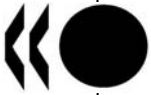


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Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

**23-Mar-2009**

**English - Or. English**

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

**DAF/INV/BR/M(2008)4/REV1  
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**Working Group on Bribery in International Business Transactions**

**SUMMARY RECORD OF THE MEETING HELD ON 9-12 DECEMBER 2008**

For more information, please contact Mr Patrick Moulette, Head of the Anti-Corruption Division, via e-mail: [patrick.moulette@oecd.org](mailto:patrick.moulette@oecd.org); tel: (+33)1 45 24 18 10; or fax: (+33)1 44 30 63 07.

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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. He welcomed the Chinese delegation, participating in the meeting as observers. It has been a difficult year for the Working Group, with NGOs and the private sector questioning if the Convention is having an impact ten years after its implementation. Competition from companies in economies that are not Parties to the Convention continues to grow. The Working Group has established a meaningful monitoring process, and it is working to define the Phase 3 process that will continue this monitoring for years to come. The initial monitoring cycle will last for four years, but the process could go on much longer. The Group is also moving forward with the challenging review of the OECD anti-bribery instruments; during this meeting, it will have to make important decisions about what to keep and what to leave out. This will allow the group to come up with a more definite programme at its meeting in March. He suggested clarifying Article 5 of the Convention – and determining under what circumstances countries must move forward with cases and when they can be dropped – will be a key topic. This is a professional issue, and also a political issue.
- Approved the agenda [DAF/INV/BR/A(2008)4/REV1].

## **2. Welcome to Israel**

*The Working Group:*

- Heard the Chair express a warm welcome the Israeli delegation, including the Ambassador of Israel to France, as well as the Deputy Secretary-General of the OECD, on the occasion of International Anti-Corruption Day. Heard the Chair note that Israel's membership in the Group fits with the Group's policy of enlargement amongst major exporters and foreign investors with the aim of combating corruption and achieving a level playing field in the conduct of international business.
- Heard the Deputy Secretary-General, Thelma Askey, say that Israel's membership in the Working Group reflects the Group's recommendation to the OECD Council that it is satisfied that Israel is willing and able to undertake the obligations required of membership in the Group and of accession to the Convention. Noted the transmission by her, on behalf of the OECD Council, of a letter from the Secretary-General inviting Israel to become a full participant in the Working Group on Bribery and to accede to the Anti-Bribery Convention.
- Heard the Ambassador of Israel, Daniel Shek, state that Israel's participation as a member of the Working Group is an important step in Israel's movement towards membership in the OECD, and that its membership in the Group is consistent with Israel's view that corruption is an intolerable peril which weakens democratic values and the rule of law. Noted the transmission by him of a letter from the Israeli Minister of Justice accepting the Secretary-General's invitation.

### 3. Summary Record of the meeting held on 14-17 October 2008

#### *The Working Group:*

- Heard the UK ask that a sentence be added to Section 6a, paragraph 3, located on page 4, as follows: “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.
- Heard Argentina ask for modification of Section 2, paragraph 4, located on page 2, as follows: “Heard Argentina request that the summary record be amended to provide a more balanced account of the country reviews.”
- Heard Argentina request that the summary record be amended to provide a more balanced account of the country reviews. He suggested that the summary record should direct interested readers to the reports and their executive summaries rather than providing specific details.
- Heard the US ask that a sentence be inserted into the paragraph addressing small facilitation payments (Section 7ai, paragraph 3, found on page 12), as follows: “Noted the United States’ suggestion that a study to illustrate to the group what small facilitation payments are would be useful.”
- Heard the UK ask that a sentence be inserted into the paragraph addressing private-to-private bribery (Section 7ai, paragraph 5, found on page 12), as follows: “The UK supported this point as well.”
- Heard the UK ask that the paragraph addressing Article 2 (Section 7ai, paragraph 6, found on page 12) be modified as follows: “However, the Group has developed standards on more “effective” liability of legal persons.”
- Heard the UK ask that the paragraph addressing foreign subsidiaries (Section 7ai, paragraph 8, found on page 12) be modified as follows: “Agreed that covering the acts of foreign subsidiaries needs to be considered further in the context of Article 4.1 on territorial jurisdiction.”
- Heard France ask that the paragraph addressing statute of limitations (Section 7ai, paragraph 11, found on page 12) be modified as follows: “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.”
- Heard the US ask that the paragraph addressing explicit disallowance of the tax deductibility of bribes (Section 7b, paragraph 7, found on page 14) be modified as follows: “On the explicit disallowance of the tax deductibility of bribes to foreign public officials and on the issue of small facilitation payments [...]”
- Heard the UK ask that the paragraph addressing equal treatment in the Phase 3 evaluation procedure (Section 8, paragraph 5, found on page 15) be modified as follows: “[...] was important to address the development of the Group’s standards 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.”

- Heard the Chair ask the Secretariat to change the procedure for reporting on written documents in the summary record. In the future, the summary record should simply refer to the cote of the document; a review of major points is not necessary.
- Reviewed a revision of the summary record taking these requests into account.
- Approved the revised summary record [DAF/INV/BR/M(2008)3/REV1].

#### **4. Election of the Chair, the Vice-chair and the Management Group**

*The Working Group:*

- Heard the Chair ask Mrs. Carolyn Ervin, Director of the Directorate for Financial and Enterprise Affairs, to take over this agenda item.
- The document C(2004)1/CORR1, which sets out the structure and systems for monitoring the OECD Anti-Bribery Convention, provides for regular review of the composition and functioning of the Management Group. Heard that the Management Group, at its 8 December 2008 meeting, suggested that such a review should take place. The Management Group will come to the plenary at its March 2009 session with a formal proposal for a review, including terms of reference.
- In light of this decision, the Management Group recommended that the current elections of the Chair, Vice Chair and Management Group members should be for terms of one year. The review could take place between March and October of 2009 and then its result would form the basis for new elections in December of 2009. Elections for one-year terms are the normal procedure at the OECD.
- Heard Mrs. Ervin refer to an email sent to all delegates to the Working Group on 3 December 2008 from Patrick Moulette with information about the election. The Chair, Professor Mark Pieth, and the Vice Chair, Dr. Maria Gavouneli, will stand for re-election in 2009. Candidates who have put themselves forward for the Management Group are: Mr. Kaname Araki (Japan), Mr. Stefano Dambruoso (Italy), Mr. Richard A. Figueroa (United States), Ms. Birgitta Nygren (Sweden), Dr. Anke Raloff (Germany), and Mr. Guillaume Vanderheyden (France).
- Hearing no objections from the Working Group, Mrs. Ervin concluded that the candidates were elected, and that the group will revisit the issue of the Management Group in March 2009.

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

*The Working Group:*

- Heard that the UK has invited the Management Group to come to London in January to learn about legislative efforts there. The dates of the visit have not been confirmed. As a new Management Group was just elected, the question will be whether the incoming group or the outgoing group attends this meeting, or both. The Management Group is working to prepare for this meeting from its side – it will be a crucial step in overcoming past difficulties and building a more positive relationship between the Management Group and the UK.

- Heard that the Management Group discussed the importance of the bookkeeping and auditing functions. Although this did not rank high on the priority list of issues for the review of the instruments, it must be given serious consideration. The Chair suggested that the Working Group hold a day-long meeting with auditors and regulators, perhaps in the context of the March 2009 plenary meeting. Regulators have a very broad view of these issues. In light of the financial crisis, it will be beneficial to learn what these professions are doing.
- Heard that the Management Group discussed accession issues. Preliminary assessments of Estonia and Slovenia will be discussed by OECD members at the closed session; they will also address the timing for a preliminary assessment of Chile in the context of its plans to change its anti-bribery laws. The Working Group sent a letter to the Deputy Foreign Minister inviting Russia to attend this meeting as an observer; the reply only stated that Russia would be unable to attend. Russian officials have, however, asked to meet with the Secretariat in Paris in mid-December. The Chair is pleased to welcome China as an observer at this meeting.
- Heard that three countries have informally expressed interest in joining the Convention. Peru approached the Secretariat in the context of the APEC Summit in Lima (at which OECD Secretary-General Gurría spoke); however, the Peruvian officials may not be clear as to the Convention's goals. A representative of Thailand approached the Secretariat during the recent ADB/OECD 6th Regional Anti-Corruption Conference for Asia-Pacific in Singapore to ask for more information about the Convention and to participate as an observer in an upcoming Working Group meeting. Finally, Egypt has asked for more information on the Convention in the context of the OECD's Initiative on Governance and Investment for Development in the Middle East and North Africa.

**6. 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 Chairperson remind the Group that the discussion will focus on cases relating to the Convention, as agreed during the June 2008 meeting. Countries which adopted major legislative reforms since the October 2008 meeting were nevertheless invited to inform the Group.
- Heard most delegations provide information on cases, including investigations and/or prosecutions, under the foreign bribery offence.
- Noted the use by several Parties of the voluntary rules for providing notifications and written information on cases in advance of the meeting, and the resulting Room Document.
- Heard the Chairperson remind countries that if they wish non-public information to appear in the matrix, they should notify the Secretariat, in writing.
- Heard Chile and Spain report on legislative progress concerning the bills that will be subject to Phase 1bis review.
- Heard the US present a proposal for a new methodology regarding the matrix part of the Tour de Table, submitted by Switzerland and the United States (Room Document 7), and decided to discuss this document at the March 2009 meeting of the Working Group.

- Noted the absence of Iceland during the discussion of this agenda item.

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

### **a) Phase 2 bis review: Ireland**

#### *The Working Group:*

- Noted the preliminary Phase 2 bis report on Ireland reviewing the “Application of the Convention and 1997 Recommendation on Combating Bribery of Foreign Public Officials in International Business Transactions” [DAF/INV/BR(2008)31].
- Noted the comments and questions about the preliminary report presented by the lead examiners and other delegations, and the responses and comments by the Irish delegation.
- Adopted the final version of the report including the recommendations; and 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.

### **b) Post Phase 2 follow-up written report: Czech Republic**

#### *The Working Group:*

- Noted the written follow-up report by the Czech Republic [DAF/INV/BR(2008)33].
- Was informed by the Czech Republic of its efforts to implement the recommendations of the Phase 2 report. The Czech Republic raised awareness of foreign bribery in several ministries and its export credit agencies. A re-structuring of law enforcement bodies responsible for corruption, tax and money laundering cases has improved co-ordination among investigators. In terms of legislative developments, the Czech Republic enacted a requirement for tax officials to report suspected foreign bribery cases. It also repealed the effective regret defence for foreign bribery.
- Was informed that the Czech Republic is considering a scheme of administrative liability against legal persons for foreign bribery. The proposal will undergo a “comment procedure” soon. The Czech authorities hope that a draft bill will be ready by summer 2009.
- Heard Iceland and Slovenia, the lead examiners for the Czech Republic’s Phase 2 examination, express their views on the Czech Republic’s implementation of the Phase 2 recommendations; also heard the views of the Chair and other Working Group members, including the Czech Republic.
- Concluded that Recommendations 3, 5(b), 5(c), 6(b), 7, 8(a), 9(b), 9(c), 10(a), 10(b), 11(a), 11(b), 12, and 14(a) have been satisfactorily implemented; Recommendations 1(a), 1(b), 1(c), 4(a), 4(b), 5(a), 6(a), 8(b), 9(a), 14(b), 15(b), 16(a), 16(b), and 17 have been partially implemented; and Recommendations 2, 6(c), 8(c), 13, and 15(a) have not been implemented. Follow-up issue 18(a) is no longer a concern, while 18(b)-(f) remain outstanding and will continue to be monitored. In accordance with its usual practice, the Working Group agreed to prepare a written summary of its conclusions for publication in conjunction with the Czech Republic’s follow-up report.

- Decided that the Chair would write to the Czech authorities to express the Group's serious concerns over the absence of liability of legal persons for foreign bribery in the Czech Republic. The Group expected to receive further information on the progress made in this regard by the Group's March 2009 meeting. It also requested the Czech Republic to provide a detailed written report on the progress in implementing corporate liability for foreign bribery by the June 2009 meeting.

**c) *Post Phase 2 follow-up written report: New Zealand***

*The Working Group:*

- Noted the written follow-up report by New Zealand [DAF/INV/BR(2008)34] to the Phase 2 report on New Zealand [DAF/INV/BR(2006)21].
- Heard a presentation by Australia and Korea, the lead examiners for the Phase 2 review of New Zealand, regarding their views on the implementation of the Phase 2 recommendations by New Zealand.
- Was informed by New Zealand about its efforts to implement the recommendations in the Phase 2 report. New Zealand has made progress in implementing several Phase 2 recommendations including engaging in substantial awareness-raising in the public sector. Heard the views of additional Working Group members and the Chair, and further comments from New Zealand.
- Noted that New Zealand had made some progress with regard to certain recommendations to adopt or amend legislation. Noted that some prior Phase 2 written follow-up reports evaluated in different ways efforts by countries to adopt or amend legislation in response to Working Group recommendations. Decided that as a general matter, recommendations to member states to adopt or amend legislation should be considered to be not implemented (rather than partially implemented) until the relevant legislation is adopted or amended.
- Concluded that Recommendations 1(a), 3(d) and 6(b) have been satisfactorily implemented; Recommendations 1(b)-(c), 2(a), 2(c), 3(a)-(c), 3(e) and 6(a) have been partially implemented; and Recommendations 2(b), 3(f), 4(a)-(c), 5(a)-(b) and 6(c) have not been implemented. The New Zealand authorities agreed to report orally to the Working Group within one year on the implementation of the recommendations not fully implemented at this time. In accordance with its usual practice, the Working Group agreed that it would prepare a brief written summary of its principal conclusions for publication in conjunction with New Zealand's follow-up report.

**d) *Post Phase 2 follow-up oral report: Brazil***

*The Working Group:*

- Thanked Brazil for the written summary of the oral report submitted and circulated to all Working Group members prior to the meeting.
- Heard the oral report by Brazil in conformity with the Phase 2 Guidelines.
- Regarding awareness and prevention, heard Brazil report that policies are now in place to raise awareness on bribery issues. This includes in particular initiatives by the National Bank for

Development on the issue of export credits and bribery, as well as initiatives targeted at the private sector, developed in cooperation with Brazilian business and non governmental organisations. Also heard Brazil indicate that, in the context of the National Strategy to Fight Corruption and Money Laundering (ENCLA), training has been provided to prosecutors on issues of corruption, including on the use of special investigative techniques in the prosecution of corruption cases; these courses include specific modules on foreign bribery.

- Concerning the Phase 2 recommendations on accounting and auditing, heard Brazil report that a new law, addressing some of the Phase 2 issues, was passed by Congress in December 2007. On the related issue of internal company controls and external audits, heard Brazil indicate that it is conducting work on these issues in 2008 and will pursue activities in this regard in 2009.
- As regards whistleblower protection, heard Brazil report that a bill has been developed by the Office of the Comptroller General in 2008, and is due to be presented to Congress. Brazil expects this new legislation to send a strong signal encouraging reports from whistleblowers, who, currently, do not benefit from any whistleblower protection under Brazilian law.
- On the important issue of liability of legal persons as outlined in Phase 2, heard Brazil report that a draft bill has been completed in the Office of Comptroller General, and is now ready for discussion with the Ministry of Justice and the Council of Federal Courts. Also heard Brazil explain that another bill on civil and administrative sanctions for legal persons is in preparation. The draft bill on the liability of legal persons establishes non-criminal liability of legal persons, in particular for acts against the foreign public administration (including bribery of a foreign public official). The Working Group expressed its interest in reviewing the draft bill and providing comments before the bill is presented to Congress. Heard Brazil indicate that a finalised draft bill could be expected to be completed between the March and June 2009 meetings of the Working Group, and that it would be useful to obtain feedback from the Working Group prior to the submission of the bill to Congress.
- On the other important point raised in Phase 2 concerning the express non tax deductibility of bribes, heard Brazil report that, due to recent changes within the Brazilian Federal Internal Revenue Secretariat, discussions on this topic had had to be restarted three months ago. On the related issue of detection of bribe payments by the tax administration, heard Brazil report that, on the basis for the OECD Handbook for Tax Examiners, detailed guidelines will be developed for tax auditors to provide guidance on identifying possible bribes to foreign public officials in the context of tax audits.
- Heard the comments and questions presented by the lead examiners from Chile and Portugal, and other delegations, as well as further explanations from Brazil.
- Welcomed the number of initiatives undertaken by Brazil in response to the Phase 2 recommendations. Noted in particular the efforts initiated by Brazil to raise awareness and provide training on corruption issues. These initiatives will need to be evaluated more closely in the context of Brazil's written follow-up report in 2009, in particular to ensure that foreign bribery (and not just domestic corruption) is specifically addressed.
- Noted that the two major issues identified in the context of the Phase 2 are still on the table. As concerns the liability of legal persons, welcomed the announcement by Brazil that draft legislation is being prepared, and expressed its desire to be kept informed and given the opportunity to provide feedback. Finally, on the issue of the express non tax deductibility of

bribes, urged Brazil to give it further thought and find a solution in time for Brazil's written follow-up report, due to be presented to the Working Group in December 2009.

*e) Post Phase 2 follow-up oral report: Turkey*

*The Working Group:*

- Noted Room Document No. 2 prepared by Turkey: “Post Phase 2 – Oral Follow-Up to Written Report on the Implementation of Specific Phase 2 Recommendations”.
- Heard the Chair remind the Working Group about the upcoming Phase *2bis* on-site visit to Turkey in January 2009, and the reasons why the Working Group recommended that Turkey undergo a Phase *2bis* examination as follows: 1. Inadequate participation by the private sector and civil society at the Phase 2 on-site visit; 2. Inadequate awareness-raising by the Turkish Government; 3. Doubts about the handling of foreign bribery allegations; and 4. The repeal of the liability of legal persons for the foreign bribery offence.
- Heard the Turkish delegation thank the Secretariat for providing information on the liability of legal persons for the foreign bribery offence and whistle-blower protections in other Parties to the Convention.
- Noted Turkey’s presentation of various measures taken since Phase 2 to raise the awareness of the following: public officials including ODA officials, foreign representations, public procurement authority officials, companies including SMEs, NGOs, and tax professionals.
- Noted steps taken by Turkey to advise foreign representations on how to proceed when they learn of credible allegations of foreign bribery.
- Heard about training provided to staff-involved in ODA-funded procurement contracting for detecting and reporting suspicions of foreign bribery.
- Heard about the preparation of a draft amendment to the Labour Law to strengthen whistle-blower protections in the public sector.
- Heard that Turkey has adopted a Witness Protection Law.
- Learned that TIKA, Turkey’s official development assistance agency, will systematically include anti-corruption clauses in its bilateral cooperation protocols and ODA-funded contracts with partners.
- Noted that on 20 November 2008, the Ministry of Finance published a communiqué in the Official Gazette expressly denying the deductibility of bribe payments.
- Noted that the Ministry of Finance has included training modules on detecting bribes in its regular training programs for assistant finance inspectors.
- Noted that a Bill amending the Turkish Commercial Code, submitted to Parliament in November 2005, is currently before the Parliamentary Justice Commission, and that this Bill seeks to require that all corporations (including state-owned/controlled) of all sizes shall be subject to an external audit.

- Heard that a regulation was passed in April 2008 subjecting lawyers and accountants to money laundering reporting obligations.
- Heard that a Draft Law was sent to the Prime Ministry on 25 July 2008 for the purpose of eliminating the requirement that the Minister of Justice request the application of “universal jurisdiction” to cases of the bribery of foreign public officials when the offence is committed by a Turkish national abroad. The Draft Law is expected to be submitted to Parliament soon.
- Heard that the same Draft Law repeals the application of “effective remorse” for foreign bribery offences.
- Heard that the same Draft Law introduces the administrative liability of legal persons for the foreign bribery offence and that this liability will be established through an amendment to the Code of Misdemeanours. Also heard Turkey clarify that the same court that convicts the natural person who perpetrated the bribery offence would have the authority to impose the administrative fine on the legal person (maximum of 1 million Turkish Liras).
- Noted Turkey’s further explanation that the liability of legal persons will be included in the Code of Misdemeanours because criminal liability is not accepted under the Turkish Constitution. Turkey also stated that it had published the draft law on the Internet, but had not yet consulted directly with the private sector. However, the Turkish Government consulted with the private sector about the results of the Phase 2 examination.
- Heard the Chair state that the Phase 2bis examination would need to look carefully at the draft law on the liability of legal persons.
- Heard that a Law was adopted by Parliament on 20 November 2008 for the purpose of temporarily or permanently disqualifying persons convicted of specific crimes, including bribery crimes, from participating in public tenders, and that the Privatization Administration enacted a communiqué excluding from privatizations companies and natural persons convicted of foreign bribery.
- Heard that the penalties for fraudulent accounting offences under article 359 of the Tax Procedure Code have been increased (minimum limit has been increased from 6 months to 1 year, and the maximum limit has been increased from 3 years to 5 years).

**f) Oral follow-up reports to written Phase 2 follow-up reports on the Slovak Republic**

*The Working Group:*

- Noted the Slovak Republic’s presentation on the Working Group’s conclusions on the Slovak Republic’s written follow-up report on the implementation of the Phase 2 recommendations, which required an oral report on the implementation of Recommendation 10 (liability of legal persons).
- Heard that the Ministry of Justice of the Slovak Republic prepared a draft law to overhaul the Criminal and Criminal Procedure Codes. The draft law proposes a new Section 83a to the Criminal Code which would allow “confiscation” of up to SKK 50 million (approximately EUR 1.66 million, not EUR 166 000 as stated in the Room Document) to be imposed against legal persons for criminal offences, including foreign bribery. The draft law also proposes a new

Section 83b which would allow confiscation against an insolvent legal person for criminal offences after bankruptcy proceedings are concluded.

- Heard the Chair comment that Section 83a appears to impose a fine rather than confiscation. However, if the provision contemplates confiscation, then it may raise concerns over whether sanctions are available if the legal person in question does not gain economically from the corrupt transaction.
- Heard that the Ministry of Justice submitted the draft law to the Slovak Government on 9 April 2008. However, the Government thereafter suspended further discussion of the draft pending the outcome of litigation concerning the constitutionality of the Slovak Special Court.
- Heard the Chair and the United States remark that there is no apparent link between the constitutionality of the Slovak Special Court and the creation of corporate liability for foreign bribery; heard the Slovak Republic explain that the provisions on corporate liability are part of a draft law amending the entire Criminal and Criminal Procedure Codes. Since the jurisdiction of the Constitutional Court derives from the Criminal Procedure Code, the Slovak Government decided to suspend the entire draft law.
- Heard the United Kingdom inquire whether corporate liability could be implemented if the Slovak Special Court was found to be unconstitutional; heard the Slovak Republic reply in the affirmative.
- Decided that the Chair would write to the Slovak Minister of Justice on the Group's behalf, urging the Slovak Republic to establish corporate liability through a new draft law that is separate from the one that has been prepared; requested that the Slovak Republic report to the Working Group in writing on this matter in June 2009.

**g) *Written report by the United Kingdom on legislative progress***

*The Working Group:*

- Considered the UK's first quarterly written report on legislative progress. The report included a summary of the UK Law Commission's main recommendations on reforming the law on bribery that were released in November 2008, and a press notice by the Secretary of State for Justice, the Rt Hon Jack Straw MP dated 20 November 2008. The report stated that the Government will publish a draft Bill on bribery for pre-legislative scrutiny in early 2009.
- Heard the UK state that the recent Queen's Speech and a statement of the Leader of the House of Commons both indicated that the Government would publish a draft Bill on bribery in the legislative session ending in the autumn of 2009. The Government has begun considering the Law Commission's proposals.
- Heard the UK state that it welcomed the Working Group's upcoming visit to London. The UK hoped the discussions during the visit would cover the Law Commission's proposals and the pre-legislative scrutiny procedure. The Chair suggested that the Working Group representatives participating in the visit should meet UK parliamentary legislative drafters, members of parliament, and government authorities responsible for preparing the decisions of ministers.
- Heard France inquire about the status of the draft Constitutional Renewal Bill which includes proposals to reform the role of the Attorney General. The UK responded that the Leader of the

House of Commons had stated that the constitutional renewal proposals will be further considered and taken forward in the legislative session ending in fall 2009.

- Discussed the current status of the BAE/Al Yamamah case and heard the UK clarify that the case remains discontinued. The Director of the Serious Fraud Office could restart the investigation if considerations of national security change. The Chair noted that the UK had clarified that the case was discontinued and that it was not closed.
- Discussed a letter sent by the UK authorities to the Swiss authorities with regard to a pending MLA request relating to the Al Yamamah case in late September 2008. Although a copy of the letter was not available for the Group, the UK indicated generally that the letter referred to the House of Lords decision in the BAE/Al Yamamah judicial review, and to the new SFO Director's agreement with his predecessor regarding the discontinuance of the case. It was also indicated that the letter said that the case was not being actively investigated. Possible interpretations of the letter were briefly discussed. The Chair noted that he did not have a copy of the letter and that the discussion suggested that the letter might be ambiguous.

## **8. Review of OECD Anti-Bribery Instruments**

### **a) Review of OECD Anti-Bribery Instruments – Priority Issues**

*The Working Group:*

- Heard the Secretariat introduce the document “Review of the OECD Anti-Bribery Instruments: Priority Issues” [DAF/INV/BR/WD(2008)15].
- Heard the Chair explain that Article 5 of the Convention and the 1996 Recommendation on the Tax Deductibility of Bribe Payments would be dealt with in separate items on the agenda.
- Also heard the Chair explain that the following matters would be discussed in this session: 1. What issues to keep on the table in the review of the instruments; 2. Texts proposed in the Note by the Secretariat; and 3. Legal form that the review should take.

### Legal Issues and Procedure

- Heard the United Kingdom raise a procedural issue regarding Part II of the document on the form that the review should take, and noted a room document entitled “Legal Issues and Procedure: Comments by the United Kingdom” prepared by the United Kingdom. The paper underscored the need to give serious consideration to the difference between an amendment to the Convention and establishing an authentic interpretation of the Convention.
- Heard Spain express surprise that the Secretariat included the possibility of an authentic interpretation in its Note, and the Chair suggest that this is not new at all, given that an authentic interpretation simply provides a snapshot of current interpretation by the Working Group.
- Noted the Chair's view that an authentic interpretation could be applied in Phase 3, but that the issue is still open for discussion.
- Noted interventions on whether to continue to debate the form of the review, or proceed with a discussion on the substance of the review.

- Noted statements by the United States and Sweden that it is important to begin with the substance of the review, since this would inform the form that the review should take. The United Kingdom did not expect a discussion on its document to go forward in this session.
- Agreed to start with substance and follow-up with a discussion on form.

### Draft Proposals

#### *Article 1 – Foreign Bribery Offence*

##### Bribing through intermediaries

- Heard Argentina propose to delay the discussion on bribery through intermediaries until after the Working Group's typology on intermediaries is completed, and noted support for this proposal from the United Kingdom, Japan, Argentina, Netherlands and Canada.
- Noted further interventions on whether to wait for the outcome of the typologies exercise.
- Agreed to wait for the outcome of the typologies exercise and that it would serve to understand the *modus operandi* of bribing through intermediaries and how far responsibility for the acts of intermediaries stretches.

##### Bribes transferred directly to third parties

- Noted Japan state it was agreed in October to delete this issue from the review, and heard the United States explain there is no ambiguity concerning the coverage of Article 1 in this respect.
- Agreed to delete this issue from the review.

##### Small facilitation payments

- Heard the Netherlands and the United Kingdom comment on the need for clear criteria on small facilitation payments especially to provide guidance to business. The United Kingdom also commented that countries that do not have a specific exception in the law might allow one in practice pursuant to prosecutorial discretion.
- Heard Sweden comment that this is an issue that keeps coming up, and that the business community might be signalling that it would like to get rid of the exception altogether. Many companies have introduced zero tolerance for bribery, and the Group needs to send them the right signal.
- Noted New Zealand mention that it has an exception for such payments, but ministers have requested reporting on this.
- Noted Canada's comment that there is a restrictive interpretation of small facilitation payments in Canadian law. Canada also commented that companies cannot be expected to keep accounting records on such payments, and that requiring such a record for the exception to apply would be creating a rule of evidence based on a reverse onus.
- Heard the United States remind the Group that there had been a proposal at the October meeting for further study of this issue. The United Kingdom agreed that this is not an issue that will go

away, and there is a need to help businesses change their culture. Australia supported such a study.

- Noted that France favours deleting the exception, but that since there is no consensus in the Group there should be a clear restrictive description in the law to ensure a level playing field.
- Heard that the Slovak Republic would like the following to be clarified: to whom, the amount, and in which situations small facilitation payments are not prohibited.
- Noted that France, the Netherlands and Norway agree that there is a need to focus on the normative side to ensure progress. Norway also mentioned that under the United Nations Convention against Corruption (UNCAC) there is no exception for small facilitation payments.
- Heard that the United Kingdom and New Zealand support draft language option 2 in the Note by the Secretariat, France supports a combination of options 1 and 2, but believes that first the issue should be looked at by a study group.
- Heard that Canada believes option 2 brings a lack of clarity. The United States would have to go back to the Senate to repeal Commentary 9. Greece supports a variant of option 2.
- Noted that South Africa prefers option 3, which simply proposes a repeal of Commentary 9. South Africa also believes that the Group needs to consider the transitional period.
- Heard that the United Kingdom believes that there is a need to summarise each Party's position on this issue. This would also be helpful to the business community. France supported this proposal.
- Noted the Chair's statement that there is agreement to form a small study group to develop an interpretive note on Commentary 9 and that the group should have a limited time-frame. The purpose of the study group is to inform the review of the instruments on this issue –not to be an alternative to the review.
- Agreed that the study group will be coordinated by Birgitta Nygren, the delegate from Sweden.
- In addition, heard the Chair sum up further issues as follows:
  - Companies are moving towards zero tolerance.
  - Companies are confused about where the threshold for small facilitation payments is, and thus there is a need for more certainty and clarity.
  - There is a need to distinguish between business practice and law. There is no need to study how the payments are made, but how they should be covered legally. It is also unlikely that business would discuss this issue openly with the Group.
  - The Group is not ready to repeal Commentary 9.
  - This is a key issue for levelling the playing field.
  - There might be a possibility to narrow the gaps in the definition.

- Where there is no exception in the law, the business community needs to know what the rules of prosecutorial discretion are in this respect. The Chair referred to the rules of the Dutch prosecutorial service in this regard.
- An interpretive note could be used to clarify small facilitation payments.
- Information on what has been done in the Group on this issue should be compiled. The Secretariat has already collected quite a lot of information (e.g. in the Mid-Term Study), but additional information might be needed, especially on the application of prosecutorial discretion to small facilitation payments. Delegations should therefore communicate what they have in place to the Secretariat as a first step.

#### Solicitation

- Heard France support option 2 and propose clarification through the 1997 Revised Recommendation. Also heard that Poland prefers option 1, and believes that all three options say essentially the same thing. Poland prefers to address this issue in an interpretive note.
- Noted that the United Kingdom questions the effect of the options on prosecutorial discretion, and wonders about cases where the bribe is extorted or otherwise obtained under duress.
- Noted the Chair state that the issue of clarity concerns cases that do not involve extortion, but involve for instance threats of economic ruin.
- Noted that the Netherlands and Canada feel that clarity is needed regarding the line between duress and extortion, but that it is up to the courts to draw the line.

#### Bribery of private sector agents

- Heard the Chair remark that the private sector has done an expensive study on this issue.
- Heard Sweden strongly urge the Group to delete this issue from the review, in particular because the United Nations Convention against Corruption (UNCAC) covers this form of bribery. Heard the United States, Poland Japan and Australia agree.
- Noted Canada's comment that bribery in the private sector is a completely different issue from the bribery of foreign public officials, and would require an amendment to the Convention.
- Noted Germany's intervention that there is a need to focus on the core issue under the Convention, but that coverage of such bribery in the UNCAC is not an argument for not dealing with it in the Group.
- