ADDRESSING CONFLICTS OF INTEREST IN PROCUREMENT: FIRST STEPS ON THE WORLD STAGE, FOLLOWING THE UN CONVENTION AGAINST CORRUPTION

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ABSTRACT. The United Nations Convention Against Corruption specifically calls for anti-corruption measures in procurement, including measures to address conflicts of interest. This paper suggests ways to implement the UN Convention's mandate in national procurement systems, by incorporating measures to remedy potential conflicts of interest into the UN Commission on International Trade Law (UNCITRAL) Model Procurement Law, a model used around the world. The paper reviews prior work on the topic, including recommendations from the Organisation for Economic Cooperation and Development (OECD) and the UN Standards of Conduct for the International Civil Service, which specifically highlight the dangers of conflicts of interest in procurement. Drawing on the experiences of the United States and other countries, the paper argues that the UNCITRAL model law should follow the OECD's recommended steps for *systems* to check conflicts of interest. In doing so, however, policymakers must be mindful that conflict-of-interest rules are ultimately meant to bridge the classic principal-agent divide in procurement -- the tendency of the purchasing official (the agency) to veer from the best interests of the principal. Because the depth of that divide, and the strategies used to bridge it, can vary enormously between nations and societies, it would be very difficult to derive a universal definition of an actionable "conflict of interest," or to impose a uniform scheme of rules or institutions to combat conflicts of interest.

INTRODUCTION

A working group has been tasked by the United Nations Commission on International Trade Law (UNCITRAL) to revise the UNCITRAL

Model Law on Procurement of Goods, Construction and Services (UNCITRAL Model Procurement Law).[1] The UNCITRAL Model Procurement Law is used widely around the world --primarily in developing nations -- as a benchmark for sound procurement practices.

The UNCITRAL Model Procurement Law, in its current (1994) version, is essentially silent on conflicts of interest in procurement.[2] The

[1] The UNCITRAL Model Procurement Law is available in electronic form at the UNCITRAL website, at http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf. The working group currently convenes twice yearly, at UN headquarters in New York and Vienna, to discuss proposed revisions to the model law. The author, who has served as an adviser to the U.S. delegation to the UNCITRAL working group, has written extensively on the reform process. *See, e.g.*, Christopher R. Yukins & Steven L. Schooner, *Incrementalism: Eroding the Impediments to a Global Public Procurement Market*, 38 Geo. J. Int'l L. 529 (2007); Christopher R. Yukins, *Integrating Integrity and Procurement: The United Nations Convention Against Corruption and the UNCITRAL Model Procurement Law*, 36 Pub. Cont. L.J. 307 (2007); 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); Jason Matechak, Don Wallace, Jr. & Jeffrey Marburg-Goodman, *International Procurement*, 40 Int'l Law. 337 (ABA, Summer 2006); Laurence Folliot-Lalliot & Christopher R. Yukins, *Révision de la Loi Type sur les Marchés Publics de la CNUDCI*," Contrats Publics, No. 51, Jan. 2006, at 36; Don Wallace, Jr. & Christopher R. Yukins, *UNCITRAL Considers Electronic Reverse Auctions, as Comparative Public Procurement Comes of Age in the United States*, 2005 Pub. Proc. L. Rev. No. 4, 183 *Public Procurement Law Review* No. 4, 183; Don Wallace, Jr., Christopher R. Yukins & Jason P. Matechak, *UNCITRAL Model Procurement Law: Reforming Electronic Procurement, Reverse Auctions, and Framework Agreements*, 2005 Proc. Law. 1 (ABA Spring Spring 2005); Don Wallace, Jr. & Christopher R. Yukins, *UNCITRAL's Model Procurement Law: Changes on the Horizon*, 81 Fed. Cont. Rep. No. 11 (Mar. 23, 2004). Any views expressed herein are, of course, the author's own, and should in no way be considered the position of any government or organization.

[2] The UNCITRAL Model Procurement Law's *Guide to Enactment*, available with the model law at http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf, does, with regard to Article 4 of the law, call for more detailed regulations regarding potential conflicts of interest in sole-source procurement. For a general discussion of how the UNCITRAL model law and

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the UN Convention Against Corruption intersect, , see Caroline Nicholas, *The United Nations Convention Against Corruption and Its Impact on Procurement Regulation: The UNCITRAL Perspective*, 2008 Pub. Proc. L. Rev. NA64; Christopher R. Yukins, *Integrating Integrity and Procurement*, *supra* note 1.

UNCITRAL working group, however, will be considering whether (and, if so, how) to address conflicts of interest in the current round of revisions to the model law.[3] The UNCITRAL working group's interest in incorporating conflict-of-interest principles into the model law stems, at least in part, from the U.N. Convention Against Corruption, which recently came into force and which specifically calls for measures to remedy conflicts of interest in procurement.[4]

The research question underlying this paper is a practical one: to map out potential next steps for the UNCITRAL initiative, as part of a broader effort to explore how nations around the world can implement conflict-of-interest rules in procurement. The paper reviews positive rules that proscribe conflicts of interest -- most importantly, the UN Convention Against Corruption's provisions -- and from those attempts to suggest potential remedies for conflicts of interest, mindful, though, of the very disparate cultural and political traditions in different nations.

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[3] *See* UNCITRAL, *Working Group I (Procurement) Thirteenth session, New York, 7-11 April 2008, Annotated Provisional Agenda*, U.N. Doc. A/CN.9/WG.I/WP.57, para. 6 (Jan. 14, 2007), *available at* http://daccessdds.un.org/doc/UNDOC/LTD/V08/501/90/PDF/V0850190.pdf?OpenElement; UNCITRAL, *Report of Working Group I (Procurement) on the Work of Its Ninth Session*, ¶ 10, U.N. Doc. A/CN.9/595 (May 8, 2006), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/V06/539/09/PDF/V0653909.pdf?OpenElement.

[4] Interest internationally in formalizing conflict-of-interest standards has been driven, in part, by a number of high-profile scandals involving alleged conflicts of interest. *See, e.g.*, James C. McKinley Jr., *Political Ally of Mexican President Embroiled in Scandal*, N.Y. Times, Mar. 15, 2008, at A7 (Mexico's interior minister "has been accused of steering lucrative contracts with the state oil monopoly to his family trucking business when he was the chairman of the energy committee in the lower house of Congress and, later, an assistant secretary of energy"); Sebastian Mallaby,*Secretary-General Ban Ki-moon Has Taken on "Mission Impossible." Everything About the United Nations Conspires Against Him*, Newsweek Int'l, Mar. 5, 2007 (the United Nations "oil-for-food scandal did tarnish [former UN Secretary General Kofi] Annan, principally because his son Kojo was on retainer from a company that profited from the program, an apparent conflict of interest").

In Part 0, the paper surveys the UN Convention Against Corruption, specifically the conflict-of-interest provisions suggested by the Convention. Part 0 reviews various initiatives internationally to address conflicts in interest, including -- most importantly -- the recommended guidelines issued by the Organisation for Economic Cooperation and Development (OECD). Applying those guidelines, and drawing on U.S. (and other nations') experiences in containing conflicts of interest in procurement, Part 0 offers specific suggestions on how the UNCITRAL Model Procurement Law might incorporate new provisions to combat conflicts of interest in procurement. In making those suggestions, however, the discussion cautions that because of the unique nature of conflict-of-interest rules -- special, dynamic rules, intended to bridge the gap in procuring officials' allegiance to their principals' goals -- it will be difficult for UNCITRAL to recommend rigidly uniform rules or institutions to combat conflicts of interest.

In mapping out these potential next steps for UNCITRAL, the paper also seeks to identify some of the key literature on conflicts of interest internationally. In the United States, a great deal of work has been done on *systems* of ethical compliance, and internationally there have been a number of studies on potential *standards* for conflicts of interest. This paper attempts to draw together the U.S. lessons on compliance *systems* with some of the international lessons -- and limitations -- on standards for conflicts of interest. The goal is to help international initiatives, such as the UNCITRAL working group, draw systems and standards together in a workable whole.

THE UN CONVENTION AGAINST CORRUPTION

The United Nations Convention against Corruption (the "UNCAC") entered into force in December 2005, after 30 of the signatory nations (140 nations have now signed the Convention[5]) ratified the instrument.[6]

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[5] *See* http://www.unodc.org/unodc/en/treaties/CAC/signatories.html.

[6] *See, e.g.,*Thomas R. Snider & Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 Corn. Int'l L. J. 691, 698-99 (2007).

The UNCAC was the product of many years' efforts at the United Nations to develop a comprehensive set of anti-corruption standards.[7]

The UNCAC includes an array of provisions, which address many types of corruption, from bribery to civil service reform to extradition.[8] This paper, however, will focus on the UNCAC provisions which require ratifying nations to address conflicts of interest in procurement.[9]

At least three provisions of the UNCAC are immediately relevant to this issue of conflict of interest in procurement. The first, in Article 7, says that states implementing the UNCAC should erect systems to prevent conflicts of interest in general:

> 4. Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.

The second, in Article 8, calls for state parties to take measures to fight corruption across all public administration, including requirements that public officials disclose potential conflicts of interest:

> 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.

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[7] *See, e.g.*, Christopher R. Yukins, *Integrating Integrity and Procurement*, *supra* note 1, at 310.

[8] *See, e.g.*, *id.* at 310-11 (extended description of the convention's various provisions).

[9] An earlier piece by the author, *Integrating Integrity and Procurement*, *supra* note 1, discussed generally how the UNCAC and the UNCITRAL Model Procurement Law can be integrated; this piece focuses more narrowly on answering the UNCAC's mandate for reform, by addressing conflicts of interest in the UNCITRAL Model Procurement Law.

The third provision, in Article 9, calls for specific measures for integrity in procurement, including:

> (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

The fourth provision, in Article 12, calls for state parties to prevent conflicts of interest by imposing restrictions on those public officials who pass through the "revolving door" (as it is colloquially known in the United States[10]) into the private sector:

> (e) 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 . . . .

Taken together, these provisions can be read to call for state parties to erect anti-corruption systems that will mitigate -- or at least regulate -- personal conflicts of interest among government procurement officials.

INTERNATIONAL INITIATIVES REGARDING CONFLICTS OF INTEREST IN PROCUREMENT

The UNCAC provisions regarding conflicts of interest followed in the wake of several other international initiatives to combat conflicts of interest in public procurement. Probably the most important of these, the guidelines for combating conflicts of interest developed by the OECD, stop short of prescribing specific standards governing conflicts of interest. The OECD guidelines, discussed in detail below, instead merely offer a framework -- a flexible but durable system, one might say -- within which implementing nations can address conflicts of interest under their own normative schemes.

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[10]*See, e.g.*, Keith R. Szeliga, *Watch Your Step: A Contractor's Guide to Revolving Door Restrictions*, 36 Pub. Cont. L.J. 519 (2007) (survey of U.S. "revolving door" prohibitions).

Notably, the process of drafting the UN Convention itself showed why a more prudent course is to suggest a system for mitigating conflicts of interest, rather than prescribing specific rules and principles. As observers noted, "[a]ddressing corruption is complex and culturally nuanced," and the member states negotiating the UNCAC could not even agree on how to define "corruption."[11] There are, noted the observers, "significant differences among States in both their official and day-to-day attitudes concerning what constitutes corruption or unlawful conduct,"[12] and so a more deferential course -- one to suggest a system or process, rather than specific prohibitions, for handling conflicts of interest under the Model Law -- seems the sounder choice.

Organisation for Economic Cooperation and Development

A good deal of the important work done internationally in developing solutions for conflicts of interest has come from the OECD.[13] In 2003, the OECD published guidelines for managing conflicts of interest in the public service.[14] The OECD guidelines offered a startlingly broad definition of conflict of interest:

> A "conflict of interest" involves a conflict between the public duty and private interests of a public official, in which the public

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[11] Ethan S. Burger & Mary S. Holland, *Why the Private Sector Is Likely To Lead the Next Stage in the Fight Against Corruption*, 30 Fordham Int'l L.J. 45, 48 (2006).

[12] *Id.*

[13] *See generally* Organisation for Economic Cooperation & Development, *Integrity in Public Procurement: Good Practice from A to Z* (2007), *available at* http://www.oecdbookshop.org.

[14] OECD, *Managing Conflict of Interest in the Public Service: OECD Guidelines and Country Experiences* (2003), *available at* http://www.oecdbookshop.org. The 2003 guidelines on managing conflict of interest followed the 1998 OECD *Recommendation on Improving Ethical Conflict in the Public Service*, which called for "'clear guidelines for interaction between the public and private sectors.'" *See* OECD, *Managing Conflict of Interest, supra*, at 40 (quoting OECD, 1998 *Recommendation on Improving Ethical Conduct in the Public Servic*e, at 4 (1998), *available at* http://www.oecd.org/dataoecd/60/13/1899138.pdf).

> official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.[15]

Defined this broadly, far too many actions of public officials (tired firemen stopping for ice cream on the way back from a fire, for example) arguably could qualify as "conflicts of interest." Although the definition seems too broad, the OECD declined to offer a more focused, workable definition,[16] which may help explain why the OECD instead ultimately focused on a recommended *system* or *framework* for handling conflicts of interest, rather than on specific rules to stop conflicts of interest.

The OECD recommendations for combating conflicts of interest included the following:

- *Identify situations in which conflicts of interest arise:* The OECD guidelines recommended that implementing states clearly identify when conflicts of interest can arise. The OECD recommended that the implementing state provide a general definition of conflicts of interest, and then provide specific examples of unacceptable conflicts. "More focused examples," urged the OECD, should be provided to those at highest risk of encountering conflicts of interest, including those in government contracting. The OECD recommendation, in sum, was that the implementing state should flesh out the normative expectations for its public servants, with special attention to the norms to be applied in certain high-risk sectors -- including procurement.

- *Establish organizational structures and practices to help identify conflicts of interest:* The OECD manual further recommended that implementing states use laws, policies, guidelines and training for resolving conflicts of interest. The OECD guidelines highlighted the need for these safeguards in "rapidly-changing or 'grey areas'

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[15] OECD, *Managing Conflict of Interest*, *supra* note 14, at 4; *see also id.* at 55 (discussing different countries' approaches to more specifically define conflict of interest).

[16] *See id.* at 58 (explaining that the definition of conflict of interest was broadly framed to accommodate different "historical, legal and public service traditions").

such as private-sector sponsorships, privatisation and deregulation programs, NGO relations, political activity, public-private partnerships and the interchange of personnel between sectors."[17]

- *Establish procedures for identifying and addressing conflicts of interest:* The OECD guidelines recommended that implementing states establish procedures for public officials to disclose potential conflicts of interest, both prior to appointment and while in office. The recommendations stressed the importance of ensuring complete disclosures, promptly reviewed by the appropriate authorities.[18]

- *Set clear rules defining public officials' obligations when confronted with a conflict of interest:* The OECD guidelines urged implementing states to set clear requirements for public officials when those officials face a conflict of interest, with a range of possible options, from divestiture (in a conflicting investment), to recusal, to reassignment, to possible resignation.[19] The OECD guidelines noted the importance of keeping any such decisions fully transparent, so that the public's confidence in government can be maintained.

- *Implementing the policy framework:* In implementing the framework to counter conflicts of interest, the OECD guidelines suggested, it is vitally important that public officials -- especially senior officials -- "arrange their private-capacity interests in a manner that preserves public confidence . . . and sets an example to others." Managers should be prepared to review and resolve potential conflicts raised by their subordinates, the OECD suggested. Organizations should regularly review their policies and procedures on conflicts of interest, to keep them up to date.[20]

- *Encourage -- and assist -- employees to implement policies:* The OECD guidelines urged that employees be given copies of the conflict of interest policies, that regular training and reminders be

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[17] *Id.* at 28-29.

[18] *Id.* at 29-30.

[19] *Id.* at 30-31.

[20] *Id.* at 31-32.

provided, and that implementing bodies provide guidance and assistance to public officials who seek to comply with the policies.[21]

- *Establish rules and guidelines for specific "at-risk" functions:* The OECD guidelines identified an array of functions specifically at risk for conflicts of interest, including outside employment, inside information on forthcoming government action, public contracts, gifts, family and community pressure, and outside appointments.[22]

- *Emphasize enforcement:* The OECD guidelines recommended that implementing states enforce personal sanctions for failure to comply with conflict of interest requirements, and organizational sanctions for those (such as private corporations) that breach conflict of interest rules.[23]

- *Develop monitoring, control and compliance mechanisms:* The OECD guidelines recommended that implementing governments set up controls to ensure adequate reporting, intake systems for complaints, and protections for whistle-blowers (those reporting violations).

- *Implement policy on a centralized basis:* The OECD suggested that a central function should be responsible for developing and maintaining conflict-of-interest rules and policies.[24]

- *Engage business and non-profit organization in drafting policies -- but be mindful of potential conflicts:* The OECD guidelines urged implementing states to consult with businesses and non-governmental organizations when developing policies on conflict of interest. At the same time, though, the OECD guidelines cautioned that conflicts are often likely to arise when outsiders, such as businesspeople, engage in public decisionmaking. The OECD guidelines recommended that safeguards be erected, for example to

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[21] *Id.* at 32-33.

[22] *Id.* at 33.

[23] *Id.* at 35.

[24] *Id.*

> ensure that private parties involved in government not have inappropriate access to sensitive government information.[25]

The OECD guidelines thus clearly describe a *system* for mitigating conflicts of interest; for the most part, the guidelines do *not* prescribe specific rules or principles to be applied. The guidelines appear to anticipate that, once the conflict-of-interest mitigation *system* is in place in an adopting nation, the nation will derive and apply its own rules and principles. The supporting material for the OECD guidelines explains that there is a good deal of variance in those rules and principles, and that many social, legal and political factors shape how those rules and principles may be applied.[26]

The approach adopted by the OECD manual, by focusing on a *system* rather than on the rules to be applied within that system, is in fact precisely the approach taken in organizational (usually corporate)

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[25] *Id.* at 36-37.

[26] See, for example, the OECD narrative on country experiences, which described the differing approaches to enforcement in the United States and Portugal:

> It is also important to analyse the changes in the development of instruments in order to see the trends in a historical perspective and recognise how countries shift their emphasis in approach and take advantage of complementary instruments. In the United States, for example, the approach in managing conflict of interest has moved from reactive criminal prosecution, to more proactive training, education and counselling programmes, although retaining the rule-based approach focusing on the responsibility of employees. In Portugal, where the policy originally focused on political accountability of political post holders, it has been replaced by a number of explicit prohibitions enacted by the law. Although these dynamics are primarily a response to the political and societal changes in a given country, influence from other countries, international institutions as well as the business sector can also be considerable. For example, the increasing popularity of simple language codes of conduct to set standards for conflictof- interest policies demonstrates this international trend.

Id. at 51. As this example shows, *how* a nation implements its conflict-of-interest laws can vary enormously, and turns on constantly changing economic, political, and social factors.

compliance in the United States. The U.S. Sentencing Commission has published guidelines for organizational compliance systems[27]; if a corporation follows those guidelines in establishing its compliance system, that corporation will likely enjoy a reduced sentence in the event of a criminal prosecution.[28] Those Sentencing Commission guidelines, and their standards for corporate compliance systems, have played an important role in tightening requirements for corporate contractors involved in U.S. federal procurement.[29]

As the U.S. Sentencing Commission explained, the Sentencing Commission's guidelines are built on certain key elements for a successful compliance system:

- Oversight by high-level personnel
- Due care in delegating substantial discretionary authority
- Effective communication to all levels of employees

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[27]U.S. Sentencing Commission, *2007 Federal Sentencing Guidelines Manual* § 8B2.1, "Effective Compliance and Ethics Program." For a history of the guidelines for organizational (corporate) compliance systems in the United States, see *Report of the Ad Hoc Advisory Group on the Organizational Sentencing Guidelines* 28-49 (Oct. 7, 2003), *available at* http://www.ussc.gov/corp/advgrprpt/AG_FINAL.pd*f*. The enhanced requirements for corporate compliance programs were born, in part, of a series of corporate scandals in the United States at the beginning of this decade, a series of scandals the 2003 report's authors referred to as the "bitter experience of the last two years." *Id.* at 49.

[28] *See* U.S. Sentencing Commission, *2007 Federal Sentencing Guidelines Manual*, *supra* note 27.

[29] *See generally* Christopher R. Yukins, Feature Comment: *Enhancing Integrity—Aligning Proposed Contractor Compliance Requirements With Broader Advances In Corporate Compliance*, 49 Gov. Contractor ¶ 166 (West/Thomson Apr. 25, 2007). A rule that became effective on December 24, 2007 requires many federal contractors to establish corporate compliance systems. 72 Fed. Reg. 65873 (Nov. 23, 2007). A proposed rule would extend those requirements, to mandate that covered contractors implement compliance systems that met all of the U.S. Sentencing Commission's required elements for compliance systems. 72 Fed. Reg. 64019 (Nov. 14, 2007).

- Reasonable steps to achieve compliance, which include systems for monitoring, auditing, and reporting suspected wrongdoing without fear of reprisal
- Consistent enforcement of compliance standards including disciplinary mechanisms
- Reasonable steps to respond to and prevent further similar offenses upon detection of a violation[30]

A comparison of the two sets of guidelines (OECD and U.S. Sentencing Commission) shows that many of these elements in the U.S. sentencing guidelines correspond closely with the OECD guidelines for a conflict-of-interest mitigation system. Moreover, as with the OECD guidelines, these U.S. "corporate compliance" guidelines aim to describe the *system* to be erected to ensure that a corporation complies with the law; as with the OECD guidelines for conflicts of interest, the actual rules to be applied (the rules against theft, for example, or self-dealing) come from outside that compliance system.

Other International Initiatives

United Nations Standards for International Civil Servants

In describing a *system* for conflict mitigation -- and leaving implementing nations to prescribe the norms to be enforced *within* that system -- the OECD guidelines contrast with other international initiatives that have gone further, to prescribe specific principles and rules. The United Nations General Assembly, for example, has endorsed the International Civil Service Commission's *Standards of Conduct for the International Civil Service*, which prescribes standards (not merely a system) for mitigating conflicts of interest.[31] Probably because of the enormous diversity of work done by the international civil service

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[30] Paula Desio, Deputy General Counsel, U.S. Sentencing Commission, *An Overview of the Organizational Guidelines*, *available at* http://www.ussc.gov/corp/ORGOVERVIEW.pdf.

[31]United Nations, International Civil Service Commission, *Standards of Conduct for the International Civil Service* (2001), *available at* http://icsc.un.org/resources/pdfs/general/standardsE.pdf.

throughout the United Nations, however, those standards of conduct are not highly detailed.[32]

[32] The *Standards of Conduct for International Civil Servants* provide, in relevant part:

> Conflict of interest
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> 21. It can happen that international civil servants are confronted with a question entailing a conflict of interest; such questions can be very sensitive and need to be treated with care. Conflict of interest includes circumstances in which international civil servants, directly or indirectly, would appear to benefit improperly, or allow a third party to benefit improperly, from their association in the management or the holding of a financial interest in an enterprise that engages in any business or transaction with the organization.
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> 22. There can be no question but that international civil servants should avoid assisting private bodies or persons in their dealings with their organization where this might lead to actual or perceived preferential treatment. This is particularly important in procurement matters or when negotiating prospective employment. At times, international civil servants may be required to disclose certain personal assets if this is necessary to enable their organizations to make sure that there is no conflict. They should also voluntarily disclose in advance possible conflicts of interest that arise in the course of carrying out their duties. They should perform their official duties and conduct their private affairs in a manner that preserves and enhances public confidence in their own integrity and that of their organization.

