

OECD ANTI-BRIBERY CONVENTION
PHASE 3 MONITORING INFORMATION
RESOURCES



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INTRODUCTION

The OECD *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* calls for a systematic monitoring process to promote and oversee the implementation of the Convention. The OECD Working Group on Bribery monitors and evaluates countries' efforts to implement the Convention, the *2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions*, the *2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions* and other related documents through a rigorous peer review system.

After an initial assessment of countries' national legislation to determine their conformity with the Convention (Phase 1), the second phase of the monitoring process examines the structures in place to enforce these laws and assesses countries' practical application and implementation of the Convention and related documents and recommends concrete actions for improvement (Phase 2). All monitoring reports are available on the OECD Anti-Corruption Division website, at www.oecd.org/bribery.

In December 2009, the Working Group on Bribery adopted a post-Phase 2 assessment mechanism to act as a permanent cycle of peer review, involving on-site visits and a shorter, more focused assessment mechanism than for Phase 2. The aim of the mechanism is to improve the capacity of Parties to the Convention to fight bribery in international business transactions by evaluating their efforts in this field through a dynamic process of mutual evaluation and peer pressure. The first cycle of review under this mechanism is known as Phase 3.

OBJECTIVE

The purpose of Phase 3 is to maintain an up-to-date assessment of the structures put in place by Parties to the OECD Anti-Bribery Convention to enforce the laws and rules implementing the Convention and the 2009 Recommendations. Phase 3 involves a shorter and more focussed evaluation than Phase 2 and concentrates on the following three pillars:

1. The progress made by Parties to the Convention on weaknesses identified in Phase 2.
2. Issues raised by changes in the domestic legislation or institutional framework of the Parties.

3. Enforcement efforts and results, and other key Group-wide, cross-cutting issues.

As for Phase 1 and 2, the approach for Phase 3 evaluations is ‘vertical’ (based on evaluations for each country). The Working Group on Bribery has established a schedule of Phase 3 evaluations from 2009 to 2014, which includes the designation of two countries to act as lead examiners in each evaluation. The countries acting as lead examiners choose the local/national experts who take part in the on-site visits and they prepare the preliminary country report. The entire Working Group on Bribery, made up of representatives from all States Parties to the Anti-Bribery Convention, evaluates each country’s performance and adopts conclusions.

ELEMENTS OF THE PHASE 3 EVALUATION

Phase 3 evaluations include:

- Appointment of two countries to act as lead examiners.
- Replies to an evaluation questionnaire by the country being evaluated.
- On-site visit to the country being evaluated.
- Preparation of a preliminary report on country performance.
- Evaluation in the Working Group on Bribery.
- Adoption by the Working Group of a report, including recommendations, on country performance.

PHASE 3 QUESTIONNAIRE

The Working Group has adopted a questionnaire for Phase 3, which is sent to the country being evaluated. Supplementary questions specific to the country concerned take into account the results of the Phase 2 evaluation of that country. The questionnaire elicits information concerning implementation of the Convention and the 2009 Recommendations.

ON-SITE VISIT

On-site visits are normally conducted over a three-day period (as opposed to approximately one week in Phase 2) and are carried out in accordance with the Phase 3 procedure in this publication. During on-site visits, a country is not required to disclose information that is otherwise protected by a country’s laws and regulations, and/or professional rules of conduct.

On-site visits by the lead examiners and OECD Secretariat are an effective way to obtain information on enforcement and prosecution. They also offer the possibility to talk with magistrates, police, tax and other authorities responsible for applying the law.

In addition, informal exchanges with key representatives of the private sector and civil society can contribute to determining the impact that the laws and enforcement have had on behaviour, including compliance schemes. Each

country is consulted on the best manner of obtaining input from the private sector and civil society.

PRELIMINARY REPORT ASSESSING PERFORMANCE

Reports include a country evaluation and recommendations for improvement. Each report is based on the replies to the questionnaires, information obtained during the on-site visit to the evaluated country, and independent research carried out by the lead examiners and Secretariat. The country undergoing evaluation has an opportunity to comment on the preliminary report.

The preliminary report is drafted by the lead examiners and the Secretariat.

EVALUATION IN THE WORKING GROUP ON BRIBERY

The mutual evaluation of each country is undertaken through a consultation in the Working Group. The evaluation provides an opportunity to discuss difficult issues, to listen to a country explain its legal system and approach and to formulate the recommendations that the Working Group agrees to make.

The evaluated country may bring experts to the session, including from the enforcement community, to respond to questions from the Working Group.

ADOPTION OF A REPORT

The Working Group formulates recommendations concerning the country's performance, which is incorporated in the final country report. Discussions in the Working Group and interaction between the lead examiners, Secretariat and the country being evaluated ensure that the evaluation reflects the fullest possible understanding of the country's approach. The evaluated country cannot block the Working Group's decision to adopt the evaluation and its recommendations. However, it has the right to have its views, comments and explanations fully reflected in the report and the evaluation.

FOLLOW-UP REPORTS

Like Phase 2, evaluated countries will be asked to provide follow-up reports on the implementation of recommendations adopted by the Working Group. Oral reports will not be automatic, however. Instead, during the adoption of the Phase 3 report and recommendations, the Working Group may determine that an evaluated country should be required to report orally within 12 months on specific recommendations or follow up issues. In all cases, the evaluated country is required to submit a written report within 24 months of the adoption of the evaluation report explaining steps taken by it concerning all Phase 3 recommendations and follow-up issues. When considering those steps taken, the Working Group may require the evaluated country to give a further oral report within a further 12 months on key outstanding recommendations.

BUDGET FOR ON-SITE VISITS

In principle, each country takes part in the evaluations of two other countries. For each country they evaluate, countries acting as lead examiners bear the costs of travel and expenses for two experts from their countries.

The evaluated country bears the cost of replying to the questionnaires, translating relevant texts into one of the two OECD official languages (English or French), and preparing the on-site visit.

OTHER OECD BODIES

The Working Group is responsible for overall review of country performance in implementing the Convention and the 2009 Recommendations. However, the monitoring of the practical application of broader issues might require specific expertise that may be found in the other parts of the OECD. In conducting its evaluation, the Working Group may draw on information and expertise developed by other OECD bodies, particularly the Committee on Fiscal Affairs, the Working Party on Export Credits and Credit Guarantees and the Development Assistance Committee.

PRIVATE SECTOR & CIVIL SOCIETY

While the private sector and civil society do not take part in the formal evaluation exercise, their views can be expressed and reflected in Phase 3, where enforcement in the private sector is also evaluated. Notably, businesses and civil society groups (such as trade unions or non-governmental organisations) very often take part in on-site visits.

Because peer review is an inter-governmental process, business and civil society groups are not invited to participate in the formal evaluation process, in particular in the evaluation and follow-up in the Working Group.

**POST-PHASE 2 EVALUATION PROCEDURE: THE CONDUCT OF
PHASE 3 EVALUATIONS**

17 December 2009
DAF/INV/BR(2008)25/FINAL

EXECUTIVE SUMMARY

- The Working Group on Bribery has adopted a post- Phase 2 assessment mechanism, to act as a permanent cycle of peer review, involving systematic on-site visits as a shorter and more focused assessment mechanism than for Phase 2. The aim of the mechanism is to improve the capacity of Parties to fight bribery in international business transactions by examining their undertakings in this field through a dynamic process of mutual evaluation and peer pressure. The first cycle of review under this mechanism will be known as Phase 3.
- Phase 3 will focus on key Group-wide cross-cutting issues; the progress made by Parties on weaknesses identified in previous evaluations; enforcement efforts and results; and any issues raised by changes in the domestic legislation or institutional framework of the Parties.
- Phase 3 evaluations are to comprise the following elements (described in part B herein), the timetable for which is set out in Annex 1 herein:
- Reply by the evaluated country to a standard questionnaire (Annex 2 herein) and supplementary questions;
- An on-site visit to the evaluated country, normally three days in length;
- Preparation by the lead examiners and Secretariat, in consultation with the evaluated country, of a preliminary report on country performance (using a standard format, as set out in Annex 3 herein);
- An evaluation in the Working Group, with adoption by the Group of recommendations and issues for follow-up; and
- Publication of the evaluation report, and press release.
- Following the adoption by the Working Group of an evaluation report, each evaluated country will report to the Group (in the manner described in part C herein): orally, if required, within 12 months of the adoption of the report; in writing, within 12 months thereafter (using the template in Annex 5 herein); and orally again, if required, within a further 12 months.

- In the event of inadequate implementation of the Convention, or where attendance at the Phase 3 on-site visit prevents the lead examiners from assessing whether a country has adequately implemented the Convention, the Working Group will consider conducting a Phase 3bis evaluation (part D herein). When there is continued failure to adequately implement the Convention, further steps might be considered by the Working Group.
- The responsibilities of the evaluated country, lead examiners, the Secretariat, and other members of the Working Group throughout the Phase 3 evaluation process are set out in part E herein.

Annex 6 herein includes a diagram on the linkage between Phase 3 evaluations, follow-up reports, and Phase 3bis evaluations.

A. INTRODUCTION

1. In March 2008, the Working Group on Bribery agreed on the general parameters for a post-Phase 2 assessment mechanism. This note recalls the modalities for carrying out evaluations based on the preliminary outline in DAF/INV/BR(2007)33/REV2 and agreed to in principle at the Working Group meeting on 18-20 March 2008 (as recorded in DAF/INV/BR/M(2008)1/REV2, item 8). It also reflects the monitoring issues identified during the course of the Group's work on the review of anti-bribery instruments, and responses to the consultation undertaken in that work (DAF/INV/BR/WD(2008)8).

2. The current Note is adopted for the purpose of governing all cycles of peer review following Phase 2, but may be amended by the Working Group on Bribery at any time. The standard questionnaire for each cycle, which reflects the substantive content for evaluations, is likely to require revision prior to the commencement of each cycle. The Secretariat will incorporate into the Agenda of the Working Group a review of this document to take place 12 months prior to the commencement of each cycle.

B. THE CONDUCT OF PHASE 3 EVALUATIONS

3. The post-Phase 2 assessment mechanism will act as a permanent cycle of peer review, subject to review and amendment, involving focussed and systematic on-site visits. Each Party that has already completed a Phase 2 evaluation agrees to be evaluated under the mechanism. The first cycle of review under this mechanism will be known as Phase 3. Subsequent cycles will be known as Phase 4, etc.

1. Objectives and principles of the Phase 3 evaluation mechanism

4. The purpose of Phase 3 mutual evaluation of the implementation of the Convention and the 2009 Recommendations on further combating bribery¹ (hereafter “Phase 3 evaluation” or “Phase 3”) is to maintain an up-to-date assessment of the structures put in place to enforce the laws and rules implementing the Convention and Recommendations, and their application in practice. Phase 3 will focus on key Group-wide cross-cutting issues (identified in the Phase 3 standard questionnaire); the progress made by Parties on weaknesses identified in Phase 2; enforcement efforts and results; and any issues raised by changes in the domestic legislation or institutional framework of the Parties.

5. Delegates agree that the monitoring procedure under Phase 3 should conform to the following general principles:

Purpose. The purpose of monitoring is to ensure compliance with the Convention and implementation of the 2009 Recommendations. Monitoring also provides an opportunity to consult on difficulties in implementation and to learn from the experiences of other countries.

Effectiveness. Monitoring must be systematic and provide a coherent assessment of whether a participant has implemented the Convention and 2009 Recommendations.

Equal treatment. Monitoring must be fair and this means equal treatment for all participants. To ensure equal treatment in the overall monitoring work of the Group, Phase 3 evaluations should be conducted in a way that takes into account the lessons learnt during the Phase 2 evaluation process. The Secretariat has an important role in ensuring the consistent application of procedures and standards, including in ensuring that Phase

¹ 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions; and 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions.

3 includes analysis of issues and/or standards which have been developed by the Group since an evaluated country's Phase 2 evaluation, or were overlooked at the time of the Phase 2 evaluation.

Efficiency and effectiveness. The Phase 3 procedure should be efficient, realistic, concise and not overly burdensome. Monitoring must also be effective to guarantee a level playing field.

Co-ordination within the OECD. The monitoring of practical applications of some issues might require specific expertise that may be found in other parts of the Organisation. In conducting its evaluation work, the Working Group will endeavour to draw on information and expertise developed by other OECD bodies - particularly the Committee on Fiscal Affairs, the Development Assistance Committee, and the Working Party on Export Credits and Credit Guarantees - on implementation of elements of the Recommendations in their respective fields.

Co-ordination with other organisations. International organisations such as the Council of Europe (GRECO and MONEYVAL), the United Nations (UNODC), OAS, and FATF, share the goal of combating corruption and money-laundering, although the scope of their respective efforts and their objectives may differ. All Parties to the Convention want to avoid duplication of effort. The OECD Secretariat will communicate regularly with the Secretariats of relevant organisations, with a view to avoiding duplication among respective exercises to monitor commitments to combat bribery in international business transactions. Contact with these organisations should be particularly attentive to avoiding burdening a particular country with multiple on-site visits, or completion of questionnaires, at the same time or close together.

Public information. The 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions calls on the Working Group to provide regular information to the public on its work and activities and on implementation of the Recommendation. This general responsibility must be balanced against the need for confidentiality which facilitates frank evaluation of performance. If the country being evaluated makes available to the evaluation team information it considers confidential, confidentiality of this information will be respected. Information contained in reports on country performance would remain confidential until it has been declassified. A country concerned could, however, take whatever steps it felt appropriate to release information concerning its report, or to make it publicly available.

6. Consistent with its established practice in monitoring work, the Working Group will undertake all aspects of the Phase 3 evaluation process on the basis of "consensus minus one" (i.e., the Party under evaluation will not have a right

of veto). Although the evaluated country cannot block such decisions, it has the right to have its views and opinions fully reflected in the applicable documentation.

2. Overview and timetable

7. The first cycle of Phase 3 evaluations should commence as soon as possible. In principle, and subject to practical and budgetary implications, each Phase 3 cycle should achieve a four-year cycle.

8. Phase 3 evaluations will be based on the replies by the country evaluated to the Phase 3 questionnaires, the results of the on-site visit, research undertaken by the Secretariat and lead examiners, and evaluation in the Working Group.

9. Phase 3 evaluations are to comprise of the following elements, the timetable for which is set out in Annex 1 herein:

- Reply by the country under evaluation (hereafter the “evaluated country”) to a standard and supplementary questionnaire;
- On-site visit to evaluated country;
- Preparation of a preliminary report on country performance;
- Evaluations in the Working Group; and
- Publication of the evaluation report and press release.

10. The evaluation for each country will be conducted in accordance with a calendar to be determined by the Working Group. The country undergoing evaluation will play an active role in fixing the date for the visit. Bearing these factors in mind, the Secretariat will establish a schedule for Phase 3 evaluations (see part E(3)(a) below), taking into account the schedule of other organisations involved in related monitoring work. The template timetable for Phase 3 evaluations (Annex 1) will be used by the Secretariat to fix an evaluation schedule for each evaluation, in consultation with the evaluated country and the lead examiners (see part E(3)(b) below).

11. Once an evaluation schedule is fixed, the evaluated country, the lead examiners, and the Secretariat must endeavour to comply strictly with the schedule. This is particularly important in the context of the deadline for the submission by the evaluated country of written responses to the Phase 3 questionnaires.

12. The evaluation for each country will be conducted in English or French. The language in which the evaluation will be conducted will be agreed upon in advance between the Secretariat and the evaluated country, and will remain the same throughout the course of the evaluation.

13. The responsibilities of the evaluated country, lead examiners, the Secretariat, and other members of the Working Group throughout the Phase 3 evaluation process are set out in part E herein.

3. Questionnaires

14. The Group has agreed on a standard questionnaire for Phase 3 (Annex 2), which will be sent to the evaluated country. Supplementary questions, specific to the country concerned, will be issued with (or as soon as possible after) the standard questionnaire.

15. The replies, in the agreed language (see part B(2) above), should be sent to the Secretariat together with supporting material (see part E(2)(b) below). The Phase 3 evaluation team (see part B(4)(a) below) will review the replies given to the questionnaires and may request, where appropriate, additional information from the country undergoing evaluation.

4. On-site visit to evaluated country

16. Each country agrees to allow an on-site visit for the purpose of providing information concerning its law and practice, including enforcement and prosecution. Each on-site visit will normally be conducted over a three-day period but could be reduced to two days, or increased to four days, according to the complexity and number of issues to be evaluated, or other logistical practicalities.

17. The on-site visit should be carried out in accordance with a programme agreed between the country undergoing evaluation and the on-site evaluation team (see part B(4)(a) below), taking account of the specific requests expressed by the evaluation team. The country undergoing evaluation will play an active role in preparing the visit.

18. During on-site visits, a country should not be required to disclose information that is otherwise protected by a country's laws and regulations. The evaluated country should describe how its authorities have applied the offence in cases involving bribery of foreign public officials (by natural or legal persons). Ideally, participants would address this by referring to concrete cases that have arisen under their implementing legislation or any other legislation (such as trafficking in influence or misuse of company assets, etc) with regard to the bribery of foreign public officials (whether or not these cases have been successfully prosecuted). The aim of such discussions, which are to be held on

a confidential basis, will be to determine how the foreign bribery offence is being prosecuted, what investigative techniques are being utilised, and what hurdles are being faced by countries in the fight against the bribery of foreign public officials. The Phase 3 evaluation report will not include any confidential information, including information pertaining to on-going cases, and will aim to provide feedback on how the evaluated country might improve the way it prosecutes cases of foreign bribery, taking into account its domestic legislation. The evaluated country will also have an opportunity to review the preliminary evaluation report and, should any confidential information remain in it, require that it be removed.

a. Composition of evaluation teams

19. Two lead examiner countries will be chosen for each Phase 3 evaluation. Wherever possible, one of the lead examiner countries should be a Party with a similar legal system as the evaluated country, and one Party (potentially the same country) which was involved in the Phase 2 review of the evaluated country. There should be no other restrictions on the appointment of lead examiner countries.

