

**INTEGRATING INTEGRITY AND PROCUREMENT: THE
UNITED NATIONS CONVENTION AGAINST CORRUPTION
AND THE UNCITRAL MODEL PROCUREMENT LAW**

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ABSTRACT. Traditionally, "procurement reform" and "anti-corruption" initiatives have been dealt with on separate tracks, although they share a common purpose: a sound government, supported by a robust and politically legitimate procurement system. Now two initiatives at the United Nations may integrate those disparate strands. The United Nations Commission on International Trade Law (UNCITRAL) is working to reform the UNCITRAL Model Law on Procurement of Goods, Construction and Services (the "UNCITRAL Model Procurement Law"), an important instrument for harmonizing, and strengthening, procurement systems throughout the developing world. The UNCITRAL working group tasked with that effort is assessing a parallel initiative at the United Nations, the UN Convention Against Corruption, which has been signed by 140 countries. This paper reviews the two UN initiatives, and concludes that the UNCITRAL Model Procurement Law provides precisely the sort of structured system of rules called for by Article 9 of the Convention. Moreover, by containing corruption, the UN Convention could make it possible to loosen at least some of the cautious constraints that confine most procurement systems, including those under the UNCITRAL Model Procurement Law. Ultimately, therefore, the UN Convention Against Corruption, if prudently implemented, could serve as a catalyst for procurement reform around the world. More broadly, the two UN initiatives show the powerful synergies that can be gained by carefully coordinating procurement reform and anti-corruption efforts.

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INTRODUCTION

Policymakers crafting a sound procurement system must balance a number of goals. Of those goals, experience has shown that *competition*, *transparency* and *integrity* are probably the most important. If a government's procurement system reflects all three elements, the system is much more likely to achieve best value in procurement, and to maintain political legitimacy. These central goals, moreover, complement one another. A fully transparent procurement system, for example, is far less likely to have problems with integrity, for many more stakeholders can exercise oversight in a transparent procurement system. The reverse is also true: a system with weak systems to enforce integrity, for example, will probably have shoddy competition, and transparency will likely erode as corruption drains the procurement system of political legitimacy.

It is becoming apparent, therefore, that reform initiatives need to integrate these goals. In practice, however, too often *competition* and *transparency* have been dealt with as issues of "procurement reform," while *integrity* has been addressed separately, as part of "anti-corruption" initiatives. The goals are the same – a strong, effective and politically legitimate government – but too often the efforts have been divided. Two ongoing initiatives in the United Nations, however, offer an opportunity to draw together these parallel tracks, of improving procurement and fighting corruption.

The first initiative stems from the United Nations' effort to combat corruption around the world. In December 2000, the United Nations (UN) General Assembly passed Resolution 55/61, which called for an international legal instrument against corruption.¹ After long negotiations, the resulting agreement, the United Nations Convention on Corruption, was adopted by the UN General Assembly on October 31, 2003, and was opened for signature.² The UN Convention Against Corruption is the first truly global agreement against corruption.³ As of mid-2006, 140 countries had signed the Convention, of which 60 countries had ratified or acceded to the Convention.⁴

The second initiative is the UN's longstanding effort to improve procurement practices, especially in developing nations. Since 2004, the United Nations Commission on International Trade Law (UNCITRAL) has been reviewing the 1994 UNCITRAL Model Law on Procurement of Goods, Construction and Services (hereinafter the "UNCITRAL Model

Procurement Law"). UNCITRAL has assigned that review to an international working group, which convenes twice yearly. One issue before the UNCITRAL working group is how the UNCITRAL Model Procurement Law should address the UN Convention Against Corruption. This paper assesses that question, and reviews how the UN Convention Against Corruption might be incorporated into existing public procurement legal regimes.

Part II of this paper reviews the UN Convention Against Corruption, which calls upon enacting states to implement a remarkably broad scheme of anti-corruption laws. Part III of the paper discusses the history of the UNCITRAL Model Procurement Law, and the UNCITRAL model law's limited provisions regarding corruption. Part IV compares the UN Convention and the UNCITRAL Model Procurement Law, and shows that the UNCITRAL Model Procurement Law would provide an excellent complement to the UN Convention; indeed, the UNCITRAL model law provides precisely the type of structured procurement rules called for by the UN Convention. Part V notes that the UN Convention focuses very narrowly on integrity, unlike a broader procurement regime which must accommodate many other goals; the analysis traces how that narrow focus can raise obstacles to implementation of the Convention. In Part VI, the paper concludes that those obstacles can be resolved by a flexible implementation of the UN Convention, an implementation which recognizes that a bolstered integrity regime may, ultimately, breathe new flexibility and strength into any procurement system.

THE UN CONVENTION AGAINST CORRUPTION

Unlike the UNCITRAL Model Procurement Law, which, as is discussed below, was a more modest outgrowth of the UN's efforts to harmonize commercial laws internationally, the UN Convention Against Corruption began from – and ultimately reflected – a much broader initiative.

Late in 2000, the United Nations General Assembly launched an effort to develop an international convention against public corruption. The resulting instrument, the United National Convention Against Corruption, was negotiated by an *ad hoc* committee between January 2002 and October 2003. The convention approved by the committee

was, per a resolution of the UN General Assembly,⁵ signed in December 2003 at a high-level political signing conference in Merida, Mexico,⁶ which was attended by signatory nations.⁷ The UN Convention Against Corruption has been signed by 140 countries and, as of this writing, has been ratified by 60 countries.⁸ The Convention entered into force on December 15, 2005, after 30 signatories had ratified the Convention.⁹ The Convention Against Corruption remains a central part of efforts by the United States,¹⁰ and by many others across the international community, to fight corruption.

The UN Convention Against Corruption explicitly references a number of earlier anti-corruption instruments,¹¹ including the Organization of American States (OAS) Inter-American Convention Against Corruption,¹² the European Union's Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union,¹³ the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,¹⁴ the Council of Europe's Criminal Law Convention on Corruption,¹⁵ the Council of Europe's Civil Law Convention on Corruption,¹⁶ the African Union (AU) Convention on Preventing and Combating Corruption,¹⁷ and the United Nations' own Convention Against Transnational Organized Crime.¹⁸

Among these various international conventions, however, as a report to the American Bar Association noted, the UN Convention Against Corruption "is by far the broadest of any of the international anticorruption conventions to date."¹⁹ The Convention spans a number of important topics,²⁰ many of which reach well beyond public procurement:

- *Preventive Measures:* Articles 5 through 15 of the Convention commit each signatory state to developing and maintaining "effective, coordinated anti-corruption policies." To make those policies work, under Article 6, enacting states are to establish "anti-corruption bodies" to implement and tout anti-corruption policies. Civil servants, per Article 7, are to be paid adequately and promoted on merit, and state parties are to "consider" action that will enhance transparency in election finance. "In accordance with the fundamental principles of domestic law" (a common formulation in the UN Convention Against Corruption, discussed further below),

states are to "maintain and strengthen systems and prevent conflicts of interest." Under Article 8, states are to establish codes of conduct for their public officials. Article 9 sets standards for procurement (which will be discussed in detail below), and Article 10 calls for greater transparency in public administration. Members of the judiciary are to be shielded from corruption, per Article 11. Under Article 12, state parties are to take measures to reduce corruption in the private sector; among those suggested are codes of conduct for the private sector, audits of firms, measures to ensure honest accounting, and limits on the employment of former public servants in the private sector. Article 13 calls for measures to enhance public participation in anti-corruption efforts (civil society initiatives, for example), and Article 14 requires state parties to institute rigorous systems to prevent money laundering.

