under the OECD Convention and FCPA, through interpretive commentary or other guidance?***

## Fixing the Loopholes

What might be done to prevent international investor behavior like that outlined above? Might it be possible to end such practices simply by expanding the scope of what is prohibited under the OECD Convention and FCPA, through interpretive commentary or other guidance?

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[3] Email from Philip Urofsky, Special Counsel for International Litigation, Fraud Section, U.S. Department of Justice to Louis T. Wells, Jr., August 6, 2002.

[4] Email from Mark Garfinkel, Vice President and General Counsel, General Counsel Overseas Private Investment Corporation, to Theodore H. Moran, February 16, 2006.

[5] "Money Laundering and Foreign Corruption: Enforcement and Effectiveness of the Patriot Act: Case Study Involving Riggs Bank." Report prepared by the Minority Staff of the Permanent Subcommittee on Investigations, US Senate, July 15, 2004. Also, Approved Judgment of the Honorable Mr. Justice Cooke between Kensington International and the Republic of Congo in the High Court of Justice, Queens Bench Division, Commercial Court, Royal Court of Justice, Strand, London. November 28, 2005.

Changing the definition of criminal behavior via administrative reinterpretation of a pre-existing text runs the risk of being considered arbitrary and capricious. Moreover, such an approach may not be able to accomplish what is required.

As noted above, the OECD Convention uses language that says "pecuniary or *other advantage.*" Arguably, a gift to family members of an official confers an advantage to the official, in terms of the overall family financial welfare. So it might be possible to interpret the OECD Convention to preclude gifts to family members. But it is difficult to see how a payment to an ostensibly unrelated business executive who was simply a family friend or business partner (crony) would be covered.

Similarly, the FCPA opens the door to a broad interpretation of what should not be given — "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 to" — the public official. As above, "anything of value" can be broadly construed to include a contribution to overall family welfare. Moreover, subsequent text in the FCPA does indicate that the value can be indirect to the official, and this may assist in more creative interpretations as well ("The FCPA prohibits corrupt payments through intermediaries. It is unlawful to make a payment to a third party, while knowing that all or a portion of the payment will go directly or indirectly to a foreign official"). On the basis of these wordings ("anything of value" and "indirectly"), it may be possible to argue that the FCPA prohibits gifts to family members in return for favorable treatment. Once again, however, it is not clear how the FCPA, as written, could prohibit a gift to a businessman whose only tie to the official was friendship. The FCPA prohibition of a payment to third parties applies only if the payment goes through the third party to the official, as opposed to remaining with the third party.

***…Changing the wording of the OECD Convention, and of home-country law based on this Convention, and of the FCPA may be the essential starting point to preventing dubious practices used by …multinational investors.***

Thus, more encompassing interpretational guidance by the U.S. Department of Justice could create an added deterrent impact for U.S. companies contemplating these arrangements. However, gaps may still remain as it is not clear how far the scope of such guidance would go, even if it were issued. It is also not certain that these could lead to successful prosecutions using the FCPA in a court of law.

Progress in discouraging these practices might also be achieved by requiring investors to report various arrangements with friends and family members, with contractual or even criminal sanctions if there were no disclosure. An effective reporting requirement depends, however, upon clarity in what kinds of third-party agreements are covered by the requirement, and the relationship of the reporting requirement to the underlying prohibitions.

## Rewriting the OECD Convention and the U.S. Foreign Corrupt Practices Act

A careful reading of the relevant texts thus makes it clear that changing the wording of the OECD Convention, and of home-country law based on this Convention, and of the FCPA may be the essential starting point to preventing dubious practices used by U.S., Japanese, European — and perhaps other

— multinational investors. Following the OECD Guidelines, these amendments should make it abundantly clear that payments to family members and personal associates will be treated — under certain conditions — as if they were payments to the official himself/herself.

The question that remains is, under what "certain conditions" would payments be impermissible? It is probably impossible — and inadvisable — to criminalize every arrangement that involves a family member or personal associate. Family members and friends of leaders may well have legitimate business or consulting roles to play in the economic life of the host country.