20. Two experts from each lead examiner country should normally be appointed to form part of the evaluation team, plus Secretariat staff. The experts will take part in the on-site visit, including the lead-up to it, as well as preparation of the preliminary report and the conduct of the evaluation in the Group. The experts should also be available for the written follow-up report by the evaluated country (see part C(2) below), and any Phase 3*bis* evaluation of the evaluated country (see part D(2) below).

21. While countries acting as lead examiners will nominate, at their discretion, the experts to participate in the evaluation team, the composition of each evaluation team should ensure adequate expertise for the areas to be evaluated. Lead examiners should aim to have at least one of their experts be either: a senior prosecutor or investigative judge with corruption-related experience; or a senior investigator with corruption-related experience. Lead examiners are encouraged to liaise with the Secretariat with the aim of assembling relevant expertise in the evaluation team. Experts must be proficient in the language in which the evaluation is to be conducted.

b. Agenda for on-site visits

22. Each on-site visit should include panels on:

- Each of the issues identified in the Phase 3 standard questionnaire (Annex 2).

- Progress made by the evaluated country on weaknesses identified in Phase 2; enforcement efforts and results; and issues raised by changes in domestic legislation, or institutional frameworks.
- Private sector and civil society views on awareness, implementation and enforcement.

c. Composition and format of panels

23. The evaluation team should seek to obtain the views of multiple agencies in both the government and non-government sectors, including parliamentarians and the judiciary. It is particularly important to compare and contrast the answers to determine, among other things, the actual state of public awareness, the true degree of cooperation amongst governmental agencies, and the degree of uniformity in the interpretation of laws and regulations.

24. The evaluated country should consult with the evaluation team concerning the composition of the panels. It must ensure that all governmental actors which the evaluation team has requested to meet with are made available, and should make its best endeavours to secure the attendance of non-governmental participants requested by the evaluation team. Where applicable, the evaluated country must facilitate any request of the evaluation team to attend a meeting(s) at a particular location.

25. Panels should be composed of a sufficient number of experts to adequately comment on issues relevant to implementation and enforcement. Panels should also be of a manageable size to permit productive discussions with the evaluation team. Formal presentations should be kept to a minimum and discussion encouraged.

26. The evaluated country may attend, but should not intervene, during the course of non-government panels.

d. Preliminary views

27. At the end of the on-site visit, there should be a final “wrap-up” session with the evaluated country and the evaluation team. The purpose of this session will be to request additional information, to pose outstanding questions, or to review matters that were not sufficiently addressed. The evaluation team may also decide to communicate their preliminary views. The evaluated country may choose to submit additional information for the purpose, among other things, of clarifying issues and/or correcting what it perceives as confusion or misunderstandings of the evaluation team.

e. Funding for on-site visits

28. The following provisions will apply to the funding for Phase 3, and Phase 3bis, evaluations:

- a) The countries taking part in the evaluations as lead examiners will bear the costs of travel and per diem expenses for their experts assigned to the on-site visit teams.
- b) The country undergoing evaluation will bear the cost of replying to the questionnaires, and preparing and hosting the on-site visit.
- c) The budget of the Organisation will bear the expenses for the travel and per diem expenses for the members of the Secretariat part of the on-site visit teams.

5. Preliminary report on country performance

a. Preparation of preliminary report

29. On the basis of the information gathered from the questionnaires and the on-site visit, as well as research undertaken by the Secretariat and the lead examiners, the Secretariat will prepare a "preliminary report" incorporating the preliminary views of the lead examiners. The lead examiners and Secretariat may request further information during the course of preparing the preliminary report and the evaluated country must provide such further information as soon as practicable. The lead examiners will review the preliminary report and decide upon any necessary revisions.

30. The revised preliminary report will be transmitted to the evaluated country, which can offer corrections and comments to be considered by the lead examiners. Any further revisions to the preliminary report will result in a "draft report", to be circulated amongst members of the Working Group and made subject to the Group's evaluation process (see part B(5) below).

31. In the event that the lead examiners disagree amongst themselves or with the Secretariat concerning any proposed recommendation or comment, such disagreement must be noted in the draft report as an issue to be resolved by the full Working Group (see further parts E(1)(d) and E(3)(g) below).

b. Format for Phase 3 evaluation reports

32. Clear, well-structured, and focussed reports will be important to achieving a qualitative assessment of the country's performance which could be accepted as the result of a fair process applying an equal standard to all countries. Without prejudicing these aims, and taking into account the fact that the number

and complexity of issues may vary from country to country, Phase 3 evaluation reports should aim to be concise.

33. Phase 3 reports will have a standard format as follows (see details in Annex 3):

- an executive summary;
- the identification of issues;
- the inclusion of commentaries by the lead examiners; and
- recommendations and issues for follow-up.

34. The commentaries will contain the lead examiners' observations and advice to the Working Group regarding appropriate actions to be taken by the evaluated country and follow-up by the Working Group. The preliminary report will not include an executive summary, or recommendations and issues for follow up, but will include a compilation of the lead examiners' commentaries (see Annex 3). These parts of the report will be prepared during the course of the Working Group evaluation (see part B(6)(e) below).

6. Evaluation in the Working Group

a. Circulation of draft report

35. The Secretariat will circulate a copy of the draft report to the delegations at least three weeks in advance of the Working Group meeting. In order to ensure that all evaluated countries have an adequate opportunity to review the draft report, the evaluation schedule should be strictly respected by all Parties involved in the preparation of the draft report. If the evaluated country has not sent its comments within the time limits set in the evaluation schedule, the Secretariat may send the draft report to the Group noting that the evaluated country's comments will be sent separately.

b. Meetings preparatory to the Working Group's consideration of the draft report

36. Essential to the smooth and efficient running of Working Group meetings are the preparatory meetings and break-away sessions between the evaluation team and the evaluated country. These meetings and sessions should be used to discuss and resolve any factual or other inaccuracies, and as many issues as possible. This will ensure that the Working Group, whose plenary time is limited, can consider and deliberate upon clearly-defined questions that remain at issue. Where preparatory meetings and break-away sessions have failed to resolve

the abovementioned details, the Group may wish to adjourn its reading(s) of the draft report and require the evaluation team and evaluated country to reconvene separately.

37. The evaluated country is expected to have raised factual or other inaccuracies, as well as disputed issues, during the written feedback on the preliminary report (see part E(2)(d) below). It should only be in exceptional cases that matters are raised for the first time during the preparatory meetings or in the Working Group's plenary meeting.

38. Prior to the discussion of the draft report by the Working Group, preparatory meetings will be held at the OECD (see Annex 4, which sets out guidance for the conduct of preparatory meetings, break away sessions, and readings in the Working Group)

39. Following the preparatory meetings, the Secretariat and the lead examiners will revise the report (in tracked changes mode). Depending on the complexity of the changes to the report arising from the preliminary meeting, the Secretariat may circulate a copy of the revised draft report (in tracked changes mode) to the Working Group at the first reading.

c. Overview of the Working Group's consideration of the draft report

40. The Working Group, in plenary, will discuss the draft report submitted by the evaluation team. Evaluation in the Working Group provides an opportunity to discuss difficult issues, to hear the country evaluated explain its legal system and approach, and to formulate the recommendations that the Group will agree to make. Discussions in the Working Group - as well as interaction between the Secretariat, lead examiners, and the evaluated country - should ensure that the evaluation reflects the fullest possible understanding of the country's approach.

41. After a full discussion of the draft report through the first, second and third readings, the Working Group will adopt the report in respect of the evaluated country (what will become the "evaluation report"). The Working Group will continue to adopt evaluation reports on the basis of "consensus minus one" (see part B(1) above). Although the country undergoing evaluation cannot block the decision to adopt the evaluation report, it has the right to have its views and opinions fully reflected in the evaluation report.

42. In accordance with Article 5 of the Rules of Procedure of the Organisation, discussions of the Working Group on mutual evaluations will be confidential.

d. *First reading of the draft report*

43. The first reading by the Working Group will involve a review and debate of the draft report, including the commentaries of the lead examiners (see Annex 4 for guidance on the conduct of the first reading).

e. *Break-away sessions*

44. Following the first reading in the Working Group, break-away sessions will be held for the purpose of revising the report, and formulating recommendations, an executive summary, and a draft OECD press release (see Annex 4 for guidance on the conduct of the break-away sessions).

45. The Secretariat will circulate the revised draft report (in tracked changes mode) to the Working Group at the second reading, along with the draft recommendations, draft executive summary, and draft press release.

f. *Second reading of the draft report*

46. A second reading will consider the draft recommendations, executive summary, press release, and any remaining disagreement on the draft report (see Annex 4 for guidance on the conduct of the second reading). The Group will also determine whether the evaluated country should be required to report orally in 12 months on any specific recommendation(s) or follow-up issue(s).

g. *Further break-away sessions*

47. Following the second reading, the lead examiners, evaluated country, and Secretariat will meet to ensure that all documentation reflects decisions taken in the second reading of the Working Group (see Annex 4 for guidance on the conduct of the break-away sessions). The Secretariat will circulate the final revised draft report and the revised draft press release to the Working Group (in tracked changes mode) at the third reading.

h. *Third reading and adoption of the evaluation report*

48. At the third reading, the Working Group will adopt the Phase 3 evaluation report, and press release (see Annex 4 for guidance on the conduct of the third reading).

7. *Publication of the evaluation report and press release*

49. As soon as possible after the third reading, the evaluation report will be published on the OECD website and announced through the agreed press release. The Secretariat should coordinate this action with the evaluated country. The evaluated country should consider ways to publicise the report

including, for example, making a public announcement, organising a press event, and translating the report into the national language. The evaluated country should, at the very least, publish the report on the government's website.

C. ORAL AND WRITTEN FOLLOW-UP REPORTS TO PHASE 3 EVALUATIONS

50. Following the adoption by the Working Group of an evaluation report, each evaluated country will report to the Group as follows:

- Within 12 months of the adoption of the evaluation report, the evaluated country may be required to report orally on the implementation of specific recommendation(s) or follow-up issue(s).
- Within 24 months of the adoption of the evaluation report, the evaluated country will submit a written report explaining the steps taken by it concerning the Phase 3 recommendations and follow-up issues.
- Within a further 12 months, the evaluated country may be required to give a further oral report on key outstanding recommendations, as identified by the Working Group during its consideration of the written follow-up report.

51. The Working Group has agreed that there should be no change in the distinction made between recommendations and follow-up issues, but that it should pay greater attention in the Phase 3 process to consideration of follow-up issues than it has during Phase 2.

1. Oral follow-up reports

52. During the adoption of the Phase 3 report, the Working Group may determine that the evaluated country should be required to report orally in 12 months on any specific recommendation(s) or follow-up issue(s) (see part B(6)(f) above).

53. During the Working Group's consideration of the written follow-up report (see below), it may determine that the evaluated country should be required to report orally within a further 12 months thereafter on specific matters which

remain outstanding, or only partially implemented, at the time of the written follow-up report.

54. If the lead examiners attend the follow-up report of an evaluated country, they may wish to comment upon the oral report, or address any questions that might be put to them during the course of the Working Group's consideration of the oral report.

2. Written follow-up report

55. Within 24 months of the adoption of the evaluation report, the evaluated country will submit a written report explaining the steps it has taken concerning the Phase 3 recommendations and follow-up issues. The written report should be made according to the standard format agreed by the Working Group (Annex 5). The written report must be provided to the Secretariat at least four weeks prior to the date on which the Working Group is scheduled to consider the report. The Secretariat should send the template in Annex 5 to the reporting country at least four weeks prior to the due date for the written report.

56. Answers should be given to each and every recommendation and follow-up issue (not only specific ones). If a country has not taken any steps to implement a recommendation which requires action (or a part thereof), an explanation should be given as to the reasons for the lack of action. In addition, the country in question should provide information as to any intended or planned action and the timing of such action.

a. Review of follow-up report

57. The Secretariat and lead examiners will review the written follow-up report and may request, where appropriate, additional information from the evaluated country, particularly where such information may influence the determination of whether a recommendation has been implemented, partially implemented, or not implemented. The Secretariat and lead examiners should, in particular, endeavour to clarify any matters with the evaluated country in advance of the plenary meeting if such matters are likely to determine whether or not a Phase 3 recommendation has been implemented.

58. The written follow-up report, plus any further information provided upon request, will be circulated to Working Group delegates at least two weeks in advance of the plenary meeting.

b. Meetings preliminary to the presentation of the written report to the Working Group

59. Prior to the Working Group meeting, preparatory meetings will be held in Paris (see Annex 4 for guidance on the conduct of the preparatory meetings).

c. Evaluation in the Working Group

60. The Working Group will consider the written follow-up report for the purpose of determining whether the Phase 3 recommendations have been implemented, partially implemented, or not implemented (see Annex 4 for guidance on the conduct of the evaluation). The Working Group will also determine whether the evaluated country should be required to report orally on any particular outstanding recommendation(s) within a further 12 months.

61. Following the Working Group's evaluation of the written follow-up report, the Secretariat will prepare draft conclusions, setting out:

- the Working Group's determinations on whether recommendations have been implemented, partially implemented, or not implemented; and
- any key outstanding recommendation(s) in respect of which the Working Group will expect the evaluated country to make an oral report in a further 12 months, if applicable.

62. The Secretariat will circulate the draft conclusions to the Working Group for confirmation, and consideration of whether further action is required.

d. Confirmation of Working Group's conclusions

63. The Working Group will consider the draft conclusions to confirm its contents and to determine whether further steps are required on account of any failure to implement core recommendations (see part C(2)(f) below and Annex 4 for further guidance).

e. Finalisation and disclosure of the follow-up report

64. Following discussions, the follow-up report will be appended to the Phase 3 evaluation report and made available on the OECD website. The follow-up report will be published as provided by the reporting country (subject to editorial corrections).

65. A one-page document summarising the discussions of the Working Group, and including the conclusions agreed to by the Group, will be prepared by the Secretariat as a cover note to the written report. The summary and conclusions will be submitted to the Working Group for approval through a written procedure. In the case of disagreement, it will be discussed at the next meeting of the Working Group.

f. Failure to implement core recommendations

66. In the event that a country has failed to take action to effectively implement the recommendations of a Phase 3 evaluation report which require concrete action and which constitute core matters under the Convention, it will be required to provide additional reports on its progress in implementing these recommendations within a fixed timeframe.

67. Any requirement to provide additional reports will need to be agreed by the Working Group on the basis of a proposal by the Chair or the lead examiners, following consultations with the reporting country. In the case of non-compliance with the recommendations of the Working Group amounting to a critical lack of implementation, even after additional follow-up reports have been provided, the Working Group should consider the possibility of conducting a Phase 3bis evaluation.

D. PHASE 3 BIS EVALUATIONS

1. Inadequate implementation of the Convention

68. In the event of inadequate implementation of the Convention, or where attendance at the Phase 3 on-site visit prevents the lead examiners from assessing whether the country has adequately implemented the Convention, the Working Group will consider conducting a Phase 3bis evaluation. When there is continued failure to implement adequately the Convention, further steps might be considered by the Working Group (see part D(3) below).

69. The Phase 3bis evaluation should be conducted under the same procedure as for Phase 3 evaluations. Phase 3bis reports would focus on the more severe deficiencies identified in the Phase 3 evaluation, and should be made available on the OECD website.

70. Annex 6 describes the linkage between the Phase 3 evaluation, the follow-up reports, and the Phase 3bis evaluation.

2. Phase 3bis on-site visit

71. The Working Group could consider the possibility of conducting a second on-site evaluation of a country whose implementation of the Convention has appeared to be inadequate in practice. Such an on-site visit, which would be

conducted as an “extraordinary” measure, would be a simplified one and would focus on issues of concern. It should ideally be led by the same examiners as the original Phase 3 evaluation, but in certain cases it could be necessary to call upon new examiners. A decision to conduct such a Phase 3bis on-site review could be made by the Working Group on the occasion of the discussion of the Phase 3 report, or after it has considered the oral and written follow-up reports of the Phase 3 evaluation.

3. Continued failure to adequately implement the Convention

72. In cases where there is continued failure to adequately implement the Convention following a Phase 3bis evaluation or the follow-up to the Phase 3 evaluation, further steps might be considered by the Working Group such as:

- Requiring the country to provide regular reports on an expedited basis of its progress in implementing the Convention and the 2009 Recommendations. The country could thus be asked to report to each meeting of the Working Group on its progress and it would be expected to be significantly in compliance within a fixed timeframe. The reports could be accompanied by a brief analysis of the progress that has been made, which could be prepared by the Secretariat and, following approval by the Group, published online.
- A group of Working Group members, selected by the plenary, could in conjunction with the Secretariat be given responsibility for reviewing any progress, including holding face to face meetings with the country, and making recommendations to the Working Group on the next steps to be taken.
- A letter could be sent from the Chair of the Working Group to the relevant Minister(s) in the concerned country to draw their attention to the failure to implement adequately the Convention and the 2009 Recommendations.
- A high-level mission (comprised of the Chair of the Working Group, the Head of the Anti-Corruption Division, several Heads of Delegation of Working Group members) could be arranged to the country in question to reinforce this message. The mission would meet with Ministers and senior officials.
- Issuing a formal public statement that a participating country is insufficiently in compliance with the Convention and the 2009 Recommendations, and requesting expeditious implementation of the Convention.

**E. RESPONSIBILITIES OF LEAD EXAMINERS, EVALUATED COUNTRY,
SECRETARIAT AND OTHER WORKING GROUP MEMBERS**

1. Responsibilities of the lead examiners

a. *Participation as lead examiner*

73. Each country will take part in the evaluation of two other countries which are Parties to the Convention, over the period of the complete review cycle. Each country should fully accept all of the obligations relating to such service, including the provision of timely comments and full attendance at all meetings (preparatory, on-site, Working Group evaluation, written follow-up, and Phase 3bis evaluation where necessary). Where a country is unable to carry out its obligations for a compelling reason, it should notify the Secretariat as soon as possible to allow another country to substitute as lead examiner.

b. *Central point of contact*

74. Each country serving as a lead examiner should designate someone as a central point of contact for communicating with the Secretariat and the evaluated country, as well as with its own agencies.

