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Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

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**English - Or. English**

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
INVESTMENT COMMITTEE**

**Working Group on Bribery in International Business Transactions**

**SUMMARY RECORD OF THE MEETING HELD ON 14-17 OCTOBER 2008**

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## 1. Adoption of the Agenda

### *The Working Group:*

- Heard the Chair state that the Working Group is at a crucial moment. During this meeting, it will address: the review of the OECD anti-bribery instruments, the design and implementation of the Phase 3 evaluation procedure, and some serious monitoring issues. The Working Group's reputation is on the line, and the challenge is to show that the Group's standards are applied consistently and strictly.
- Approved the agenda [DAF/INV/BR/A(2008)3/REV1].

## 2. Summary Record of the Meeting held on 17-20 June 2008

### *The Working Group:*

- Heard the UK request two clarifications regarding section 5h), the oral follow-up report to the written Phase 2 follow-up report on the United Kingdom.
  - Page 13, paragraph 5: Asked that the last sentence read: "The principal **difficulty** related to establishing territorial jurisdiction which as necessary because the facts pre-dated the entry into force of the 2001 legislation creating nationality jurisdiction."
  - Page 14, paragraph 2: Asked that the third sentence read: "As a result, foreign bribery cases would **continue** to be funded out of the general SFO budget."
- Heard United States ask for a clarification regarding section 10. Preparations for the 2009-2010 Programme of Work and Budget, to state: "Per the Working Group, the **initial** Phase 3 cycle will take four years, requiring a large number of reviews each year (eight to ten), once the monitoring mechanism has been approved in 2009." (page 20, section 10, paragraph 1)
- Heard Sweden note that the discussion on section 11. Examination of Israel's request to accede to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (page 22) was more complicated than the summary record reflected.
- Heard Argentina request that the summary record be amended to provide a more balanced account of the country reviews to include both positive and negative findings.

## 3. Election of the Members of the Management Group

### *The Working Group:*

- Heard the Chair announce that two places are open on the Management Committee after the resignation of two members. Three individuals have been nominated for these two spots: Mr. Stefano Dambruoso (Italy), Mr. Hyunsoo Yun (Korea) and Dr. Anke Raloff (Germany).
- Heard the Chair state that OECD procedures for electing leaders of subsidiary bodies have recently changed. All groups are now required to elect their Chairs and other officers for the following year at the last meeting of each year. The full Management Group will therefore be reconstituted in December. For this reason, he suggested waiting until the overall election in

December to fill the two open spots on the Management Committee, and postponing all elections until that time.

- Heard the Chair add that the current size of the Management Group is six to eight members, but it can be enlarged if the Working Group wishes to do so.
- Heard Italy agree that it would be best to postpone the election until December.

#### **4. Report on the Management Group Meeting**

*The Working Group:*

- Heard the Chair's report on the meeting of the MG on 13 October; noted that the MG agenda mirrored the WGB's plenary agenda; was reminded that the MG's main concern is to clarify procedural concerns, i.e. how to address a matter in plenary, substantive questions are all debated in plenary.
- Heard that the MG had briefly spoken about: the vacant posts in the MG and the applicable election in light of the Organisation's new rules of procedures to designate the various MG members; how to organise the "review of the instruments" during the two sessions scheduled for this item during the plenary; the next steps related to the development of the "Phase 3 procedure"; the meeting of prosecutors; and accession topics.
- Noted that the MG also considered the country reviews scheduled for the plenary; heard that the MG was pleased to note that a Chinese delegation would attend the December plenary; was concerned by the relations with the Asian Development Bank which are not fully satisfactory and need to be improved; and finally agreed that cooperation and coordination with UNODC are essential, also in view of the next meeting of the State Parties to UNCAC, and that the Secretariat should continue to transmit the WGB's monitoring information to UNODC.

#### **5. Steps by State Parties to implement and enforce the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and to implement the 1997 Revised Recommendation: *Tour de Table discussion***

*The Working Group:*

- Heard the Chairman urge countries to use the voluntary rules for providing notifications and written information on cases and legislative and other steps taken to implement the Convention in advance of the meeting. In particular, heard the Chair invite countries requesting deletions from the matrix to do it in writing well in advance of the December 2008 meeting.
- Heard the Chairman reiterate his invitation to delegations to consult and present proposals to improve the Tour de Table at the next meeting.
- Heard most delegations provide information on cases, including investigations and/or prosecutions, under the foreign bribery offence.
- Noted reports by Parties on steps taken for the implementation of the Convention and of recommendations made in country reviews; and noted in particular that 12 Parties had provided an update for the "steps taken" document. Noted Italy's comment on the letter by the Chairman of 18 July 2008.

- Noted the absence of two countries during the discussion of this agenda item (Iceland and New Zealand).

## **6. Self- and Mutual Evaluation of Implementation of the Convention and the 1997 Revised Recommendation**

### ***a) Phase 2 bis Review: United Kingdom***

#### *The Working Group:*

- Noted the preliminary Phase 2 bis report on the United Kingdom reviewing the “Application of the Convention and 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions” [DAF/INV/BR(2008)23].
- Noted the comments and questions about the preliminary report presented by the lead examiners and other delegations, and the responses and comments by the United Kingdom delegation.
- In light of serious concerns about United Kingdom’s implementation of the Convention, requested the UK to provide a written report on legislative progress at each Working Group meeting; reserved the right to carry out follow-up visits to the UK as the Group deems appropriate and/or to take further appropriate action after it considers the reports or any on-site visits; and welcomed the invitation of the UK government to discuss the content of the Law Commission report soon after its publication in order to fully apprise the UK of the views of the Working Group before a draft bill is submitted for pre-legislative scrutiny. The Working Group also highlighted some positive aspects in the UK’s fight against foreign bribery including the allocation of significant financial resources and nation-wide jurisdiction to a specialised unit of the City of London Police for foreign bribery investigations. The Group noted the UK’s first conviction of an individual for foreign bribery and its recent anti-corruption strategy to improve and strengthen the UK’s law and structures to tackle foreign bribery.
- Agreed on the specific recommendations to the UK, including that it reforms its foreign bribery law and establish effective corporate liability for bribery urgently and as a matter of political priority.
- Adopted the final version of the report including the recommendations; agreed on the text of the executive summary of the report and of the press release to be published with the report on the OECD website; and decided to hold a press conference to announce the publication of the report.