***The tests for impermissible behavior would have to focus on whether there is a conflict of interest and whether a gift is being given. The tests might include — but would not necessarily have to depend upon — whether any favor or influence was sought or given in return.***

Strong guidance on the dividing line between legitimate and illegitimate acts can be drawn from recent guidance issued by OPIC:

> When entering into a joint venture or other contractual relationship with a business associate, employee or relative of a public official, OPIC sponsors and project companies should be particularly cautious. Contracts, purchase orders, consulting arrangements and equity interests should not be used as a quid-pro-quo to influence, induce or obtain a favorable decision by a foreign public official. These vehicles should also not be used as a means of channeling payments or benefits to foreign public officials or to their business associates or relatives.[6]

The tests for impermissible behavior therefore would have to focus on whether there is a conflict of interest and whether a gift is being given. The tests might include — but would not necessarily have to depend upon — whether any favor or influence was sought or given in return. Where this appears to be the case, the burden of proof would fall on the investor to show the scheme was a legitimate business transaction based on value received or promised for any and all benefits provided.

A key test for conflict of interest in these circumstances is whether there is the possibility of self-dealing, in which public and private interests and/or public and private roles collide.

The test of whether a gift is being bestowed could include: is a genuine service rendered for any payment made, and is there a discernible proportionality between the value being given and the considerations offered in return? If the payment is made in the form of an equity partnership, does the recipient have to put any assets at risk? If the payment is in the form of the awarding of a contract, is the value received consistent with what would have happened through an open and competitive process?

Forbidden behavior would not have to be limited to whether there were a clear quid pro quo showing that the payment or "gift" affected the awarding of the investment concession, or the structure of the terms. The creation of circumstances in which there were a conflict of interest and the bestowal of gifts to conflicted parties could be a stand-alone prohibition.

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[6] From the new 2007 OPIC *Anti-Corruption Policies and Strategies Handbook*. OPIC now requires project sponsors for all finance projects to submit Sponsor Disclosure Reports, containing information about the history of a primary project sponsor>s owners and officers, and compliance with the FCPA and other similar anti-corruption laws.

While the international legal community may be able to improve upon the precise language, a layman's proposal for amendment to the OECD Convention and the FCPA — drawing upon the current OECD Guidelines — might state that "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. Nor should enterprises be solicited or expected to render a bribe or other undue advantage. They should not use subcontracts, purchase orders, consulting agreements, partnerships, or equity interests as a means of channeling benefits to public officials, or to business associates, friends, or relatives of such officials. They should disclose all payments to possibly conflicted parties, and be prepared to demonstrate that value offered was commensurate with services received, as in an open and competitive transaction."

In addition to the specific disclosures recommended above, it is important to enhance the transparency surrounding all payments made and received in international investment transactions. Before turning to this issue in Section 4, however, there is another potential means of containing corruption in international investments: the refusal of arbitral panels to enforce contracts obtained by corrupt means.

## 3. Using Investor-State Arbitration under Bilateral or Regional Investment Treaties to Deter Corruption

Investor-state arbitration may constitute a powerful additional vehicle for combating corrupt payments. A trend has emerged in which tribunals have shown themselves unwilling to enforce investment contracts when those contracts have been acquired via use of corruption.

***Investor-state arbitration may constitute a powerful additional vehicle for combating corrupt payments. A trend has emerged in which tribunals have shown themselves unwilling to enforce investment contracts when those contracts have been acquired via use of corruption.***

This can prove crucially important in creating a level playing field among international investors from diverse home countries, including countries such as Russia and China that are not known for tight enforcement of anticorruption regulations. All investors, regardless of origin, will be forced to think twice about using bribes to obtain concessions if they understand that their rights will not subsequently be recognized if at any point in the long life of their projects they find themselves engaged in investor-state arbitrations.

### A Trend in Arbitration Cases

For comparative purposes, a starting point might be observed in 2000, when, in Metalclad v. Mexico, despite rampant rumors of corruption and pleadings about corrupt practices, the Tribunal simply chose not to address the issue of corruption.

The beginnings of change appeared in 2001, in Wena v. Egypt, when the Tribunal indicated in response to pleadings by Egypt that corruption of a state official could be a determining factor in deciding whether to enforce the contract, but argued that there was insufficient proof in the case to consider this properly.