75. The central point of contact will:

- Provide the Secretariat with a preliminary list of questions to be included in the supplementary questionnaire.
- Ensure that materials are received and distributed to appropriate experts within their government.
- Consult with the appropriate experts within the government to identify issues raised by the evaluated country's response to the Phase 3 questionnaires, and then communicate these issues to the Secretariat for inclusion in any follow-up questions.

c. *On-site visit*

76. The lead examiners should take an active role in the conduct of the panels at the on-site visit and should be prepared to chair panels as appropriate. The lead examiners will participate in an objective, impartial manner and will not be influenced by the way in which issues are treated by their own country.

d. Attendance at Working Group meetings

77. The lead examiner experts must attend the Working Group meeting to present the preliminary Report. The lead examiner experts must also, wherever possible, attend the Working Group meetings which will discuss the follow-up reports to the Phase 3 evaluation, as well as any Working Group meeting concerning a Phase 3bis evaluation.

e. Written follow-up report

78. The lead examiners will review the contents of the follow-up written reports and be prepared to raise substantive or policy issues that need to be addressed to initiate the discussion of such reports (see further part C(2) above). They should also be ready to present views to the Group on whether any of the outstanding or partially implemented recommendations should be drawn to the attention of the Working Group with a view to requiring the evaluated country to report orally on those recommendation(s) within a further 12 months (see part D(2)(c) above).

2. Responsibilities of the evaluated country

a. Central point of contact

79. The evaluated country must designate someone as a central point of contact, who will be responsible for:

- Communicating with the Secretariat and the lead examiners.
- Coordinating the evaluated country's response to the Phase 3 questionnaire and supplementary questions.
- Coordinating the preparation for the on-site visit, and any matters arising from the on-site visit or during the preparation of the preliminary report.
- Coordinating the evaluated country's attendance at the OECD for the evaluation in the Working Group, and preparatory meetings.

b. Questionnaire responses and supporting materials

80. In accordance with the evaluation schedule established by the Secretariat, the evaluated country must submit a written response, in the agreed language (see part B(2) above), to the Phase 3 questionnaires and to any additional questions collectively submitted by the lead examiners and the Secretariat. Where appropriate or requested by the lead examiners or the Secretariat, the

evaluated country must also provide supporting materials, such as laws, regulations, and judicial decisions.

81. Answers should be integrated into a single written response. It is essential that answers, and any accompanying materials, be provided sufficiently in advance of the on-site visit for review by the lead examiners and the Secretariat.

82. Supporting materials should be provided in the agreed language (see part B(2) above). Where the materials are voluminous, the evaluated country should discuss with the Secretariat which items should be translated on a priority basis.

c. *On-site visit*

83. The evaluated country must assemble panels in accordance with the agenda and in consultation with the Secretariat and the lead examiners. The names, titles, and responsibilities of each participant must be provided to the Secretariat in advance of the on-site visit. The evaluated country should do its utmost to ensure that the composition of the panels reflects the proposals of the evaluation team (see part B(4)(c) above).

84. The evaluated country is responsible for providing a venue for the on-site visit. The language in which the evaluation will be conducted will be agreed upon in advance (see part B(2) above). The evaluated country will be required to provide interpretation and translation if deemed necessary by the evaluation team.

85. Although the evaluated country is not required to make travel arrangements for the evaluation team, it may consider negotiating for a block of hotel rooms at a government rate at a location convenient to the venue for the evaluation.

86. The evaluated country will be responsible for providing additional information requested by the evaluation team during the on-site visit as well as a complete list of all participants in the on-site visit.

d. *Preliminary report*

87. After the evaluation team has prepared its preliminary report, this will be forwarded to the evaluated country, which should carefully review the preliminary report and submit any corrections or clarifications it deems appropriate. Corrections or clarifications should be indexed to specific paragraphs of the preliminary report. This should not be viewed as an opportunity to rewrite the report. The evaluated country should, however, note significant points of disagreement to allow the Secretariat to draw up a list of

preliminary issues for the meeting preparatory to the Working Group evaluation (see part B(6)(b) above).

88. Provided the preliminary report is transmitted to the evaluated country on time, comments must be submitted within the time limits set in the evaluation schedule. To ensure that the Working Group receives the draft report in time to review it prior to the Working Group meeting, comments that are submitted late will not be included in the draft report circulated to the Working Group but will be circulated separately (see part B(6)(a) above).

e. *Evaluation in the Working Group*

89. The evaluated country must bring the relevant experts to the Working Group's evaluation on the draft report (see part B(6) above) in order to be able to respond to questions from the Group. It may submit observations and views orally, and/or in writing, to the plenary.

f. *Post-evaluation*

90. The evaluated country is expected to do its utmost to implement the recommendations made in the Working Group's evaluation report. The evaluated country must provide written follow-up reports to the Working Group, and oral reports where required, on progress made in implementing the Group's recommendations and issues for follow-up (see part C above).

3. *Responsibilities of the Secretariat*

a. *Schedule of Phase 3 evaluations*

91. The Secretariat will establish a schedule for Phase 3 evaluations, taking into account the schedule of other organisations involved in related monitoring work. Once approved by the Working Group, any significant changes to the schedule must be approved by the Working Group.

b. *Evaluation schedule*

92. In consultation with the lead examiners and the evaluated country, and as much in line as possible with the timetable in Annex 1, the Secretariat will establish an evaluation schedule for submitting questions, questionnaire responses, the on-site visit, and drafting and review of the report.

c. *Secretariat members of the evaluation team*

93. The Secretariat will name a team to staff the Phase 3 evaluation. The size of this team may vary from one examination to another, depending on the complexity of the review and the available budget. For example, it may require a

larger team to review a G-8 country; or a smaller team may be adequate for a smaller country. As appropriate, the team may draw upon the expertise existing within other parts of the Secretariat in areas critical to a successful review.

d. Questionnaires

94. The Secretariat will review the evaluated country's Phase 1 and 2 evaluations, and any additional materials, and prepare a list of supplementary questions including questions submitted by the lead examiners or any other member of the Working Group. As well as including additional or more specific questions to supplement the Phase 3 standard questionnaire, the supplementary questions should focus on progress made on weaknesses identified in Phase 2, enforcement efforts and results, and issues raised by changes in domestic legislation, or institutional frameworks. The supplementary questionnaire will be sent to the evaluated country after consultation with the lead examiners.

e. Preparation for on-site visit

95. In consultation with the lead examiners and the evaluated country, the Secretariat will prepare an agenda for the on-site visit. The Secretariat will perform the necessary preparatory work for the on-site visit, including assembling a list of issues in consultation with the lead examiners. This list, which may take the form of bullet-points to be addressed by each panel at the on-site visit, is intended to guide the evaluated country toward the issues that should be addressed in the on-site visit and is not intended to be a supplemental questionnaire. The agenda and list of issues must be provided sufficiently in advance of the on-site visit to permit the evaluated country to prepare. The Secretariat should in addition prepare a summary of issues for use by the evaluation team.

f. On-site visit

96. At the conclusion of each day, the Secretariat should convene a meeting of the lead examiners to share preliminary views. The Secretariat should maintain a list of follow-up questions and additional materials requested of the evaluated country during the on-site visit.

g. Preparation of preliminary report

97. Following the on-site visit, the Secretariat will draft a preliminary report based upon the evaluated country's response to the Phase 3 questionnaires, the on-site visit, and any additional materials and research. The preliminary report will incorporate the lead examiners' preliminary views. After being reviewed by the lead examiners, this draft will be provided to the evaluated country. The Secretariat, under the guidance of the lead examiners, will make

any appropriate changes in response to comments and corrections submitted by the evaluated country. Further guidance on the preparation and format of the preliminary report is set out in part B(5) above and Annex 3 below.

98. The Secretariat has an important role in ensuring the consistent application of procedures and standards throughout the Phase 3 evaluation mechanism. In the event that the lead examiners disagree amongst themselves, and have been unable to resolve the issue, it is the responsibility of the Secretariat to ensure that such disagreement is noted in the draft report as an issue to be resolved by the full Working Group. The Secretariat should further ensure that the draft report notes any treatment of an issue which is inconsistent with the way such issues have been treated during the course of the Phase 2 and 3 monitoring exercises. This will be particularly important in circumstances where the disagreement or inconsistency arises because an issue is treated in the same way by the evaluated country and the lead examiner(s).

h. Publication of evaluation report

99. The Secretariat will be responsible for editing and publishing the evaluation report following its adoption in the third reading by the Working Group.

i. Follow-up reports

100. Countries which are due to provide an oral or a written report (see part C above) will be reminded by the Secretariat in advance of the meeting.

101. Following the discussion of oral follow-up reports (see part C(1) above), the Secretariat will prepare a brief summary to be included in the record of the meeting.

102. In the case of a written follow-up report, the Secretariat will send the template (Annex 5) in advance to the evaluated country. The Secretariat will review the written report and liaise with the lead examiners to determine whether additional information should be requested from the evaluated country. The Secretariat will also arrange preparatory meetings for the lead examiners to consider their views as to whether the Phase 3 recommendations have been implemented, partially implemented, or not implemented, and to communicate these views to the evaluated country.

103. Following the Working Group's consideration of the written follow-up report, the Secretariat will prepare draft conclusions to be circulated to the Working Group for confirmation, and consideration of whether further action is required (see part C(2)(c) and (d) above). A summary of the discussion, including the conclusions agreed to by the Group, will be prepared by the Secretariat in consultation with the lead examiners and the evaluated country, and will be approved by the Working Group by written procedure (see part C(2)(d) above).

4. Responsibilities of other members of the Working Group

a. *Pre-evaluation*

104. Working Group members are encouraged to submit questions at any stage of the evaluation process. The Secretariat and the lead examiners should carefully consider whether any issues raised have been addressed in the questions and answers they are already considering.

b. *Plenary review*

105. Each Working Group member should ensure that a qualified expert has reviewed the preliminary Phase 3 report, or written follow-up report, in advance of the plenary session and that, whenever possible, such qualified experts attend and actively participate in the plenary review of the Phase 3 reports, written follow-up reports, and discussion of oral follow-up reports.

c. *Written procedure for adoption of the written follow-up reports*

106. Summaries and conclusions of the discussions of Phase 3 follow-up written reports will be circulated for approval under written procedure (see part C(2)(d) and (e) above). Each Working Group member should ensure that the summaries are reviewed by a qualified expert to ensure that they correctly reflect both that member's views and that of the Working Group.

ANNEX 1

TIMETABLE FOR PHASE 3 EVALUATIONS

| TIMETABLE OVERVIEW | |
|--------------------|---|
| Commencement | Phase 3 questionnaires sent to evaluated country |
| 8 weeks | Reply to questionnaires provided by evaluated country |
| 13 weeks | On-site visit to evaluated country |
| 20-28 weeks | Preparation of preliminary report on country performance, broken down as follows: <ul style="list-style-type: none"> · 20 weeks: preliminary report sent to lead examiners · 22 weeks: comments from lead examiners due · 23 weeks: preliminary report sent to evaluated country · 25 weeks: comments from evaluated country due · 28 weeks: preliminary report sent to Working Group (OLIS) |
| 31 weeks | Evaluation in the Working Group |

| STAGE | RESPONSIBILITY | TIMING |
|---|--------------------------------|--|
| 1. Preparation of Phase 3 supplementary questions <ul style="list-style-type: none"> · Research on cases dealing with enforcement · Review of Phase 2 written follow-up report and issues arising during <i>tour de table</i> process · Review of outstanding recommendations and follow-up issues · Review of legislative and institutional changes · Comments by lead examiners | Secretariat and lead examiners | 4 weeks |
| 2. Submission of written responses to the Phase 3 questionnaires | Evaluated country | 8 weeks (plus 1 if translation required) [from time questionnaires received] |

POST-PHASE 2 EVALUATION PROCEDURE:
THE CONDUCT OF PHASE 3 EVALUATIONS

| | | |
|--|---|--|
| <p>3. Preparation of on-site review</p> <ul style="list-style-type: none"> · Preparation of schedule for visit (agenda) · Consultation with evaluated country · Analysis of replies to questionnaires · Summary of outstanding issues · Finalisation of on-site agenda | <p>Secretariat</p> <p>Secretariat and lead examiners</p> <p>Evaluated country</p> | <p>Contemporaneous with Stage 2</p> <p>5 weeks</p> <p>2 weeks prior to on-site visit</p> |
| <p>4. On-site review</p> <ul style="list-style-type: none"> · Interviews · Evening consultations with lead examiners | <p>Secretariat, evaluated country, and lead examiners</p> | <p>3 days (+/- 1 depending on logistics)</p> |
| <p>5. Preparation of draft report</p> <ul style="list-style-type: none"> · Analysis of information from Phase 3 questionnaires and the on-site visit · Receipt and analysis of additional documentation requested on-site · Receipt and analysis of responses to outstanding issues from on-site visit · Preparation of internal draft by Secretariat team members · Inclusion of lead examiners' preliminary conclusions · Revision and completion of final draft by Secretariat team leader | <p>Secretariat</p> | <p>6 weeks</p> |
| <p>6. Review of draft report by lead examiners</p> <ul style="list-style-type: none"> · Comments by lead examiners · Incorporation of lead examiners' comments | <p>Lead examiners</p> <p>Secretariat</p> | <p>2 weeks</p> <p>1 week</p> |
| <p>7. Review of draft report by evaluated country</p> <ul style="list-style-type: none"> · Submission of corrections and comments by evaluated country | <p>Evaluated country</p> | <p>3 weeks (plus 1 if translation required)</p> |

| | | |
|--|--|--|
| <p>8. Review of draft report</p> <ul style="list-style-type: none"> · Incorporation of corrections · Liaison between Secretariat, evaluated country, and lead examiners · Revision (if necessary) of preliminary conclusions | <p>Secretariat and lead examiners</p> | <p>2 weeks</p> |
| <p>9. Circulation of draft report</p> | <p>Secretariat</p> | <p>3 weeks prior to the Working Group meeting</p> |
| <p>10. Pre-Working Group meeting</p> <ul style="list-style-type: none"> · Preparation of list of issues · Drafting of recommendations and executive summary · Consultation with evaluated country | <p>Secretariat Secretariat and lead examiners Secretariat, lead examiners, and evaluated country</p> | <p>Day before Working Group meeting</p> |
| <p>11. Working Group Evaluation</p> | <p>Working Group</p> | <p>Three readings on consecutive days</p> |
| <p>12. Publication of report and press release</p> | <p>Secretariat</p> | <p>As soon as possible following the adoption by the Working Group of the report and press release</p> |

ANNEX 2

PHASE 3 QUESTIONNAIRE

Objective

The purpose of the third phase of the peer evaluation (Phase 3) of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) and the 2009 Recommendations on further combating bribery (the 2009 Recommendations)² is to focus on the following three pillars:

1. The progress made by Parties on weaknesses identified in Phase 2 (addressed in Part I(A) below).
2. Issues raised by changes in the domestic legislation or institutional framework of the Parties (addressed in Part I(B) below).
3. Enforcement efforts and results, and other key Group-wide cross-cutting issues (addressed in Part II below).

This questionnaire will assist the Phase 3 evaluation team and the Working Group on Bribery in assessing how the evaluated country addresses those issues.

Phase 3 is carried out in accordance with the Phase 3 evaluation procedure in DAF/INV/BR/(2008)25/FINAL.

Submission of replies

Replies shall be submitted to the Secretariat in the agreed official language for the evaluation within the time limits fixed in the evaluation schedule, and preferably in electronic format.

Replies shall be precise and provide sufficient detail to enable an assessment of the law implementing the Convention and its actual application. Where appropriate, copies of, or links to, relevant laws, regulations, administrative guidance, or court decisions shall be provided.

² 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions; and 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions.

Confidentiality

Replies to the questionnaire received by the Secretariat are confidential. The evaluated country is encouraged to release information concerning its questionnaire responses, or make them publicly available, subject to its domestic laws on the protection of privacy and secrecy.

QUESTIONS CONCERNING PHASE 3

PART I. VERTICAL (COUNTRY-SPECIFIC) ISSUES

In responding to the questions in Parts I(A) and I(B), please note that some questions may overlap, depending on the Phase 2 recommendations and follow-up issues for each country, and depending on the nature of any legal and institutional changes for each country. Answers might also overlap with questions in Part II of the Questionnaire. Please do not repeat responses given but refer, instead, to the appropriate question where the response was already made.

A. PROGRESS ON PHASE 2 RECOMMENDATIONS ³

1.1 Since your written follow-up report to Phase 2, did you take steps to implement the recommendations identified by the Working Group on Bribery (Working Group) as not having been implemented, or having been only partially implemented?

- By way of supplementary questions, the Secretariat will elaborate on this question having regard to the written follow-up report to Phase 2, the findings of the Working Group in that regard, any subsequent oral report(s), and other official updates such as those to the Steps Taken by State Parties to implement and enforce the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

1.2 What practice has developed concerning the issues identified for follow-up in Phase 2?

³ This section of the Questionnaire addresses Phase 2 recommendations that were not fully implemented by the time of your country's written follow-up report to Phase 2.