Id. paras. 21-22. The standards also include other provisions that touch on conflicts of interest, such as provisions regarding outside employment and activities. *Id.* paras. 41-45.

World Bank Procurement Guidelines

Another important source of procurement rules internationally is the World Bank's procurement guidelines, to which the Bank's borrower nations generally must adhere. Like the *Standards of Conduct for the International Civil Service*, the World Bank's procurement guidelines (to which borrowers must adhere) do proscribe specific acts -- in other words, they do impose certain specific rules and principles.[33] The World Bank's procurement guidelines do *not*, however, specifically address personal conflicts of interest. The World Bank's guidelines for purchasing consultant services do address conflicts of interest, but only for consultants, who are not normally included among a government's purchasing officials.[34]

EXPANDING THE UNCITRAL MODEL LAW TO ADDRESS CONFLICTS OF INTEREST

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[33] *E.g.*, The International Bank for Reconstruction and Development, The World Bank, *Guidelines -- Procurement Under IBRD Loans and IDA Credits*, Sec. 1.14(b) (revised Oct. 2006) (World Bank "will reject a proposal for award if it determines that the bidder recommended for award has, directly or through an agent, engaged in corrupt, fraudulent, collusive, coercive or obstructive practices in competing for the contract in question"), *available at* http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ProcGuid-10-06-ev1.doc.

[34] The International Bank for Reconstruction and Development, The World Bank, *Guidelines: Selection and Employment of Consultants by World Bank Borrowers* (Rev. Oct. 2006). The consultant guidelines state as follows, with regard to consultants' potential conflicts of interest:

> 4.12 *Conflict of Interest.* The Consultant shall not receive any remuneration in connection with the assignment except as provided in the contract. The Consultant and its affiliates shall not engage in consulting activities that conflict with the interest of the client under the contract, and shall be excluded from downstream supply of goods or construction of works or purchase of any asset or provision of any other service related to the assignment other than a continuation of the "Services" under the ongoing contract.

Id. ¶ 4.12.

As the discussion above reflects, there is no clear example on the international procurement stage to draw upon, in addressing conflicts of interest in the UNCITRAL Model Procurement Law. The discussion above suggests, however, some basic principles that may guide the process.

The first is that it will be difficult, if not impossible, to craft a universal set of standards for conflicts of interest. Even in highly industrialized nations that share deep cultural and political traditions, there can be (and usually are) enormous differences in conflict-of-interest rules from one nation to another.[35] The discussion below demonstrates why, as a theoretical matter, it would be very difficult to derive even a uniform definition of actionable "conflicts of interest." The working group that is reshaping the UNCITRAL Model Procurement Law would, therefore, probably find it extremely difficult to develop a common code of appropriate behavior for the model law.

Absent a common code governing conflicts of interest, the next-best alternative would be to establish a *framework* or *recommended structure or system* for combating conflicts of interest. This is, as was noted above, precisely the approach suggested by the OECD guidelines for managing conflicts of interest: a recommended *system*, a framework within which implementing nations could apply their own conflict-of-interest rules and principles. To give substance to this approach, the discussion below will proceed through key elements of the proposed OECD framework, and will draw on the U.S. experience to highlight some important practical concerns in implementation.

Drafting Special Protections For Procurement -- Second

The first question in implementation is whether, as the OECD manual suggested, special conflict-of-interest protections should be erected for procurement, as a special "at risk" area.[36] As is discussed further below, the practical experience in the United States and

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[35] *See, e.g.*, Sigma/OECD, *Conflict-of-Interest Policies and Practices in Nine EU Member States: A Comparative Review*, OECD Doc.GOV/SIGMA(2006)1/Rev1, at 11-15 (June 18, 2007) (recounting sharply different conflict-of-interest rules in nine nations in study).

[36] OECD, *Managing Conflict of Interest*, *supra* note 14, at 33.

elsewhere has been that procurement process is itself a special area of risk for conflicts of interest, and so requires its own unique set of rules.[37] That approach, though, may turn the UNCITRAL initiative on its head.

Normally, as in the United States, special conflict-of-interest rules are integrated into an existing body of general rules governing ethics in public service. If UNCITRAL were to develop a special conflict-of-interest code for procurement and that code were adopted (say, by a developing nation) *before* a general ethical code was in place, the UNCITRAL rules, focused on procurement, could skew or distort any broader ethical scheme, especially if the later, general scheme was written to accommodate the previous procurement-specific provisions.

To solve this problem, UNCITRAL may decide to recommend that an implementing nations should approach the procurement conflict-of-interest rules fully sensitive to other ethics initiatives in the nation. If a general ethics code is already in place, the procurement rules should complement that general code. If no general ethics code is in place, the conflict-of-interest rules derived for the procurement system should, if possible, reflect the broader norms of the nation, and the implementing state should be prepared to modify the procurement rules on conflict of interest to accommodate new and emerging norms in the broader ethics regime.

Identifying Situations In Which Conflicts Of Interest Arise

The UNCITRAL Model Procurement Law, following the lead of the OECD guidelines, as noted should recommend that implementing nations identify situations in which conflicts of interest arise. Compiling a list of examples has two benefits: it forces policymakers to debate and define the boundaries of appropriate behavior, and it creates what is, in effect, a code of conduct that can be used to stabilize norms throughout the affected community. That has, in fact, been the experience in the United States federal procurement system, where examples of acceptable

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[37] *See, e.g.*, 41 U.S.C. § 423; FAR 3.104-1 *et seq.*, 48 C.F.R. 3.104-1 *et seq.*(U.S. Procurement Integrity Act and its implementing rules); Janos Bertok, *Promoting Transparency and Integrity in Public Procurement: The Work of the OECD,* 2006 Pub. Proc. L. Rev. NA188.

conduct are used, by both lawyers and laymen, to illuminate the standing rules on conflicts of interest.[38]

Establishing Laws, Policies and Guidelines

Following the OECD lead, the UNCITRAL Model Procurement Law could call for implementing nations to develop the internal structures and norms -- the laws, policies, guidelines and training -- necessary to combat conflicts of interest. As the discussion above noted, these conflict-of-interest rules are likely to be highly unique to the implementing nation; for the reasons more fully discussed below, the rules are likely to reflect the nation's peculiar legal, social, cultural, and religious experience and traditions, and may well borrow from existing conflict-of-interest rules systems. The adopted rules also will likely reflect the implementing nation's specific pattern of development: where there are fewer resources available, for example, it is considered far more tolerable to concentrate decisionmaking in just a few hands.[39] It will probably be impossible, therefore, for UNCITRAL to suggest any uniform standards to be applied in every nation. Instead, UNCITRAL's best course will likely be to point to common approaches, without being unduly prescriptive.

In doing so -- in pointing to common approaches that emerge in many nations' conflict-of-interest rules -- UNCITRAL may want to

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[38] *See, e.g.,* 5 C.F.R. Part 2635, Standards of Conduct (regulations on government employees' standards of conduct give many examples to illustrate acceptable (and unacceptable) actions by government officials), *available at* http://www.usoge.gov/pages/laws_regs_fedreg_stats/oge_regs/5cfr2635.html; FAR 9.508, 48 C.F.R. § 9.508 (extensive examples of actions that may raise untenable conflicts of interest).