### ***b) Post Phase 2 follow-up written report: the Netherlands***

#### *The Working Group:*

- Noted the written follow-up report to the Phase 2 Report by the Netherlands [DAF/INV/BR(2008)24].
- Was informed by the Netherlands of the steps taken to implement the Phase 2 recommendations of the Working Group on Bribery. The Netherlands has increased its efforts to raise awareness and improve training on the foreign bribery offence among the relevant Dutch public agencies, as well as within the private sector and professional bodies. Guidance has also been provided to certain sectors of the Dutch public service on reporting suspicions of foreign bribery, and plans are underway to pass legislation making such reporting obligatory. Significant steps have also

been taken to improve the investigation and prosecution of foreign bribery in the Netherlands, notably through the publication of a new Directive on Instructions for the Investigation and Prosecution of Corruption Offences Public Office Committed Abroad in June 2007, and a significant increase in the budget allocated to law enforcement authorities for dealing with foreign bribery investigations. Nevertheless, some confusion remains in the Directive, in particular with respect to certain factors to be taken into account when prosecuting foreign bribery cases, and the Working Group welcomed the Netherlands' expressed intention to remedy this promptly.

- Heard Ireland and Norway, as lead examiners for the Netherlands' Phase 2 evaluation, express their views on the Netherlands' implementation of the Phase 2 recommendations; also heard the views of other Working Group members and of the Chair, as well as further explanations from the Netherlands.
- Concluded that the Netherlands have satisfactorily implemented Recommendations 1(a), 1(b), 2(b), 2(c), 2(d), 2(e), 3(a), 3(b), 3(c), 3(e), 4, 5(b), and 6; that the Netherlands have partially implemented Recommendations 2(a) and 7; and that the Netherlands have not implemented Recommendations 3(f) and 5(a). Further concluded that Recommendation 3(d) should be dropped as it is no longer relevant. The follow-up issues identified in Phase 2 will continue to be monitored.
- Agreed to prepare, in accordance with its usual practice, a written summary of the Working Group conclusions for publication in conjunction with the Netherlands' follow-up report.
- Heard the Netherlands agree to report orally within one year (i.e. by October 2009) to the Working Group on the implementation of the four Phase 2 recommendations that the Group considers not yet satisfactorily implemented.

***c) Post Phase 2 follow-up oral report: Chile***

*The Working Group:*

- Noted the room document prepared by Chile on "Steps taken by Chile to implement the Working Group's priority recommendations of Phase 2".
- Heard Chile reaffirm its commitment to the Convention and explain the legislative process for Bills pending in Parliament:
  - A Bill, contained in the Bulletin N° 5725-07, deals with the offence, sanctions and jurisdiction for foreign bribery. It was introduced in Parliament in March 2008. On 30 September 2008, the Chamber of Deputies unanimously approved the Bill. It should now be discussed in the Senate and the government expects its enactment by June 2009.
  - A Bill contained Bulletin N° 4426-07, presented by the Ministry of Finance, contains provisions principally directed to combat money laundering. Provisions on criminal ancillary liability of legal persons in case of foreign bribery, among other crimes, were added to this Bill. Discussions have been interrupted by the government, which is working to first secure consensus among parliamentarians.

- Agreed with the Chairman to focus on the discussions on these very important Bills relevant to the planned Phase 1 bis evaluation of Chile, and not discuss the implementation of Phase 2 recommendations.
- Expressed concern that the Bill proposing ancillary liability of legal persons might not meet the standard of the Convention. Chile indicated that parliamentary consensus could be reached on a proposal of ancillary liability but not a proposal of full criminal liability, since Chilean juridical literature (doctrine) and parliamentarians follow the principle “*societas delinquere no potest*”.
- Discussed the possibility of introducing administrative liability of legal persons for bribery acts in Chile. Chile informed the Working Group that the Ministry of Justice was examining whether it could adapt the administrative liability system operating in other countries such as Italy or Spain to Chile’s system, but added that introducing administrative sanctions would require passing a law.
- Noted that since the Bills are not yet approved, the Phase 1 bis evaluation planned for the October 2008 meeting could not take place. Particularly, noted that the postponement of the Phase 1 bis evaluation will impact on the timetable for accession to the OECD.
- Agreed that Chile report on the contents and timetable of the Bills in March 2009.

***d) Oral follow-up reports to written Phase 2 follow-up reports: Belgium, Greece, Hungary and***

***Sweden***

**Belgium**

*The Working Group:*

- Noted the presentation by Belgium on the Working Group’s conclusions on Belgium written follow-up report on the implementation of the Phase 2 recommendations, requiring an oral report, one year after the approval of the written follow-up report, on the implementation of the following key Recommendations: 1(a) and 1(b).
- Further noted the informal written version of the oral report supplied by Belgium for the information of the Group.
- With regard to Recommendation 1(a) [develop efforts to raise awareness of the offense of bribery of public officials within the administration and in the quasi-governmental sector]
  - Heard Belgium indicate that a circular on the ethical Framework for the federal civil service was published in the “Moniteur belge” on 17 August 2007. It reminded delegates that, because the Belgian legislation makes no distinction between domestic bribery and bribery of foreign public officials, Belgium does not deem it necessary to emphasize corruption of foreign public officials in particular. Rather, the intention is to raise awareness in the public sector with regard to the danger of corruption overall.
  - With regard to the Framework for professional conduct, heard Belgium explain that the Office of Administrative Ethics and Professional Conduct of the Federal Department of the Budget and Management Control (SPF Budget) has organized training sessions for senior civil servants. Additionally, the Minister of Justice has sent a letter to colleagues in the Budget Office asking them to put on the agenda of the Council of Ministers the dissemination

of this Framework for professional conduct to all Federal Public Services. The Framework has also been published in “Fedra” (magazine of the federal civil servants), where the managers of the Office of Administrative Ethics and Professional Conduct have been interviewed and have provided explanations. The Heads of the Belgian delegations to the OECD Working Group on Bribery and GRECO have made presentations to the Office of Administrative Ethics and Professional Conduct on the recommendations of both organisations in terms of awareness raising and prevention. The magazine “Just News” published an article on the OECD and GRECO evaluations.