- *Criminalization and Law Enforcement:* Articles 15 through 42 address specific measures that state parties must take to enforce anti-corruption efforts through the criminal law. Article 15 addresses bribery, and calls for states to adopt laws to criminalize the intentional offer or receipt, to or by a public official, of "an undue advantage, for the official himself or . . . another . . . , in order that the official act or refrain from acting in the exercise of his . . . official duties." Article 16 casts a broader net, and calls for states to criminalize bribery of *foreign* officials, to the extent that corruption affects the conduct of international business. Article 17 calls for laws to bar embezzlement and other forms of diversion for private benefit by public officials, and Article 18 calls for states to "consider" laws that would bar public officials from trading in influence. Per Article 19, states are also to consider criminalizing abuses of office, and, per Article 20, illicit enrichment (*i.e.*, "a significant increase in the assets of a public official that he or she cannot reasonably explain"). Article 21 addresses what we in the United States call "commercial bribery," a concept that has never been well defined in private commercial law; Article 21 calls for enacting states to "consider adopting" legal measures that would criminalize the offer or receipt of "an undue advantage" in a private firm, if that "undue advantage" would cause a private employee to act "in breach of his or her duties." Article 22 requires enacting states to consider laws to ban private embezzlement, and Article 23 calls for laws to stop the laundering of criminal proceeds. Article 24

would criminalize "concealment," *i.e.*, concealing or retaining property gained unlawfully, and Article 25 would criminalize obstruction of justice. Article 26 calls for laws to hold "legal persons" (*e.g.*, corporations) legally liable for corruption, and Article 27 would make aiding and abetting, or attempt, bases for criminal liability. Article 28 would allow criminal intent to be inferred from the circumstances surrounding an alleged crime, and Article 28 would require "long" statutes of limitation regarding crimes of corruption. Article 30 calls for structured, proportional sanctions, and Article 31 would allow the freezing and forfeiture of assets tainted by corruption. Article 32 seeks to ensure protection for witnesses, experts and victims, and Article 33 similarly would protect those reporting corruption. Article 34 opens the door to punishing firms for corruption – including, potentially, rescission of a contract. Article 35 calls for states to "take such measures as may be necessary, in accordance with principles of [their] domestic law[s]" (again, a standard formulation) to ensure that those who suffer damages due to corruption "have the right to initiate legal proceedings against those responsible." Article 36 calls for specialized anti-corruption law enforcement bodies, and Article 37 says that states shall take steps protect anti-corruption "whistleblowers." Articles 38 and 39 contemplate cooperation between governments, and between authorities and the private sector. Article 40 calls for limits to bank secrecy rules so as not to shield corruption, and Article 41 says that criminal records from other states should be made available to combat corruption. Finally, Article 42 calls for measures to ensure that state parties may indeed exercise jurisdiction over corruption that arises within their spheres of authority.

- *International Cooperation:* Chapter IV of the Convention, from Articles 43 through 50, includes detailed requirements for international cooperation in investigating and prosecuting corruption, including extensive provisions regarding extradition. Articles 44 (Extradition) and 46 (Mutual Assistance) are especially important, because they are self-executing, *i.e.*, unlike the Convention's other articles, these articles regarding extradition and mutual assistance apparently will *not* require domestic legislation to come into effect.²¹
- *Asset Recovery:* Chapter V of the Convention addresses asset recovery, and sets out, in Articles 51 through 59, detailed provisions

calling for international cooperation in identifying and seizing assets that are tainted by corruption.

- *Technical Assistance and Information Exchange:* Chapter VI of the Convention, Articles 60 through 62, call for international in initiatives to train in, and exchange information on, anti-corruption efforts worldwide.
- *Mechanisms for Implementation:* Chapter VII, Articles 63 and 64, establish a conference and secretariat within the United Nations, to help implement, improve and expand upon the Convention's terms.
- *Final Provisions:* Chapter VIII of the Convention, in Articles 65 through 71, sets forth administrative matters regarding the convention. Article 65 says that each state party "shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure implementation of its obligations under this Convention." Article 66 sets out mechanisms for settlement of disputes between member states, including potentially arbitration before the International Court of Justice.

As even this brief summary shows, the UN Convention Against Corruption spans a startlingly broad range of topics, from extradition to bribery to procurement. The next sections of this paper assess how this wide-ranging agreement should be integrated with the UNCITRAL Model Procurement Law – and, by implication, how anti-corruption efforts generally should best be integrated with existing procurement regimes.

THE UNCITRAL MODEL PROCUREMENT LAW

The United Nations Commission on International Trade Law (UNCITRAL) Model Law on Procurement of Goods, Construction and Services (the "UNCITRAL Model Procurement Law"),²² which was approved in 1994, is currently undergoing review by a working group launched by UNCITRAL.²³ At its ninth meeting, in New York in April 2006, the working group noted the need to review the United Nations Convention Against Corruption, to determine how the UNCITRAL Model Procurement Law might accommodate the Convention:

The Working Group noted that the United Nations Convention against Corruption had recently entered into force and that although the main elements of its provisions addressing procurement were consistent with those of the Model Law, its requirements for domestic review provisions and those addressing conflicts of interest went beyond the current provisions of the Model Law, and might warrant the further attention of the Working Group in due course.²⁴

As it stands, the UNCITRAL Model Procurement Law already includes a limited anti-corruption provision, which describes how the procurement process itself should expunge any corruption:

Article 15. Inducements from suppliers or contractors (Subject to approval by ... (the enacting State designates an organ to issue the approval),) a procuring entity shall reject a tender, proposal, offer or quotation if the supplier or contractor that submitted it offers, gives or agrees to give, directly or indirectly, to any current or former officer or employee of the procuring entity or other governmental authority a gratuity in any form, an offer of employment or any other thing of service or value, as an inducement with respect to an act or decision of, or procedure followed by, the procuring entity in connection with the procurement proceedings. Such rejection of the tender, proposal, offer or quotation and the reasons therefor shall be recorded in the record of the procurement proceedings and promptly communicated to the supplier or contractor.²⁵

UNCITRAL's *Guide to Enactment* for the Model Procurement Law explains that, while this provision is an important safeguard, enacting states "should have in place generally an effective system of sanctions against corruption by Government officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process."²⁶ Clearly, therefore, the drafters of the UNCITRAL Model Law contemplated a complementary legal regime, to ensure that corruption does not penetrate and undermine an enacting state's procurement system.²⁷

As presently drafted, the UNCITRAL Model Procurement Law may, however, provide a less complete solution regarding domestic review (also known as "bid challenges," or, in the United States, "bid protests"). As the note from the working group quoted above suggested,²⁸ the

domestic review provisions in the current version of the UNCITRAL Model Procurement Law may not pass muster under the UN Convention Against Corruption.²⁹ The UNCITRAL Model Procurement Law reflects its drafters' ambivalence regarding domestic review,³⁰ exempts a broad number of procurement actions from review,³¹ and imposes significant procedural constraints on disappointed offerors that would seek review.³² It may, however, be too early to count the UNCITRAL Model Procurement Law as even arguably inadequate, for the UNCITRAL working group has long planned to address the model law's review provisions,³³ and ultimately the UNCITRAL Model Procurement Law's review provisions may, by any measure, meet the demands of the UN Convention on Corruption.

IMPLICATIONS OF THE UN CONVENTION AGAINST CORRUPTION FOR PROCUREMENT LAW

As noted, the working group that is driving reform of the UNCITRAL's Model Procurement Law is assessing how, and whether, the UN Convention Against Corruption should be incorporated into the UNCITRAL Model Procurement Law. For the reasons discussed below, however, that may not be the correct question; given the prevalence of the Convention, perhaps the true question is how the UNCITRAL Model Law can best be assimilated into the regime contemplated by the Convention Against Corruption. And that assessment, in turn, has broader implications for procurement law in general, for the assessment suggests how procurement and anti-corruption regimes should be integrated.³⁴

Should the UNCITRAL Model Procurement Law Incorporate the UN Convention Against Corruption By Reference?

The first question – and the question to be put before the UNCITRAL working group reviewing the UNCITRAL Model Procurement Law – is whether the UNCITRAL Model Procurement Law should accommodate, by incorporation or otherwise, the UN Convention Against Corruption. For practical and legal reasons, however, that may be the wrong question.

Practically speaking, it is highly unlikely that a nation would adopt the UNCITRAL Model Procurement Law *before* that nation signed the UN Convention Against Corruption. As noted, fully 140 nations have

signed the Convention, and 60 nations have ratified it already. The UNCITRAL Model Procurement Law, in contrast, has been relied upon by only 18 nations.³⁵ As a practical matter, therefore, it is much more likely that a nation that has already signed (and perhaps even ratified) the Convention would move to adopt the Model Procurement Law – which means, in substance, that the proper question is whether a nation that has adopted the Convention Against Corruption can, consistent with the Convention's requirements, also formally adopt the UNCITRAL Model Procurement Law.