B. ISSUES RAISED BY CHANGES IN DOMESTIC LEGISLATION, JURISPRUDENCE OR INSTITUTIONAL FRAMEWORKS SINCE PHASE 2

2.1 Have there been any changes to your legal framework (legislative, regulatory, or jurisprudential) or institutional framework (including policy statements, guidelines, directives, and protocols) since Phase 2 which might *directly or indirectly* impact upon any of the obligations under the Convention, the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation on Further Combating Bribery) or the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation on Tax Measures)? If there have been such changes:

- (a) Please include or provide exact references to all relevant documentation concerning the bribery of foreign public officials (foreign bribery), including documentation that may have an impact on the detection, investigation or prosecution of foreign bribery (e.g. legislation, regulations, court decisions, interpretative notes or commentaries, guidelines, or policy directives). Please describe the impact that these changes have had on the implementation of the Convention or other OECD anti-bribery instruments.
- (b) In particular, please include reference to any change(s) affecting:
 - (i) the offence of bribing a foreign public official (the foreign bribery offence), criminal responsibility for the foreign bribery offence, and related defences and exceptions, including small facilitation payments;
 - (ii) the responsibility of legal persons for the foreign bribery offence, or the responsibility of legal persons more generally;
 - (iii) sanctions applicable to the foreign bribery offence, including confiscation and administrative or civil sanctions;
 - (iv) the exercise of territorial, nationality or other forms of extraterritorial jurisdiction over the foreign bribery offence;
 - (v) the availability of investigative techniques in cases of bribery, including access to information from financial institutions and tax authorities;
 - (vi) the potential impact of factors prohibited under Article 5 of the Convention (i.e. national economic interest, relations with another State, or the identity of the natural or legal persons involved), or of other forms of improper influence which are the result of concerns of a political nature, on investigations and prosecutions;

(vii) prosecutorial discretion, and any requirement to obtain consent from the executive branch of government (e.g. Minister of Justice) to open, close or continue an investigation or prosecution; or to inform the executive branch prior to the opening, closure or continuance of an investigation or prosecution; or any authority of the executive branch to direct the opening, closure or continuance of an investigation or prosecution;

(viii) the statute of limitations applicable to the foreign bribery offence;

(ix) false accounting offences, and money laundering offences in so far as the latter relate to foreign bribery;

(x) the tax treatment of bribes to foreign public officials, including the tax treatment of small facilitation payments and implementation of the 2009 Recommendation on Tax Measures;⁴

(xi) the ability of your tax authorities to require financial institutions in your country to provide information; and

(xii) new arrangements and agreements on mutual legal assistance (MLA) and extradition; and the rules governing MLA and extradition, including the potential impact of issues addressed under Articles 9 and 10 of the Convention (i.e. bank secrecy, absence of an extradition treaty, declining extradition requests solely on the grounds that a person is a country's national, requirement for dual criminality).

(c) Please include reference to any significant changes in the resources (human and financial) available for the implementation of the Convention and the 2009 Recommendations, including resources for law enforcement authorities and bodies responsible for awareness and prevention of foreign bribery.

(d) If more than one level of government has relevant legislative-making powers, please identify relevant changes to all levels of legislation which might *directly or indirectly* impact upon the implementation of the Convention.

2.2 Has your national policy or strategy on combating the bribery of foreign public officials been updated since Phase 2, or changed in any way?

2.3 If you have any dependencies or overseas territories, what progress has been made since Phase 2 to bring them in compliance with the Convention? In addition, if you have the authority to extend ratification of the Convention to them, what steps have been taken in this regard?

⁴ Please refer, in this regard, to the questions in Part II(9) of the Questionnaire.

II. HORIZONTAL (CROSS-CUTTING) ISSUES, INCLUDING ENFORCEMENT EFFORTS AND RESULTS ⁵

In responding to the questions in this Part of the Questionnaire, please note that some questions may overlap with those already asked in Parts I(A) and I(B) above, depending on the nature of the Phase 2 recommendations and follow-up issues for each country, and depending on the nature of any legal and institutional changes for each country. Please do not repeat responses already given but refer, instead, to the appropriate question where the response was already made.

This paragraph is designed to provide you with some guidance, additional to that in DAF/INV/BR/(2008)25/FINAL, for answering the questions in Part II of the Questionnaire. You should be prepared to describe how your authorities have applied the foreign bribery offence and related offences, including questions concerning confiscation, related money laundering provisions, and international cooperation. Ideally, this would be addressed by referring to concrete cases that have arisen under implementing legislation, irrespective of whether these cases have been successfully prosecuted. The aim of such information, which will be held on a confidential basis, is to assist the Working Group to determine how the foreign bribery offence is being prosecuted, what investigative techniques are being utilised, and what hurdles are being faced by countries in the fight against the bribery of foreign public officials.⁶ You are not required to disclose or agree to the publication of information that is protected by law, regulations and/or professional rules of conduct in your country.

3. Investigation and prosecution of the foreign bribery offence

3.1 Please provide information on enforcement action since Phase 2⁷ with regard to alleged foreign bribery, related accounting misconduct, and related money laundering,⁸ including if available updated information not already provided as part of other data gathering exercises by the Working Group:

⁵ The horizontal issues in this part of the Questionnaire were identified during the course of Phase 1 and Phase 2 monitoring, as well as during the review of the OECD anti-bribery instruments.

⁶ The Phase 3 evaluation report will not include any confidential information, including information pertaining to on-going cases, and will aim to provide feedback on how the evaluated country might improve the way it prosecutes cases of foreign bribery, taking into account its domestic legislation. The evaluated country will also have an opportunity to review the preliminary evaluation report and, should any confidential information remain in it, require that it be removed.

⁷ Countries are encouraged to provide relevant information on all enforcement action since signing the Convention.

⁸ The Convention addresses three offences: the bribery of foreign public officials, fraudulent accounting, and money laundering where the predicate offence is the bribery of foreign public officials.

- (a) Concerning the investigation of such cases, please identify: (i) the total number of investigations commenced each year each year; (ii) the number of on-going investigations; (iii) the number of investigations in which there has been a pre-trial seizure or freezing of assets; (iv) the number of discontinued investigations without sanctions; and (v) the number of discontinued or deferred investigations where persons were sanctioned as a result of settlement, mediation, or the like.
- (b) Concerning criminal prosecutions and convictions with formal charges, please identify: (i) the total number of prosecutions commenced each year; (ii) the number of on-going prosecutions; (iii) the number of prosecutions discontinued or deferred without sanctions or conditions; (iv) the number of prosecutions discontinued or deferred with sanctions or other measures; (v) the number of convictions with sanctions; and (vi) the number of acquittals.
- (c) Concerning additional administrative or civil proceedings foreseen under Article 3(4) of the Convention which seek imposition of sanctions (e.g. debarment, suspension from public procurement contracts, suspension or termination of official export credit support, penalties for accounting violations), please identify on an annual basis: (i) the number of on-going proceedings; (ii) the number of proceedings discontinued or deferred without sanctions or other measures; (iii) the number of proceedings discontinued or deferred with sanctions or other measures; (iv) the number of proceedings discontinued as a result of civil settlements or agreements, or reference of the matter to arbitration; (v) the number of decisions finding liability with sanctions; and (vi) the number of decisions finding no liability.
- (d) Concerning all statistics provided, please distinguish between natural persons and legal persons (e.g. “3NP” for three matters involving natural persons, or “2LP” for two matters involving legal persons). Please also distinguish between enforcement action concerning alleged foreign bribery (e.g. “FB”), related accounting misconduct (e.g. “AM”) and related money laundering misconduct (e.g. “ML”).
- (e) Please provide a summary of selected relevant cases since Phase 2, including those that address weaknesses identified in previous evaluations and information on any changes in the domestic legal or institutional framework since Phase 2. In accordance with national rules on confidentiality, please include:
 - (i) the sources of information regarding foreign bribery, and how they came to the attention of your law enforcement authorities (e.g. media, competitors, employees, tax authorities, the auditing profession, money laundering authorities, the investigation of other offences, embassies, information from foreign authorities, foreign court decisions, or MLA requests from other countries);

- (ii) the important facts of the case revealed by the evidence (which may be anonymised), including the briber (NP and/or LP), the amount of the bribe, the nature of the advantage obtained, the time period and location of the events, the involvement of intermediaries, etc.;
 - (iii) the procedural steps taken, including investigative and prosecutorial steps;
 - (iv) the practices and procedures used by law enforcement authorities to assess the information received; and
 - (v) any interpretation of the foreign bribery offence by the court, or opinion of (please provide a copy of any relevant documentation, with a translation of the relevant parts of such documentation into the agreed official language for the evaluation).
- (f) Where applicable, please indicate the nature of any challenges encountered which: prevented information referred to your law enforcement authorities accusing natural and/or legal persons of involvement in foreign bribery from progressing to the investigative stage; or prevented investigations from leading to indictments (or the initiation of civil or administrative proceedings); or prevented any indictments (or other proceedings) from going to trial; or resulted in any trials leading to acquittals (or the finding of no liability). Where such challenges have arisen, please explain what measures you have taken in attempting to overcome them, including practices that have worked particularly well.
- (i) Practical challenges might include, for example, that: the benefit was transferred through an intermediary, including a related legal person; the benefit was provided directly to a third party with the agreement, or instruction, of the foreign public official; the person bribed was not clearly a foreign public official, or might have received the bribe in a personal capacity; a defence or exception that does not apply in your jurisdiction was successfully invoked in another country; the offence occurred only in part in your country, or entirely abroad in a foreign territory (i.e. either in a public official's country, or in a third party); the circumstances surrounding the offence are the subject of an on-going investigation in another country, or have been investigated and concluded in another country; and/or the statute of limitations expired before or during the investigation or prosecution.
 - (ii) If challenges have been encountered as a result of waiting for the conclusion of a request for MLA from, or extradition by, another State, please describe the nature of such difficulties and what measures you have taken in attempting to overcome them. Please identify whether any difficulties relate to another State which is a Party to the Convention

(without necessarily naming the Party). Please include reference to any difficulties encountered in obtaining judicial or administrative decisions from another State which is Party to the Convention.

3.2 What are the most common sources of information referred to your law enforcement authorities accusing natural and/or legal persons of involvement in foreign bribery? If such information is not being referred to your authorities, what do you believe the reasons for this to be (e.g. reluctance by the public to blow the whistle)?

3.3 Please describe the criteria for the commencement, suspension, interruption and termination of the statute of limitations applicable to the foreign bribery offence.

3.4 Have your law enforcement authorities investigated and/or prosecuted credible factual allegations of bribing a foreign public official through an intermediary where the intermediary made an offer, promise or gift to a foreign public official for the benefit of the company without having been directed or authorised to do so? If your authorities have prosecuted such cases, please describe (by reference to selected relevant cases) how they established the necessary *mens rea* for criminality?

3.5 Have your law enforcement authorities investigated and/or prosecuted credible factual allegations of bribing a foreign public official where all of the advantage was transferred directly to a third party with the knowledge or agreement of the foreign public official? If so, please describe (by reference to selected relevant cases) what practical or legal obstacles your authorities faced in this situation.

3.6 Have your law enforcement authorities investigated and/or prosecuted credible factual allegations of bribing a foreign public official where the benefit given, offered, or promised was small or was a facilitation payment?

(a) If so, and if your country allows an exception or defence for facilitation payments, or applies one in practice through prosecutorial discretion, have there been situations where authorities in your country have decided not to proceed with an investigation or prosecution because it was not clear whether the payment was a facilitation payment? Please explain (by reference to selected relevant cases where applicable) how your authorities determined whether or not the benefit amounted to a facilitation payment.

(b) If your country does not allow such an exception or defence, and your foreign bribery law would cover such payments, please provide any relevant cases and explain what criteria or other standards govern the investigation and prosecution of such cases.

- (c) Whether your country allows such an exception or defence, or disallows facilitation payments, have your authorities periodically reviewed your country's policies and approaches on small facilitation payments?

3.7 Have your law enforcement authorities investigated and/or prosecuted credible factual allegations of bribing a foreign public official where the foreign public official solicited the bribe?

3.8 Please provide information on measures taken by your authorities to ensure that:

- (a) Investigations and prosecutions of the bribery of foreign public officials are not influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, in compliance with Article 5 of the Convention;
- (b) Credible factual allegations of bribery of foreign public officials are seriously investigated and assessed by the competent authorities; and
- (c) Adequate resources have been provided to law enforcement authorities to permit effective investigation and prosecution of bribery of foreign public officials.

4. Responsibility of legal persons

4.1 Can you provide examples, since Phase 2, of the application of the law ascribing the responsibility of legal persons (including State-owned or State-controlled enterprises) for the bribery of a foreign public official?

- (a) If not, please refer if possible to cases since Phase 2 involving bribery of domestic officials or other similar offences (e.g. fraud, money laundering, or an offence(s) against anti-monopoly or anti-cartel laws).
- (b) Please provide, if available, detailed information on the types of entities that have been prosecuted and how the standard of liability (e.g. vicarious liability, or liability triggered by acts of high-level managerial authority) has been applied.
- (c) Where a case has been brought against a natural person employed by or acting on behalf of a legal person, please explain whether an investigation or prosecution has also been initiated against the legal person. If not, please explain the reasons for this.
- (d) Please explain how jurisdiction has been established (or not) over legal entities operating abroad, including foreign subsidiaries of national

companies or legal entities which are registered or operate in more than one jurisdiction.

5. Sanctions

5.1 Please describe the nature (type and level) of all criminal, administrative, and civil sanctions that have been applied in practice to natural and legal persons for the foreign bribery offence since Phase 2.⁹ The summary should include, if possible, information on:

- (a) The grounds for determining the severity of the sentence (including the amount of the fine and/or term of the imprisonment, or for the non-imposition of a sanction).
- (b) The application of a procedure for plea-bargaining, or other procedure such as deferred prosecution, if your country provides such a procedure. If information is available, please compare the sanctions imposed as a result of these two procedures with those obtained otherwise.

6. Confiscation of the bribe and the proceeds of bribery

6.1 Please describe, using the example of selected relevant cases, how confiscation of the bribe and proceeds of the offence has been exercised in relation to the foreign bribery offence. If confiscation is not available under your country's laws, please explain how monetary sanctions of a comparable effect have been applied.

- (a) In particular, please indicate to what extent your authorities have been able to trace the assets generated by commission of the foreign bribery offence? Have authorities encountered difficulties in tracing the proceeds resulting from commission of the foreign bribery offence?
- (b) Have your authorities experienced difficulties in quantifying the proceeds of bribery for the purpose of pre-trial seizure, or confiscation? If applicable, please describe the nature of such difficulties and what measures you have taken in attempting to overcome them, including practices that have worked particularly well.
- (c) What is the policy and practice of your authorities concerning the recovery of the proceeds of bribery of foreign public officials? If your authorities have experienced difficulties in this respect, please describe the nature of such difficulties and what measures you have taken in attempting to overcome them, including practices that have worked particularly well.

⁹ Countries are encouraged to provide relevant information on all sanctions applied since signing the Convention.

7. Money laundering

7.1 Please provide the most recent report of the Financial Action Task Force, or regional equivalent, on the operation of your anti-money laundering mechanisms. If applicable, please also explain any steps taken, since the adoption of the latter report, to change your anti-money laundering mechanisms.

7.2 Please explain how your money laundering legislation has been applied since Phase 2 where the predicate offence was the foreign bribery offence. Please include, if available:

- (a) Information on whether cases of bribing foreign public officials have been detected by your money laundering authorities, or by foreign money laundering authorities where information was shared with your authorities. Please also explain whether this was done by identifying the laundering of the proceeds of bribing a foreign public official and/or the bribe payment and/or a connected offence.
- (b) Information concerning the capacity to detect bribe payments through money laundering transactions involving politically exposed persons (PEPs) who are foreign public officials.
- (c) Any available information on how your authorities have quantified the proceeds of bribery in money laundering cases concerning the bribery of foreign public officials as a predicate offence, and whether your authorities have encountered difficulties in this respect.

8. Accounting requirements, external audit, and internal controls, ethics and compliance programmes

8.1 Has your country been successful since Phase 2 in detecting foreign bribery through the enforcement of books and records requirements, accounting standards, auditing standards, and financial statement disclosure requirements? If so, please explain how these requirements are enforced, and provide a summary of selected relevant cases. Please also indicate whether the investigation of foreign bribery has led to the detection and investigation of fraudulent accounting.

8.2 What are the measures in place in your country concerning guidance for external auditors who discover indications of a suspected act of bribery to report such matters (i) within the audited company; and (ii) to authorities outside the company (e.g. law enforcement and regulatory authorities)? Please specify in particular:

- (a) Whether these measures are included in law or in other regulatory texts, including professional regulations;
- (b) Whether these measures include an authorisation or an obligation to report;
- (c) Whether the external auditor, in the case of insufficient management action upon receipt by management of such a report, is under obligation (by law, professional regulations, or otherwise) to elevate such reporting to a company monitoring body, independent of management, such as audit committees or boards of directors or of supervisory boards;
- (d) Whether there are specific criteria allowing or requiring such reporting by external auditors (e.g. materiality, the suspicion of an offence, etc.);
- (e) Whether your national legislation provides for protection from legal action for external auditors reporting to authorities outside the company; and
- (f) Whether the audited company's management, if it receives such a report, is under obligation (by law, professional regulations, or otherwise) to act on such information and, where applicable, please describe such measures. If such an obligation does not exist in your country, please describe any steps taken by your authorities to encourage audited companies to act on information received.

8.3 Are there in your country any foreign bribery investigations that may have been triggered by reports from external auditors, either through the company itself, or directly to law enforcement or regulatory authorities?

8.4 Since Phase 2, what steps has your country taken to encourage companies to adopt and develop adequate internal controls, ethics and compliance programmes or measures for the prevention and detection of bribery of foreign public officials? In particular, please describe:

- (a) Steps taken to encourage companies to take into account elements identified in Annex 2 to the 2009 Recommendation on Further Combating Bribery;
- (b) Steps taken to encourage companies to prohibit or discourage the use of small facilitation payments, and ensure that, where they are made, they are accurately accounted for in companies' books and financial records;
- (c) Steps to encourage companies to publicly disclose (e.g. in annual reports, on their web sites, or otherwise) their internal controls, ethics and compliance programmes or measures; and

- (d) Specific action undertaken in coordination with business associations and/or professional organisations, in particular as concerns small and medium size enterprises exporting or investing abroad.

8.5 Please indicate what steps have been taken to encourage companies to provide mechanisms for communication by and protection of persons not willing to violate professional standards or ethics, as well as for persons willing to report in good faith and on reasonable grounds suspected breaches of the law or professional standards or ethics. Please also indicate what steps have been taken to encourage companies to take appropriate action based on such reporting.