[39] In the United States, for example, there is a relatively high tolerance for the movement of personnel between the government and the private sector; that movement through the "revolving door" is tolerated -- perhaps even encouraged -- so that the government will continue to have access to high-performing individuals from the private sector. *See, e.g.,* Keith R. Szeliga, *A Contractor's Guide to Revolving Door Restrictions*, 36 Pub. Cont. L.J. 519 (2007); Stuart B. Nibley, *Jamming the Revolving Door, Making It More Efficient, or Simply Making It Spin Faster: How Is the Federal Acquisition Community Reacting to the Darleen Druyun and Other Recent Scandals?*, 41 Proc. Law. 1 (2006).

emphasize the need for special rules for procurement.[40] In the United States, while there is a *general* set of rules governing rules of conduct for federal employees (and, reciprocally, framing acceptable actions for their contractor counterparts),[41] Congress and federal regulators have derived a *special* set of requirements for procurement personnel.[42]

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[40] OECD, *Managing Conflict of Interest*, *supra* note 14, at 28-29. In the United States, the devolution of responsibilities and functions to private contractors has caused severe strains in the existing structure of ethics rules, which was generally constructed at an earlier time, when many more government employees exercised much more direct control. *See, e.g.*, Shelley Roberts Econom, *Confronting the Looming Crisis in the Federal Acquisition Workforce*, 35 Pub. Cont. L.J. 171 (2006) ("The separate bodies of laws and rules governing the government workforce and contractor workforce have not kept pace with real-world developments and no longer fit reality. . . . With so much work today contracted out, it is often difficult to draw the line between the government and contractor workforces, and government officials find themselves 'negotiating fuzzy boundaries.'"); Dan Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 Admin. L. Rev. 859 (2000).

[41] The U.S. Office of Government Ethics has prepared a *Compilation of Federal Ethics Laws*, which is available at http://www.usoge.gov/pages/laws_regs_fedreg_stats/compilation_ethics_laws.html. Chapter I of that compilation covers general conflict-of-interest statutes. Chapter II discusses the requirements of the Ethics of Government Act of 1978, including special requirements regarding personal financial disclosures by certain U.S. officials. Chapter III addresses, *inter alia*, the Procurement Integrity Act, discussed further below. *See generally* Mary Lou Soller & Brian A. Hill, *Financial Conflicts of Interest: The Impact on Contractors and Federal Employees*, 40 Proc. Law. 1 (2005); Jacqueline Wood, Note, *Government Contractor Standards of Ethical Conduct: The Need for a More Detailed Regulatory Scheme*, 36 Pub. Cont. L.J. 437 (2007). *Cf.* Ronald D. Lunau, Phoung T.V. Ngo & Catherine Beaudoin, *The Federal Accountability Act: Changes to Procurement and Contracting in Canada*, 42 Proc. Law. 5, 6 (2007) ("The [Canadian] government has also produced a draft *Code of Conduct for Procurement* , which consolidates the existing conflict of interest and anticorruption policies. The *Code* will apply to both public servants and government suppliers and is intended to provide a clear statement of mutual expectations."); J.M. Migai Akech, *Development Partners and Governance of Public Procurement in Kenya*, 37 N.Y.U. J. Int'l L. & Pol. 829 (2005) ("[T]he civil service is by far the most important launching

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In framing conflict-of-interest rules for procurement, the UNCITRAL working group may wish to emphasize the difference between *personal* and *organizational* conflicts of interest. Most of the foregoing discussion goes to *personal* conflicts of interest -- conflicts of interest that arise because an individual official (or contractor) has conflicting obligations that may distort his or her decisionmaking. In suggesting areas of potential regulation, UNCITRAL may wish to go a step further, to address *organizational* conflicts of interest as well. Organizational conflicts of interest have long been a subject of concern in the United States,[43] and they have gained increased attention in the European Union, as well.[44]

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pad for businessmen in Kenya as it gives senior government officials and politicians access to public resources, including lucrative public procurement contracts. The participation of public officials in private enterprise has thus been a key source of corruption in public procurement, since the rules established to guard against conflicts of interest have invariably been breached.").

[42] *See* Procurement Integrity Act, 41 U.S.C.§ 423; FAR 3.104-1 *et seq.*, 48 C.F.R. § 3.104-1 *et seq.* (regulations implementing Procurement Integrity Act).

[43] Organizational conflicts of interest are addressed in FAR Subpart 9.5, 48 C.F.R. Subpart 9.5. *See, e.g.*, Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25 (2005); Keith R. Szeliga, *Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 Pub. Cont. L.J. 639 (2006); Daniel A. Cantu, *Organizational Conflicts of Interest/Edition IV*, 06-12 Briefing Papers (Thomson West, Nov. 2006). The principles of organizational conflicts of interest, it should be noted, have also been applied in the United States to government decisions that may be tainted by conflicts of interest, where, for example, a government official may be overseeing a competition that could lead to an agency's function being outsourced to the private sector. *See, e.g.*, Major Harney, *A-76 Cost Studies and Conflicts of Interest: The General Accounting Office and the Office of Government Ethics Square Off*, 1999 Army Law. 37.

[44] *See, e.g.*, Peter Braun & Ceren Berispek, *Conflicts of Interest in Public Award Procedures: Deloitte Business Advisory NV v Commission of the European Communities (T-195/05*), 2008 Pub. Proc. L. Rev. NA53; Gregory S. Hayken, *Comparative Study: The Evolution of Organisational Conflicts of Interest Law in Europe and the United States*, 2006 Pub. Proc. L. Rev. 137.

As the term suggests, organizational conflicts of interest apply to an *organization*, and may disqualify that organization for a procurement if other work (or other ties) may create a conflict of interest for that organization. Thus, for example, where a firm has been retained to draft the solicitation for a future procurement, the firm generally may not compete in that future procurement. An organizational conflict of interest will also disqualify a firm from providing advice to the government, where its advice might be skewed by other obligations (or opportunities) available to the firm.[45]

A nation's willingness (and ability) to exclude vendors with actual or potential organizational conflicts of interest will, as with personal conflicts of interest, vary enormously. As with personal conflicts, a nation's sensitivity to organizational conflicts of interest will likely be shaped by the nation's history, and the nation's ability to exclude firms will turn, at least in part, on whether that nation has alternative vendors available. Here again, therefore, while UNCITRAL may wish to highlight the need to monitor and control organizational conflicts of interest, UNCITRAL may not wish to suggest rigid uniform rules.

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[45] These examples go to the first type of organizational conflict of interest generally recognized under U.S. law -- impaired objectivity. *See, e.g.,* FAR 2.101, 48 C.F.R. § 2.101 ("'Organizational conflict of interest' means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired . . . ."). The Federal Acquisition Regulation also bars organizational conflicts of interest where "a person has an unfair competitive advantage." *Id.* This latter type of organizational conflict of interest has waned in importance; the law regarding "unfair advantage" developed largely because of concerns, many decades ago, about defense industry consolidation, but that concern is now more commonly addressed through other means, and not through the law regarding organizational conflicts of interest.

Establish procedures for identifying and addressing conflicts of interest

Per the OECD manual's recommendations, UNCITRAL may wish to outline *when* conflicts of interest should be identified and addressed. Unlike the standards for conflicts of interest, which can vary widely from nation to nation, here the procedural triggers -- the milestones for disclosure -- are less likely to vary, and the UNCITRAL model law (and its guide to enactment) could be more prescriptive.

As the OECD manual noted, disclosure should probably be called for both prior to an official's appointment and periodically while in office.[46] In the U.S. federal system, generally speaking covered officials must file reports when nominated, annually while in office, and then after leaving office.[47] These are relatively objective milestones, and the UNCITRAL model law could suggest that these milestones be used uniformly if implementing nations wish to address personal conflicts of interest in their procurement laws.

To provide the employee support recommended by the OECD manual,[48] the conflict-of-interest procedures should accommodate employees with questions regarding conflicts of interest, both while in government service and as they leave the government. In the U.S. system, employees departing government service may ask an ethics officer to review and rule on potential conflicts of interest; that process helps to ventilate potential problems, and gives employees (and their prospective private-sector employers) at least some measure of comfort.[49]

There are, thus, some relatively clear signposts for *when* conflicts of interest should be assessed, and how that review can be facilitated. What

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[46] OECD, *Managing Conflict of Interest*, *supra* note 14, at 29-30.