- With regard to regional civil servants, heard Belgium report that the Office of Administrative Ethics and Professional Conduct is currently working to develop an inter-federal Platform. This project will be presented to the Secretary of State for the Budget through the Office’s Action Plan. This Platform will gather the managers of Integrity and Professional conduct at the Federal, Regional and Community levels in order to ensure a more uniform approach to these issues.
- With regard to Recommendation 1(b) [increase private sector awareness of the offense of bribery of foreign public officials]
  - Heard Belgium’s explanations that it followed the example of a number of countries who have issued a brochure on the prevention of corruption within the corporate sector. The contents of this brochure, which are almost final, have been prepared by the Inter-departmental Working Party responsible for following up the OECD Phase 2 recommendations. It describes the general problem of corruption as well as national and international initiatives, and refers to a number of possible warnings and actions for the corporate sector. The Minister of Justice has given his agreement in principle to the dissemination of such a brochure. He will consult with the representatives of the private sector and the Minister for Enterprises and Simplification for their opinion.
- Heard Argentina and Switzerland – lead examiners for Belgium – express the view that, although the political situation in Belgium since 2007 may explain the delay in implementing these recommendations, they are concerned with the little progress which has been achieved by Belgium since 2005. They expressed the hope that the new government will implement all the recommendations of the WGB as a matter of priority.
- A discussion took place on whether the oral follow up report of Belgium should focus only on the key recommendations identified by the WGB in its post Phase 2 follow-up written report on Belgium. It was mentioned that the report was adopted by the Group on 10 January 2008 whereas the revised methodology for the follow-up reports was approved at the June 2008 meeting.
- Heard the Chair conclude that the procedure for the oral follow-up report of Belgium is clear insofar as the group identified, in its follow-up written report, the two key recommendations on which Belgium should report to the Group.
- Heard Argentina and Switzerland support the idea that Belgium should submit a detailed oral report, in June 2009, on all the outstanding recommendations – and not only on those identified as the key recommendations by the Working Group. Heard exchanges of views on this issue and heard the Chair remind delegates that the guidelines for Phase 2 reviews provide that, in principle, the examined country may be required to provide additional reports on its progress in implementing the WGB’s recommendations. Heard the Chair underline, however, that the Group is not in a position to indefinitely perform a follow-up of the same kind.

- Heard the Chair's conclusions that the Group acknowledges that there are deficiencies in the implementation of the recommendations that have not been addressed by Belgium and that this will give rise to a re-examination by the Group in the context of the Phase 3 review.

## Greece

### *The Working Group:*

- Noted Greece's presentation on the Working Group's conclusions on Greece's written follow-up report on the implementation of the Phase 2 recommendations which required an oral report on the implementation of Recommendations 1(b), 1(d), 1(e), 5(a), 6(b), 6(c), 6(d) and 7.
- Concerning Recommendations 1(b) and 1(d), heard that Hellenic Aid prepared new Guidelines for development co-operation missions. The Guidelines specifically refer to the foreign bribery offence and will be used to evaluate applications received in 2008-2009. The regular training seminars for Hellenic Aid personnel have addressed foreign bribery. All Hellenic Aid contracts now specifically require a contractor to abstain from acts contrary to the OECD Convention and Greece's foreign bribery law.
- Concerning Recommendation 1(e), heard that Greece sent an urgent circular on 14 May 2008 to staff of all Greek overseas embassies, consulates and permanent representations. The communication pointed out that foreign bribery is a crime under the Criminal Code. It also instructed the staff to report forthwith any foreign bribery allegation concerning a Greek company or individual to the competent authorities in Greece.
- Concerning Recommendation 5(a), heard Greece reiterate that conflicts of competence between the Internal Affairs Division of the Hellenic Police (IAD) and the Special Investigations Service (SIS) remain virtually impossible. No such conflicts have occurred. Nevertheless, the two bodies have taken measures to enhance co-ordination. These include participation in the Strategic Committee for co-ordinating anti-money laundering activities, and devising a new system to recover assets (including those relating to foreign bribery).
- Concerning Recommendation 6(b), heard that Greece has enacted a new Article 2(4) in Law 2656/1998 (Greece's foreign bribery implementing legislation). The new provision expressly excludes the application of Article 30(2), Code of Penal Procedure from foreign bribery cases. Article 30(2) allows the Minister of Justice to postpone or suspend prosecutions of "political offences" and "offences through which the international relations of the state may be disturbed".
- Concerning Recommendation 6(c), heard Greece explain that the limitation period for foreign bribery offences could not be tested because there have been no actual cases. Nevertheless, the Ministry of Justice has continued to monitor any delays in the administration of justice. It has also taken additional measures to reduce delay in the administrative courts.
- Concerning Recommendations 6(d) and 7, heard Greece explain that the concerns expressed in the recommendations are theoretical given the absence of foreign bribery cases. Nevertheless, effective and dissuasive administrative fines have been imposed against legal persons for money laundering and other financial crimes. As well, the liability of legal persons may be triggered by the actions of a director or any other person making decisions for a particular action or omission. Finally, Greek authorities have interpreted the concept of "the value of a contract" to encompass all possible advantages to an offender, including tax benefits. The Special Investigations Service

has reiterated this rule in several directives on the technical aspects of imposing administrative fines.

- Heard Ireland and Portugal, the lead examining countries, express their appreciation of Greece's efforts to implement the recommendations. They note that the implementation of Recommendations 6(c), 6(d) and 7 could not be assessed in the absence of actual foreign bribery cases.
- Heard the Chair remark that the Working Group, in accordance with its usual procedure, would note Greece's presentation in the Summary Record of the meeting but would not make formal conclusions on the implementation of the recommendations on which Greece reported during the meeting.