***Tribunals can vitiate the right of an investor to seek remedies under international investment agreements.***

In 2005, in Methanex v. United States, the Tribunal recognized that it had the capacity to issue a finding of "fact of corruption" even though such allegations had not been proven in associated criminal trials. It set out an extensive discussion of the methodology for a Tribunal to follow in making such a finding, noting that a smoking gun is rarely to be found, using the analogy of connecting the dots, and going so far as to label the pieces of evidence as dot one, dot two, and so on. Thus, although the Tribunal did not lay down a specific burden of proof to find corruption, the arbitrators nonetheless made it clear that circumstantial evidence, without using that term, is admissible, and that it is reasonable for a Tribunal to draw appropriate inferences from such evidence. While the Tribunal ruled that the evidence available to members did not support a finding of corruption in this particular case, the arbitrators made clear that the presumption that an investor can rely upon arbitrators to enforce a contract obtained via corrupt actions is not justified.

Still more important are the two most recent cases. In Inceysa v. El Salvador, August 2006, the Tribunal both issued a finding of corruption and ruled that the fact of the corruption vitiated its jurisdiction. In this case, the Tribunal relied on a frequently used line in bilateral investment treaties (BITs), that an investment "must be made in accordance with the law of the host country," or words to similar effect in other agreements. These words, it found, meant that an investment made through corrupt means was not made in accordance with law, rendering it beyond the jurisdiction of the Tribunal. The Tribunal could not, therefore, hear the case.

Finally, in World Duty Free v. Kenya, October 2006, the claimant readily admitted to a bribe of some $2 million to then President Daniel Arap Moi, organized through a close business associate as an intermediary. The claimant argued, essentially, that this was the only way to do business with Kenya. This argument was rejected by the Tribunal that declined, as a matter of "ordre publique internationale," to hear a case where the investment come into being through corruption. This expanded the reasoning of the Inceysa Tribunal, which had confined the reasoning to language found in the BIT, to a broader policy and public international law context. This is important, as not all investment agreements contain the language found in the BIT in the Inceysa case.

These cases show that Tribunals can vitiate the right of an investor to seek remedies under international investment agreements. They show growing acceptance of the principle — already widespread in domestic law — of rejecting the validity of any contract or permit obtained by corrupt means. This must be seen today as sound law. The more difficult question is whether Tribunals must so conclude; and there appears to be a growing consensus that they must if corruption can be shown.

The analysis provided to CGD by Richard Kreindler, in Appendix 2, offers further support for this view. Kreindler argues that where there is some reasonable basis for believing there could be corruption, whether raised directly by a party to the arbitration or by a third party (*amicus curiae*, for example), the Tribunal can and must exercise its responsibility to investigate, must be prepared to rule without fear or favor, and must raise and investigate the issue

on its own cognizance if it has proper cause. Mere allegations of corruption cannot be enough to deprive an investor of treaty rights.

Some caveats must be noted, however. Arbitral decisions are not subject to *stare decisis*; that is, while arbitrators do consider prior opinions — and there appears to be growing acceptance, as noted above, that corrupt procurement of contracts is contrary to widely accepted norms of international public policy — there is no formal process of setting and following precedent, and there cannot be until there is an appeals process that can resolve conflicting decisions by Tribunals.

In addition, arbitral panels are not well-equipped to pursue criminal investigations. But they do have broad plenary powers to do what is needed to ensure the proper outcome of the case. And they can, of course, always refer cases to national authorities.

## Reinforcing this Deterrent to Corruption

How can the use of investor-state dispute settlement procedures be reinforced to help combat corruption?

The first step is significant consciousness-raising among the community of arbitrators that their responsibilities include sensitivity to the potential for corruption in the awarding of the contracts they are asked to interpret and enforce. The broadening of the definition of corrupt payments, as outlined in the previous section, must complement this growing awareness of what to look for.

***There should be consciousness-raising among the community of arbitrators that their responsibilities include sensitivity to the potential for corruption in the awarding of the contracts they are asked to interpret and enforce.***

The second step is wider acceptance of *amicus curiae* interventions by civil society organizations in any given case. This enlarges the potential for identifying corruption since such organizations may have much less interest in protecting the guilty than some host governments.

The third step lies in steadily increasing the transparency surrounding international investor-host government relationships, including payments made by the investors and expenditures made by hosts at all levels of government. To be successful, such an effort requires support for capacity building among indigenous government agencies, auditors, and non-governmental organizations, as well as international organizations, considered in the next section.

Finally, addressing the relationship between the obligations of investor and host states not to undertake corrupt behavior in the texts of bilateral and other investment agreements would solidify the current direction to sanction such behavior through the application of the general principles of public international law. This would, however, require a change to include the notion of basic investor responsibilities and obligations in the texts, as well as a lengthy process of amendment to some 2,500 existing agreements. Progress here is important, but reform of the current system of deterring corruption cannot wait until an anticorruption standard is at last included in bilateral and other investment agreements.

