



# TRANSPARENCY INTERNATIONAL | USA

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President & CEO*

August 10, 2010

VIA FACSIMILE  
202-395-4549

Ambassador Ron Kirk  
Office of the United States Trade Representative  
1700 G Street  
Washington, DC 20508

Dear Ambassador Kirk:

As a member of the Trade and Environment Policy Advisory Committee, I have followed closely the early negotiations on the Trans Pacific Partnership (“TPP”) Agreement. I am writing now to urge inclusion of strong anti-corruption and legal and regulatory transparency requirements, including for government procurement.

All of our TPP negotiating partners are familiar with these provisions as parties to trade arrangements and multilateral agreements. The benefit to the United States and to U.S. business and consumers of including such provisions in the TPP Agreement is that its obligations will be enforceable in dispute settlement.

As you have noted, corruption must be stopped for investment and trade to flourish, and transparency is essential for the benefits of trade agreements to be fully realized. The United States has been a leader in promoting a global anti-corruption agenda and USTR has played a key role through negotiation of free trade agreements with provisions to enhance legal and regulatory transparency, including in government procurement. More recent free trade agreements also commit our trading partners to anti-corruption provisions that outlaw domestic and foreign bribery and protect whistleblowers.

TI-USA urges the United States to table a text for the TPP Agreement that includes the full legal and regulatory transparency and government procurement chapters from existing free trade agreements (“FTAs”). All TPP members have already agreed to the APEC Transparency Standards, including for Government Procurement.

TI-USA also urges inclusion of text on foreign bribery and anti-corruption. As shown in Attachment 1, all the TPP partners have committed to provisions on these issues as parties to the United Nations Convention against Corruption (“UNCAC”) and, for five of the TPP partners, as parties to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“OECD Convention”). All of

the TPP partners, as APEC member economies, have endorsed the APEC Course of Action on Fighting Corruption and Ensuring Transparency.

Attachment 2 provides a comparison of the anti-corruption provisions of U.S. FTAs, the UNCAC and the OECD Convention. As you will see, our TPP partners have already taken on obligations under the UNCAC and the OECD Convention that go beyond present U.S. FTA language. Therefore, the TPP anti-corruption provisions should be more extensive than those in recent U.S. FTAs.<sup>1</sup>

We have provided in Attachment 3 suggested draft anti-corruption language derived from the U.S. - Central America Free Trade Agreement Chapter Eighteen, amplified by provisions from the UNCAC and the OECD Convention.

Including strong, enforceable provisions in the TPP will help protect legitimate business and promote government accountability. Their inclusion would also make a statement that the U.S. and its TPP partners are committed to addressing corruption in their countries for the economic and social welfare of their citizens.

We appreciate your efforts to use the TPP negotiation to achieve the highest level of commitment to combat corruption and look forward to working with you and your colleagues as the negotiations proceed.

Sincerely,



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<sup>1</sup> The recent Canada-Chile Free Trade Agreement, Articles 1907-1910, include anti-corruption provisions that go beyond the current U.S. FTA provisions.



# TRANSPARENCY INTERNATIONAL | USA

## Attachment 1

| <b>TPP Country</b>   | <b>APEC Member</b> | <b>Party to<br/>UNCAC</b> | <b>Party to OECD Convention</b> |
|----------------------|--------------------|---------------------------|---------------------------------|
| Australia            | <b>YES</b>         | <b>YES</b>                | <b>YES</b>                      |
| Brunei<br>Darussalam | <b>YES</b>         | <b>YES</b>                | NO                              |
| Chile                | <b>YES</b>         | <b>YES</b>                | <b>YES</b>                      |
| New Zealand          | <b>YES</b>         | <b>YES</b>                | <b>YES</b>                      |
| Peru                 | <b>YES</b>         | <b>YES</b>                | <b>YES</b>                      |
| Singapore            | <b>YES</b>         | <b>YES</b>                | NO                              |
| Viet Nam             | <b>YES</b>         | <b>YES</b>                | NO                              |

## Attachment 2

### Comparative Chart of Anti-Corruption Provisions

| U.S. FTAs   | UNCAC   | OECD Convention and Revised Recommendations  |
|---|---|--|
| <p><b>Prohibition on Solicitation of Bribes:</b><br/>Each Party shall adopt or maintain the necessary legislative or other measures to establish it is a criminal offense under its law, [<i>Bahrain, CAFTA</i>: in matters affecting international trade or investment,] for a public official of that Party or a person who performs public functions for that Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions.</p>                                     | <p>Art. 15 (b) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: The solicitation or acceptance by a [national] public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.</p> <p>Art. 16(2) Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official . . . , directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.</p> |  |
| <p><b>Prohibition on Bribery of domestic official:</b><br/>Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law in matters affecting international trade or investment, for: any person subject to the jurisdiction of the Party intentionally to offer or grant, directly or indirectly, to a public official of the Party or a person who performs public functions for the Party any article of monetary value of other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions.</p> | <p>Art. 15(a) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.</p>   |  |
| <p><b>Prohibition on Bribery of Foreign Official:</b><br/>Each Party shall adopt or maintain the necessary legislative or other measure to establish that it is a criminal offense under its law, [in matters affecting</p>   | <p>Art. 16(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence,</p>  | <p>Convention Art. 1(1) Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for</p> |

| <b>U.S. FTAs</b>  | <b>UNCAC</b>  | <b>OECD Convention and Revised Recommendations</b>  |
|---|---|---|
| international trade or investment, for] any person subject to the jurisdiction of that Party intentionally to offer, promise, or give any undue pecuniary or other advantages, directly or indirectly, to a foreign official, for that official or for another person, in order that the official act or refrain from acting in relation to the performance of the official duties, in order to obtain or retain business or other improper advantage in the conduct of international business. | when committed intentionally, the promise, offering or giving to a foreign public official . . . , directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.  | any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.   |
| <b>Prohibition on Aiding or Abetting:</b><br>Each Party shall adopt or maintain the necessary legislative or other measure to establish that it is a criminal offense under its law, [in matters affecting international trade or investment,] for any person subject to the jurisdiction of that Party to aid or abet, or to conspire in, the commission of any of the offenses described in subparagraphs (a) through (c).  | Art. 27(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.<br>(2) Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.<br>(3) Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention. | Convention Art. 1 (2) Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.  |
| <b>Jurisdiction:</b>  | Art. 42(1) Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when: (a) The offence is committed in the territory of that State Party; or<br>(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.  | Art. 4(1) Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.<br>(2) Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles. |

| U.S. FTAs   | UNCAC   | OECD Convention and Revised Recommendations   |
|---|---|---|
|   | <p>(2) Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when: (a) The offence is committed against a national of that State Party; or (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or (c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or (d) The offence is committed against the State Party.</p> <p>(3) For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.</p> <p>(4) Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her. offender is present in its territory and it does not extradite him or her.</p> | <p>(3) When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.</p> <p>(4) Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.</p> |
| <p><b>Liability of Enterprises:</b><br/>In the event that, under the legal system of a Party, criminal responsibility is not applicable to enterprises, that Party shall ensure that enterprises shall be subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions, for any of the offenses described in paragraph 1.</p> | <p>Art. 26(1) Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.</p> <p>(2) Subject to the legal principles of the State Party, the liability of legal</p>   | <p>Art. 2 Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.</p>   |

| U.S. FTAs   | UNCAC  | OECD Convention and Revised Recommendations   |
|---|--|---|
|   | <p>persons may be criminal, civil or administrative.</p> <p>(3) Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.</p> <p>(4) Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.</p>   |   |
| <p><b>Enforcement:</b><br/>Each Party shall adopt or maintain appropriate penalties and procedures to enforce the criminal measures that it adopts or maintains to 1) prohibit officials from accepting bribes, 2) prohibit persons from bribing domestic or foreign officials and 3) aiding or abetting any of these acts.</p> | <p>Art. 30(1) Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.</p> <p>(3) Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.</p> | <p>Convention Art. 3(1) The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party's own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.</p>  |
| <p><b>Sanctions:</b></p>  | <p>Art. 31(1) Each State party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of: (a) proceeds of crime derived from offenses established in accordance with this Convention or property the value of which corresponds to that of such proceeds; (b) property, equipment or other instrumentalities used in or destined for use in offenses established in accordance with this Convention.</p>   | <p>Convention Art. 3(3) Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.</p> <p>Art. 3(4) Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.</p> |
| <p><b>Whistleblower Protection (non-binding):</b><br/>Each Party shall endeavor to adopt or maintain appropriate measures to protect persons who, in good faith, report acts of bribery.</p>  | <p>Art. 33 Each State shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on</p>   | <p>Recommendation IX Member countries should ensure that appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report</p>   |

| U.S. FTAs                  | UNCAC   | OECD Convention and Revised Recommendations  |
|----------------------------|---|--|
|                            | reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.   | in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of a foreign officials in international business transactions.  |
| <b>Witness Protection:</b> | <p>Art. 32(1) Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.</p> <p>(2) The measures envisaged in paragraph 1 of this article may include, <i>inter alia</i>, without prejudice to the rights of the defendant, including the right to due process:</p> <p>(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;</p> <p>(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.</p> |  |
| <b>Accounting:</b>         | Art. 12(3) In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:  | Convention Art. 8(1) In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified |

| <b>U.S. FTAs</b>  | <b>UNCAC</b>   | <b>OECD Convention and Revised Recommendations</b>  |
|---|--|---|
|   | <p>(a) The establishment of off-the-books accounts;</p> <p>(b) The making of off-the-books or inadequately identified transactions;</p> <p>(c) The recording of non-existent expenditure;</p> <p>(d) The entry of liabilities with incorrect identification of their objects;</p> <p>(e) The use of false documents; and</p> <p>(f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.</p> | <p>transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.</p> <p>Art. 8(2) Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.</p>   |
| <b>Taxes:</b>   | <p>Art. 12(4) Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.</p>   | <p>Recommendation VIII URGES Member countries to: i) fully and promptly implement the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which recommends in particular “that Member countries and other Parties to the OECD Anti-Bribery Convention explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes in an effective manner”, and that “in accordance with their legal systems” they “establish an effective legal and administrative framework and provide guidance to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities</p> |
| <p><b>Gov’t Procurement Integrity:</b><br/>Each Party shall adopt or maintain procedures to declare ineligible for participation in the Party’s procurements, either indefinitely or for a specified time, suppliers that the Party has determined to have engaged in fraudulent or other illegal actions in relation to procurement. On request of another Party, a Party shall identify the suppliers determined to be ineligible</p> | <p>Art. 9.<br/>1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective,</p>   | <p>Recommendation VI Member countries’ laws and regulations should permit authorities to suspend, to an appropriate degree, from competition for public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance, enterprises determined to have bribed foreign public officials</p>  |

| <b>U.S. FTAs</b>   | <b>UNCAC</b>   | <b>OECD Convention and Revised Recommendations</b>   |
|--|--|--|
| <p>under these procedures, and, where appropriate, exchange information regarding those suppliers or the fraudulent or illegal action.</p> | <p>inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia: (a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders; (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication; (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures; (d) 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 established pursuant to this paragraph are not followed; (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.</p> | <p>in contravention of that Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials.</p> |

### **Attachment 3**

#### **Suggested Text for Government Procurement Chapter** (based on CAFTA)

##### **Ensuring Integrity in Procurement Practices**

Further to Article \_\_\_\_ (Anti-Corruption Measures), each Party shall adopt or maintain procedures to declare ineligible for participation in the Party's procurements, either indefinitely or for a specified time, suppliers that the Party has determined to have engaged in fraudulent or other illegal actions in relation to procurement. On request of another Party, a Party shall identify the suppliers determined to be ineligible under these procedures, and, where appropriate, exchange information regarding those suppliers or the fraudulent or illegal action.

#### **Suggested Anti-Corruption Text for Transparency Chapter** (based on CAFTA Chapter Eighteen, Section B Anti-Corruption changes in bold; deletions in strikeout)

##### **Statement of Principle**

The Parties affirm their resolve to eliminate bribery and corruption in international trade and investment.

##### **Anti-Corruption Measures**

1. Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, ~~in matters affecting international trade or investment,~~ for:

(a) a public official of that Party or a person who performs public functions for that Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;

(b) any person subject to the jurisdiction of that Party intentionally to offer or grant, directly or indirectly, to a public official of that Party or a person who performs public functions for that Party any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;

(c) any person subject to the jurisdiction of that Party intentionally to offer, promise, or give any undue pecuniary or other advantage, directly or indirectly, to a foreign official, for that official or for another person, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business; and

(d) any person subject to the jurisdiction of that Party to aid or abet, or to conspire in, the commission of any of the offenses described in subparagraphs (a) through (c).

2. Each Party shall adopt or maintain appropriate penalties and procedures, **which are effective, proportionate and dissuasive**, to enforce the criminal measures that it adopts or maintains in conformity with paragraph 1.

3. In the event that, under the legal system of a Party, criminal responsibility is not applicable to enterprises, that Party shall ensure that enterprises shall be subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions, for any of the offenses described in paragraph 1.

4. **Each Party shall take such measures as may be necessary to provide that the (i) proceeds of the offenses described in paragraph 1, (ii) property the value of which corresponds to that of such proceeds, and (iii) property, equipment or other instrumentalities used in or destined for use in such offenses are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.**

5. **In order to prevent corruption, each Party shall take such measures as may be necessary regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offenses described in paragraph 1:**

- (a) **The establishment of off-the-books accounts;**
- (b) **The making of off-the-books or inadequately identified transactions;**
- (c) **The recording of non-existent expenditure;**
- (d) **The entry of liabilities with incorrect identification of their objects;**
- (e) **The use of false documents; and**
- (f) **The intentional destruction of bookkeeping documents earlier than foreseen by the law.**

**Each Party shall provide effective, proportionate and dissuasive civil, administrative or criminal penalties for omissions and falsifications in respect of the books, records, accounts and financial statements.**

6. Each Party shall ~~endeavor to~~ adopt or maintain appropriate measures to protect persons who, in good faith, report acts of bribery or corruption described in paragraph 1.

## Cooperation in International Fora

The Parties recognize the importance of regional and multilateral initiatives to eliminate bribery and corruption in international trade and investment. The Parties shall work jointly to encourage and support appropriate initiatives in relevant international fora.

### Definitions

For purposes of this Section:

**act or refrain from acting in relation to the performance of official duties** includes any use of the official's position, whether or not within the official's authorized competence;

**foreign official** means any person holding a legislative, administrative, or judicial office of a foreign country, at any level of government, whether appointed or elected; any person exercising a public function for a foreign country at any level of government, including for a public agency or public enterprise; and any official or agent of a public international organization;

**public function** means any temporary or permanent, paid or honorary activity, performed by a natural person in the name of a Party or in the service of a Party, such as procurement, at the central level of government; and

**public official** means any official or employee of a Party at the central level of government, whether appointed or elected.