For legal reasons, too, the UN Convention Against Corruption will take precedence over the Model Procurement Law. Article 3 of the UNCITRAL Model Procurement Law specifically states that, where there is a conflict between the Model Procurement Law and any treaty obligations of the adopting state, the treaty obligations are to prevail. As a legal matter, therefore, again the UN Convention Against Corruption takes precedence, and the proper question is how the UNCITRAL Model Procurement Law might be incorporated into the Convention – not the reverse.

Can the UN Convention Accommodate the Model Procurement Law?

The next question, then, is if a state that has adopted the UN Convention Against Corruption may, without doing violence to the Convention's requirements, also adopt the UNCITRAL Model Procurement Law. To assess that, we must look to the UN Convention's core procurement requirements, per Article 9 of the Convention,³⁶ arrayed against the UNCITRAL Model Procurement Law's key provisions.

Table I, which is set forth in Appendix to this paper, shows, point by point, that the UNCITRAL Model Procurement Law fulfills almost all of the elements called for by the UN Convention Against Corruption. The one serious "gap"³⁷ in the UNCITRAL Model Procurement Law lies in the rules of conduct for procurement personnel required by the UN Convention's Article 9(1)(e). The UNCITRAL Model Procurement Law does not speak to those rules of conduct,³⁸ for the UNCITRAL Model Law "sets forth only the procedures to be followed in selecting the supplier or contractor," and "assumes that the enacting State has in place, or will put into place, the proper institutional . . . structures and human resources necessary to operate . . . the procurement procedures."³⁹ The

UNCITRAL Model Procurement Law thus contemplates – indeed, welcomes – precisely the type of integrity rules that should arise under the UN Convention Against Corruption, for the Convention calls for extensive rules to guide procurement officials' conduct. A nation that has ratified the UN Convention should, therefore, be able to accommodate the UNCITRAL Model Procurement Law. The UN Convention should fill the gap left in the UNCITRAL model law regarding rules of conduct, while at the same time the UNCITRAL model law should complement, and bring substance to, the core procurement requirements of the UN Convention.

HOW AN ANTI-CORRUPTION REGIME MAY SHAPE PROCUREMENT

The discussion above shows that, as a technical matter, a nation that first adopts the UN Convention Against Corruption can then adopt the UNCITRAL Model Procurement Law, as a logical (and graceful) complement to the UN Convention. The question for that hypothetical nation (and the broader question for governments generally) is whether it makes sense to put an anti-corruption regime in place *before* a procurement regime, and to give anti-corruption efforts first emphasis; in other words, is it sound policy to take an “integrity first” approach to procurement?

To understand this question, it is important to understand that a procurement system almost always reflects a compromise between a number of goals, which are explicitly named in many systems of procurement rules,⁴⁰ and which were enumerated by our colleague Steven Schooner in his 2002 piece, *Desiderata: Objectives for a System of Government Contract Law*.⁴¹ Those “desiderata” – nine common goals for procurement systems – include (1) competition; (2) integrity; (3) transparency; (4) efficiency; (5) customer satisfaction; (6) best value; (7) wealth distribution; (8) risk avoidance; and (9) uniformity.⁴² Of those “desiderata,” *competition*, *integrity* and *transparency* are typically viewed as the core, or preeminent, goals in any sound procurement system.⁴³

Unlike a system of procurement rules, however, the UN Convention Against Corruption instead puts “integrity” first among its goals, and makes only nodding (if any) reference to other goals that may, in fact, be

critical elements of a procurement system. This “integrity first” approach can bring both benefits, and burdens, to a procurement system.

Shifting Policy Leadership to the Integrity Community

The most obvious impact of an “integrity first” approach to procurement will be to give the leaders of the anti-corruption community – including prosecutors, politicians, ethics officials, the press, and private “watchdog” groups – a strong first voice in procurement policy.⁴⁴ While this may seem an attractive outcome, since integrity is the cornerstone to a strong procurement system, it may have its costs.

First, procurement reform may be overwhelmed by broader efforts to address corruption.⁴⁵ Early reports from other nations' efforts to implement the UN Convention Against Corruption bear out this concern, for the reports suggest that procurement reform is just one small part (and an easily forgotten part) of much more sweeping anti-corruption initiatives.⁴⁶

Moreover, the anti-corruption community is, after all, a relatively narrow interest group (even if it represents a much broader public interest), and ultimately that community may find itself outmaneuvered by other, more sophisticated groups in the procurement arena. Other interest groups, such as those in industry, may be able to manipulate the procurement rules to their own ends even while mollifying the anti-corruption interest groups, both inside and outside government, which typically lack deep experience in procurement matters.

A corollary and natural result of giving the UN Convention primacy in procurement policy will be to create “fault lines” in procurement rules, as the rules strain towards integrity and away from other goals of the procurement system, such as competition or efficiency. As a result of this shift towards integrity, fault lines will likely emerge, where the rules generated by the UN Convention Against Corruption are both over- and under-inclusive.

The Under-Inclusive Convention: Gaps Left in the “Revolving Door”

An example from the UN Convention Against Corruption may help to illustrate this point, for the Convention does not adequately address a recurring danger in public procurement: the “revolving door.” As government officials move into the private sector, and their private

counterparts enter government, there is a pronounced risk that procurement decisions inside the government will be corrupted by past relationships – or by future job opportunities. The experience of the United States is that this "revolving door," a subtle form of corruption, can divert many millions of dollars in procurement decisions,⁴⁷ and U.S. law accordingly attempts to confine "revolving door" corruption by setting strict limits on prospective contractors' ability to recruit and retain government officials, and on procurement officials' ability to negotiate future employment with prospective offerors.⁴⁸

In contrast to U.S. law, which has molded laws and ethics rules to match the procurement system's unique demands,⁴⁹ the UN Convention on Corruption does not speak directly to the "revolving door." Article 8, *Codes of Conduct for Public Officials*, says only:

5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

The Convention thus leaves it to the enacting states ("where appropriate" and only so long as "in accordance with . . . domestic law") to establish rules for disclosure. Nor does the Convention close this gap in Article 12, *Private Sector*, which sets minimum standards for former officials; Article 12 calls, in paragraph 2(e), for enacting states to enact measures:

Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure.⁵⁰

Finally, Article 18, *Trading in Influence*, calls upon enacting states to consider measures to criminalize the promise, or solicitation or acceptance, of “an undue advantage in order that the public official . . . abuse his . . . influence with a view to obtaining from an administration . . . an unfair advantage.”⁵¹

The UN Convention does not, however, bar categories of contact with past or future employers, or, for example, probe the prejudices that may arise if an official’s family members work for contractors. These are the types of contacts, and potential prejudices, that more mature procurement rules systems, such as the United States’, will guard against: U.S. law bars, for example, a job offer from a contractor to an official overseeing that contractor’s business, or to the official’s child.⁵² The Convention’s formulation thus leaves gaps regarding the “revolving door” – the risk that officials’ procurement decisions will be infected by their ties to the contractor community.⁵³ Those gaps can be traced, of course, in part to the relatively skeletal nature of the Convention’s obligations, which by design are to be fleshed out through national law and regulation. But those gaps can also, it seems, be traced to the provenance of the Convention, which is primarily an instrument to fight corruption, and not a carefully defined system of procurement rules.

Over-Inclusive Convention: Commercial Bribery and Damages

Notably, the UN Convention Against Corruption can also arguably be *over*-inclusive, in part as a result of focusing so heavily on *integrity* at the expense of the other “desiderata” that drive any good procurement system. Two examples bear this out.