## Hungary

### *The Working Group:*

- Noted the room document submitted by Hungary in support of its oral report, which was circulated to all Working Group members one day prior to the meeting.
- Heard the presentation by Hungary in response to the Summary and Conclusions of the Working Group on the implementation by Hungary of its Phase 2 recommendations, which required Hungary to report within one year on implementation of Recommendations 1(c), 1(d), 1(e), 2(a), 2(b), 2(c), 2(d), 3(c), 3(d), 3(e), 3(f), 4(a), 4(b), 5(b) and 6(b). Hungary explained that, given that a written document had been circulated to the Working Group, it would focus its oral presentation on the most important steps taken to implement the Working Group recommendations.
- With regard to Phase 2 recommendations relating to the liability of legal persons, heard Hungary report that it had amended its law on the criminal liability of legal persons in July 2008, in response to the WGB and GRECO recommendations. The Explanatory Memorandum to the legislation specifically refers to and explains the Working Group recommendations. The new law eliminates the requirement of a financial advantage or financial gain as a necessary factor for establishing the liability of a legal person; the definition has been amended to cover any pecuniary or non pecuniary advantage. In addition, the range of persons whose acts can trigger the liability of the legal person has been broadened to include all persons who may qualify as chief executive.
- Regarding this latter point concerning persons whose acts may trigger the liability of legal persons, heard France ask how broadly defined the notion of "chief executive" is under Hungarian law, and whether it would be limited to the financial director or chief executive officer of the company or whether it would also include operational managers at the local level. Heard Hungary respond that local managers are indeed also covered, as clarified in the new amended legislation.
- Heard Hungary report that significant progress had also been made in respect of related accounting offences. In particular, legislative measures were adopted to ensure greater transparency in the keeping of accounts, notably by disallowing the transfer of funds in cash above a certain limit (which allows for improved traceability).

- Also heard Hungary report that the Criminal Procedure Act had been amended in 2006 to comply with the Working Group recommendations regarding the statute of limitations, and the legislation on immunities.
- Heard the lead examiners, Austria and Denmark, welcome the written document submitted by Hungary as a background to its oral report, and express the view that much progress appears to have been made by Hungary, in particular with regard to the legislation on the criminal liability of legal persons.

## Sweden

### *The Working Group:*

- Noted the presentation by the Swedish delegation in conformity with the conclusions by the Working Group on Sweden written follow-up report on the implementation of the Phase 2 recommendations, requiring an oral report, one year after the approval of the written follow-up report, on the implementation of the following recommendations: Recommendations 5(a) and (b), and Recommendation 8.
- With regard to Recommendations 5(a) and 5(b) on obligations for auditors to report bribery offences, heard Sweden report that, subsequent to the explanations given during the written follow-up report, the inquiry/law commission set up by the Government to consider the recommendations has delivered its report. It suggests that an auditor be required to report suspected bribery to the Board and to competent authorities regardless of who within the company structure has committed the offence. A Government Bill is expected to be submitted to Parliament in June 2009 at the latest.
- With regard to Recommendation 8 on the definition of foreign public officials, heard Sweden report that the Swedish Ministry of Justice has finalised its analysis of the anti-corruption legislation as a whole and determined that there is a need to look over the entire legislation. Terms of references of a new inquiry/law commission will be decided by the Government in December 2008 and will include the definition of foreign public officials viz. officials of a public international organisation of which Sweden is not a member.
- Heard Poland, as lead examiner for Phase 2, express its satisfaction concerning the ongoing legislative process and its hope that the Phase 2 recommendations will be fully implemented soon.

## **7. Review of the OECD Anti-Bribery Instruments**

### ***a) Working Group's Instruments***

#### *The Working Group:*

- Noted the following document prepared by the Secretariat: "Review of the OECD Anti-Bribery Instruments: Proposing Actions following the Public Consultation" DAF/INV/BR/WD(2008)14.
- Heard the Chair summarize the contents and purpose of the note by the Secretariat, and the limitations of the interpretive value of the data collected by the Secretariat in the "Table of Proposed Actions" sent to delegations on 31 July 2008.

- Also heard the Chair explain that the note enables the Working Group to quickly see the top issues of concern for the Working Group as a whole, and differentiate between issues potentially requiring work on the OECD anti-bribery instruments, as opposed to potential future work outside the context of the review of the instruments, including Phase 3 horizontal issues. The list of issues for potential work on the instruments is relatively short. Some issues are identified as possibly requiring further consultation internally with other parts of the OECD, such as export credit and public procurement, and others with external experts, such as reporting by auditors.
  - Heard the Chair propose to go through the issues in the note in the order that they appear, beginning with the Criminalization issues followed by the Detection and Prevention Issues. The Chair also proposed to focus on the issues that ranked overall in the top ten (out of 75), with some flexibility. For instance, although reporting by auditors did not rank high, it might warrant a closer look partly in view of the current financial crisis and consequent renewed interest in governance and transparency.
  - Heard general comments from the following delegations regarding the value of the data in the Note by the Secretariat: Canada, Sweden, Argentina, United States, Japan and Switzerland.
  - Noted the Chair's summary of the general comments, including the agreement of the Working Group to discuss the document, and the need to be cautious about amending the Convention through the back-door.
  - Agreed that a discussion on the legal form of any clarification language would be held at the December plenary on the basis of advice provided by the Legal Directorate. Also agreed that the purpose of the current discussion would be to decide which issues to keep "alive" for discussion in December, and that the Secretariat would prepare another Note for that discussion which proposes options for carrying the issues forward, including alternative, clarification language where appropriate. The Secretariat should come up with the least prescriptive language possible for each issue.
  - Agreed that the Secretariat would show the draft note to the Management Group before issuing it on OLIS, and that the Management Group would review the format and procedural aspects of the note but not the substantive content.
  - Also agreed that the note would be issued on OLIS three weeks before the December plenary.
- i. Criminalization Issues to Maintain

#### Article 1 of Convention

- On bribing through intermediaries, agreed that for the time being it is preferable to look at this issue through a typology exercise, and come back to it later if deemed appropriate following that exercise. The Working Group agrees to look at how far responsibility on the part of a person or company who is represented by an intermediary extends for the act of an intermediary who bribes a foreign public official.
- On bribes that benefit third parties, noted the Chair's comment that the Convention clearly covers benefits transferred directly to third parties with the agreement or knowledge of the foreign public official, but that some delegations might desire clarification that this situation is covered.

- On small facilitation payments, agreed to keep the issue for now. The Group noted the Chair's comment that the business community believes that further discussion on this issue is necessary, due to compliance problems. Noted the United States' suggestion that a study to illustrate to the group what small facilitation payments are would be useful. Also heard the Chair state that in Parties where such payments are not prohibited, we need to ensure that they cannot be misused.
- Regarding solicitation, agreed that this issue should be retained for now given that it would be useful to state explicitly that solicitation is not a defense to foreign bribery.
- Concerning private-to-private bribery, noted Germany's intervention that ensuring a level playing field demands that the Group looks at this issue further, in particular due to privatization programs. Also noted the Netherlands' intervention that ICC has been promoting this issue for some time; the UK supported this point as well. The Group therefore agreed to keep this issue on the table for now, but noted strong reservations from a number of delegations.