## 4. Expanding Transparency to Combat Corrupt Payments

Perhaps there is no more important method to reduce corruption than to expand the transparency surrounding the relationships and payments associated with international investment concessions. The risk of exposure — with damage to reputation, loss of assets, and possible prosecution — acts as a great inhibitor on both sides of any corrupt relationship, as long as the corrupt relationships are clearly recognized as such.

***The most important contemporary effort to promote the transparency of investor payments is the Extractive Industry Transparency Initiative (EITI); 26 out of 53 resource-rich countries are signatories, and it is supported by donor governments, major extractive industry companies, civil society, and the international financial institutions. The challenge now is to make the EITI work.***

This cannot be accomplished by developed country governments — or by developing country governments — working by themselves. Instead, working together, rich and poor states must undertake mutually supportive measures to permit and enable their publics to monitor international business transactions that otherwise might conceal corrupt payments. Multilateral lending institutions and regional development banks meanwhile can provide support for the efforts of all sides.

It has long been argued that regular reporting by corporations of payments made to foreign governments — beginning with oil, gas, and mineral extraction — would aid efforts to end corruption, make producing countries and their energy or other resource supplies more stable, and enable citizens of these countries to hold their leaders to account for the misuse of their abundant natural resource wealth.

The most important contemporary effort to promote the transparency of investor payments is the Extractive Industry Transparency Initiative (EITI), developed and promoted initially by the British government. Five years after its launch, EITI currently has 26 out of 53 resource-rich countries as signatories, and is supported by donor governments (including the U.S.), major extractive industry companies, civil society, and the international financial institutions (IFIs). The challenge now is to make the EITI work. This will take a coordinated effort on the part of rich countries, poor countries, and the international community.

As a starting point, EITI needs to establish a system for validating the performance of participating countries against EITI criteria and their own agreed work plans. This in turn requires technical assistance and capacity building for developing country officials, legislators, and civil society organizations, funded via developed country contributions to the World Bank Trust Fund dedicated to this endeavor. The list of countries that endorse EITI must be lengthened. Over time, the EITI umbrella should be extended from extractive industries to infrastructure and, ultimately, to other industries as well.

Besides support for host-country monitoring, the multilateral institutions that provide political risk insurance, guarantees, and capital to large international investment projects can play a direct role in promoting transparency about investor payments. Companies that benefit from World Bank Group support — via funding from the International Finance Corporation (IFC) or guarantees from the Multilateral Investment Guarantee Agency (MIGA) — should be required to publish what they pay and whom they pay for the right to operate

or obtain investment concessions. Eligibility for IFC or MIGA support should be made conditional on host authorities publishing payment information uniformly from investors of all nationalities, whether from OECD countries or not. The same should be true for projects receiving insurance, guarantees, or finance from the regional development banks.

## 5. Conclusions

The fight against corruption in international investments will not succeed unless the laws of rich countries are changed and these new laws are rigorously enforced. The fight also cannot succeed unless developing countries allow information about investor payments and investor relationships to be made public, and local officials, legislators, and civil society organizations are trained to monitor investor behavior.

In addition, international companies from all home countries — including non-OECD home countries — must be made subject to the same risks and penalties so that responsible investors are not put at a competitive disadvantage.

The measures outlined here — stronger interpretation of existing rules, changes in the OECD Convention and FCPA, refusal of international arbitrators to honor contracts (including the contracts of non-OECD investors) obtained by corrupt means, and enlargement of the capacity to monitor payments and gifts — will fill loopholes in the current effort to combat corruption.

***International companies from all home countries — including non-OECD home countries — must be made subject to the same risks and penalties so that responsible investors are not put at a competitive disadvantage.***