First, the Convention calls for enacting states to enact laws outlawing what is known as “commercial bribery,” such as when a private firm plies a private employee with “undue advantages” so as to persuade the private employee not to do his duty to his employer.⁵⁴ “Commercial bribery” has never flourished as a concept in U.S. law,⁵⁵ although U.S. procurement law bars payments to private decision makers in certain contexts as illegal “contingent fees.”⁵⁶ “Commercial bribery” has failed in the United States as a legal doctrine in part because it is so difficult to gauge when, in fact, a gift from an outsider has undermined an employee’s “duties” to his employer, but more importantly because it is assumed that *other* enforcement mechanisms – workplace opprobrium, or simply firing the employee – will contain whatever threat “commercial bribery” may pose.⁵⁷ The assumption is that what may

seem to be “commercial bribery,” such as an expensive dinner for a customer’s chief executive, may in fact serve as an efficient market mechanism in the commercial sector. By calling for provisions that would ban “commercial bribery” outright, the UN Convention has imposed a market restraint that may have unforeseen consequences, both inside and outside the procurement market.

As Japan pointed out in its comments on the draft convention, criminalizing purely “private bribery” in a convention aimed at public corruption may be beside the point.⁵⁸ The real goal, as Japan suggested, may be to control corruption of those private parties (individuals and organizations) that play a role *within* government, as contractors or otherwise. That is an issue with which many nations, including the United States,⁵⁹ continue to struggle. As a technical matter, as Japan suggested in its comments,⁶⁰ the problem could be resolved by the Convention Against Corruption’s broad definition of “public official” in Article 2: that definition sweeps up “any . . . person who performs a public function, including for a public agency or public enterprise, or provides a public service.”

Unfortunately, the interpretative notes published by the Convention’s drafters did not clarify this point; instead, the notes said only that enacting states may define “public official” for purposes of the *previous* clause of Article 2.⁶¹ Moreover, the code of official conduct specifically recommended to enacting states by the Convention,⁶² the International Code of Conduct for Public Officials (December 1996),⁶³ in no way suggests that the code should extend to those *outside* government who are arguably performing a “public function.”⁶⁴ Thus, the Convention and its supporting documents appear to leave it to enacting states to decide whether those states will bind contractors which are performing “public functions” by the same codes of conduct used to bind government officials. Ironically, then, the Convention Against Corruption, which may be overly inclusive in outlawing “commercial bribery” by private parties *outside* government, leaves largely unresolved how enacting states are to handle corruption by outsiders who are performing traditional functions *inside* government.

Another example of what may prove an “overly inclusive” measure is Article 35 of the Convention, which calls for enacting states to allow those harmed by corruption to sue for damages.⁶⁵ This provision could have a startlingly disruptive impact in the realm of procurement, for

Article 35 of the UN Convention could open the door to claims from third parties damaged by corruption – suppliers, for example, or individual citizens – who historically have had no right to challenge procurements tainted by corruption.⁶⁶ This threatens to disrupt the traditional boundaries on bid challenges, which, in the United States for example, were limited to certain parties: to offerors to bring bid protests, and to public authorities to launch civil or criminal challenges. This new right of action in third parties may be an important tool against corruption, but also may undermine other aims of the procurement system, such as efficient competition. Again, a rules system driven first by integrity may collide with the more complicated (and compromising) needs of the procurement system.

CONCLUSION: INTEGRATING THE UN CONVENTION INTO A PROCUREMENT SYSTEM

In light of the UN Convention's problems in procurement – its narrow focus on integrity, which may play out in rules that are both under- and over-inclusive – how, then, should nations implement the Convention into their procurement systems? How, for example, can a nation that has ratified the UN Convention Against Corruption incorporate the principles of the Convention, without undermining the existing procurement regime?

First, nations adopting the UN Convention should recognize its promise as well as its problems. The Convention may seem overwhelming in scope and ambition, but only because it offers such a comprehensive roadmap to future anti-corruption efforts. In area after area, from bribery to money laundering to simple personnel practices, the UN Convention marks the way for future reforms, implemented through enacting nations' domestic laws, which will combat corruption.

That, in turn, lends a second strategy for incorporating the Convention into domestic law: implement the Convention flexibly, with an eye to other domestic imperatives, such as the procurement law's competing goals of competition and efficiency. The UN Convention itself allows enormous flexibility in enacting almost all of the Convention's provisions:⁶⁷ almost every article in the Convention is *not* self-executing, and must be enacted into domestic law by such measures as are “necessary” and in accordance with “fundamental principles of

[the enacting state's] domestic law.” Implementing the Convention therefore need not do violence to the existing regime of procurement rules, whether based on the UNCITRAL Model Procurement Law or otherwise.

If the enacting state does not yet have an established system of procurement rules, as called for by the Convention's Article 9, the UNCITRAL Model Procurement Law is a logical solution to fill that gap. The UNCITRAL Model Procurement Law reflects many years of work, to make procurement best practices available in a single code for developing nations.

In implementing a new body of rules, or reconciling existing procurement rules with the UN Convention, procurement professionals must recognize the broader promise, for the procurement system itself, of stronger integrity. Many of the confining rules in procurement are, after all, simply bulwarks against corruption. Public procurement forces itself through cumbersome transparent competitions not merely for the sake of transparency or competition, but to ensure that corruption cannot taint those competitions. The experience of the United States shows that, with an aggressive integrity system, the procurement process can shed some of its more cumbersome aspects, and can allow government officials more discretion in selecting the best value for purchasing agencies' needs.

There is an irony – albeit a hopeful one – buried here. While the UN Convention Against Corruption may in essence force enacting nations to adopt structured procurement systems, such as that contemplated by the UNCITRAL Model Procurement Law, if the Convention fulfills its promise and reduces the overall risk of corruption in those nations, in time those nations may be able to move beyond the highly structured procurement systems described by the UNCITRAL Model Procurement Law (and other, similar international models). Highly structured procurements reduce corruption, but also impede efficient outcomes;⁶⁸ if the Convention itself can reduce corruption, therefore, procurement officials will in time be able to make their procurements more flexible, and likely more effective in capturing optimal value.

To make the integration of integrity into procurement successful over time, therefore, there should be an ongoing dialogue between the anti-corruption and procurement communities. The integrity demanded by the UN Convention Against Corruption may be only one of many goals

in a complex procurement system, but that integrity has to remain a central goal to ensure the success – and popular acceptance – for that procurement system. Over time, it is fully possible to integrate the Convention into procurement, and to make important trade-offs between integrity, transparency, competition and efficiency, among other goals. But to make that integration successful, it is vitally important that the anti-corruption community listen, quite carefully, to the shifting needs of procurement – and that the procurement community welcome the Convention's promises of integrity, as a healthy step forward in improving the procurement system itself.

NOTES

1. G.A. Res. 55/61, U.N. Doc. A/RES/55/61 (Jan. 22, 2001).
2. UN Convention Against Corruption, U.N. Doc. A/58/422 (includes summary history of negotiations and text of Convention submitted for approval), available at http://www.unodc.org/pdf/crime/convention_corruption/session_7/422e.pdf; the text of the Convention itself is available at http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf; United Nations Convention Against Corruption: *Signatures*, http://www.unodc.org/unodc/crime_signatures_corruption.html; see Sean D. Murphy, *Adoption of UN Convention Against Corruption*, 98 Am. J. Int'l L. 182, 182 (2004).
3. Philippa Webb, *The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?*, 8 J. Int'l Econ. L. 191, 191 (2005); Samuel M. Witten, Deputy Legal Adviser, U.S. Department of State, *Testimony on the United Nations Convention Against Corruption Before the U.S. Senate Committee on Foreign Relations*, June 21, 2006, at 2-3 ("the Convention is by far the most comprehensive set of international commitments relating to corruption") [hereinafter "U.S. State Department Testimony"], available at <http://foreign.senate.gov/testimony/2006/WittenTestimony060621.pdf>.
4. United Nations Convention Against Corruption: *Signatures*, *supra* note **Error! Bookmark not defined.**