#### Article 2

- Agreed that there is not a lot of interest in changing Article 2 of the Convention on the liability of legal persons. However, the Group has developed standards on more "effective" liability of legal persons, including the level of the directing mind that triggers liability and the need to not link such liability to a conviction of a natural person. The Group therefore agreed to keep this issue on the table for the purpose of providing guidance on effectiveness that could, for instance, be included in a good practice manual.

#### Article 3

- Noted that the quantification of the proceeds of bribery might benefit from workshops and further study.

#### Article 4

- Agreed that covering the acts of foreign subsidiaries needs to be considered further in the context of Article 4.1 on territorial jurisdiction. For instance, to what extent can the acts of subsidiaries be considered the acts of agents?
- Concerning nationality jurisdiction, heard the Chair state that Article 4.2 establishes an indirect obligation to establish nationality jurisdiction, but that the interpretation of this obligation is not clear. Also heard Canada state that if the rule is to be that Parties are required to establish nationality jurisdiction, the Convention should be changed to make this clear because this represents a change in the standard.

#### Article 5

- Noted that the Legal Directorate has been requested by the Chair to prepare a paper for the December plenary on the issue of prosecutorial discretion and national security, including different options and the pros and cons of each option.

#### Article 6

- Agreed to look at the statute of limitations, including the criteria for its commencement, suspension and termination, as a possible horizontal issue in Phase 3.

Article 9

- Agreed that there is clear interest in retaining the issue of mutual legal assistance for the purpose of providing guidance or independent study, as well as for consideration in prosecutors' meetings.

Monitoring and Follow-Up

- Agreed that the need to coordinate with other international and regional monitoring mechanisms ranks very high and that such coordination should be part of the Phase 3 procedure and also might extend beyond monitoring.
- ii. Non-Criminalization Issues to Maintain (other than tax treatment of bribes)
- Agreed to keep the following non-criminalization issues open for the time being:
    - Clarification that public officials should be obligated to report foreign bribery to the appropriate authorities;
    - Effective whistleblower protections in public and private sectors;
    - Internal company controls and external audit – i.e. continue dialogue with auditing and accounting profession concerning what the 1997 Revised Recommendation should say about reporting (e.g. in framework of seminar);
    - Public procurement, because 1997 Revised Recommendation is outdated in this respect, but treatment of issue should be combined with ODA;
    - Whether non-Members should be bound by the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits;
  - Concerning cooperation with other major economic players, which was ranked overall by the delegations as the most important issue in the Table of Proposed Actions, agreed that need to consider further full implications of intermediate forms of association, such as an instruction from Council in a Recommendation to form associations with major economies through for instance MOUs and modified review mechanism.
  - Also heard the Chair state that a recommendation to ratify the UNCAC might be included in an instrument.

***b) Review of the 1996 joint Recommendation***

*The Working Group:*

- Noted the “Draft Recommendation on Tax measures for further combating Bribery of Foreign Public Officials in International Business Transactions” [CTPA/CFA/WP8/NOE2(2007)7/REV2/ADD2/REV1/CONF].
- Heard the Chair indicate that this document is submitted for discussion to both the Working Group on Bribery and the Working Party on Tax Avoidance and Evasion (Working Party 8),

which will meet next week and will resume its discussion on the basis of the input provided by the WGB.

- On the procedure followed so far, heard the Secretariat remind delegates that this document had already been circulated to the WGB in July, together with the “Table of proposed actions on the review of the Instruments”. It is the result of previous discussions in the Secretariat and in the Working Party 8, where the process was initiated; written comments were provided by three WGB delegations and seven WP8 delegations (See Annex C to the “Table of proposed actions on the review of the Instruments”).
- On the substance of the Recommendation, heard the Secretariat summarize the main clarifications introduced by the new draft Recommendation.
- On the next steps of the procedure, further heard the Secretariat indicate that the draft Recommendation – once reviewed by the WP8 – will be: i) re-submitted to the WGB in December; ii) forwarded to both the Committee of Fiscal Affairs and the Investment Committee for endorsement; and iii) transmitted to Council, hopefully in February, as a joint proposal, as was the 1996 Recommendation, which it would succeed.
- Heard the presentation by a representative of the Centre for Tax Policy and Administration, which highlighted the work of Working Party 8 on drafting this new Council Recommendation.
- On the explicit disallowance of the tax deductibility of bribes to foreign public officials and on the issue of small facilitation payments [see I “Recommends” (i)], heard the United States and Estonia express the opinion that facilitation payments should not be included in the draft Recommendation, as they are not in the scope of the Anti-Bribery Convention. Heard Canada suggest that this issue should be discussed by the tax experts in the WP8. Heard Switzerland and the United Kingdom express the view that it is premature to discuss this issue whereas discussions on facilitation payments per se have not yet started in the context of the review of the Instruments. Heard France, the Netherlands, Sweden and Poland express their support for an explicit disallowance of the tax deductibility of bribes, including facilitation payments. Heard the Chair express the view that, even if small facilitation payments are not covered by the definition of “bribes” within the meaning of the Convention, they are nevertheless generally illegal in the country where they are perpetrated and that, as a matter of principle, illegal acts should not give rise to tax deductibility.
- On the reporting of suspicions of serious crimes by tax authorities (see II. “Further Recommends”), heard the Chair express the concern that using “Further recommends” – in contrast with “Recommends” used in I. – may be interpreted as introducing a recommendation of a lesser level. Heard Switzerland express the view that reporting suspicions does not pertain to the job of the tax authorities. Canada also expressed some reservations on this reporting requirement and suggested that it should be discussed by the tax experts in the context of the WP8. Heard the Chair remind of the expectation, routinely expressed by the WGB, that tax authorities report suspicions of bribes and emphasize that the WGB should not fall behind its own standards. Heard Germany, Sweden, the United Kingdom and France support the idea, underlying the role that tax authorities can play in detecting and reporting suspicions. Further heard France and the United Kingdom suggest that the requirement to “establish an effective system” may appear too cumbersome with regard to the goal and suggested that establishing “effective procedures” would be more appropriate.