8.6 Please indicate whether and in what circumstances your government agencies may consider the existence of internal controls, ethics and compliances systems or measures in their decisions to grant public advantages (e.g. public subsidies, export credits, public licences, public procurement and ODA-funded contracts, etc.).

9. Tax measures for further combating bribery

9.1 Does your country explicitly disallow the tax deductibility of bribes to foreign public officials, for all tax purposes? Are there specific conditions under which tax authorities accept or deny the deductibility of bribes to foreign public officials?

9.2 Has your country taken steps to review, on an ongoing basis, the effectiveness of your legal, administrative and policy frameworks as well as practices for disallowing tax deductibility of bribes to foreign public officials? Is guidance provided to taxpayers and tax authorities as to the types of expenses that are deemed to constitute bribes to foreign public officials? Please include information on whether such bribes are effectively detected by tax authorities.

9.3 Please describe the circumstances in which your tax authorities can (or must) report suspicions of foreign bribery transactions to law enforcement authorities in your own country, and how tax information is shared with tax authorities and/or law enforcement authorities in another country, including whether:

- (a) Such information must be requested or can be shared spontaneously; and
- (b) The optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention is included in your bilateral tax treaties.

10. International cooperation

10.1 Please describe the requests for MLA received by your authorities from other Parties to the Convention regarding the bribery of a foreign public official since Phase 2.¹⁰ Please include answers to the following questions, if this information is available and capable of being shared:

- (a) How many requests of this kind have your authorities received each year from other Parties to the Convention? How many requests have been granted/rejected each year and on what grounds? What types of measures were requested (e.g. search and seizure of financial and company records, witness statements, court records, etc.)?
- (b) On average, how long has it taken your country to reply to requests for MLA from other Parties concerning foreign bribery? If possible, please provide examples of the shortest and longest times it has taken your country to reply to such requests. Is the delay for answering similar to the delay for other offences? Are there time limits for responding to requests for the various forms of MLA? Was the range of legal assistance provided the same as that provided for other offences?
- (c) How have any existing requirements (such as dual criminality or reciprocity) been applied?
- (d) Have you granted or denied requests for MLA concerning a legal person and, if so, under what circumstances?
- (e) Have your authorities been able to grant MLA as promptly in cases where a request is for:
 - (i) information from a financial institution (such as a customer's name or details about a customer's transaction); or
 - (ii) information about a company (including the identity of the owner, proof of incorporation, legal form, address, the names of directors, etc.)?
- (f) Have you consulted and otherwise co-operated with competent authorities in other countries on the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials?
- (g) Have you consulted and otherwise co-operated as appropriate with international and regional law enforcement networks involving Parties and non-Parties, in investigations and other legal proceedings concerning

¹⁰ Countries are encouraged to provide relevant information on all requests since signing the Convention.

specific cases of foreign bribery, through such means as the sharing of information spontaneously or upon request, provision of evidence, extradition, and the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials?

- (h) Have reports of foreign bribery been referred to your authorities by international government organisations, such as the international and regional development banks? If so, have steps been taken by your authorities to investigate such matters?
- (i) Have you considered ways for facilitating mutual legal assistance between Parties and with non-Parties in cases of foreign bribery, including regarding treaty requirements and evidentiary thresholds where applicable?

10.2 Concerning MLA requests regarding the bribery of a foreign public official made by you to other countries since Phase 2,¹¹ please provide the following information if available and capable of being shared:

- (a) How many requests have you made to other countries? How long has it taken for your country to receive a reply to such requests? How many of them were granted/rejected and on what grounds? In responding to this question, please differentiate between requests to Parties and non-Parties (without necessarily naming the countries).
- (b) If you did not receive a response to your request(s), what further steps did you take, if any? Did the absence of a response result in termination of proceedings?

11. Public awareness and the reporting of foreign bribery

11.1 Please provide information on actions undertaken or planned since Phase 2 to make the Convention and your country's foreign bribery law better known in your country.

- (a) Please include information on steps taken to engage companies (especially small and medium enterprises), business associations, professional organisations, trade unions, non-governmental organisations, universities and business schools, and the media, as well as the general public.
- (b) Please describe awareness-raising and training provided to government officials, including those posted abroad, on the laws implementing the Convention, such that government officials can provide basic information to

¹¹ Countries are encouraged to provide relevant information on all requests since signing the Convention.

their companies at home and abroad and appropriate assistance when such companies are solicited for bribes.

- (c) Please advise whether you are aware of any positive consequences from increased awareness of the Convention, the foreign bribery offence, or its detection and prosecution (e.g. an increase in corporate codes of conduct directed towards the detection and reporting of foreign bribery, an increased level of reporting from embassies abroad, etc.).

11.2 In your awareness-raising efforts since Phase 2, have you used international standards on corporate social responsibility, including Annex 2 to the 2009 Recommendation on Further Combating Bribery, the OECD Guidelines for Multinational Enterprises and other relevant OECD and non-OECD principles as they relate to issues of bribery? If so, how did you use them?

11.3 Please indicate the procedures or mechanisms in place for reporting suspected acts of foreign bribery, and how existing procedures and mechanisms were publicised.

11.4 Please indicate the measures in place to encourage and/or require reporting by your own public officials of suspected acts of foreign bribery. In particular, please describe:

- (a) Which categories of public officials are concerned by these reporting mechanisms;
- (b) The mechanisms for reporting internally as well as externally to law enforcement authorities; and
- (c) Whether specific awareness raising activities have been undertaken to publicise the existence of these reporting channels, and facilitate their use, and whether certain bodies of public officials have been more specifically targeted.

11.5 Please describe the measures in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities. Please also indicate whether any specific awareness raising activities have been undertaken to publicise the existence of such measures.

12. Public advantages

12.1 Please indicate whether measures were taken since Phase 2 to permit your authorities to suspend from competition for public contracts or other public advantages (e.g. public procurement and ODA-funded contracts, export credits,

etc.) companies determined to have bribed a foreign public official in the context of an international business transaction. If so, please describe the measures taken. Please also describe what steps you have taken to evaluate the effectiveness of your approach in this area.

12.2 Please indicate whether measures were taken since Phase 2 to enhance transparency in public procurement. If so, please describe the measures taken. In this regard, please indicate the international instruments your country has adhered to (e.g. WTO Agreement on Government Procurement).

12.3 Please indicate whether measures were taken since Phase 2 by your export credit agency to address foreign bribery issues in relation to the attribution and suspension of export credit guarantees. If so, please describe the measures taken. If relevant, please indicate in particular whether your country has taken steps to adhere to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits and explain those steps. If not, please explain why not.

ANNEX 3

PHASE 3 REPORT OUTLINE

[COUNTRY]: PHASE 3

REPORT ON THE IMPLEMENTATION AND APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 RECOMMENDATIONS ON FURTHER COMBATING BRIBERY

EXECUTIVE SUMMARY

The executive summary must not be longer than 1 page, and will be organised as follows:

- Paragraph 1 will contain a short introduction, and provide the tone of the report. It will refer to a mixture of positive and critical features. It will also contain a reference to the Phase 2 evaluation, and the oral and written follow-up reports to that evaluation.
- Paragraph 2 will outline the progress made by the country in addressing outstanding recommendations in Phase 2 and highlight the most important recommendations that remain outstanding (if any). Significant legislative or institutional changes might also be referred to. This paragraph will also refer to relevant resulting Phase 3 recommendations.
- Paragraph 3 will outline two or three main problems identified in the report, additional to any already identified in paragraph 2, along with the resulting recommendations of the Working Group.
- Paragraph 4 will outline the main positive features of the report. The order of the critical and positive paragraphs may be reversed, depending upon the decision of the Working Group, but the general rule should be to have the critical features appear first in the draft to be presented to the Group.

- Paragraph 5 will summarise the goal and procedure of the Phase 3 evaluation mechanism.

For the purpose of the draft report (placed on OLIS), the Executive Summary will be replaced by a compilation of the commentaries of the lead examiners (as called for in paragraph 34 of DAF/INV/BR/(2008)25/REV4).

A. INTRODUCTION

1. The On-site Visit

2. Outline of the Report

3. Cases Involving the Bribery of Foreign Public Officials

This section should be consistent with the treatment of such cases in Phase 2 reports.

B. IMPLEMENTATION AND APPLICATION BY [COUNTRY X] OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

Part B of the report should begin with the following text:

This part of the report considers the approach of [Country X] to key Group-wide cross-cutting issues identified by the Working Group for the evaluation of all Parties subject to Phase 3. Where applicable, consideration is also given to vertical (country-specific) issues arising from progress made by [Country X] on weaknesses identified in Phase 2, or issues raised by changes in the domestic legislation or institutional framework of [Country X].

For each topic:

- Discuss in detail what the recommendation or issue for follow-up was in Phase 2 (if any);
- Identify and explain the impact of relevant changes in the domestic legislation or institutional framework of the country since Phase 2 (if any);
- Identify, in particular, relevant steps taken to implement the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council on Tax Measures for Further Combating

the Bribery of Foreign Public Officials in International Business Transactions;

- Discuss what issues arise from the latter points and information obtained from the country's answers to the Phase 3 questionnaires, from the on-site visit, and/or from independent research undertaken by the evaluation team.

1. Foreign bribery offence

2. Responsibility of legal persons

3. Sanctions

4. Confiscation of the bribe and the proceeds of bribery

5. Investigation and prosecution of the foreign bribery offence

6. Money laundering

7. Accounting requirements, external audit, and company compliance and ethics programmes

8. Tax measures for combating bribery

9. International cooperation

10. Public awareness and the reporting of foreign bribery

11. Public advantages

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

1. Recommendations of the Working Group

2. Follow-up by the Working Group

ANNEX 4

GUIDANCE ON THE CONDUCT OF MEETINGS SURROUNDING THE ADOPTION OF EVALUATION REPORTS AND CONSIDERATION OF WRITTEN FOLLOW-UP REPORTS

With a view to achieving equal treatment amongst all Parties, this Annex sets out guidance on the conduct of meetings leading up to the adoption of Phase 3 evaluation reports, and consideration of written follow-up reports.

CONDUCT OF MEETINGS FOR THE ADOPTION OF EVALUATION REPORTS

Meetings preparatory to the Working Group's consideration of the draft report

Prior to the discussion of the draft report by the Working Group, preparatory meetings will be held at the OECD (see part B(6)(b) of this Note).

Discussions should aim to achieve the timeframes suggested below:

- 1 hour (in principle): The Secretariat will meet with the lead examiners to discuss any outstanding issues in the draft report, including the draft commentaries of the lead examiners.
- 2 hours (in principle): The Secretariat and lead examiners will then meet with the evaluated country to review outstanding issues in the draft report and the commentaries of the lead examiners. This meeting will be focused on the main points of disagreement between the lead examiners and evaluated country, and will not involve discussion of technical drafting issues.

First reading in the Working Group

The first reading by the Working Group will involve a review and debate of the draft report, including the commentaries of the lead examiners (see part B(6)(d) of this Note). The first reading should aim to achieve the timeframes suggested below:

- 15 minutes: The *lead examiners* will present a summary of the following regarding the evaluated country:
 - The on-site visit.
 - Main unresolved concerns about the implementation of the Convention and Revised Recommendation.
 - Major issues that have been resolved to their satisfaction.
 - Places where the draft report and commentaries have been amended as a result of discussions in the preliminary meeting.
- 15 minutes: The *evaluated country* will respond to the concerns of the lead examiners.
- 1 hour 30 minutes – 2 hours: The *Working Group* will have the opportunity to react to the draft report and presentations of the lead examiners and the evaluated country. Working Group members should indicate where they agree and disagree with the concerns of the lead examiners, and may raise other issues of concern or interest that may have been overlooked in the report. The Working Group may also propose and agree upon changes to parts of the draft report where necessary. This part of the first reading will be conducted as an open debate, and must afford the evaluated country and the lead examiners adequate opportunity to respond to queries and comments by the Working Group.

Break-away sessions

Following the first reading in the Working Group, break-away sessions will be held for the purpose of revising the report, and formulating recommendations, an executive summary, and a draft OECD press release (see part B(6)(e) of this Note). Discussions should aim to achieve the timeframes suggested below:

- 1 hour (in principle): The Secretariat will meet with the lead examiners to formulate draft recommendations, the draft executive summary, and a draft press release to be presented at the second reading in the Working Group. The draft executive summary will be drafted by the Secretariat under the guidance of the lead examiners and in a standard format (see Annex 3). In drafting the press release, input should be obtained from the OECD Media Division. The lead examiners and the Secretariat will also revise the draft report based on the discussion in the Working Group. The Secretariat and lead examiners will then provide the evaluated country with the draft recommendations, the draft executive summary, and the draft press release.

- 1 hour (in principle): The Secretariat, lead examiners and evaluated country will meet once the evaluated country has had an opportunity to review these documents to hear the country's reaction to them.
- 30 minutes: Where necessary the Secretariat, lead examiners and evaluated country will meet again prior to the second reading in the Working Group to ensure that the draft recommendations, executive summary, and press release are ready to be circulated in the Working Group.

Second reading in the Working Group

A second reading will consider the draft recommendations, executive summary, press release, and any remaining disagreement on the draft report (see part B(6)(f) of this Note). The second reading should aim to achieve the timeframes suggested below:

- 15 minutes: The *lead examiners* will present the draft recommendations to the Working Group. The lead examiners will indicate the areas where disagreement on the draft recommendations remains between the lead examiners and the evaluated country.
- 15 minutes: The *evaluated country* will be given the opportunity to respond to the draft recommendations.
- 1 hour – 1 hour 30 minutes: The *Working Group* will discuss and debate the revised report and matters raised in the second reading by the lead examiners and evaluated country, affording them adequate opportunity to respond to comments by the Working Group. The Working Group will:
 - Finally adopt a comprehensive set of recommendations identifying areas for (i) action by the evaluated country, and (ii) follow-up by the Working Group.
 - Determine whether the evaluated country should be required to report orally in 12 months on any specific recommendation(s) or follow-up issue(s).
 - Agree on the executive summary of the report.
 - Consider the draft press release and, where appropriate, make suggestions concerning any desired amendment of the press release.
 - Consider, as appropriate, the need to hold a related press conference following the adoption of the draft report.

- The Working Group may also agree upon changes to the draft report where necessary.

Further break-away sessions

Following the second reading (see part B(6)(g) of this Note):

- 1 hour (in principle): The Secretariat will meet with the lead examiners to review the revised draft report, including the recommendations, the executive summary, as well as the draft press release, in order to check that they reflect the Working Group discussions.
- 30 minutes (in principle): Where necessary, the Secretariat, the lead examiners and the evaluated country will meet again prior to the third reading in the Working Group to ensure that the draft report, recommendations, executive summary, and press release are ready to be circulated to the Working Group for the third reading.

Third reading in the Working Group

The third reading, of 15 minutes, should proceed as follows (see part B(6)(h) of this Note):

- 5 minutes: The *lead examiners* will present any major changes made in the revised version of the report (including the recommendations and the executive summary) and the press release.
- 5 minutes: The *evaluated country* will be given an opportunity to respond.
- 5 minutes: The *Chair* will propose adoption of the Phase 3 evaluation report, and the press release.

CONDUCT OF MEETINGS FOR WRITTEN FOLLOW-UP REPORTS

Meeting preparatory to the presentation of written follow-up reports

Prior to the Working Group meeting, preparatory meetings will be held in Paris (see part C(2)(b) of this Note). Discussions should aim to achieve the timeframes suggested below:

- 30 – 45 minutes: The Secretariat will meet with the lead examiners to discuss outstanding issues, including preliminary views as to whether the Phase 3 recommendations have been implemented, partially implemented, or not implemented.

- 1 hour: The Secretariat and lead examiners will then meet with the evaluated country. The lead examiners will inform the evaluated country of their preliminary views. While these views will not be open to debate, the evaluated country will be given an opportunity to comment on the preliminary conclusions, or provide further information or materials relevant to these.
- 15 – 30 minutes: Where necessary, the Secretariat and lead examiners may meet again to ensure that the lead examiners are ready to present their views to the Working Group in plenary.

Evaluation in the Working Group

The Working Group will consider the written follow up report for the purpose of determining whether the Phase 3 recommendations have been implemented, partially implemented, or not implemented (see part C(2)(c) of this Note). The evaluation should aim to achieve the timeframes suggested below:

- 10 minutes: The *lead examiners* will present a summary of their preliminary views as to whether the Phase 3 recommendations have been implemented, partially implemented, or not implemented.
- 10 minutes: The *evaluated country* will respond to the concerns of the lead examiners.
- 40 minutes: The *Working Group* will have an opportunity to react to the presentations and discuss the status of the Phase 3 recommendations and follow-up issues. The Group will decide by “consensus minus one” whether the Phase 3 recommendations have been implemented, partially implemented, or not implemented.

Confirmation of conclusions by the Working Group

The Working Group will consider the draft conclusions prepared by the Secretariat (see part C(2)(c) of this Note) to confirm its contents and to determine whether further steps are required on account of any failure to implement core recommendations.

ANNEX 5

TEMPLATE FOR WRITTEN FOLLOW-UP TO PHASE 3

Instructions

This document seeks to obtain information on the progress each participating country has made in implementing the recommendations of its Phase 3 evaluation report. Countries are asked to answer all recommendations as completely as possible. Further details concerning the written follow-up process is in the Phase 3 Evaluation Procedure [DAF/INV/BR(2008)25/FINAL, part C(2)].

Responses to the first question should reflect the current situation in your country, not any future or desired situation or a situation based on conditions which have not yet been met. For each recommendation, separate space has been allocated for describing future situations or policy intentions.

*Please submit completed answers to the Secretariat on or before
.....*

Name of country:

Date of approval of Phase 3 evaluation report:

Date of information:

Part I: Recommendations for Action

Text of recommendation 1:

[For the sake of convenience and for practical reasons, the Secretariat will send the template including the text of all the Recommendations].