5. United Nations G.A. Res. 58/4, ¶ 2, U.N. Doc. A/RES/58/4 (Nov. 21, 2003), <http://www.un.org/Depts/dhl/resguide/r58.htm>. Explanatory notes for the Convention Against Corruption are set forth in a *Report of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption on the Work of Its First to Seventh Sessions: Addendum: Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention Against Corruption*, U.N. Doc. A/58/422/Add. 1 (Oct. 7, 2003) [hereinafter "Ad Hoc Committee's Interpretative Notes"], available at www.unodc.org/pdf/crime/convention_corruption/session_7/422add1.pdf.
6. United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption: Background*, www.unodc.org/unodc/crime_convention_corruption.html.
7. United Nations, Press Release: "Trillion-dollar scourge of corruption under attack, as UN conference closes in Merida" (Dec. 2003), www.un.org/webcast/merida/statements/release3-eng.htm.
8. See United Nations Convention Against Corruption: *Signatures*, *supra* note **Error! Bookmark not defined.**
9. *Id.* The UN Convention Against Corruption has been submitted to the U.S. Senate for review. A hearing was **held** before the U.S. Senate Committee on Foreign Relations on June 21, 2006, see U.S. Senate Committee on Foreign Relations, *Hearing: United Nations Convention Against Corruption (Treaty Doc. 109-6)*, 109th Cong., 2d Sess. (June 21, 2006), available at <http://foreign.senate.gov/hearings/2006/hrg060621a.html>, and the Convention was reviewed by the Senate Committee on Foreign Relations in August 2006, see U.S. Senate Committee on Foreign Relations, *Press Release: Hearing Before the Committee on Foreign Relations, U.S. Senate*, 109th Cong., 2d Sess. (Aug. 1, 2006) (referencing UN Convention Against Corruption (Treaty Doc. 109-6)), available at <http://foreign.senate.gov/hearings/2006/hrg060801p.html>.
10. The Bush administration cited the support of the group of eight leading industrial nations (the "G-8" nations) as an important element of international efforts to fight corruption. See White House, Office of the Press Secretary, *Fact Sheet: The President's Accomplishments at the [Group of 8] G-8 Summit* (July 17, 2006)

(G-8 leaders agreed to promote "ratification and implementation of the UN Convention Against Corruption"), *available at* <http://fpc.state.gov/fpc/69103.htm>; *see also* U.S. Attorney General John Ashcroft, *Prepared Remarks at Conference for Signing the UN Convention Against Corruption, Merida, Mexico* (Dec. 9, 2003) (noting strong support of the United States), *available at* <http://www.state.gov/p/inl/rls/rm/27072.htm>. As to U.S. law, it is the position of the United States that the Convention is in accord with current U.S. law, and so requires no implementing legislation. *See* U.S. State Department Testimony, *supra* note **Error! Bookmark not defined.**, at 4-5 ("The United States already conducts itself consistently with the Convention's provisions, so our work related to implementation will largely involve ensuring that the Convention is implemented properly by others and cooperating in appropriate cases that are covered under the Convention. A Conference of the States Parties will convene in December 2006 to discuss what governments can do to promote implementation, and because of our central role in the drafting of the Convention and our leadership in this area, we are working with other governments to develop some realistic options."); *id.* at 8 ("The Convention would not require implementing legislation for the United States."); Statement Concerning the UN Convention Against Corruption by Bruce C. Swartz, Deputy Attorney General, U.S. Department of Justice, Before the U.S. Senate Committee on Foreign Relations, at 3 (June 21, 2006) ("the U.S. does not need to enact any new legislation to implement Chapter III (or any other components) of the Convention") [hereinafter "U.S. Justice Department Statement"], *available at* <http://www.foreign.senate.gov/testimony/2006/SwartzTestimony060621.pdf>; Section of International Law, American Bar Association, *Report to the House of Delegates on the United Nations Convention Against Corruption*, at 1, 3-4 (Aug. 2005) [hereinafter "ABA Report"], *available at* <http://www.abanet.org/leadership/2005/annual/summaryofrecommendations/110.doc>.

11. For a review of other agreements against corruption, see UN Commission on Crime Prevention and Criminal Justice, *Existing International Legal Instruments, Recommendations and Other Documents Addressing Corruption: Report of the Secretary-General*, UN Doc. E/CN.15/2001/3 (Apr. 2, 2001), *available at*

http://www.unodc.org/unodc/crime_cicp_commission_session_10.html. As that review reflects, a number of international instruments designed to combat corruption have cited sound procurement practices as a central goal in defeating corruption. For a detailed analysis of how international anti-corruption instruments address corruption in procurement, see Anne Janet DeAses, Note: *Developing Countries: Increasing Transparency and Other Methods of Eliminating Corruption in the Public Procurement Process*, 34 PUB. CONT. L.J. 553 (2003).

12. Available at <http://www.oas.org/juridico/english/Treaties/b-58.html>.
13. The Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union, Council Act 97/C 195/01 (May 26, 1997). See generally European Union, Summary: *The Fight Against Corruption Involving European Community Officials*, <http://europa.eu/scadplus/leg/en/lvb/l33027.htm>; Claire A. Daams, *Regional Initiatives: European Union against Corruption*, at notes 21-22 and accompanying text (paper presented at the 9th International Anti-Corruption Conference, Durban, 1999), http://www1.transparency.org/iacc/9th_iacc/papers/day1/ws6/d1ws6_cdaams.html#ref21.
14. Organisation for Economic Co-operation & Development, OECD Doc. No. DAFFE/IME/BR(97)20 (Apr. 1998), available at [http://www.ois.oecd.org/olis/1997doc.nsf/LinkTo/daffe-ime-br\(97\)20](http://www.ois.oecd.org/olis/1997doc.nsf/LinkTo/daffe-ime-br(97)20).
15. Council of Europe, *Criminal Law Convention on Corruption* (1999), <http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm>.
16. Council of Europe, *Civil Law Convention on Corruption* (1999), <http://conventions.coe.int/Treaty/EN/Treaties/Html/174.htm>.
17. http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf.
18. United Nations Convention Against Transnational Organized Crime (2002), http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf.

19. American Bar Association, Section of International Law, *Policy on Convention Against Corruption*, at __ (Aug. 2005), available at http://www.abanet.org/intlaw/policy/crimeextradition/conventioncorruption08_05.pdf.
20. The U.N. Office on Drugs & Crime has published a "toolkit" to assist nations in implementing anti-corruption efforts. See U.N. Office on Drugs & Crime, *The Global Programme Against Corruption: UN Anti-Corruption Toolkit* (3d ed., Vienna, Sept. 2004), available at http://www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep04.pdf. That "toolkit" sets in context many of the requirements of the Convention Against Corruption. For example, the Convention calls for nations to install independent regulatory bodies to oversee anti-corruption efforts, and the "toolkit" explains how other nations have established those independent bodies. *Id.* Ch. III.
21. See U.S. Justice Department Statement, *supra* note **Error! Bookmark not defined.**, at 5 (U.S. position is that only Articles 44 and 46 are self-executing, and other articles of the Convention are not self-executing); ABA Report, *supra* note **Error! Bookmark not defined.**, at 10 n.33, 15 & Annex 2 at 8-10.
22. United Nations (U.N.) Doc. No. A/49/17 & Corr. 1, annex I, available at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model.html.
23. For background on the 1994 model law, see James J. Myers, *The New UNCITRAL Model Law on Procurement*, 23 PUB. CONT. L.J. 267 (1994). The working papers and reports of UNCITRAL Working Group I (Procurement) are available at www.uncitral.org, specifically at http://www.uncitral.org/uncitral/en/commission/working_groups/1Procurement.html. For previous discussions of the UNCITRAL developments, see Christopher R. Yukins, *A Case Study in Comparative Procurement Law: Assessing UNCITRAL's Lessons for U.S. Procurement*, 35 PUB. CONT. L.J. 457 (2006); Christopher R. Yukins & Don Wallace, Jr., *UNCITRAL Considers Electronic Reverse Auctions, as Comparative Public Procurement Comes of Age in the United States*, 2005 PUB. PROC. L. REV. No. 4, 183; Christopher R. Yukins, Don Wallace, Jr. & Jason P. Matechak, *UNCITRAL Model Procurement Law: Reforming Electronic Procurement, Reverse Auctions, and Framework Agreements*, 40

PROC. LAW., Winter 2005, at 12 (Am. Bar Ass'n); Don Wallace, Jr. & Christopher R. Yukins, *UNCITRAL's Model Procurement Law: Changes on the Horizon*, 81 FED. CONT. REP. (BNA) No. 11 (Mar. 23, 2004). Drafts of those earlier pieces are generally available on the Social Science Research Network website, www.ssrn.com. See also Professor Laurence Folliot-Lalliot & Christopher R. Yukins, *Révision de la Loi Type sur les Marchés Publics de la CNUDCI*, CONTRATS PUBLICS, No. 51, Jan. 2006 (on UNCITRAL developments). The UNCITRAL commission met for its 39th annual session in New York in July 2006, and, among other things, endorsed the ongoing reform effort regarding the Model Procurement Law. See Press Release, UN Information Service, *UN Commission on International Trade Law Concludes 39th Session in New York*, U.N. Doc. UNIS/L/102 (July 7, 2006), available at <http://www.unis.unvienna.org/unis/pressrels/2006/unis1102.html>. The UNCITRAL working group for revision of the Model Procurement Law is to meet next in Vienna, in September 2006.