[47] *See, e.g.*, 5 C.F.R. § 2634.201 (describing slightly different milestones for senior officials of different ranks).

[48] OECD, *Managing Conflict of Interest*, *supra* note 14, at 32.

[49] *See* FAR 3.104-6, 48 C.F.R. § 3.104-6 (ethics advisory opinions for procurement officials); 5 C.F.R. § 2638.301 *et seq.* (ethics advisory opinions by Office of Government Ethics and agency ethics officials).

is less clear, however, is *who* should be required to file such disclosures, and *how broad* those disclosures should be. Ethics rules in the U.S. executive branch, for example, call for financial disclosures only by more senior officials,[50] and U.S. rules carefully circumscribe what must be disclosed.[51] Because financial disclosure may be onerous, and may in practice deter some potential candidates from public service, UNCITRAL may choose to leave it to implementing nations to decide who should be required to disclose, and how broad those disclosures should be.

Should UNCITRAL decide to extend conflicts of interest rules to *organizational* conflicts of interest, the rules may prove less nettlesome. Experience in the U.S. federal system has shown that there are two distinct periods in which to assess potential organizational conflicts of interest: before contract award and during contract performance. Current U.S. rules emphasize review *before* award,[52] in part because it is difficult to assess potential organizational conflicts during performance, as too many variables may be in play. That said, historically U.S. rules called for more review of organizational conflicts during contract performance, usually under a negotiated contract provision,[53] and UNCITRAL could, in principle, follow a similar course.

It is also easier, in dealing with organizational conflicts, to identify *which entities* should disclose potential organizational conflicts of interest, and the *scope of the required disclosure*. While disclosures of potential organizational conflicts of interest can, as with personal disclosures, deter candidates from working with the government, organizations are less likely than individuals to balk, unpredictably, at required disclosures, especially if the government can offer vendors reasonable assurances that any disclosures by the vendors will be protected from public release. It would not be unreasonable, therefore, for UNCITRAL to recommend that all prospective vendors on a sensitive

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[50] *See, e.g.*, 5 C.F.R. § 2634.202.

[51] *See, e.g.*, 5 C.F.R. §§ 2634.301 - .311 (contents of reports).

[52] FAR 9.506, 48 C.F.R. § 9.506.

[53] *See, e.g.*, James W. Taylor, *Organizational Conflicts of Interest/Edition II*, 84-8 Briefing Papers 1, 3-4 (1984).

project be required to address reasonably foreseeable organizational conflicts of interest, given the scope of work projected by the solicitation.

There will, of course, be uncertainty regarding what conflicts of interest must be disclosed as truly relevant, but there is also a practical way to curb the risks posed by that uncertainty. If the agency's subsequent conflict-of-interest determination (whether positive or negative) is subject to possible challenge[54] (by the disappointed vendor, or by a competitor if the vendor passed muster), then the vendor and the reviewing agency will in effect share (and mitigate) the risk. If the vendor's disclosure of potential conflicts was too narrow and the purchasing agency nevertheless allows the vendor to proceed, a competitor may well challenge the agency's decision, and point out the successful vendor's conflicting interests. Conversely, if the vendor made a full disclosure and the agency wrongly read that disclosure to reveal a disqualifying organizational conflict of interest, the offended vendor will be able to challenge the bar. Ultimately, therefore, a remedy (protest) system can ease the risk of an inherently uncertain disclosure process.

Set rules defining officials' obligations when confronted with a conflict

As noted, the OECD manual called for implementing states to set clear requirements for public officials when those officials face a conflict of interest. Officials, the OECD manual suggested, should be afforded a range of possible options, from divestiture of a conflicting investment, to recusal from the matter, to reassignment to another post, to possible

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[54] While the current UNCITRAL model law makes only limited provision for bid challenges (referred to as "review," *see* UNCITRAL Model Procurement Law, Art. 52 *et seq.*, and as "bid protests" in the United States), the working group currently reviewing potential reforms to the model law has indicated that these provisions may be strengthened substantially during the reform process. *See* UNCITRAL, Working Group I, *Revisions to the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994): Proposed Revisions to the Text of the Model Law, Made by the Working Group at Its Sixth to Eleventh Sessions*, UN Doc. No. A/CN.9/WG.I/. . ./CRP . . . , at 47 (July 25, 2007), *available at* http://www.uncitral.org/pdf/uncitral/english/workinggroups/wg_1/crp-xxxxx.pdf.

resignation.[55] The UNCITRAL working group may well wish to adopt this checklist of possible solutions, without tying any solution (a sanction or remedial action) to any specific conflict of interest. The appropriate sanction or solution is likely to vary by the circumstances of the case, and by the traditions and experience of the nation; closely dictating sanctions and solutions would not, therefore, appear to be prudent for UNCITRAL.[56]

[55] OECD, *Managing Conflict of Interest*, *supra* note 14, at 30-31.

[56] The U.S. experience may again be instructive here, for even within the U.S. system there is variance. Under the relatively recent rules implementing the Procurement Integrity Act, FAR 3.104-1 *et seq.*, 48 C.F.R. § 3.104-1 *et seq.*, if a senior procurement official is offered employment by a vendor, that senior official must either recuse himself from the procurement or explicitly reject the offer. FAR 3.104-3(c), 48 C.F.R. § 3.104-3(c). Those conflict-of-interest requirements are triggered by a mere "contact" regarding potential employment. The parallel provision regarding conflicts of interest in the traditional Executive branch rules, however, is triggered only when *negotiations* occur with a prospective vendor -- a different, and apparently more liberal, triggering point. 18 U.S.C. § 208. As these examples suggest, different legal traditions (and different policy imperatives) make it difficult to impose rigidly uniform rules for enforcing the conflict-of-interest provisions.

Putting anti-corruption institutions in place: Thinking through the principal-agent conflict

Many of the remaining recommendations of the OECD manual -- including the need for leadership in implementing conflicts-of-interests policies, [57] the need for training and guidance,[58] and the need for enforcement[59] and controls -- will be important parts of any UNCITRAL reform effort. These elements, which go to the institutions that need to be put in place to combat conflicts of interest, will probably not lend themselves to statutory language in the UNCITRAL model law. Instead, these elements are likely to be addressed in the UNCITRAL model law's *Guide to Enactment.*

In assessing these institutional elements of a conflict-of-interest rules regime, the UNCITRAL working group may want to draw upon the experience of the U.S. federal procurement system, which has made significant progress on all of these fronts. In the U.S. procurement community, in both the private and public sectors, training and compliance systems stand as important bulwarks against conflicts of interest; indeed, new rules *require* that most federal contractors have compliance systems in place.[60] Compliance is further reinforced by multiple layers of oversight and enforcement, including:

- Multiple sets of federal rules addressing potential conflicts of interest.[61]
- A procurement workforce that is trained in the rules, to recognize and abate conflicts of interest.

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[57] *Id.* at 31-32.

[58] *Id.* at 32-33.

[59] *Id.* at 35.

[60] *See* 72 Fed. Reg. 65873 (Nov. 23, 2007) (final rule, requiring limited compliance systems); 72 Fed. Reg. 64019 (Nov. 14, 2007) (final rule, requiring broader compliance systems and mandatory self-disclosure of criminal acts).

[61] Those rules include the *Standards of Ethical Conduct for Employees of the Executive Branch*, 5 C.F.R. Part 2635, and Department of Defense Directive 5500.07 (Nov. 29, 2007), *available at* http://www.dod.mil/dodgc/defense_ethics/.