# APPENDIX 1
## FOREIGN CORRUPT PRACTICES ACT

## UNITED STATES CODE
## TITLE 15. COMMERCE AND TRADE
## CHAPTER 2B. SECURITIES EXCHANGES

*15 USCS §§ 78dd-1 through 78dd-3*

**§ 78dd-1. Prohibited foreign trade practices by issuers**

(a) Prohibition. It shall be unlawful for any issuer which has a class of securities registered pursuant to section 12 of this *title [15 USCS § 78l*] or which is required to file reports under section 15(d) of this *title [15 USCS § 78o(d)*], or for any officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer, 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 anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(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 issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or 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 issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) 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 any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty

of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its 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 issuer in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action. Subsections (a) and (g) 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 a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses. It shall be an affirmative defense to actions under subsection (a) or (g) that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Guidelines by the Attorney General. Not later than one year after the date of the enactment of the Foreign Corrupt Practices Act Amendments of 1988 [enacted Aug. 23, 1988], the Attorney General, after consultation with the Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which issuers may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provi-

sions of subchapter II of chapter 5 of title 5, United States Code [*5 USCS §§ 551* et seq.], and those guidelines and procedures shall be subject to the provisions of chapter 7 of that *title [5 USCS §§ 701* et seq.].

(e) Opinions of the Attorney General.

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by issuers concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by an issuer and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code [*5 USCS §§ 551* et seq.], and that procedure shall be subject to the provisions of chapter 7 of that *title [5 USCS §§ 701* et seq.].

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by an issuer under the procedure established under paragraph (1), shall be exempt from disclosure under *section 552 of title 5, United States Code*, and shall not, except with the consent of the issuer, be made publicly available, regardless of whether the Attorney General responds to such a request or the issuer withdraws such request before receiving a response.

(3) Any issuer who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions

of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(f) Definitions. For purposes of this section:

(1) (A) The term "foreign official" means 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.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (*22 U.S.C. 288*); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(2) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(3) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(g) Alternative jurisdiction.

(1) It shall also be unlawful for any issuer organized under the laws of the United States, or a State, territory, possession, or commonwealth of the United States or a political subdivision thereof and which has a class of securities registered pursuant to section 12 of this *title [15 USCS § 78l*] or which is required to file reports under section 15(d) of this *title [15 USCS § 78o(d)*], or for any United States person that is an officer, director, employee, or agent of such issuer or a stockholder thereof acting on behalf of such issuer, to corruptly do any act outside the United States 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 to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section for the purposes set forth therein, irrespective of whether such issuer or such officer, director, employee, agent, or stockholder makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (*8 U.S.C. 1101*)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

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**§ 78dd-2. Prohibited foreign trade practices by domestic concerns**

(a) Prohibition. It shall be unlawful for any domestic concern, other than an issuer which is subject to section 30A of the Securities Exchange Act of 1934 [*15 USCS § 78dd-1*], 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 anything of value to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(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;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or 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; or

(3) 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 any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its 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.

(b) Exception for routine governmental action. Subsections (a) and (i) 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 a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses. It shall be an affirmative defense to actions under subsection (a) or (i) that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief.

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Guidelines by the Attorney General. Not later than 6 months after the date of the enactment of the Foreign Corrupt Practices Act Amendments of 1988 [enacted Aug. 23, 1988], the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement

policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code [*5 USCS §§ 551* et seq.], and those guidelines and procedures shall be subject to the provisions of chapter 7 of that *title [5 USCS §§ 701* et seq.].

(f) Opinions of the Attorney General.

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code [*5 USCS §§ 551* et seq.], and that procedure shall be subject to the provisions of chapter 7 of that *title [5 USCS §§ 701* et seq.].

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under *section 552 of title 5, United States Code*, and shall not, except with the consent of the domestic concern, be made publicly available, regardless of whether

the Attorney General responds to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(g) Penalties.

(1) (A) Penalties. Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $ 2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $ 10,000 imposed in an action brought by the Attorney General.

(2) (A) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $ 100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $ 10,000 imposed in an action brought by the Attorney General.

(h) Definitions. For purposes of this section:

(1) The term "domestic concern" means—

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2) (A) The term "foreign official" means 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.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (*22 U.S.C. 288*); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3) (A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative jurisdiction.

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States 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 to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a), for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 101 of the Immigration and Nationality Act (*8 U.S.C. 1101*)) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

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**§ 78dd-3. Prohibited foreign trade practices by persons other than issuers or domestic concerns**

(a) Prohibition. It shall be unlawful for any person other than an issuer that is subject to section 30A of the Securities Exchange Act of 1934 [*15 USCS § 78dd-1*] or a domestic concern (as defined in section 104 of this Act [*15 USCS § 78dd-2*]), or for any officer, director, employee, or agent of such person or any stockholder thereof acting on behalf of such person, while in the territory of the United States, corruptly to make use of the mails or any means or instrumentality of interstate commerce or to do any other act 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 to—

(1) any foreign official for purposes of—

(A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(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 person in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or 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 person in obtaining or retaining business for or with, or directing business to, any person; or

(3) 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 any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its 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 person in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action. Subsection (a) of this section 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 a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses. It shall be an affirmative defense to actions under subsection (a) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof.