- Heard the Chair provide a summary of the discussion, to be conveyed to the WP8, noting that: a) The WGB is in agreement with the requirement of an explicit non-tax deductibility of bribes, but that it is not in a position to provide the WP8 with a final answer on the issue of facilitation payments ; and that b) there were two views on the reporting requirement by tax authorities: one that this is a tax issue which should be discussed by the WP8, and the other that this reporting requirement by the tax authorities would be a useful tool if deemed feasible by the tax experts.

## **8. Phase 3 evaluation procedure**

### *The Working Group:*

- Noted the document DAF/INV/BR(2008)25 for discussion.
- Heard the Secretariat explain that the document is the first part of a single comprehensive document on the Phase 3 evaluation procedure. Further heard the Secretariat explain that the document would be again considered at the meeting of the WGB in December 2008, with revisions in tracked changes mode and an additional part on follow-up to Phase 3 evaluations and Phase 3bis evaluations.
- Heard the United States observe that the document fails to explain that the Phase 3 mechanism is a permanent cycle of peer reviews. Heard Sweden question whether the Group was in a position to bind itself to an eternal system of monitoring, observing that the Group may wish to change the content and modalities of the mechanism in the future. Heard the Chair observe that the Group could always amend the procedure or content prior to the commencement of each cycle. Heard the United States recognise that the Group could modify such matters in the future, but that the document should reflect the existence of a common agreement that monitoring by peer review is a permanent feature, and that adoption of the Phase 3 mechanism as a permanent cycle of reviews could avoid the need for the Group to take a new decision on that point each time that a cycle of reviews is complete. Heard the Chair suggest that the document be amended to reflect the suggestion of the United States, with an express recognition that modification of procedure and content will be possible.
- Heard the Chair observe that the document should primarily stand as a procedural order and should thus aim to be concise and prescriptive in its language, avoiding descriptive passages. Heard the Chair further suggest that the document should better emphasise the obligations of Parties to be subject to evaluation under Phase 3 as the means of evaluation adopted under Article 12.
- Concerning the principle of equal treatment, heard Poland agree that the third sentence in the statement of this principle (paragraph 7 of the document) was important to address the development of the Group's findings over time and the consequent inconsistent treatment between countries evaluated at the beginning of Phase 2 as opposed to those evaluated towards the end of that cycle. Further heard Poland ask how this would be achieved. Heard the Secretariat and Chair explain that this will be an important issue for the Secretariat, and lead examiners, which will need to be considered separately for each evaluation in Phase 3.
- Concerning the principle of cost-effectiveness (paragraph 7 of the document), heard the United States suggest that this should also reflect the notion of efficiency and streamlining since the aim of Phase 3 is to achieve a more focussed, less resource-intensive, and less burdensome mechanism.

- Heard Switzerland emphasise that the Phase 3 mechanism can only commence once the content of the Phase 3 questionnaire is finalised and ask that this be reflected in the document.
- Concerning the establishment of a calendar for the evaluation of Parties under Phase 3 (paragraph 12 of the document), heard Poland as if more details could be included on how this calendar is to be established. Heard the Chair observe that the Group should not bind itself too much in this area. Heard the Secretariat advise that a draft calendar will be presented and discussed during the December 2008 plenary of the WGB.
- Concerning the discussion of on-going cases and other confidential matters during the course of an on-site visit (paragraph 21 of the document), heard Canada express concerns about the second sentence of the paragraph, calling for an evaluated country to endeavour to provide information to the evaluation team “to the greatest extent possible”. Heard Canada state that while it is clear that information which cannot be provided as a matter of law could not be required of an evaluated country, there might be further information which would be prejudicial for an evaluated country to disclose (such as information which is sensitive for operational reasons). Heard the Chair agree that further work is required on the precise language of this part of the text, but that the Group should recognise and be ready to avoid the difficulties it has faced in the Phase 2 examination of some Parties. Also heard Germany request that the words “pertaining to on-going cases” be deleted from the penultimate sentence, or amended to include words such as “including information pertaining to on-going cases”, to make it clear that Phase 3 reports will not include any confidential information at all.
- Concerning the availability of the same experts throughout the course of an evaluation (paragraph 23 of the document), heard France request that it be made clear that this occur as far as is possible, since practicalities may prevent the same individuals being available at all stages. Heard the Chair observe that this paragraph states that experts “should” be available throughout an evaluation and that, as is the practice at present, if changes need to be made then such changes will occur.
- Concerning the experience of experts appointed by lead examiners (paragraph 24 of the document), heard Germany and France request that the text after the first sentence be deleted so that appointment of experts is left entirely at the discretion of the lead examining country. Heard the United States agree that the appointment of experts should be at the discretion of lead examiners, but that it is important and useful for lead examiners to know what level of expertise is useful for an evaluation team. Heard the United States and Chair suggest that the language of the paragraph should be rephrased so that lead examiners are asked, in softer language, to achieve the level of expertise identified as a matter of preference.
- Concerning the length of Phase 3 reports (paragraph 38 of the document), heard France agree with the idea that reports should be concise, but suggest that reference to a specific page length for reports should be removed.
- Concerning the ability of delegations to submit questions to the Secretariat and lead examiners in advance of the WGB plenary evaluation of a country (paragraph 42 of the document), heard France suggest that this is undesirable and should be removed. Heard the Chair and Secretariat report that this text is taken from Phase 2 procedural documents, but that it has not been utilised.
- Concerning the conduct of evaluations in the Working Group (part B(5) of the document), heard the Chair express the view that the precise timing of meetings requires flexibility.

- Concerning the responsibilities of an evaluated country during the Working Group's evaluation (paragraph 74 of the document), heard Japan question the value added by the final sentence of that paragraph. Heard the Chair agree that this was unnecessary and should be deleted.
- Concerning the use of a written procedure to approve the summary and conclusions of the WGB following a written follow-up report (paragraph 90 of the document), heard France suggest that a written procedure should be avoided if possible. Heard the Chair suggest that the Secretariat look at alternative options and include these in its revision of the document.
- Concerning the timetable for Phase 3 evaluations (Annex 1 to the document), heard Switzerland suggest that the evaluated country be given eight weeks to respond to the Phase 3 standard questionnaire and supplementary questions, instead of the allocated six weeks. Heard the Chair observe that the Group is seeking to achieve a shorter process than for Phase 2, but that the timetable should be realistic. Heard the Chair suggest that the time for responses to questions be extended to eight weeks, but that the Group take the approach that this is a firm timetable to be strictly complied with. Heard Sweden request that the circulation of the draft report occur three weeks prior to the WGB plenary, rather than two weeks.

## **9. Examination of Israel's request to accede to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions**

### *The Working Group:*

- Noted documents DAF/INV/BR(2008)18/REV 1 (revised report by the Secretariat), DAF/INV/BR(2008)9 (Israel's answers to the accession questionnaire), and DAF/INV/BR(2008)12 (Israel's answers to supplementary questions to the accession questionnaire). Heard the Secretariat provide an overview of its report on Israel's request to accede to the Convention, noting the enactment by Israel of the foreign bribery offence.
- Heard Switzerland ask about the existence of a policy or framework in Israel for the fight against foreign bribery (concerning paragraphs 15 and 16 of the Secretariat report). Heard the Secretariat explain that it understood that the enactment of the foreign bribery offence by Israel brought foreign bribery under the scope of Israel's national plan to fight corruption.
- On the issue of nationality jurisdiction, heard Canada ask why the Secretariat's report assessed nationality jurisdiction to be satisfactory despite the inadequacies listed in paragraph 67 of the report. Heard the Secretariat clarify that nationality jurisdiction was compliant with Article 4(2) of the Convention, but that the matters identified nevertheless raised concerns about whether Israel's nationality jurisdiction was *effective* in the fight against foreign bribery (impacting upon Article 4(4) of the Convention). Further heard the Secretariat note that Israel's basis of jurisdiction pertaining to offences under international treaties to which it is party (as a form of jurisdiction under Article 16 of the Israeli Penal Code) offsets some of the concerns identified in paragraph 67 of the report.
- On the question of the detection and investigation of foreign bribery, heard Sweden ask why the accession questionnaire does not ask about a duty to report domestic or foreign bribery (concerning paragraph 71 of the Secretariat report). Heard the Secretariat explain that this is not specifically addressed in either the accession questionnaire or the Phase 1 questionnaire. Heard the Chair observe that the questionnaires may be out of step with the subsequent development of the Group's standards.

- At the request of the Chair, heard the Secretariat highlight the following additional main aspects of the report (concerning the willingness and ability of Israel to undertake obligations under the Convention):
  - That the principal elements of the foreign bribery offence are broadly in compliance with Article 1 of the Convention. Some aspects required further attention, including acts of complicity by intermediaries (which are subject to criminal liability in respect of “preferential treatment or to practice discrimination”, rather than in the case of a bribe given “to obtain or retain business or other improper advantage”).
  - The principles concerning the liability of legal persons are somewhat vague, with liability following only if this is found to be necessary by the court “in the circumstances” (both advantageous and disadvantageous, depending on the application of these principles).
  - Applicable sanctions appear to be very low, particularly when one has regard to the fact that financial sanctions are the same for legal persons as they are for natural persons. Although there is a power to impose additional financial sanctions under Article 63 of the Israeli Penal Code, this is discretionary and would not apply to a situation where a bribe is offered, or where it is promised or given and no benefit is obtained from the foreign public official (since the discretionary power is only activated where the criminal conduct results in a benefit being obtained). Practically speaking, therefore, if an Israeli company was to offer a bribe to a foreign public official, or promised or gave a bribe without receiving a benefit, the discretion to increase the sanction against the company beyond a maximum fine equivalent to 19,000 EUR would not apply. This was identified as probably the worst feature of Israel’s legislative framework. Heard the Secretariat advise that the Group would need to decide if this was serious enough to block accession to the Convention, or whether the matter could be adequately addressed within Phase 1.
  - Although the forfeiture of a bribe or its proceeds is possible, this is a discretionary power, whereas Article 3(3) of the Convention *requires* seizure and confiscation.
  - An indictment for foreign bribery requires the prior consent of the Attorney General, whose decision can be based on the public interest. The State Attorney’s Guidelines on Considerations for Closing a Case due to Lack of Public Interest appear to be vague on what amounts to “public interest”, particularly as to whether this might include considerations prohibited by Article 5 of the Convention. This is a matter which the Group might be happy to further consider in Phase 1 and 2.
- Heard the Chair note that although its legal framework was not perfect, Israel had enacted a foreign bribery offence. Heard the United States express the view that the Group should not expect perfection and that Israel had demonstrated a willingness and ability to undertake the obligations under the Convention, having regard to its enactment of the offence, and that its drafting of the offence took into account informal feedback provided by the Secretariat (thus suggesting that Israel was prepared to make best efforts). Heard Canada and France support the views expressed by the United States.
- Heard the Chair observe that Israel appeared to be an essential regional economic power in the Middle East.
- Agreed that Israel appeared willing and able to undertake the obligations under the Convention, and that Israel’s membership in the Group and accession to the Convention would be to the

mutual benefit of existing WGB members. Consequently agreed to recommend that Israel be invited to become a full participant in the Working Group on Bribery; and to recommend that Israel be invited to accede to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

## **10. Meeting of Prosecutors**

*The Working Group:*

- Noted the document prepared by the Secretariat titled “Proposals for meetings of Prosecutors” [DAF/INV/BR(2008)26] and heard a short presentation by the Secretariat.
- Acknowledged that discussions in the Working Group could be too theoretical and that meetings of prosecutors could help prosecutors to hold discussions at a practical level, and engage in peer learning.
- Agreed, in principle, to hold regular, informal and voluntary meetings of prosecutors along the parameters developed in the note. The principles of a voluntary participation (§31), and audience adapted to the items for discussions (§§ 23-24, §26) were highlighted. In particular, if a country or person does not wish to discuss a particular issue, this country or person can decide to leave the meeting room or to not participate in the meeting.
- Agreed that meetings of prosecutors should not duplicate efforts made in other forums, and should focus on peer learning and discussions of existing problems.
- Agreed that the informal nature of the meeting prevents prosecutors from taking any decision that could bind the Working Group. Meetings should systematically be followed by discussions with interested Working Group delegates.
- Agreed to organise the next meeting of prosecutors in March or June 2009, depending on the agendas for those Working Group plenaries. Agreed that the main theme will be mutual legal assistance, with the possibility to identify one or two additional topics. The date, agenda and invitations should be circulated sufficiently in advance of the meeting to allow the broadest possible participation.