- A centralized ethics authority (the Office of Government Ethics), and numerous ethics officials in all of the agencies. [62]
- Other government counsel; who serve an important role in monitoring -- and objecting to -- illegal or unethical behavior by agency employees.
- "Whistleblowers" -- employees, inside and outside the government, who report wrongdoing, and who may (in some instances) share in the government's monetary recovery for wrongdoing.[63]
- Agency inspectors general, whose staffs audit agency actions to ensure conformance with legally required procedures.[64]
- Leaders at the agencies -- including political leaders -- who loath the embarrassment of a publicized conflict of interest and who therefore make quite clear to their subordinates the need to follow conflict-of-interest rules.
- An active press, quite willing to identify and publicize apparent conflicts of interest in public procurement.
- Bid challenge (remedies) forums, which hear and pass on challenges by disaffected bidders in the procurement process[65]; by

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[62] The U.S. Office of Government Ethics website is at http://www.usoge.gov; links to various agencies' own ethics websites are at http://www.usoge.gov/pages/other_links/otherlinks_fedgovt_gen.html#Anchor-Federa-30117. The Department of Defense maintains a Standards of Conduct Office (SOCO) which oversees ethics enforcement at the Defense Department; the SOCO website is at http://www.dod.mil/dodgc/defense_ethics/.

[63] *See, e.g.*, Louis D. Victorino, Robert L. Ivey, Kevin R. Sullivan, *"Qui Tam" Lawsuits*, 89-10 Briefing Papers 1 (Sept. 1989).

[64] *See, e.g.*, U.S. General Accounting Office, *Inspectors General: Office Consolidation and Related Issues*, GAO Rep. No. GAO-02-575, at 5-14 (Aug. 2002) (discussing history and extent of work by inspectors general), *available at* www.gao.gov.

[65] *See, e.g.*, James J. McCullough, Catherine E. Pollack & Steven A. Alerding, *Bid Protest Practice in the Court of Federal Claims* 00-10 Briefing Papers 1 (2000); Government Accountability Office, *Bid Protests at GAO: A Descriptive*

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effectively forcing procurement officials to follow required procedures -- procedures themselves intended to erase conflicts of interest -- these forums decrease the risk that conflicts will emerge.

- Agencies' criminal investigative units; the larger purchasing agencies, such as those in the Department of Defense, sponsor these investigative units, which can play an important role in unearthing serious conflicts of interest.[66]
- Prosecutors, central criminal investigators, and courts: These institutions tend to process and expose the grossest conflicts of interest; those very public and serious convictions have an *in terrorem* effect, in turn discouraging even more minor conflicts of interest.
- Congress, which plays an important role, both in setting overall policies on conflicts of interest *and* in investigating individual conflicts.
- A highly informed public, which expects public procurement to be conflict-free.

Since the United States has a relatively successful set of institutions in place to combat conflicts of interest, should UNCITRAL simply recommend that developing nations mimic the U.S. institutions? The answer is probably no, but for complicated reasons.

To make sense of why it would not be enough merely to replicate the U.S. institutions, it is vitally important that UNCITRAL identify the roles that each of these institutions plays, to clarify how the institutions complement and support one another in combating conflicts of interest. The key to solving that riddle -- to understanding the institutions' several

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Guide (8th ed. 2006), *available at* http://www.gao.gov/decisions/bidpro/bid/d06797sp.pdf.

[66] A list of Defense Department and civilian agency criminal investigative units appears at http://www.dodig.osd.mil/INV/DCIS/fleolink.htm.

roles -- is to understand the central tension in public procurement, which spawns conflicts of interest: the principal-agent relationship.[67]

There is an extensive body of literature on principal-agent theory,[68] which has been applied successfully to procurement.[69] Under this model,

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[67] *See, e.g.*, Cliff McCue & Eric Pier, *Using Agency Theory to Model Cooperative Public Purchasing, in Advancing Public Procurement: Practices, Innovation & Knowledge Sharing* 45, 47-49 (Gustavo Piga & Khi V. Thai eds., PrAcademics Press 2007), *available at* http://www.ippa.ws/IPPC2/BOOK/Chapter_3.pdf; Ohad Soudry, *A Principal-Agent Analysis of Accountability in Public Procurement, in Advancing Public Procurement, supra*, 432, *available at* http://www.ippa.ws/IPPC2/BOOK/Chapter_19.pdf.

[68] *See, e.g.*, Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 Colum. L. Rev. 1757, 1758-59 (1989) (discussing development of the principal-agent approach). Richard Waterman and Kenneth Meier reviewed that literature, and summed up how the principal-agent model has been applied to government structures:

> The two key elements of the principal-agent model as it has been applied to the bureaucracy are [1] goal conflict and [2] information asymmetry; they are the spark plugs that power the theory. Because there is goal conflict between principals and agents, agents have the incentive to shirk (or engage in other nonsanctioned actions). The information asymmetry allows bureaucrats to be unresponsive to agents. Even in a case where there are relatively similar goals, conflict may exist over the exact means to use with an agent's desire to obtain slack resources that provide the incentive and the information asymmetry that provides the opportunity to shirk.

Richard W. Waterman & Kenneth J. Meier, *Principal-Agent Models: An Expansion*, 8 J. Pub. Admin. Res. & Theory 173, 177 (Apr. 1998) (citation omitted; brackets included), *available at* http://links.jstor.org/sici?sici=1053-1858%28199804%298%3A2%3C173%3APMAE%3E2.0.CO%3B2-N.

[69] Ohad Soudry describes the principal-agent problem in procurement as follows:

> [I]n the absence of effective control mechanisms, procurement officials are likely to involve some personal preferences, derived from their private interests, career prospects, social contacts, monetary reward or merely an aversion to effort, when making procurement decisions. In the terms of the principal-agent terminology used above, a lack of accountability means that the (procurement) agent is more likely to engage in a low level rather than a

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the procuring official acts as an *agent* for a principal (or principals). That *principal* may shift from one political culture to another -- in the United States, "taxpayers" or Congress may be viewed as the principal, while in a monarchy the king may be considered the principal.[70] In acting on behalf of that principal (however defined), the procuring official (the "agent") may have goals that diverge from the principal. If the agent's goals diverge sufficiently, or in a specially acute way, the agent may be said to have a conflict of interest.[71] Notably, the risk that such a conflict (such a divergence in goals) will be material -- will cause

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> high level of effort when performing his tasks. The challenge faced by public procurement regulators therefore, is to ensure that the agency costs which rise when procurement agents carry out tasks for the benefit of their principal, do not exceed the benefit derived from such a delegation of decision-making authority.

Ohad Soudry, *supra* note 67, at 435.

[70] *See generally* Richard W. Waterman & Kenneth J. Meier, *supra* note 68, at 178-79 (discussing multiple principals).

[71] As is discussed below, not all technical "conflicts" are actionable; where a society draws the line can depend on many variables. Professor Bradley Wendel lamented the somewhat arbitrary line between what is permissible and what is not:

> It can be difficult to rationalize distinctions drawn between impermissible and permissible interests of the agent. In Stark's terms, the conceptual challenge is to survey the field of interests and pick out those which are "encumbering" in the sense of creating a normatively significant influence on the agent's judgment. The question of how we distinguish encumbering interests from innocuous ones is just as contestable as the discretionary judgment that we entrust to agents, however, which is what gives rise to worries about conflicts of interest in the first place.

W. Bradley Wendel, *The Deep Structure of Conflicts of Interest*, 16 Geo. J. Legal Ethics 473, 485 (2003) (reviewing Andrew Stark, *Conflict of Interest in American Public Life* (2000) & *Conflict of Interest in the Professions* (Michael Davis & Andrew Stark eds., 2001)).

costs to the principal[72] -- increases as an asymmetry of information tilts in the agent's (the official's) favor, *i.e.*, in those situations where the agent (the contracting official) holds much more information than the principal.