24. UNCITRAL, *Report of Working Group I (Procurement) on the Work of Its Ninth Session (New York, 24-28 April 2006)*, U.N. Doc. A/CN.9/595, ¶ 9 (draft May 8, 2006).
25. UNCITRAL Model Procurement Law, *supra* note **Error! Bookmark not defined.**, Art. 15.
26. The UNCITRAL *Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services*, available at <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf>, states as follows regarding Article 15 of the Guide:

Article 15. Inducements from suppliers or contractors

1. Article 15 contains an important safeguard against corruption: the requirement of rejection of a tender, proposal, offer or quotation if the supplier or contractor in question attempts to improperly influence the procuring entity. A procurement law cannot be expected to eradicate completely such abusive practices. However, the procedures and safeguards in the Model Law are designed to promote transparency and objectivity in the procurement proceedings and thereby to reduce corruption. In addition, the enacting State should have in place generally an effective system of sanctions against corruption by Government

officials, including employees of procuring entities, and by suppliers and contractors, which would apply also to the procurement process.

2. To guard against abusive application of article 15, rejection is made subject to approval, to a record requirement and to a duty of prompt disclosure to the alleged wrongdoer. The latter is designed to permit exercise of the right to review.

27. The Model Procurement Law's *Guide to Enactment*, *supra* note **Error! Bookmark not defined.**, alluded to complementary bodies of law, such as criminal laws:

It should be noted that the procurement proceedings in the Model Law, beyond raising matters of procedure to be addressed in the implementing procurement regulations, may raise certain legal questions the answers to which will not necessarily be found in the Model Law, but rather in other bodies of law. Such other bodies of law may include, for example, the applicable administrative, contract, criminal and judicial-procedure law.

Id. ¶ 13. The *Guide to Enactment* also acknowledged that the UNCITRAL Model Procurement Law is only "a 'framework' law providing only a minimum skeleton of essential provisions and envisaging the issuance of procurement regulations." *Id.* ¶ 7.

28. *See supra* text accompanying note **Error! Bookmark not defined.**
29. Article 9 of the UN Convention Against Corruption, subparagraph 1(d), calls for an "effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures [for procurement] established pursuant to [Article 9, paragraph 1 of the Convention] are not followed."
30. The footnoted commentary that accompanies Chapter VI, Review, in the Model Procurement Law specifically notes that "because of constitutional or other considerations, States might not, to one degree or another, see fit to incorporate these articles" regarding domestic review.
31. UN Model Procurement Law, *supra* note **Error! Bookmark not defined.**, Art.52(2).

32. Under Article 56 of the Model Procurement Law, for example, filing for review of a procurement action will trigger an automatic suspension of the procurement for only seven days. In practice, unless the procuring agency itself extends the suspension (which is unlikely), this means that the procuring action will likely proceed after seven days, thus likely gutting much of the effective relief available to the complaining party.
33. UNCITRAL, *Report of Working Group I (Procurement) on the Work of Its Sixth Session (Vienna, 30 August-3 September 2004)*, U.N. Doc. No. A/CN.9/568 ¶¶ 102-113 (Sept. 14, 2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/V04/578/12/PDF/V0457812.pdf?OpenElement>.
34. See generally DeAses, *supra* note **Error! Bookmark not defined.** (discussing implementation of anti-corruption conventions in procurement systems).
35. The UNCITRAL secretariat reports that legislative texts "based on or largely inspired by the UNCITRAL Model Law on Procurement of Goods, Construction and Services have been adopted in various countries," including Albania, Azerbaijan, Croatia, Estonia, Gambia (2001), Kazakhstan, Kenya, Kyrgyzstan, Malawi (2003), Mauritius, Mongolia, Poland, Republic of Moldova, Romania, Slovakia, Tanzania, Uganda, and Uzbekistan. See UNCITRAL, *Status: 1994 - UNCITRAL Model Law on Procurement of Goods, Construction and Services*, available at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/1994Model_status.html.
36. To compare how Article 9 evolved during negotiation of the Convention, see an early draft (then Article 8), in *Proposals and Contributions Received from Governments at the Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption (Buenos Aires, Dec. 4-7, 2001) – Austria and Netherlands: Proposed Text of the United Nations Convention Against Corruption*, UN Doc. A/AC.261/IPM/4 (Nov. 2, 2001), available at http://www.unodc.org/unodc/crime_cicp_convention_corruption_prepmtg.html. Notably, that early text did not include a provision explicitly calling for domestic review ("bid protest") systems; instead, the early version simply called for "[a]dequate powers of remedy in the case of failure to comply" with the requirements of that portion of the Convention.

37. As the discussion above reflected, *see supra* text accompanying notes **Error! Bookmark not defined.** & **Error! Bookmark not defined.**-**Error! Bookmark not defined.**, the domestic review ("bid challenge" or "bid protest") provisions of the UNCITRAL Model Procurement Law may not be sufficiently robust to meet the requirements of the UN Convention on Corruption. Because those review procedures may be updated and bolstered in the ongoing reform of the UNCITRAL Model Procurement Law, however, *see id.*, it is probably too early to term the review procedures an irreparable gap in the UNCITRAL model law.
38. Limited provisions regarding integrity appear throughout the UNCITRAL Model Procurement Law:
- Article 6(1)(b)(v) says that, to prequalify, contractors may have to show that they have not been convicted of a crime;
 - Article 15, quoted above, says that bids are to be rejected from any bidder that offers or gives an "inducement" to shape the procurement decision of a present or former official; and,
 - Article 45, which applies to services procurements, requires agencies to hold information from other offerors confidential.

As was noted above, *see supra* note **Error! Bookmark not defined.**, the *Guide to Enactment* for the UNCITRAL Model Procurement Law, in its discussion of Article 15, paragraph 1, points out that the enacting state "should have in place generally an effective system of sanctions against corruption by government officials . . . and by suppliers and contractors."

39. UNCITRAL Model Procurement Law, *Guide to Enactment*, *supra* note **Error! Bookmark not defined.**, ¶ 36. The *Guide to Enactment*, in paragraph 37, suggests that an enacting state may wish to vest one agency or agencies with oversight responsibility for the procurement system, including oversight for training procurement personnel.
40. The UNCITRAL Model Procurement Law's *Guide to Enactment*, *supra* note **Error! Bookmark not defined.**, explains how these goals overlap in the Model Law:
- The objectives of the Model Law, which include maximizing competition, according fair treatment to suppliers and contractors

bidding to do Government work, and enhancing transparency and objectivity, are essential for fostering economy and efficiency in procurement and for curbing abuses. With the procedures prescribed in the Model Law incorporated in its national legislation, an enacting State may create an environment in which the public is assured that the Government purchaser is likely to spend public funds with responsibility and accountability and thus to obtain fair value, and an environment in which parties offering to sell the Government are confident of obtaining fair treatment.

Id. ¶ 8; *see, e.g.*, U.S. Federal Acquisition Regulation (FAR) 1.102, 48 C.F.R. § 1.102 (statement of guiding principles), *available at* www.arnet.gov/far; The International Bank for Reconstruction and Development/The World Bank, *Guidelines: Procurement under IBRD Loans and IDA Credits*, § 1.2 (May 2004) (general policy considerations), *available at* <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement-May-2004.pdf>; *see also* Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 Coordinating the Procurement Procedures of Entities Operating in the Water, Energy, Transport and Postal Services Sectors, Official Journal L 134, 30/04/2004 P. 0001 – 0113 (European procurement directive reflects same guiding principles), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0017:EN:HTML>.