(d) Injunctive relief.

(1) When it appears to the Attorney General that any person to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require

the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(4) All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Penalties.

(1) (A) Any juridical person that violates subsection (a) of this section shall be fined not more than $ 2,000,000.

(B) Any juridical person that violates subsection (a) of this section shall be subject to a civil penalty of not more than $ 10,000 imposed in an action brought by the Attorney General.

(2) (A) Any natural person who willfully violates subsection (a) of this section shall be fined not more than $ 100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person who violates subsection (a) of this section shall be subject to a civil penalty of not more than $ 10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a person, such fine may not be paid, directly or indirectly, by such person.

(f) Definitions. For purposes of this section:

(1) The term “person”, when referring to an offender, means any natural person other than a national of the United States (as defined in section 101 of the Immigration and Nationality Act (*8 U.S.C. 1101*) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the law of a foreign nation or a political subdivision thereof.

(2) (A) The term “foreign official” means 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.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that is designated by Executive order pursuant to section 1 of the International Organizations Immunities Act (*22 U.S.C. 288*); or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3) (A) A person's state of mind is knowing, with respect to conduct, a circumstance or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4) (A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place or ship outside thereof, and such term includes the intrastate use of—

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

*** CURRENT THROUGH P.L. 110-80, APPROVED 8/13/2007 ***

# Appendix 2

## Is the Arbitrator Obligated to Denounce Money Laundering, Corruption of Officials, etc.?

### The Arbitrator as Accomplice — Sham Proceedings and the Trap of the Consent Award

Dr. Richard H. Kreindler, Shearman & Sterling LLP - Frankfurt

Money laundering, corruption, and other sanctionable or objectionable practices are not new to arbitration, but for various reasons they may be becoming more prevalent. Accordingly, with increasing frequency, the arbitrator is called upon to address issues posed by either a suspicion, evidence, or even overt admission of such practices. The arbitrator may or must then determine the legal consequences on various levels, including arbitrability, jurisdiction, burden of proof, choice of law, application of any "transnational public policy," and any right or duty of denunciation.

***1. Are disputes involving allegations of corruption non-arbitrable?***

In principle, despite prior rulings and views to the contrary, the answer is that such disputes are arbitrable. The broad definition of arbitrability in modern legislation embraces most allegations of corruption, bribery, and the like. This outcome should also apply where the alleged or manifest illegality renders void *ab initio* the underlying main contract but not, or not necessarily, the related agreement to arbitration. An exception may still arise in narrow cases where the illegality renders void *ab initio* both the main contract and the agreement to arbitration.

***2. Are all kinds of "corruption" arbitrable, or are some not?***

One can attempt to make distinctions between "kinds" of corrupt practices, such as bribes, payoffs, commissions, *contrats de pot de vin*, and "personal donations." At the same time, in principle no one practice is any less "arbitrable" than any other, as long as the act relates to a commercial or money-related claim and, as in the case of any other allegation, it is somehow "related to" a claim or defense made or otherwise relevant in the arbitration.

***3. Are all kinds of "corruption" illegal?***

What is an "illegal payoff" in one country or culture may be known as "influence peddling" in another, and viewed as a commercially appropriate and expected component of a contract or as a quasi-contract consideration. Regrettably, this distinction may even extend to acts which in "most" — but perhaps not yet all — countries are condemned as both illegal and abhorrent, such as child prostitution, slave labor, and compensation by way of drug trafficking. Differences in acceptability, regionally and culturally, will surely extend to certain kinds of "commission," "broker," and "intermediary" arrangements.

***4. Under what legal standard should or must the arbitrator determine the issue of illegality?***

A typical international arbitration may have several different points of legal reference: the chosen law, the law of the seat of arbitration, an applicable company law, the law at the place of performance and the law of the place(s)

of likely attempted enforcement of an arbitral award. There may be tension and conflict of outcomes between two or more of these points of reference: what is "illegal" at the seat may be "legal" under the choice of law and may be wholly unregulated under the law at the place of performance. Put simply, to the extent a claim or defense of illegality is arbitrable (see above) and *sub judice*, the treatment should be the same as with any other claim or defense: namely, application of the agreed or deemed substantive law, subject to any contrary or different outcome dictated by the superseding mandatory public policy at the seat.