Action taken as of the date of the follow-up report to implement this recommendation:

If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

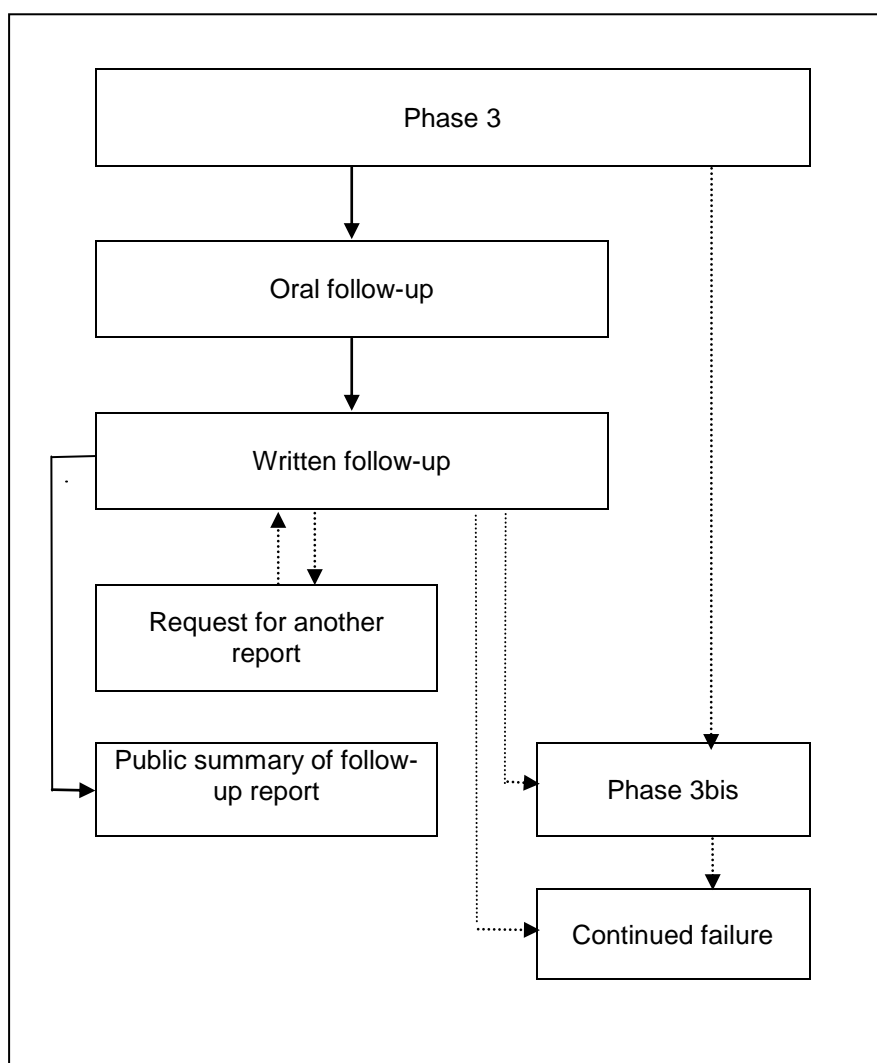
Part II: Issues for Follow-up by the Working Group

Text of issue for follow-up:

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

ANNEX 6

**DIAGRAM ON LINKAGE BETWEEN PHASE 3 EVALUATIONS, FOLLOW-UP
REPORTS, AND PHASE 3BIS EVALUATIONS**



**CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC
OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS
AND RELATED INSTRUMENTS**

CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

Adopted by the Negotiating Conference on 21 November 1997

Preamble

The Parties,

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions;

Considering that all countries share a responsibility to combat bribery in international business transactions;

Having regard to the Revised Recommendation on Combating Bribery in International Business Transactions, adopted by the Council of the Organisation for Economic Co-operation and Development (OECD) on 23 May 1997, C(97)123/FINAL, which, *inter alia*, called for effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and co-ordinated manner and in conformity with the agreed common elements set out in that Recommendation and with the jurisdictional and other basic legal principles of each country;

Welcoming other recent developments which further advance international understanding and co-operation in combating bribery of public officials, including actions of the United Nations, the World Bank, the International Monetary Fund, the World Trade Organisation, the Organisation of American States, the Council of Europe and the European Union;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising the role of governments in the prevention of solicitation of bribes from individuals and enterprises in international business transactions;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, monitoring and follow-up;

Recognising that achieving equivalence among the measures to be taken by the Parties is an essential object and purpose of the Convention, which requires that the Convention be ratified without derogations affecting this equivalence;

HAVE AGREED AS FOLLOWS:

Article 1

The Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.
2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.
3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as "bribery of a foreign public official".
4. For the purpose of this Convention:
 - (a) "foreign public official" means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation;
 - (b) "foreign country" includes all levels and subdivisions of government, from national to local;

- (c) “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence.

Article 2

Responsibility of Legal Persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3

Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party’s own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable.
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Article 4

Jurisdiction

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.
4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

Article 5

Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Article 6

Statute of Limitations

Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

Article 7

Money Laundering

Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

Article 8

Accounting

1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records,

financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.

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

Article 9

Mutual Legal Assistance

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.
2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.
3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

Article 10

Extradition

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.
2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the

legal basis for extradition in respect of the offence of bribery of a foreign public official.

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.
4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

Article 11

Responsible Authorities

For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

Article 12

Monitoring and Follow-up

The Parties shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of this Convention. Unless otherwise decided by consensus of the Parties, this shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference, or within the framework and terms of reference of any successor to its functions, and Parties shall bear the costs of the programme in accordance with the rules applicable to that body.

Article 13

Signature and Accession

1. Until its entry into force, this Convention shall be open for signature by OECD Members and by Non-Members which have been invited to become full participants in its Working Group on Bribery in International Business Transactions.

2. Subsequent to its entry into force, this Convention shall be open to accession by any non-signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions or any successor to its functions. For each such non-signatory, the Convention shall enter into force on the sixtieth day following the date of deposit of its instrument of accession.

Article 14

Ratification and Depositary

1. This Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws.
2. Instruments of acceptance, approval, ratification or accession shall be deposited with the Secretary-General of the OECD, who shall serve as Depositary of this Convention.

Article 15

Entry into Force

1. This Convention shall enter into force on the sixtieth day following the date upon which five of the ten countries which have the ten largest export shares set out in DAF/IME/BR(97)18/FINAL (annexed), and which represent by themselves at least sixty per cent of the combined total exports of those ten countries, have deposited their instruments of acceptance, approval, or ratification. For each signatory depositing its instrument after such entry into force, the Convention shall enter into force on the sixtieth day after deposit of its instrument.
2. If, after 31 December 1998, the Convention has not entered into force under paragraph 1 above, any signatory which has deposited its instrument of acceptance, approval or ratification may declare in writing to the Depositary its readiness to accept entry into force of this Convention under this paragraph 2. The Convention shall enter into force for such a signatory on the sixtieth day following the date upon which such declarations have been deposited by at least two signatories. For each signatory depositing its declaration after such entry into force, the Convention shall enter into force on the sixtieth day following the date of deposit.

Article 16

Amendment

Any Party may propose the amendment of this Convention. A proposed amendment shall be submitted to the Depositary which shall communicate it to the other Parties at least sixty days before convening a meeting of the Parties to

consider the proposed amendment. An amendment adopted by consensus of the Parties, or by such other means as the Parties may determine by consensus, shall enter into force sixty days after the deposit of an instrument of ratification, acceptance or approval by all of the Parties, or in such other circumstances as may be specified by the Parties at the time of adoption of the amendment.

Article 17

Withdrawal

A Party may withdraw from this Convention by submitting written notification to the Depositary. Such withdrawal shall be effective one year after the date of the receipt of the notification. After withdrawal, co-operation shall continue between the Parties and the Party which has withdrawn on all requests for assistance or extradition made before the effective date of withdrawal which remain pending.

ANNEX
STATISTICS ON OECD EXPORTS

| | 1990-1996 US\$ million | 1990-1996 % of Total OCDE | 1990-1996 % of 10 largest |
|---------------------------------|---------------------------|------------------------------|------------------------------|
| United States | 287 118 | 15.9% | 19.7% |
| Germany | 254 746 | 14.1% | 17.5% |
| Japan | 212 665 | 11.8% | 14.6% |
| France | 138 471 | 7.7% | 9.5% |
| United Kingdom | 121 258 | 6.7% | 8.3% |
| Italy | 112 449 | 6.2% | 7.7% |
| Canada | 91 215 | 5.1% | 6.3% |
| Korea | 81 364 | 4.5% | 5.6% |
| Netherlands | 81 264 | 4.5% | 5.6% |
| Belgium-Luxembourg ¹ | 78 598 | 4.4% | 5.4% |
| Total 10 largest | 1 459 148 | 81.0% | 100% |
| Spain | 42 469 | 2.4% | |
| Switzerland | 40 395 | 2.2% | |
| Sweden | 36 710 | 2.0% | |
| Mexico | 34 233 | 1.9% | |
| Australia | 27 194 | 1.5% | |
| Denmark | 24 145 | 1.3% | |
| Austria* | 22 432 | 1.2% | |
| Norway | 21 666 | 1.2% | |
| Ireland | 19 217 | 1.1% | |
| Finland | 17 296 | 1.0% | |
| Poland** | 12 652 | 0.7% | |
| Portugal | 10 801 | 0.6% | |
| Turkey * | 8 027 | 0.4% | |
| Hungary ** | 6 795 | 0.4% | |

¹ Concerning Belgium-Luxembourg: Trade statistics for Belgium and Luxembourg are available only on a combined basis for the two countries. For purposes of Article 15, paragraph 1 of the Convention, if either Belgium or Luxembourg deposits its instrument of acceptance, approval or ratification, or if both Belgium and Luxembourg deposit their instruments of acceptance, approval or ratification, it shall be considered that one of the countries which have the ten largest exports shares has deposited its instrument and the joint exports of both countries will be counted towards the 60 per cent of combined total exports of those ten countries, which is required for entry into force under this provision.

CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS
IN INTERNATIONAL BUSINESS TRANSACTIONS

| | | | |
|--------------------|------------------|-------------|--|
| New Zealand | 6 663 | 0.4% | |
| Czech Republic *** | 6 263 | 0.3% | |
| Greece * | 4 606 | 0.3% | |
| Iceland | 949 | 0.1% | |
| Total OCDE | 1 801 661 | 100% | |

Notes: * 1990-1995; ** 1991-1996; *** 1993-1996;
Source: OECD, (1) IMF

COMMENTARIES ON THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

Adopted by the Negotiating Conference on 21 November 1997

General:

1. This Convention deals with what, in the law of some countries, is called “active corruption” or “active bribery”, meaning the offence committed by the person who promises or gives the bribe, as contrasted with “passive bribery”, the offence committed by the official who receives the bribe. The Convention does not utilise the term “active bribery” simply to avoid it being misread by the non-technical reader as implying that the briber has taken the initiative and the recipient is a passive victim. In fact, in a number of situations, the recipient will have induced or pressured the briber and will have been, in that sense, the more active.

2. This Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of a Party’s legal system.

Article 1. The Offence of Bribery of Foreign Public Officials:

Re paragraph 1:

3. Article 1 establishes a standard to be met by Parties, but does not require them to utilise its precise terms in defining the offence under their domestic laws. A Party may use various approaches to fulfil its obligations, provided that conviction of a person for the offence does not require proof of elements beyond those which would be required to be proved if the offence were defined as in this paragraph. For example, a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article. Similarly, a statute which defined the offence in terms of payments “to induce a breach of the official’s duty” could meet the standard provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and this was an “autonomous” definition not requiring proof of the law of the particular official’s country.

4. It is an offence within the meaning of paragraph 1 to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company which could properly have been awarded the business.

5. "Other improper advantage" refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements.

6. The conduct described in paragraph 1 is an offence whether the offer or promise is made or the pecuniary or other advantage is given on that person's own behalf or on behalf of any other natural person or legal entity.

7. It is also an offence irrespective of, *inter alia*, the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

8. It is not an offence, however, if the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law.

9. Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

10. Under the legal system of some countries, an advantage promised or given to any person, in anticipation of his or her becoming a foreign public official, falls within the scope of the offences described in Article 1, paragraph 1 or 2. Under the legal system of many countries, it is considered technically distinct from the offences covered by the present Convention. However, there is a commonly shared concern and intent to address this phenomenon through further work.

Re paragraph 2:

11. The offences set out in paragraph 2 are understood in terms of their normal content in national legal systems. Accordingly, if authorisation, incitement, or one of the other listed acts, which does not lead to further action,

is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.

Re paragraph 4:

12. "Public function" includes any activity in the public interest, delegated by a foreign country, such as the performance of a task delegated by it in connection with public procurement.

13. A "public agency" is an entity constituted under public law to carry out specific tasks in the public interest.

14. A "public enterprise" is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

15. An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, *i.e.*, on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.

16. In special circumstances, public authority may in fact be held by persons (e.g., political party officials in single party states) not formally designated as public officials. Such persons, through their *de facto* performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials.

17. "Public international organisation" includes any international organisation formed by states, governments, or other public international organisations, whatever the form of organisation and scope of competence, including, for example, a regional economic integration organisation such as the European Communities.

18. "Foreign country" is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

19. One case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office – though acting outside his competence – to make another official award a contract to that company.

Article 2. Responsibility of Legal Persons:

20. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility.

Article 3. Sanctions:

Re paragraph 3:

21. The “proceeds” of bribery are the profits or other benefits derived by the briber from the transaction or other improper advantage obtained or retained through bribery.

22. The term “confiscation” includes forfeiture where applicable and means the permanent deprivation of property by order of a court or other competent authority. This paragraph is without prejudice to rights of victims.

23. Paragraph 3 does not preclude setting appropriate limits to monetary sanctions.

Re paragraph 4:

24. Among the civil or administrative sanctions, other than non-criminal fines, which might be imposed upon legal persons for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement or from the practice of other commercial activities; placing under judicial supervision; and a judicial winding-up order.

Article 4. Jurisdiction:

Re paragraph 1:

25. The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.

Re paragraph 2:

26. Nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party. These principles deal with such matters as dual criminality. However, the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute. For countries which apply nationality jurisdiction only to certain types of offences, the reference to “principles” includes the principles upon which such selection is based.

Article 5. Enforcement:

27. Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature. Article 5 is complemented by paragraph 6 of the Annex to the 1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions, C(97)123/FINAL (hereinafter, "1997 OECD Recommendation"), which recommends, *inter alia*, that complaints of bribery of foreign public officials should be seriously investigated by competent authorities and that adequate resources should be provided by national governments to permit effective prosecution of such bribery. Parties will have accepted this Recommendation, including its monitoring and follow-up arrangements.

Article 7. Money Laundering:

28. In Article 7, "bribery of its own public official" is intended broadly, so that bribery of a foreign public official is to be made a predicate offence for money laundering legislation on the same terms, when a Party has made either active or passive bribery of its own public official such an offence. When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation.

Article 8. Accounting:

29. Article 8 is related to section V of the 1997 OECD Recommendation, which all Parties will have accepted and which is subject to follow-up in the OECD Working Group on Bribery in International Business Transactions. This paragraph contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls the implementation of which will be important to the overall effectiveness of the fight against bribery in international business. However, one immediate consequence of the implementation of this Convention by the Parties will be that companies which are required to issue financial statements disclosing their material contingent liabilities will need to take into account the full potential liabilities under this Convention, in particular its Articles 3 and 8, as well as other losses which might flow from conviction of the company or its agents for bribery. This also has implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials. In addition, the accounting offences referred to in Article 8 will generally occur in the company's home country, when the bribery offence itself may have been committed in another country, and this can fill gaps in the effective reach of the Convention.

Article 9. Mutual Legal Assistance:

30. Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance.

Re paragraph 1:

31. Within the framework of paragraph 1 of Article 9, Parties should, upon request, facilitate or encourage the presence or availability of persons, including persons in custody, who consent to assist in investigations or participate in proceedings. Parties should take measures to be able, in appropriate cases, to transfer temporarily such a person in custody to a Party requesting it and to credit time in custody in the requesting Party to the transferred person's sentence in the requested Party. The Parties wishing to use this mechanism should also take measures to be able, as a requesting Party, to keep a transferred person in custody and return this person without necessity of extradition proceedings.

Re paragraph 2:

32. Paragraph 2 addresses the issue of identity of norms in the concept of dual criminality. Parties with statutes as diverse as a statute prohibiting the bribery of agents generally and a statute directed specifically at bribery of foreign public officials should be able to co-operate fully regarding cases whose facts fall within the scope of the offences described in this Convention.

Article 10. Extradition

Re paragraph 2:

33. A Party may consider this Convention to be a legal basis for extradition if, for one or more categories of cases falling within this Convention, it requires an extradition treaty. For example, a country may consider it a basis for extradition of its nationals if it requires an extradition treaty for that category but does not require one for extradition of non-nationals.

Article 12. Monitoring and Follow-up:

34. The current terms of reference of the OECD Working Group on Bribery which are relevant to monitoring and follow-up are set out in Section VIII of the 1997 OECD Recommendation. They provide for:

- i) receipt of notifications and other information submitted to it by the [participating] countries;

- ii) regular reviews of steps taken by [participating] countries to implement the Recommendation and to make proposals, as appropriate, to assist [participating] countries in its implementation; these reviews will be based on the following complementary systems:
 - a system of self evaluation, where [participating] countries' responses on the basis of a questionnaire will provide a basis for assessing the implementation of the Recommendation;
 - a system of mutual evaluation, where each [participating] country will be examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of the progress of the [participating] country in implementing the Recommendation.
- iii) examination of specific issues relating to bribery in international business transactions;
- ...
- v) provision of regular information to the public on its work and activities and on implementation of the Recommendation.

35. The costs of monitoring and follow-up will, for OECD Members, be handled through the normal OECD budget process. For Non-Members of the OECD, the current rules create an equivalent system of cost sharing, which is described in the Resolution of the Council Concerning Fees for Regular Observer Countries and Non-Member Full Participants in OECD Subsidiary Bodies, C(96)223/FINAL.

36. The follow-up of any aspect of the Convention which is not also follow-up of the 1997 OECD Recommendation or any other instrument accepted by all the participants in the OECD Working Group on Bribery will be carried out by the Parties to the Convention and, as appropriate, the participants party to another, corresponding instrument.

Article 13. Signature and Accession:

37. The Convention will be open to Non-Members which become full participants in the OECD Working Group on Bribery in International Business Transactions. Full participation by Non-Members in this Working Group is encouraged and arranged under simple procedures. Accordingly, the requirement of full participation in the Working Group, which follows from the relationship of the Convention to other aspects of the fight against bribery in international business, should not be seen as an obstacle by countries wishing to participate in that fight. The Council of the OECD has appealed to Non-Members to adhere to the 1997 OECD Recommendation and to participate in

any institutional follow-up or implementation mechanism, i.e., in the Working Group. The current procedures regarding full participation by Non-Members in the Working Group may be found in the Resolution of the Council concerning the Participation of Non-Member Economies in the Work of Subsidiary Bodies of the Organisation, C(96)64/REV1/FINAL. In addition to accepting the Revised Recommendation of the Council on Combating Bribery, a full participant also accepts the Recommendation on the Tax Deductibility of Bribes of Foreign Public Officials, adopted on 11 April 1996, C(96)27/FINAL.

**RECOMMENDATION OF THE COUNCIL FOR FURTHER COMBATING
BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL
BUSINESS TRANSACTIONS**

Adopted by the Council on 26 November 2009

THE COUNCIL,

Having regard to Articles 3, 5a) and 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 21 November 1997 (hereinafter “the OECD Anti-Bribery Convention”);

Having regard to the Revised Recommendation of the Council on Bribery in International Business Transactions of 23 May 1997 [C(97)123/FINAL] (hereinafter “the 1997 Revised Recommendation”) to which the present Recommendation succeeds;

Having regard to the Recommendation of the Council on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions of 25 May 2009 [C(2009)64], the Recommendation of the Council on Bribery and Officially Supported Export Credits of 14 December 2006 [C(2006)163], the Recommendation of the Development Assistance Committee on Anti-corruption Proposals for Bilateral Aid Procurement of 7 May 1996 [DCD/DAC(96)11/FINAL], and the OECD Guidelines for Multinational Enterprises of 27 June 2000 [C(2000)96/REV1];

Considering the progress which has been made in the implementation of the OECD Anti-Bribery Convention and the 1997 Revised Recommendation and reaffirming the continuing importance of the OECD Anti-Bribery Convention and the Commentaries to the Convention;

Considering that bribery of foreign public officials is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns, undermining good governance and sustainable economic development, and distorting international competitive conditions;

Considering that all countries share a responsibility to combat bribery of foreign public officials in international business transactions;

Reiterating the importance of the vigorous and comprehensive implementation of the OECD Anti-Bribery Convention, particularly in relation to enforcement, as reaffirmed in the Statement on a Shared Commitment to Fight Against Foreign Bribery, adopted by Ministers of the Parties to the OECD Anti-Bribery Convention on 21 November 2007, the Policy Statement on Bribery in International Business Transactions, adopted by the Working Group on Bribery on 19 June 2009, and the Conclusions adopted by the OECD Council Meeting at Ministerial Level on 25 June 2009 [C/MIN(2009)5/FINAL];

Recognising that the OECD Anti-Bribery Convention and the United Nations Convention against Corruption (UNCAC) are mutually supporting and complementary, and that ratification and implementation of the UNCAC supports a comprehensive approach to combating the bribery of foreign public officials in international business transactions;

Welcoming other developments which further advance international understanding and co-operation regarding bribery in international business transactions, including actions of the Council of Europe, the European Union and the Organisation of American States;

Welcoming the efforts of companies, business organisations and trade unions as well as other non-governmental organisations to combat bribery;

Recognising that achieving progress in this field requires not only efforts on a national level but also multilateral co-operation, as well as rigorous and systematic monitoring and follow-up;

General

I. **NOTES** that the present Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions shall apply to OECD Member countries and other countries party to the OECD Anti-Bribery Convention (hereinafter "Member countries").

II. **RECOMMENDS** that Member countries continue taking effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions.

III. **RECOMMENDS** that each Member country take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine the following areas:

i) awareness-raising initiatives in the public and private sector for the purpose of preventing and detecting foreign bribery;

ii) criminal laws and their application, in accordance with the OECD Anti-Bribery Convention, as well as sections IV, V, VI and VII, and the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, as set out in Annex I to this Recommendation;

iii) tax legislation, regulations and practice, to eliminate any indirect support of foreign bribery, in accordance with the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions, and section VIII of this Recommendation;

iv) provisions and measures to ensure the reporting of foreign bribery, in accordance with section IX of this Recommendation;

v) company and business accounting, external audit, as well as internal control, ethics, and compliance requirements and practices, in accordance with section X of this Recommendation;

vi) laws and regulations on banks and other financial institutions to ensure that adequate records would be kept and made available for inspection and investigation;

vii) public subsidies, licences, public procurement contracts, contracts funded by official development assistance, officially supported export credits, or other public advantages, so that advantages could be denied as a sanction for bribery in appropriate cases, and in accordance with sections XI and XII of this Recommendation;

viii) civil, commercial, and administrative laws and regulations, to combat foreign bribery;

ix) international co-operation in investigations and other legal proceedings, in accordance with section XIII of this Recommendation.

Criminalisation of Bribery of Foreign Public Officials

IV. **RECOMMENDS**, in order to ensure the vigorous and comprehensive implementation of the OECD Anti-Bribery Convention, that Member countries should take fully into account the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, set forth in Annex I hereto, which is an integral part of this Recommendation.

V. **RECOMMENDS** that Member countries undertake to periodically review their laws implementing the OECD Anti-Bribery Convention and their approach to enforcement in order to effectively combat international bribery of foreign public officials.

VI. **RECOMMENDS**, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should:

i) undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;

ii) encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records.

VII. **URGES** all countries to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of small facilitation payments.

Tax Deductibility

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”;

ii) support the monitoring carried out by the Committee on Fiscal Affairs as provided under the 2009 Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

Reporting Foreign Bribery

IX. **RECOMMENDS** that Member countries should ensure that:

i) easily accessible channels are in place for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities, in accordance with their legal principles;

ii) appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery of foreign public officials in international business transactions detected in the course of their work, in accordance with their legal principles;

iii) appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions.

Accounting Requirements, External Audit, and Internal Controls, Ethics and Compliance

X. **RECOMMENDS** that Member countries take the steps necessary, taking into account where appropriate the individual circumstances of a company, including its size, type, legal structure and geographical and industrial sector of operation, so that laws, rules or practices with respect to accounting requirements, external audits, and internal controls, ethics and compliance are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business, according to their jurisdictional and other basic legal principles.

A. Adequate accounting requirements

i) Member countries shall, in accordance with Article 8 of the OECD Anti-Bribery Convention, take such measures as may be necessary, within the framework of their laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing

standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery;

ii) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities;

iii) Member countries shall, in accordance with Article 8 of the OECD Anti-Bribery Convention, 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.

B. Independent External Audit

i) Member countries should consider whether requirements on companies to submit to external audit are adequate;

ii) Member countries and professional associations should maintain adequate standards to ensure the independence of external auditors which permits them to provide an objective assessment of company accounts, financial statements and internal controls;

iii) Member countries should require the external auditor who discovers indications of a suspected act of bribery of a foreign public official to report this discovery to management and, as appropriate, to corporate monitoring bodies;

iv) Member countries should encourage companies that receive reports of suspected acts of bribery of foreign public officials from an external auditor to actively and effectively respond to such reports;

v) Member countries should consider requiring the external auditor to report suspected acts of bribery of foreign public officials to competent authorities independent of the company, such as law enforcement or regulatory authorities, and for those countries that permit such reporting, ensure that auditors making such reports reasonably and in good faith are protected from legal action.

C. Internal controls, ethics, and compliance

Member countries should encourage:

i) companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance, set forth in Annex II hereto, which is an integral part of this Recommendation;

ii) business organisations and professional associations, where appropriate, in their efforts to encourage and assist companies, in particular small and medium size enterprises, in developing internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance, set forth in Annex II hereto;

iii) company management to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those which contribute to preventing and detecting bribery;

iv) the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards;

v) companies to provide channels for communication by, and protection of, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for persons willing to report breaches of the law or professional standards or ethics occurring within the company in good faith and on reasonable grounds, and should encourage companies to take appropriate action based on such reporting;

vi) their government agencies to consider, where international business transactions are concerned, and as appropriate, internal controls, ethics, and compliance programmes or measures in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits.

Public Advantages, including Public Procurement

XI. RECOMMENDS:

i) 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 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;¹

ii) In accordance with the 1996 Development Assistance Committee Recommendation on Anti-corruption Proposals for Bilateral Aid Procurement, Member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts;²

iii) Member countries should support the efforts of the OECD Public Governance Committee to implement the principles contained in the 2008 Council Recommendation on Enhancing Integrity in Public Procurement [C(2008)105], as well as work on transparency in public procurement in other international governmental organisations such as the United Nations, the World Trade Organisation (WTO), and the European Union, and are encouraged to adhere to relevant international standards such as the WTO Agreement on Government Procurement.

Officially Supported Export Credits

XII. RECOMMENDS:

i) Countries Party to the OECD Anti-Bribery Convention that are not OECD Members should adhere to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits;

ii) Member countries should support the efforts of the OECD Working Party on Export Credits and Credit Guarantees to implement and monitor implementation of the principles contained in the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits.

International Co-operation

¹ Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence.

² This paragraph summarises the DAC recommendation, which is addressed to DAC members only, and addresses it to all OECD Members and eventually non-member countries which adhere to the Recommendation.

XIII. **RECOMMENDS** that Member countries, in order to effectively combat bribery of foreign public officials in international business transactions, in conformity with their jurisdictional and other basic legal principles, take the following actions:

i) consult and otherwise co-operate with competent authorities in other countries, and, as appropriate, international and regional law enforcement networks involving Member and non-Member countries, in investigations and other legal proceedings concerning specific cases of such bribery, through such means as the sharing of information spontaneously or upon request, provision of evidence, extradition, and the identification, freezing, seizure, confiscation and recovery of the proceeds of bribery of foreign public officials;

ii) seriously investigate credible allegations of bribery of foreign public officials referred to them by international governmental organisations, such as the international and regional development banks;

iii) make full use of existing agreements and arrangements for mutual international legal assistance and where necessary, enter into new agreements or arrangements for this purpose;

iv) ensure that their national laws afford an adequate basis for this co-operation, in particular in accordance with Articles 9 and 10 of the OECD Anti-Bribery Convention;

v) consider ways for facilitating mutual legal assistance between Member countries and with non-Member countries in cases of such bribery, including regarding evidentiary thresholds for some Member countries.

Follow-up and institutional arrangements

XIV. **INSTRUCTS** the Working Group on Bribery in International Business Transactions, to carry out an ongoing programme of systematic follow-up to monitor and promote the full implementation of the OECD Anti-Bribery Convention and this Recommendation, in co-operation with the Committee for Fiscal Affairs, the Development Assistance Committee, the Investment Committee, the Public Governance Committee, the Working Party on Export Credits and Credit Guarantees, and other OECD bodies, as appropriate. This follow-up will include, in particular:

i) continuation of the programme of rigorous and systematic monitoring of Member countries' implementation of the OECD Anti-Bribery Convention and this Recommendation to promote the full implementation of these instruments, including through an ongoing system of mutual evaluation, where each Member country is examined in turn by the Working Group on Bribery, on the basis of a report which will provide an objective assessment of

the progress of the Member country in implementing the OECD Anti-Bribery Convention and this Recommendation, and which will be made publicly available;

ii) receipt of notifications and other information submitted to it by the Member countries concerning the authorities which serve as channels of communication for the purpose of facilitating international cooperation on implementation of the OECD Anti-Bribery Convention and this Recommendation;

iii) regular reporting on steps taken by Member countries to implement the OECD Anti-Bribery Convention and this Recommendation, including non-confidential information on investigations and prosecutions;

iv) voluntary meetings of law enforcement officials directly involved in the enforcement of the foreign bribery offence to discuss best practices and horizontal issues relating to the investigation and prosecution of the bribery of foreign public officials;

v) examination of prevailing trends, issues and counter-measures in foreign bribery, including through work on typologies and cross-country studies;

vi) development of tools and mechanisms to increase the impact of monitoring and follow-up, and awareness raising, including through the voluntary submission and public reporting of non-confidential enforcement data, research, and bribery threat assessments;

vii) provision of regular information to the public on its work and activities and on implementation of the OECD Anti-Bribery Convention and this Recommendation.

XV. **NOTES** the obligation of Member countries to co-operate closely in this follow-up programme, pursuant to Article 3 of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960, and Article 12 of the OECD Anti-Bribery Convention.

Co-operation with non Members

XVI. **APPEALS** to non-Member countries that are major exporters and foreign investors to adhere to and implement the OECD Anti-Bribery Convention and this Recommendation and participate in any institutional follow-up or implementation mechanism.

XVII. **INSTRUCTS** the Working Group on Bribery in International Business Transactions to provide a forum for consultations with countries which

have not yet adhered, in order to promote wider participation in the OECD Anti-Bribery Convention and this Recommendation, and their follow-up.

Relations with international governmental and non-governmental organisations

XVIII. **INVITES** the Working Group on Bribery in International Business Transactions, to consult and co-operate with the international organisations and international financial institutions active in the fight against bribery of foreign public officials in international business transactions, and consult regularly with the non-governmental organisations and representatives of the business community active in this field.

ANNEX I
GOOD PRACTICE GUIDANCE ON IMPLEMENTING SPECIFIC ARTICLES
OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC
OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

Having regard to the findings and recommendations of the Working Group on Bribery in International Business Transactions in its programme of systematic follow-up to monitor and promote the full implementation of the OECD Convention on Combating Bribery in International Business Transactions (the OECD Anti Bribery Convention), as required by Article 12 of the Convention, good practice on fully implementing specific articles of the Convention has evolved as follows:

A) Article 1 of the OECD Anti Bribery Convention: The Offence of Bribery of Foreign Public Officials

Article 1 of the OECD Anti-Bribery Convention should be implemented in such a way that it does not provide a defence or exception where the foreign public official solicits a bribe.

Member countries should undertake public awareness-raising actions and provide specific written guidance to the public on their laws implementing the OECD Anti-Bribery Convention and the Commentaries to the Convention.

Member countries should provide information and training as appropriate to their public officials posted abroad on their laws implementing the OECD Anti-Bribery Convention, so that such personnel can provide basic information to their companies in foreign countries and appropriate assistance when such companies are confronted with bribe solicitations.

B) Article 2 of the OECD Anti Bribery Convention: Responsibility of Legal Persons

Member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted.

Member countries' systems for the liability of legal persons for the bribery of foreign public officials in international business transactions should take one of the following approaches:

- a. the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons; or
- b. the approach is functionally equivalent to the foregoing even though it is only triggered by acts of persons with the highest level managerial authority, because the following cases are covered:
 - A person with the highest level managerial authority offers, promises or gives a bribe to a foreign public official;
 - A person with the highest level managerial authority directs or authorises a lower level person to offer, promise or give a bribe to a foreign public official; and
 - A person with the highest level managerial authority fails to prevent a lower level person from bribing a foreign public official, including through a failure to supervise him or her or through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

C) *Responsibility for Bribery through Intermediaries*

Member countries should ensure that, in accordance with Article 1 of the OECD Anti Bribery Convention, and the principle of functional equivalence in Commentary 2 to the OECD Anti-Bribery Convention, a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf.

D) *Article 5: Enforcement*

Member countries should be vigilant in ensuring that investigations and prosecutions of the bribery of foreign public officials in international business transactions are not influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved, in compliance with Article 5 of the OECD Anti Bribery Convention.

Complaints of bribery of foreign public officials should be seriously investigated and credible allegations assessed by competent authorities.

Member countries should provide adequate resources to law enforcement authorities so as to permit effective investigation and prosecution of bribery of foreign public officials in international business transactions, taking into consideration Commentary 27 to the OECD Anti Bribery Convention.

ANNEX II GOOD PRACTICE GUIDANCE ON INTERNAL CONTROLS, ETHICS, AND COMPLIANCE

This Good Practice Guidance acknowledges the relevant findings and recommendations of the Working Group on Bribery in International Business Transactions in its programme of systematic follow-up to monitor and promote the full implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereinafter “OECD Anti-Bribery Convention”); contributions from the private sector and civil society through the Working Group on Bribery’s consultations on its review of the OECD anti bribery instruments; and previous work on preventing and detecting bribery in business by the OECD as well as international private sector and civil society bodies.

Introduction

This Good Practice Guidance (hereinafter “Guidance”) is addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programmes or measures for preventing and detecting the bribery of foreign public officials in their international business transactions (hereinafter “foreign bribery”), and to business associations and professional organisations, which play an essential role in assisting companies in these efforts. It recognises that to be effective, such programmes or measures should be interconnected with a company’s overall compliance framework. It is intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery.

This Guidance is flexible, and intended to be adapted by companies, in particular small and medium sized enterprises (hereinafter “SMEs”), according to their individual circumstances, including their size, type, legal structure and geographical and industrial sector of operation, as well as the jurisdictional and other basic legal principles under which they operate.

A) Good Practice Guidance for Companies

Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in

particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures.