41. 2002 Pub. Proc. L. Rev. 103, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620.
42. *Id.* Our colleague Daniel Gordon argues that accountability – government officials’ and agencies’ accountability for their actions – should be yet another stated goal in any successful procurement system. Indeed, Article 1 of the UN Convention Against Corruption cites accountability as one of the core purposes of the Convention, as does the *Guide to Enactment* of the UNCITRAL Model Procurement Law, quoted *supra* note **Error! Bookmark not defined.**
43. Schooner, *supra* note **Error! Bookmark not defined.**, at 104.
44. *See, e.g.*, Testimony of William A. Reinsch, President, National Foreign Trade Council & Co-Chairman of USA*Engage, on the UN Convention Against Corruption, Before the U.S. Senate Committee on Foreign Relations, at 4 ("this Convention will benefit political

systems and investment regimes worldwide by empowering reform elements with the tools they need to root out corruption and encourage transparent, stable investment climates"), *available at* <http://foreign.senate.gov/testimony/2006/ReinschTestimony060621.pdf>; Testimony of Alan Larson, Chairman of the Board of Transparency International, Before the U.S. Senate Committee on Foreign Relations (June 21, 2006), *available at* <http://foreign.senate.gov/testimony/2006/LarsonTestimony060621.pdf>.

45. *See, e.g.*, Ben W. Heineman, Jr. & Fritz Heimann, *The Long War Against Corruption*, FOREIGN AFFAIRS, Vol. 85, No. 3, at 115 (May 1, 2006) (procurement reform one subsidiary part of anti-corruption efforts); Donald Greenlees, "Stagnation Marks Anti-Corruption Fight; Despite Progress in Some Countries, 'No Global Improvement' After 10 Years," INT'L HERALD TRIB., Apr. 6, 2006, at 1 ("There has been no global improvement [regarding corruption] on average [over the past decade], Daniel Kaufman, the director of global programs at the World Bank Institute in Washington, said by phone. 'It is quite sobering. The average quality of governance worldwide has remained stagnant.' . . . In light of these findings, and amid pressure from emboldened domestic lobby groups and international donors, most governments have now elevated the importance of the fight against corruption.").
46. *See, e.g.*, Brenda Nakayiwa, *Corruption – Museveni Can't Hunt the Thieves Alone*, UGANDA MONITOR, Aug. 4, 2006 (many anti-corruption institutions, including one to improve procurement, have been established, as Ugandan government moves aggressively to combat corruption); Charles Takyi-Boadu, "Corruption Not Preserve of Politicians," GHANAIAN CHRON., Mar. 16, 2006 (procurement reform part of multifaceted anti-corruption efforts in Ghana); Azlan Othman, "Brunei: ACB Conducting Studies on Construction Projects," BORNEO BULL., Mar. 3, 2006 (Brunei's Anti-Corruption Bureau undertaking various initiatives, including procurement reform).
47. *See, e.g.*, *Lockheed Martin Aeronautics Co.*, Comp. Gen. Nos. B-295401 *et al.*, 2005 WL 502840 (Feb. 24, 2005) (recounting bias in major systems procurements by senior Air Force procurement official Darleen Druyun towards Boeing because of jobs afforded

Druyun and her family members); Jeffrey Branstetter, *Darleen Druyun: An Evolving Case Study in Corruption, Power, and Procurement*, 34 PUB. CONT. L.J. 443 (2005).

48. See 41 U.S.C. § 423 (Procurement Integrity Act); FAR 3.104-1 *et seq.*, 48 C.F.R. § 3.104-1 *et seq.* (implementing regulations); 18 U.S.C. § 208 (criminal violation to render official action regarding firm with which official has job negotiations ongoing); Elizabeth Dietrich, Note: *The Potential for Criminal Liability in Government Contracting*, 34 PUB. CONT. L.J. 521 (2005); Claude P. Goddard, Jr., *Business Ethics in Government Contracting – Part I*, 03-06 BRIEFING PAPERS 1 (Thomson-West May 2003) (comprehensive survey of post-government-employment legal restrictions). The "revolving door" also may create *organizational* conflicts of interest – conflicts of interest that disqualify an organization from competition, because of an unfair advantage or a bias it would carry into its advice to the government – as a result, for example, of special information that individuals carry into organizations from the government. See generally Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25 (2005); FAR 9.5, 48 C.F.R. Subpart 9.5.
49. Extensive regulations governing U.S. procurement officials' unique obligations to deflect job contacts or recuse themselves, as required by the Procurement Integrity Act, 41 U.S.C. § 423, are set forth at FAR 3.104-1 *et seq.*, 48 C.F.R. § 3.104-1 *et seq.* These procurement-specific requirements supplement the "revolving door" ethics rules that cover federal employees generally, per 5 C.F.R. § 2635.604.
50. UN Convention Against Corruption, *supra* note **Error! Bookmark not defined.**, Art. 12, Private Sector, para. 2(e).
51. *Id.*, Art. 18.
52. 18 U.S.C. § 208. For a compendium of U.S. statutes governing ethics in government service, see U.S. Office of Government Ethics, *Compilation of Federal Ethics Laws* (2004), available at http://www.usoge.gov/pages/laws_regs_fedreg_stats/comp_fed_ethics_laws.pdf.
53. Nor does the UN Convention's Article 9, which governs public procurement, close these gaps. Article 9, paragraph 1(e) only calls

for enacting states, where “appropriate,” to put in place “measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.”

54. UN Convention, *supra* note **Error! Bookmark not defined.**, Art. 21 (barring the promise, solicitation or acceptance “of an undue advantage” by or to “any person who directs or works . . . for a private sector entity . . . in order that he or she, in breach of his or duties, act or refrain from acting”). Due in part to opposition from the United States during negotiations of the UN Convention Against Corruption, the “commercial bribery” provisions were diluted, and ultimately left enacting states with a great deal of discretion *not* to criminalize “bribes” given in a purely private context. *See* Webb, *supra* note **Error! Bookmark not defined.**, at 214-15.
55. *See generally* D.E. Ytreberg, *Validity and Construction of Statutes Punishing Commercial Bribery*, 1 A.L.R.3d 1350 (2006).
56. Section 3.402 of the Federal Acquisition Regulation (FAR) describes the statutory bar against “contingent fees” – typically, fees paid by subcontractors to elicit orders from prime contractors – in federal procurement:

3.402 Statutory requirements.

Contractors’ arrangements to pay contingent fees for soliciting or obtaining Government contracts have long been considered contrary to public policy because such arrangements may lead to attempted or actual exercise of improper influence. In 10 U.S.C. 2306(b) and 41 U.S.C. 254(a), Congress affirmed this public policy but permitted certain exceptions. These statutes—

 - (a) Require in every negotiated contract a warranty by the contractor against contingent fees;
 - (b) Permit, as an exception to the warranty, contingent fee arrangements between contractors and bona fide employees or bona fide agencies; and
 - (c) Provide that, for breach or violation of the warranty by the contractor, the Government may annul the contract without liability or deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

FAR 3.402, 48 C.F.R. § 3.402. In part because such "contingent fees" may be much more common in the commercial marketplace, the FAR also exempts sales of "commercial items" (commercially available goods and services) from the scope of the "contingent fee" bar. FAR 3.404, 48 C.F.R. § 3.404.

57. The United States' opposition to including commercial bribery in the Convention was described as follows:

Extending the Convention to cover the private sector was one of the most contentious issues during the negotiations. The EU spearheaded the drive to criminalize bribery in the private sector. It was supported by the Latin American and Caribbean States whose representative argued that in view of the linkage between the two sectors, adopting a "limited" approach that only targeted the public sector "would adversely affect the implementation of the future convention." However, the US resisted intrusions on "purely private sector conduct"; a US official explained, "Private sector bribery is not a crime in the United States. We get at it in other ways."