The result may include declaring the illegality of the act under the law of the seat even if it was legal under the otherwise applicable substantive law. Even further, it should be possible to declare the illegality of the act even if was legal under both the law of the seat and the substantive law in those cases where the tribunal determines an illegality as a matter of a deemed "transnational" or "international" public policy.

The "mere fact" that corruption or bribery is certifiably a common and even commercially necessary practice in a particular country or particular industry need not result in its condoning by the arbitrator as long as it is also a violation of such public policy.

The result should be no different even where the agreed substantive law has little or no nexus to the underlying transaction and/or to the law of the seat. At the same time, the lesser the nexus to the seat, the greater the justification in considering "transnational" or "international" public policy. Finally, the arbitrator is not obligated to consider or address the legality or illegality under the law of the place(s) of likely attempted enforcement, although the appropriateness of doing so will increase the more obvious the location and the more obvious the potential barrier.

***5. Should or must the arbitrator determine the issue of illegality in all cases when alleged?***

The answer should be yes, as long as the otherwise applicable prerequisites of arbitrability, jurisdiction, and relatedness to the proceedings are fulfilled. Furthermore, there must be no danger of infringing upon or usurping the sovereignty of competent state criminal authorities, particularly at the seat. The arbitrator is not obligated to consider such danger respecting the sovereignty of such authorities at the place(s) of putative attempted enforcement. Again, the appropriateness of doing so will increase the more obvious the location and the more obvious the potential barrier.

***6. Should or must the arbitrator determine on his own any illegality even when not alleged?***

The possible tension here is between the respective duties of equal treatment, right to be heard, *ultra petita* and public policy. But is there really a tension between due process and public policy? The arbitrator must be mindful here of the public policy control but also of the due process control, such that the parties must be made aware of, and be given a reasonable opportunity to comment in particularized fashion on, the suspicion or evidence of illegality. As the agreed or deemed primary trier of fact, the arbitrator is in a unique position, normally not shared or aspired to by the subsequent reviewing or enforcing court, to ascertain the facts. To the extent that determining the facts

surrounding an alleged illegality may be tied to enforceability, the arbitrator should err on the side of initiating investigation, and thereby preempt any need or temptation of a reviewing court to reopen the case.

What about the tension between *ultra petita* and competence-competence? There is no real tension — a self-initiated inquiry into illegality may legitimately be considered relevant to an affirmation or denial of arbitrability and/or of the arbitrator's own jurisdiction. In such a case, the arbitrator should also "err on the side of" conducting the inquiry. In those circumstances, the argument could be made that the self-initiated inquiry is not *ultra petita* for the simple reason that the *petita* must always be deemed to encompass a right to ascertain arbitrability and jurisdiction.

Where, however, a suspected or manifest illegality is irrelevant to the claims, defenses, jurisdiction, and overall enforceability under the law of the seat, then the arbitrator should have no right or duty to engage in investigations and findings which are the province of the state criminal authorities. This would be the case even in the face of the argument that as long as he is "motivated" by a desire to conform to the mandate of public policy, the arbitrator's self-initiated inquiry into possible illegality should in principle not be a violation of *ultra petita.*

A different situation arises where the arbitrator suspects or knows that the parties are colluding to instrumentalize the arbitral process for illicit purposes, such as money laundering, in violation of public policy under the law of the seat. In that case, the right or duty to avoid a public policy violation may supersede any competing duties respecting equal treatment, right to be heard or *ultra petita*. This right or duty should also apply even in the rare cases where the parties have validly waived any right of recourse against the award.

In situations where the act is not illegal under the law of the seat, but is determined by the arbitrator to be illicit as a matter of a deemed "transnational" or "international" public policy, there may be a basis to conclude that the domestic law is superseded by the transnational public policy or that the transnational public policy has become part of the domestic law.

### *7. Should or must the arbitrator resign in the face of a manifestly illegal contract?*

One should distinguish between illegal contracts on the one hand and illegal conduct of the parties in the arbitration on the other. In the case of illegal conduct, the arbitrator has a right to resign his mandate in those cases in which he determines that he is no longer able to fulfill his function, including an unwillingness to aid or abet collusion between the parties seeking to instrumentalize the arbitral process. An arbitrator should not be compelled to carry out, against his will, a task as personal as that of judging. In such cases, the arbitrator may also be seen as having a duty to resign in order to avoid becoming an accomplice to an illegal act, at least as a matter of the law of the seat.

Short of such collusion, however, the arbitrator should not and must not resign in the case of even a manifestly illegal contract as long as the otherwise applicable prerequisites of arbitrability, jurisdiction, and relatedness to the proceedings are fulfilled. Resignation in the face of a distasteful or otherwise troublesome illegality should not be countenanced, except insofar as the reasons relate to an inability to guarantee continuing impartiality or other incapacity in carrying out the arbitrator role. Otherwise, throwing in the towel

could be seen as aiding and abetting the underlying illegality and abdicating the powers and duties which the arbitrator possesses to civilly sanction the illegality.

Indeed, resignation might be seen as a form of complicity in the original illegality where the arbitrator surrendered his opportunity to actively condemn. Depending upon the applicable rules, resignation in lieu of rendering a ruling or award at least confirming the illegality might allow the parties to seek another tribunal which could take a softer approach to the issue.

***8. What are the consequences of a finding of illegality in the arbitration in terms of liability?***

In the case of an illegal contract, depending upon the applicable law, the arbitrator will need to determine whether: only one or both parties knew or should have known of the illegality; the contract is deemed to be void or voidable as a result; and waiver or estoppel operates to extinguish the claim or negate the defense.

Generally speaking, contracts tainted with illegality are unenforceable. Contracts procured by bribery are voidable at the instance of the party whose agent was bribed. Similarly, with respect to the discretion attached to an award of costs, the arbitrator should consider declining an award of costs to the "successful" respondent where the respondent knew or should have known of the illegality and/or the reason for the "success" was the voidness or voidability of the underlying contract.

***9. What are the consequences in terms of denunciation to the state authorities?***

There is no apparent reason here to distinguish between illegal contracts and illegal conduct in the arbitration. In both cases, the arbitrator should be seen as having no right of "denunciation," even if he determines that he must resign.

An exception would be where the suspected or manifest act is of the same kind and nature, under the applicable law, as would require any other third party to denounce; presumably, such cases will be exceedingly rare. Such right or duty of denunciation must also overcome the duty, if any, of confidentiality or secrecy attaching to the arbitration and the right, if any, of professional privilege attaching to a party or, more likely, to a counsel. In the case of certain investment-related arbitrations, including those allowing for *amicus curiae* participation, this issue of confidentiality may be turned on its head.

In the case of illegal contracts, likewise the arbitrator should be seen as having no right of "denunciation," even if he determines that he must resign, unless the suspected or manifest act is of the same kind and nature, under the applicable law, as would require any other third party to denounce; presumably, such cases will also be exceedingly rare. Again, such right or duty of denunciation must also overcome the duty, if any, of confidentiality or secrecy attaching to the arbitration and the right, if any, of professional privilege attaching to a party or counsel.

The desire and duty to inform the authorities of the suspicion or existence of illegal acts, and their perpetrators, may be great, but does not necessarily flow from the mission as arbitrator. In the absence of a corresponding treaty, the state courts of one country are not obliged to enforce the penal laws of another country. Why then should an arbitral tribunal do so?

# Appendix 3

## Experts Consulted

While preparing this report, we consulted with a group of experts, some in gatherings at the Center for Global Development, some "virtually." Among the experts consulted were representatives of the US Treasury, the State Department, the private sector, and international organizations. A list of those consulted follows. The views and analysis expressed in the paper are not necessarily the views of those consulted, and in some cases there was strong disagreement with the report's conclusions and recommendations.

Joseph C Bell, Senior Partner, Hogan and Hartson

Kim Elliott, Senior Fellow, Center for Global Development

Debra A Juncker, United States Department of State

Richard Kreindler, Partner, Shearman and Sterling LLP

Lucinda Low, Partner, Steptoe and Johnson LLP

Howard Mann, Senior International Law Advisor,
Institute for Sustainable Development, Canada

Tara O'Connor, Director, Africa Risk Consulting

Gary Sampliner, Senior Counsel, U.S. Department of Treasury

Louis Wells, Herbert F. Johnson Professor of International Management
at Harvard Business School

Sarah Wykes, Senior Campaigner, Global Witness

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