## **11. Preparation of the typology exercise on intermediaries in foreign bribery**

*The Working Group:*

- Noted the brief intervention by the Secretariat, reminding that in December 2007 the Group decided to engage in a second typology exercise on the role of intermediaries in foreign bribery report on bribery as set out in [DAF/INV/BR(2007)40]; and that the Group decided to postpone the typology exercise due to Group’s very heavy agenda until the second half of 2008.
- Noted the Secretariat’s room document 5 on several outstanding matters; noted delegates’ support for the exercise and its instructions that the typology: 1) be initiated by an Informal Experts’ Meeting on 8 December 2008 at the OECD; 2) be chaired by two persons: one with strong economic knowledge and one with confirmed legal background; 3) be based on the exchange of information and intelligence between Working Group delegates, law enforcement officials and prosecutors with experience in international bribery as well as representatives of observer organisations; 4) build on anonymised case materials relevant under the Convention and

submitted by delegations and experts; 5) also considers input by some selected additional experts, in particular investigators from international institutions and non-Government representatives who would be invited to attend parts of the Informal Expert Meeting to report on compliance methods by business.

- Noted the intervention of the Swiss delegate who recommended that the Secretariat contacts BIAC to seek the latter's involvement; heard that Swiss businesses were very interested in addressing this matter as agents are key economic players in international trade and investments.
- Noted that the OECD Secretariat would draft, based on submitted case materials and the information exchange among experts during the informal December meeting, a draft report; noted that the report would be reviewed by participating experts prior to its presentation to the Working Group at its March 2009 plenary.
- Heard the Chair's instruction to the Secretariat to engage in the necessary planning in order to initiate the typology exercise on the role of intermediaries in foreign bribery on 8 December 2008.

## **12. Global Relations Activities/Recent or Upcoming International Anti-Corruption Initiatives**

### *Report on the Latin-American Regional Anti-Corruption Conference: Commitment and Co-operation in the Fight Against Transnational Bribery*

- Heard Mr. Agustín García-López, Ambassador of Mexico to the OECD, report on the Latin-American Regional Anti-Corruption Conference, which took place in Mexico City on 29-30 September 2008. Three Mexican Ministries – Public Function, Foreign Affairs, and Attorney General – worked collaboratively to organise this meeting, which was jointly sponsored by the OECD and supported by the Organisation of American States and the Inter-American Development Bank. The conference was a success by all standards: it met its objectives, and welcomed more than 800 participants from 22 countries. Representatives of all the key international organisations leading the fight against corruption – OECD, the UN, GRECO, the OAS, etc. – also participated. There was wide media coverage throughout Latin America. Attendees showed commitment to strengthening regional and international co-operation to fight corruption, particularly MLA. Mexico also took the opportunity of the conference to announce its plans to put in place a system at all levels of government to ensure compliance with the various international anti-corruption instruments. Finally, Ambassador García-López thanked Chair Mark Pieth for attending the meeting and the OECD Secretariat for its support.

### *Report on OECD Anti-Corruption Division activities with China*

- Heard the Secretariat report on next steps following a visit by several members of the Anti-Corruption Division to China in May. A Chinese delegation will participate as Observers in the December Working Group plenary meeting. An anti-corruption seminar in China in 2009 has been proposed; although the contacts at the Chinese Ministry of Supervision have not confirmed yet such a meeting in their work programme for next year. Mr. Zihua Xu, Deputy Director-General in the Chinese Ministry of Supervision, attended the recent Latin-American Regional Anti-Corruption Conference, where he made a presentation about detection of bribery in China. Finally, the OECD Secretariat will be meeting with a group of 20 Chinese government officials on 14 November 2008; representatives from divisions throughout the Organisation involved in the fight against corruption will meet with this delegation to discuss their work.

- Heard the United States welcome involvement of other delegations in finding opportunities to provide training and technical assistance in China.

### **13. Reports by International Organisations**

*The Working Group:*

- Heard Ms. Elsa Gopala-Krishnan, Associate Crime Prevention Officer in the Division for Treaty Affairs at the UNODC, provide an update on the United Nations Convention against Corruption (UNCAC). There are currently 126 Parties to the UNCAC, but 9 members of the Working Group have not yet ratified it. UNODC and OECD are co-operating in the fight against corruption; for example, Patrick Moulette, Head of the OECD Anti-Corruption Division, made a presentation at the recent UNODC meeting about creating a monitoring mechanism for UNCAC. The Conference of State Parties to UNCAC will meet in Doha in 2009; the two priorities for this meeting are:
  - Gathering information on UNCAC implementation. All signatories are supposed to submit self-assessment reports to identify technical assistance needs (particularly legislative questions).
  - Working on the UNCAC review mechanism. The goal is to avoid duplication of efforts with existing monitoring systems. Several countries are currently participating in a voluntary pilot programme. Formal consultations will take place on 5-6 November, and the working group on the review mechanism will meet in mid-December.
- Heard the Chair state that the Working Group recognises that all organisations must develop appropriate monitoring processes for their anti-corruption instruments. He said that the OECD has an economic approach to anti-corruption issues, while the UN views these issues from a different perspective.

### **14. Any other business**

*The Working Group:*

- Heard the Chair propose a course of action for the election of the Management Group. He noted that there were several candidates for the two open spots on the Management Group, and also that OECD procedures require the re-election of the full Management Group – including the Chair and the vice Chair – in December. He suggested that the Management Group and the Secretariat work together in the weeks following the meeting to determine an election process. It is somewhat complicated, as the current members of the Management Group have been elected at different times and for terms of differing lengths. It could be a very cumbersome process. Therefore, the Secretariat and the Management Group will develop a model, which will be circulated electronically to the full Working Group for feedback.

### **15. Preliminary assessments for OECD membership**

See separate document [DAF/INV/BR/ACS(2008)9], available to The OECD Members of the Working Group.

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**Liste des participants  
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**14/10/2008 - 17/10/2008**

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