Webb, *supra* note **Error! Bookmark not defined.**, at 213 (footnotes omitted) (quote from U.S. official from "UN Anti-corruption Pact Raises Last-Minute Alarms," *Reuters*, June 29, 2003); *see also* U.S. State Department Testimony, *supra* note **Error! Bookmark not defined.**, at 3 ("The Convention avoids obligations regarding complex substantive areas that are less appropriate or unripe for multilateral solutions, such as political party financing and criminalization of purely private sector corruption, that are currently handled by individual nations under their domestic laws.").

58. *See Proposals and Contributions Received from Governments at the Informal Preparatory Meeting of the Ad Hoc Committee for the Negotiation of a Convention Against Corruption (Buenos Aires, Dec. 4-7, 2001) – Japan: Non-Paper*, UN Doc. A/AC.261/IPM/3, ¶ 23 ("The issues seems to contain two questions at different levels, firstly, the question of the treatment of private entities that provide public services, but belong to the category of 'private sector' can be addressed by defining 'public official' Secondly, as regards the real private sector, it should be borne in mind that the main target of the convention is corruption in the public sector").

59. In the United States, contractors play an ever-larger role in government, as the numbers of government employees decline and the government seeks out specialized skills in the private sector. This has been the subject of intense concern in the U.S. procurement community, *see, e.g.*, Steven L. Schooner, *A Conversation About Malversation: The Post-Millennial U.S. Experience Combating Corruption in Public Procurement* (paper delivered at conference, "Public Procurement – Global Revolution III," University of Nottingham, United Kingdom, June 2006) (on file with author), and has resulted in efforts to control organizational conflicts of interest, *see, e.g.*, Gordon, *supra* note **Error! Bookmark not defined.**, including legislative efforts to address the sweeping role taken by private "lead systems integrators" in developing integrated weapons systems, *see* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 805 (calling for study of conflicts posed by lead systems integrators), *available at* <http://thomas.loc.gov>; Steven L. Schooner & Christopher R. Yukins, *Emerging Policy and Practice Issues* (2005), in THOMSON/WEST GOVERNMENT CONTRACTS YEAR IN REVIEW (conference papers), Chap. 9 (discussing ramifications of Section 805 of the defense authorization act), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=887355.
60. *See supra* note **Error! Bookmark not defined.**
61. Ad Hoc Committee's Interpretative Notes, *supra* note **Error! Bookmark not defined.**, ¶ 4.
62. *See* UN Convention Against Corruption, *supra* note **Error! Bookmark not defined.**, Art. 8(3).
63. International Code of Conduct for Public Officials, contained in the annex to UN General Assembly Resolution 51/59 (Dec. 12, 1996), *available at* <http://www.un.org/ga/documents/gares51/gar51-59.htm>.
64. The International Code of Conduct for Public Officials, *supra* note **Error! Bookmark not defined.**, clearly directs its message to public employees, not outsiders performing functions within the government. The Code's statement of general principles, for example, states in relevant part:
1. A public office, as defined by national law, is a position of trust, implying a duty to act in the public interest. Therefore, the

ultimate loyalty of public officials shall be to the public interests of their country as expressed through the democratic institutions of government.

2. Public officials shall ensure that they perform their duties and functions efficiently, effectively and with integrity, in accordance with laws or administrative policies. They shall at all times seek to ensure that public resources for which they are responsible are administered in the most effective and efficient manner.

3. Public officials shall be attentive, fair and impartial in the performance of their functions and, in particular, in their relations with the public. They shall at no time afford any undue preferential treatment to any group or individual or improperly discriminate against any group or individual, or otherwise abuse the power and authority vested in them.

65. Article 35 of the UN Convention states:

Article 35

Compensation for Damages

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

It is the position of the United States that Article 35 is *not* self-executing. *See* U.S. Justice Department Statement, *supra* note **Error! Bookmark not defined.**, at 5. The U.S. position is, therefore, that, absent enabling legislation passed by Congress, an individual harmed by corruption in a procurement process could not bring suit in U.S. courts for damages under Article 35 of the Convention. The U.S. position is supported by the interpretative notes published with the Convention, which stress that any relief under Article 35 must be pursuant to mechanisms erected by the enacting states themselves. *See Report of the Ad Hoc Committee for the Negotiations of a Convention Against Corruption on the Work of Its First to Seventh Sessions – Addendum*, U.N. Doc. A/58/422/Add. 1, at 6 (Oct. 7, 2003), available at http://www.unodc.org/unodc/crime_convention_corruption_reports.html.

66. The UNCITRAL Model Procurement Law's review procedures, at Article 55(2), state only, with regard to participation in review procedures, that participation is allowed by any "supplier or contractor or any other governmental authority whose interests are or could be affected by the review proceeding."
67. For a spirited criticism of the extremely flexible approach taken by the UN Convention, *see* Webb, *supra* note **Error! Bookmark not defined.**, at 221-22.
68. A simple example from the United States' experience may help here. The UNCITRAL Model Procurement Law, which was designed for procurement systems with higher risks of corruption, presumptively calls for a "tendering" (or, in U.S. terms, a bidding) process. *See, e.g., UNCITRAL Guide to Enactment of UNCITRAL Model Law on Procurement of Goods, Construction and Services, supra* note **Error! Bookmark not defined.**, ¶ 14. In the U.S. procurement

system, however, tendering is by far the exception rather than the rule, because a highly structured bidding process does not allow the purchasing agency to engage in open, mutually beneficial negotiations with offerors, negotiations through which the two parties can discuss – and optimize – technical and price solutions. Thus, the U.S. system relies heavily on a type of negotiated procurement that would raise extreme risks of corruption in other nations. The United States' ability to use this type of flexible system, which allows for more efficient outcomes, is a direct product of a strong system of integrity and enforcement.

APPENDIX

TABLE I	
<i>UN Convention Against Corruption, per Article 9, calls for a procurement system that affords:</i>	<i>UNCITRAL Model Procurement Law requires:</i>
Public distribution of information relating to procurement procedures and contracts. (Paragraph 1(a))	Public accessibility of all procurement-related texts (Article 5), published in a specified language (Article 17).
Advance establishment of the conditions for participation in a procurement, including award criteria and tendering rules, and their publication. (Paragraph 1(b))	Structured qualification requirements for suppliers (Article 6); published prequalification requirements (Article 7); nondiscriminatory access to procurements (Article 8); offerors must be notified if all offers are rejected (Article 12); acceptance and contracting must be per standards rules, or per terms previously notified to offerors (Article 13); public notices of award to be published (Article 14).
Objective and predetermined criteria for procurement decisions, to facilitate subsequent verification. (Paragraph 1(c))	Specifications are to be objective and predetermined (Article 16); presumptive use of tendering (bidding) procedures, with limited exceptions for other methods (Article 18); limited authority for two-stage tendering, requests for proposal or competitive negotiations (Article 19); limited conditions for restricted tendering (Article 20), requests for quotations (Article 21), and single-source procurement (Article 22); carefully structured tendering, evaluation and award procedures

	(Chapter III: Articles 23-36); special methods for the procurement of services (Chapter IV: Articles 37-45), including protections for the confidentiality of proposals (Article 45); structured procedures for "special" methods of tendering, including two-stage tendering, restricted tendering, requests for proposals, competitive negotiations, requests for quotations, and single-source procurements (Articles 46-51).
An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that established rules are not followed. (Paragraph 1(d))	Chapter VI, <i>Review</i> , is, by the terms of the UNCITRAL Model Procurement Law, optional for enacting states. The model law sets forth detailed procedures for review (or "bid protest") procedures, with important exemptions (Article 52), and rules regarding standing and scope of review (Article 52 and Article 55(2) (standing)), agency-level review (Article 53); independent administrative review (Article 54); notice (Article 55), temporary suspension of the procurement pending review (Article 56), and judicial review (Article 57).
Measures to regulate procurement personnel, such as declarations of personal interest in specific procurements, screening procedures, and training. (Paragraph 1(e))	
Appropriate measures to ensure transparency and accountability in: national budgeting; revenues and expenditures; accounting and auditing standards; risk management and internal control; and, corrective actions. (Paragraph 2.)	Procurement communications generally must be auditable (Article 9); records of procurement proceedings must be maintained (Article 11).