Once we apply the literature on principal-agent relations and recognize that in procurement, as elsewhere in public administration, a divergence in goals and asymmetrical information can give rise to a conflict of interest, we can also foresee the remedial steps necessary to mitigate those potential conflict of interests. As Professor Sharon Hannes recently noted:

> Under agency theory, whenever one person, the agent . . . is required to fulfill a task for another person, the principal . . . a conflict of interest[73] emerges. This conflict means the agent may pursue her own agenda rather than actions optimal in fulfilling her task for the principal. As a result, goes the argument, the principal-agent setting entails three types of costs. *The first type is monitoring costs*. Since the agent is prone to deviate from the goals set for her, the principal must employ expensive means to verify what her agent is doing and, if necessary, call her to order.
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> *The second inevitable type of cost is bonding costs*. Bonding measures do not assist the principal in scrutinizing and governing the actions of the agent, but, rather, are intended to ensure that the agent sticks to the objectives of her employment. Hence, a public servant is often required to cut any ties he may

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[72] One useful conceptual device is to consider the "principal" to be the public interest. *See* Richard W. Waterman & Kenneth J. Meier, *supra* note 68, at 174-75.

[73] Note that a legally cognizable conflict of interest -- a legally actionable one -- must generally be more material, or have a specially serious cast. A procurement official who leaves the office early one day to accommodate a sick child may, in some technical sense, have a conflict of interest because he has put that sick child's interest first; the conflict, however, is hardly grounds for legal action. The procurement official who makes a procurement decision to benefit an unemployed adult child, however, probably has broken the law. The difference between the two conflicts of interest is arguably one of degree, not type.

> have with the business community to ensure objectivity; financial reporters or advisors are required to refrain from personal investments to prevent skewed recommendations; and workers go to much trouble to bring references and pursue studies, which, at least in part, are efforts aimed at showing how devoted they are going to be to their jobs.
>
> *Finally*, even after monitoring and bonding costs, *there is a residual loss to be borne*. This means there is always enough room for a conflict of interest to arise between the principal and agent. For example, a certain amount of theft by workers always occurs; some confidential information will always leak; and employee effort levels rarely meet those of owners. In fact, as long as the residual losses are lower than the cost of additional bonding or monitoring costs required to overcome them, it is efficient to incur these losses.[74]

Having identified the problem that underlies conflicts of interest in procurement -- the principal-agent arrangement, and its attendant asymmetric information and diverging goals -- we thus can identify its likely costs: monitoring costs, bonding costs, and residual costs that neither monitoring nor bonding can (or should) erase. These make the various remedial strategies for conflicts of interest, from congressional oversight to prosecution and rules, both easier to understand and more difficult to apply.

Applying the principal-agent model, we can understand, for example, that the extensive conflict-of-interest rules in the U.S. system reflect a "bonding" cost, incurred in order to align public officials to the "principal's" (say, the public's) interest. (The highly detailed rules also reduce monitoring costs, by making it easier to monitor and judge the procuring officials' actions.) Again applying the model, we can see that an active press reduces monitoring costs (and thus risk), much as whistleblowers serve as surrogate monitors and enforcers of the

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[74] Sharon Hannes, *Reverse Monitoring: On the Hidden Role of Employee Stock-Based Compensation*, 105 Mich. L. Rev. 1421, 1438-39 (2007) (emphasis added).

principal's interest.[75] Bid challenges, under this model, are merely a means of bonding -- of forcing procurement officials to bond closely to the principal's goals, as defined by the procurement rules, including the conflict-of-interest rules[76] -- and agency leaders who admonish procuring officials to follow the conflict-of-interest roles are merely reinforcing that same bonding.

While the principal-agent model makes the procurement system's cures easier to understand, it also makes them more complicated to apply. Principal-agent relationships shift and mutate constantly in a dynamic government system[77] -- such as a procurement system -- and it is vitally important to understand the institutions at issue, and their roles and their social and political contexts,[78] if the principal-agent problems are to be addressed appropriately.[79]

This brings us back, then, to the question of whether UNCITRAL should simply recommend the United States' anti-corruption institutions to other nations, as institutional models to be mimicked. Because each

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[75] *E.g.*, William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 Loy. L.A. L. Rev. 1799 (1996).

[76] *See, e.g.*, Xinglin Zhang, *Supplier Review as a Mechanism for Securing Compliance with Government Public Procurement Rules: A Critical Perspective*, 2007 Pub. Proc. L. Rev. 325; Robert M. Hansen, *CICA Without Enforcement: How Procurement Officials and Federal Court Decisions Are Undercutting Enforcement Provisions of the Competition in Contracting Act*, 6 Geo. Mason L. Rev. 131, 140-41 (1997).

[77] Richard W. Waterman & Kenneth J. Meier, *supra* note 68, at 197-98.

[78] *See, e.g.*, Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 Pub. Cont. L.J. 321, 342 (noting that principal-agent theorists, among others, have urged the "importance of understanding institutions and the practical applications of this understanding").

[79] For example, while normally one would want conflict-of-interest rules in place to ensure that procuring officials (agents) did not allow personal interests to distort their purchasing decisions, if in a hypothetical state the king were the principal and all the procuring officials belonged to his tribe (thus reducing the king/principal's bonding costs and, potentially, his monitoring costs), it might be unnecessary to impose rigid conflict-of-interest rules.

nation's institutions, legal traditions, social norms, culture and history will vary so enormously, the context in which those anti-corruption institutions act would change dramatically, from country to country -- and, with a change in context, the institutions might prove far less useful. It would be a mistake, therefore, merely to replicate the U.S. anti-corruption institutions, no matter how successful they may be in the United States, in developing nations through the UNCITRAL model law.

Given these many variables -- the highly dynamic principal-agent relationships, the divergences of interest that may be mitigated (or exacerbated) through outside channels, and the asymmetries of information that may remain open or may be resolved quite abruptly -- it is clear why the OECD stopped short of endorsing any fixed set of conflict-of-interest rules, and indeed why the OECD did not even recommend specific institutional forms to combat conflicts of interest rules. Because the principal-agent tensions vary so widely, conflict-of-interest rules and regimes are also likely to vary enormously, between states and, as time passes and institutions evolve, even within individual states. A wiser course, therefore, for both the OECD and UNCITRAL, is to recommend a sound institutional framework, within which implementing states can evolve and enforce their own conflict-of-interest rules.

CONCLUSION

The working group reviewing the UNCITRAL model procurement law will likely address conflicts of interest in the current round of reforms, in part because the UN Convention Against Corruption calls for protections against this type of corruption.

In seeking out templates for reform, the UNCITRAL working group can rely heavily upon the OECD *Guidelines for Managing Conflict of Interest in the Public Service*. The OECD *Guidelines*, and practical experience internationally, suggest constructive steps for building *systems* to combat conflicts of interest in procurement, steps that the UNCITRAL model procurement law might adopt:

- Although the focus may be on procurement, a first step should be to assess how conflict-of-interest rules can be integrated with broader ethics rules used across government.

- To help define the normative and practical goals of the conflict-of-interest rules, examples of unacceptable conflicts of interest should be identified.
- Rulemakers should establish laws, policy and guidelines on conflicts-of-interest in procurement, mindful of their unique institutions and traditions.
- Protective procedures, such as financial disclosures by officials at appointment and during a term of office, should be established in order to root out conflicts of interest; because these structured procedures are less likely to run afoul of national norms, here the UNCITRAL rules could be more prescriptive.
- Similarly, procedures and rules should be put in place to require specific official action (recusal, for example) when conflicts of interest do arise.

As the discussion above reflects, however, the OECD guidelines are only a first step. While the OECD guidelines identify certain discrete elements -- such as the need for regular financial disclosures, and the need for employee counseling on potential conflicts of interest -- in practice the OECD guidelines probably should not be interpreted rigidly in the UNCITRAL model law. Divergent goals and asymmetries of information -- the principal-agent conundrum that haunts public procurement -- are just too varied across societies to impose simple, uniform conflict-of-interest *rules*. By the same token, it would be a misstep for UNCITRAL to propose strictly uniform *institutions* to combat conflicts of interest, for those institutions can succeed, *i.e.*, can close the principal-agent gap, only when those institutions *complement* and *reinforce* a nation's existing rules, institutions and widely held norms. A sounder course for the UNCITRAL model law and its drafters, therefore, would be to suggest certain minimum elements of a *system* to combat conflicts of interest, but to leave it to implementing states to decide how to derive, and enforce, their own conflict-of-interest rules.