Companies should consider, *inter alia*, the following good practices for ensuring effective internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery:

1. strong, explicit and visible support and commitment from senior management to the company's internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery;
2. a clearly articulated and visible corporate policy prohibiting foreign bribery;
3. compliance with this prohibition and the related internal controls, ethics, and compliance programmes or measures is the duty of individuals at all levels of the company;
4. oversight of ethics and compliance programmes or measures regarding foreign bribery, including the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority;
5. ethics and compliance programmes or measures designed to prevent and detect foreign bribery, applicable to all directors, officers, and employees, and applicable to all entities over which a company has effective control, including subsidiaries, on, *inter alia*, the following areas:
 - i. gifts;
 - ii. hospitality, entertainment and expenses;
 - iii. customer travel;
 - iv. political contributions;
 - v. charitable donations and sponsorships;
 - vi. facilitation payments; and
 - vii. solicitation and extortion;

6. ethics and compliance programmes or measures designed to prevent and detect foreign bribery applicable, where appropriate and subject to contractual arrangements, to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia, and joint venture partners (hereinafter “business partners”), including, *inter alia*, the following essential elements:
 - i. properly documented risk-based due diligence pertaining to the hiring, as well as the appropriate and regular oversight of business partners;
 - ii. informing business partners of the company’s commitment to abiding by laws on the prohibitions against foreign bribery, and of the company’s ethics and compliance programme or measures for preventing and detecting such bribery; and
 - iii. seeking a reciprocal commitment from business partners.
7. a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of foreign bribery or hiding such bribery;
8. measures designed to ensure periodic communication, and documented training for all levels of the company, on the company’s ethics and compliance programme or measures regarding foreign bribery, as well as, where appropriate, for subsidiaries;
9. appropriate measures to encourage and provide positive support for the observance of ethics and compliance programmes or measures against foreign bribery, at all levels of the company;
10. appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company’s ethics and compliance programme or measures regarding foreign bribery;
11. effective measures for:
 - i. providing guidance and advice to directors, officers, employees, and, where appropriate, business partners, on complying with the company’s ethics and compliance programme or measures, including when they need urgent advice on difficult situations in foreign jurisdictions;
 - ii. internal and where possible confidential reporting by, and protection of, directors, officers, employees, and, where appropriate, business

partners, not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for directors, officers, employees, and, where appropriate, business partners, willing to report breaches of the law or professional standards or ethics occurring within the company, in good faith and on reasonable grounds; and

- iii. undertaking appropriate action in response to such reports;
12. periodic reviews of the ethics and compliance programmes or measures, designed to evaluate and improve their effectiveness in preventing and detecting foreign bribery, taking into account relevant developments in the field, and evolving international and industry standards.

B) Actions by Business Associations and Professional Organisations

Business associations and professional organisations may play an essential role in assisting companies, in particular SMEs, in the development of effective internal control, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. Such support may include, *inter alia*:

- 1. dissemination of information on foreign bribery issues, including regarding relevant developments in international and regional forums, and access to relevant databases;
- 2. making training, prevention, due diligence, and other compliance tools available;
- 3. general advice on carrying out due diligence; and
- 4. general advice and support on resisting extortion and solicitation.

**RECOMMENDATION OF THE COUNCIL ON TAX MEASURES FOR
FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS**

Adopted by the Council on 25 May 2009

THE COUNCIL,

Having regard to Article 5, b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

Having regard to the Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials [C(96)27/FINAL] (hereafter the "1996 Recommendation"), to which the present Recommendation succeeds;

Having regard to the Revised Recommendation of the Council on Bribery in International Business Transactions [C(97)123/FINAL];

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions to which all OECD Members and eight non-Members are Parties, as at the time of the adoption of this Recommendation (hereafter the "OECD Anti-Bribery Convention");

Having regard to the Commentaries on the OECD Anti-Bribery Convention;

Having regard to the Recommendation of the Council concerning the Model Tax Convention on Income and on Capital (hereafter the "OECD Model Tax Convention") [C(97)195/FINAL];

Welcoming the United Nations Convention Against Corruption to which most parties to the OECD Anti-Bribery Convention are State parties, and in particular Article 12.4, which provides that "Each State Party shall disallow the tax deductibility of expenses that constitute bribes"

Considering that the 1996 Recommendation has had an important impact both within and outside the OECD, and that significant steps have already been taken by governments, the private sector and non-governmental agencies to combat the bribery of foreign public officials, but that the problem still continues to be widespread and necessitates strengthened measures;

Considering that explicit legislation disallowing the deductibility of bribes increases the overall awareness within the business community of the illegality of bribery of foreign public officials and within the tax administration of the need to detect and disallow deductions for payments of bribes to foreign public officials; and

Considering that sharing information by tax authorities with other law enforcement authorities can be an important tool for the detection and investigation of transnational bribery offences;

On the proposal of the Committee on Fiscal Affairs and the Investment Committee;

I. RECOMMENDS that:

- i. 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. Such disallowance should be established by law or by any other binding means which carry the same effect, such as:

- prohibiting tax deductibility of bribes to foreign public officials;
- prohibiting tax deductibility of all bribes or expenditures incurred in furtherance of corrupt conduct in contravention of the criminal law or any other laws of the Party to the Anti-Bribery Convention.

Denial of tax deductibility is not contingent on the opening of an investigation by the law enforcement authorities or of court proceedings.

- ii. Each Member country and other Party to the OECD Anti-Bribery Convention review, on an ongoing basis, the effectiveness of its legal, administrative and policy frameworks as well as practices for disallowing tax deductibility of bribes to foreign public officials. These reviews should assess whether adequate guidance is provided to taxpayers and tax authorities as to the types of expenses that are deemed to constitute bribes to foreign public officials, and whether such bribes are effectively detected by tax authorities.
- iii. Member countries and other Parties to the OECD Anti-Bribery Convention consider to include in their bilateral tax treaties, the optional language of paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention, which allows "*the sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities on certain high priority matters (e.g. to combat*

money laundering, corruption, terrorism financing)" and reads as follows:

"Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use."

II. further RECOMMENDS Member countries and other Parties to the OECD Anti-Bribery Convention, in accordance with their legal systems, to 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.

III. INVITES non-Members that are not yet Parties to the OECD Anti-Bribery Convention to apply this Recommendation to the fullest extent possible.

IV. INSTRUCTS the Committee on Fiscal Affairs together with the Investment Committee to monitor the implementation of the Recommendation and to promote it in the context of contacts with non-Members and to report to Council as appropriate.

RECOMMENDATION OF THE COUNCIL ON BRIBERY AND OFFICIALLY SUPPORTED EXPORT CREDITS

Adopted by the Council on 14 December 2006

THE COUNCIL

Having regard to the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960 and, in particular, to Article 5 b) thereof;

Having regard to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (hereafter the Anti-Bribery Convention) and to the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions [C(97)123] (hereafter the 1997 Recommendation);

Having regard to the 2006 Action Statement on Bribery and Officially Supported Export Credits;

Considering that combating bribery in international business transactions is a priority issue and that the Working Party on Export Credits and Credit Guarantees is the appropriate forum to ensure the implementation of the Anti-Bribery Convention and the 1997 Recommendation in respect of international business transactions benefiting from official export credit support;

Noting that the application by Members of the measures set out in Paragraph 2 in no way mitigates the responsibility of the exporter and other parties in transactions benefiting from official support to: (i) comply with all applicable laws and regulations, including national provisions for combating bribery of foreign public officials in international business transactions, or (ii) provide the proper description of the transaction for which support is sought, including all relevant payments;

On the proposal of the Working Party on Export Credits and Credit Guarantees (hereafter the ECG):

1. **RECOMMENDS** that Members take appropriate measures to deter bribery¹ in international business transactions benefiting from official export credit support, in accordance with the legal system of each member country and the character of the export credit² and not prejudicial to the rights of any parties not responsible for the illegal payments, including:

- a) Informing exporters and, where appropriate, applicants, requesting support about the legal consequences of bribery in international business transactions under its national legal system including its national laws prohibiting such bribery and encouraging them to develop, apply and document appropriate management control systems that combat bribery.
- b) Requiring exporters and, where appropriate, applicants, to provide an undertaking/ declaration that neither they, nor anyone acting on their behalf, such as agents, have been engaged or will engage in bribery in the transaction.
- c) Verifying and noting whether exporters and, where appropriate, applicants, are listed on the publicly available debarment lists of the following international financial institutions: World Bank Group, African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development and the Inter-American Development Bank³.
- d) Requiring exporters and, where appropriate, applicants, to disclose whether they or anyone acting on their behalf in connection with the transaction are currently under charge in a national court or, within a five-year period preceding the application, have been convicted in a national court or been subject to equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country.
- e) Requiring that exporters and, where appropriate, applicants, disclose, upon demand: (i) the identity of persons acting on their behalf in connection with the transaction, and (ii) the amount and purpose of commissions and fees paid, or agreed to be paid, to such persons.
- f) Undertaking enhanced due diligence if: (i) the exporters and, where appropriate, applicants, appear on the publicly available debarment lists of

¹ As defined in the Anti-Bribery Convention.

² It is recognised that not all export credit products are conducive to a uniform implementation of the Recommendation. For example, on short-term whole-turnover and multi-buyer export credit insurance policies, Members may, where appropriate, implement the Recommendation on an export credit policy basis rather than on a transaction basis.

³ The implementation of paragraph 1 c) may take the form of a self-declaration from exporters and, where appropriate, applicants, as to whether they are listed on the publicly available IFI debarment lists.

one of the international financial institutions referred to in c) above; or (ii) the Member becomes aware that exporters and, where appropriate, applicants or anyone acting on their behalf in connection with the transaction, are currently under charge in a national court, or, within a five-year period preceding the application, has been convicted in a national court or been subject to equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country; or (iii) the Member has reason to believe that bribery may be involved in the transaction.

- g) In case of a conviction in a national court or equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country within a five-year period, verifying whether appropriate internal corrective and preventive measures⁴ have been taken, maintained and documented.
- h) Developing and implementing procedures to disclose to their law enforcement authorities instances of credible evidence⁵ of bribery in the case that such procedures do not already exist.
- i) If there is credible evidence at any time that bribery was involved in the award or execution of the export contract, informing their law enforcement authorities promptly.
- j) If, before credit, cover or other support has been approved, there is credible evidence that bribery was involved in the award or execution of the export contract, suspending approval of the application during the enhanced due diligence process. If the enhanced due diligence concludes that bribery was involved in the transaction, the Member shall refuse to approve credit, cover or other support.
- k) If, after credit, cover or other support has been approved bribery has been proven, taking appropriate action, such as denial of payment, indemnification, or refund of sums provided.

2. INSTRUCTS the ECG to continue to:

- a) Exchange information on how the Anti-Bribery Convention and 1997 Recommendation are being taken into account in national official export credit systems.

⁴ Such measures could include: replacing individuals that have been involved in bribery, adopting an appropriate anti-bribery management control systems, submitting to an audit and making the results of such periodic audits available.

⁵ For the purpose of this Recommendation, credible evidence is evidence of a quality which, after critical analysis, a court would find to be reasonable and sufficient grounds upon which to base a decision on the issue if no contrary evidence were submitted.

- b) Collate and map the information exchanged with a view to considering further steps to combat bribery in respect of officially supported export credits.
 - c) Exchange views with appropriate stakeholders.
- 3. INVITES** the Parties to the Anti-Bribery Convention which are not OECD Members to adhere to this Recommendation.

**RECOMMENDATION OF THE DEVELOPMENT ASSISTANCE COMMITTEE
ON ANTI-CORRUPTION PROPOSALS FOR BILATERAL AID
PROCUREMENT**

Recommendation endorsed by the Development Assistance Committee at its
High Level Meeting, 6-7 May 1996

1. DAC Members share a concern with corruption:
 - It undermines good governance.
 - It wastes scarce resources for development, whether from aid or from other public or private sources, with far-reaching effects throughout the economy.
 - It undermines the credibility of, and public support for, development co-operation and devalues the reputation and efforts of all who work to support sustainable development.
 - It compromises open and transparent competition on the basis of price and quality.
2. The DAC, therefore, firmly endorses the need to combat corruption through effective prohibition, co-ordinated in a multilateral framework to ensure harmonised implementation. Other meaningful and concrete measures are also required to ensure transparency, accountability and probity in the use of public resources in DAC Members' own systems and those of partner countries, who themselves are increasingly concerned with this problem.
3. In its efforts to curb corruption, the DAC recognises that opportunities may exist for corrupt practices in aid-funded procurement. Together with other efforts to deal with corruption, the DAC hereby expresses its firm intention to work to eliminate corruption in aid procurement.
4. **The DAC therefore recommends that Members introduce or require anti-corruption provisions governing bilateral aid-funded procurement. This work should be carried out in co-ordination with other work being undertaken in the OECD and elsewhere to eliminate corruption, and in collaboration with recipient countries. The DAC also recommends that its**

Members work to ensure the proper implementation of their anti-corruption provisions and that they draw to the attention of the international development institutions to which they belong, the importance of proper implementation of the anti-corruption provisions envisaged in their rules of operation.

5. The DAC will follow up on the effect given to this Recommendation within one year.

6. DAC Members will work closely with development partners to combat corruption in all development co-operation efforts.

OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES – SECTION VII

VII. Combating Bribery, Bribe Solicitation and Extortion

Enterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage. Enterprises should also resist the solicitation of bribes and extortion. In particular, enterprises should:

1. Not offer, promise or give undue pecuniary or other advantage to public officials or the employees of business partners. Likewise, enterprises should not request, agree to or accept undue pecuniary or other advantage from public officials or the employees of business partners. Enterprises should not use third parties such as agents and other intermediaries, consultants, representatives, distributors, consortia, contractors and suppliers and joint venture partners for channelling undue pecuniary or other advantages to public officials, or to employees of their business partners or to their relatives or business associates
2. Develop and adopt adequate internal controls, ethics and compliance programmes or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation). These internal controls, ethics and compliance programmes or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of bribing or hiding bribery. Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise's internal controls, ethics and compliance programme or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation and extortion.
3. Prohibit or discourage, in internal company controls, ethics and compliance programmes or measures, the use of small facilitation payments, which are generally illegal in the countries where they are

made, and, when such payments are made, accurately record these in books and financial records.

4. Ensure, taking into account the particular bribery risks facing the enterprise, properly documented due diligence pertaining to the hiring, as well as the appropriate and regular oversight of agents, and that remuneration of agents is appropriate and for legitimate services only. Where relevant, a list of agents engaged in connection with transactions with public bodies and State-owned enterprises should be kept and made available to competent authorities, in accordance with applicable public disclosure requirements.
5. Enhance the transparency of their activities in the fight against bribery, bribe solicitation and extortion. Measures could include making public commitments against bribery, bribe solicitation and extortion, and disclosing the management systems and the internal controls, ethics and compliance programmes or measures adopted by enterprises in order to honour these commitments. Enterprises should also foster openness and dialogue with the public so as to promote its awareness of and co-operation with the fight against bribery, bribe solicitation and extortion.
6. Promote employee awareness of and compliance with company policies and internal controls, ethics and compliance programmes or measures against bribery, bribe solicitation and extortion through appropriate dissemination of such policies, programmes or measures and through training programmes and disciplinary procedures.
7. Not make illegal contributions to candidates for public office or to political parties or to other political organisations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management.

Commentary on Combating Bribery, Bribe Solicitation and Extortion

Bribery and corruption are damaging to democratic institutions and the governance of corporations. They discourage investment and distort international competitive conditions. In particular, the diversion of funds through corrupt practices undermines attempts by citizens to achieve higher levels of economic, social and environmental welfare, and it impedes efforts to reduce poverty. Enterprises have an important role to play in combating these practices.

Propriety, integrity and transparency in both the public and private domains are key concepts in the fight against bribery, bribe solicitation and extortion. The business community, non-governmental organisations, governments and inter-governmental organisations have all co-operated to strengthen public support for anticorruption measures and to enhance transparency and public awareness of the problems of corruption and bribery. The adoption of appropriate corporate

governance practices is also an essential element in fostering a culture of ethics within enterprises.

The *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the *Anti-Bribery Convention*) entered into force on 15 February 1999. The *Anti-Bribery Convention*, along with the *2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions* (the *2009 Anti-Bribery Recommendation*), the *2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, and the *2006 Recommendation on Bribery and Officially Supported Export Credits*, are the core OECD instruments which target the offering side of the bribery transaction. They aim to eliminate the “supply” of bribes to foreign public officials, with each country taking responsibility for the activities of its enterprises and what happens within its own jurisdiction.¹ A programme of rigorous and systematic monitoring of countries’ implementation of the *Anti-Bribery Convention* has been established to promote the full implementation of these instruments.

The *2009 Anti-Bribery Recommendation* recommends in particular that governments encourage their enterprises to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the *Good Practice Guidance on Internal Controls, Ethics and Compliance*, included as Annex II to the *2009 Anti-Bribery Recommendation*. This *Good Practice Guidance* is addressed to enterprises as well as business organisations and professional associations, and highlights good practices for ensuring the effectiveness of their internal controls, ethics and compliance programmes or measures to prevent and detect foreign bribery.

Private sector and civil society initiatives also help enterprises to design and implement effective anti-bribery policies.

The *United Nations Convention against Corruption (UNCAC)*, which entered into force on 14 December 2005, sets out a broad range of standards, measures and rules to fight corruption. Under the *UNCAC*, States Parties are required to

¹. For the purposes of the Convention, a “bribe” is defined as an “...offer, promise, or giv(ing) of 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”. The Commentaries to the Convention (paragraph 9) clarify that “small ‘facilitation’ payments do not constitute payments made ‘to obtain or retain business or other improper advantage’ within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. ...”.

prohibit their officials from receiving bribes and their enterprises from bribing domestic public officials, as well as foreign public officials and officials of public international organisations, and to consider disallowing private to private bribery. The *UNCAC* and the *Anti-Bribery Convention* are mutually supporting and complementary.

To address the demand side of bribery, good governance practices are important elements to prevent enterprises from being asked to pay bribes. Enterprises can support collective action initiatives on resisting bribe solicitation and extortion. Both home and host governments should assist enterprises confronted with solicitation of bribes and with extortion. The *Good Practice Guidance on Specific Articles of the Convention* in Annex I of the *2009 Anti-Bribery Recommendation* states that the *Anti-Bribery Convention* should be implemented in such a way that it does not provide a defence or exception where the foreign public official solicits a bribe. Furthermore, the *UNCAC* requires the criminalisation of bribe solicitation by domestic public officials.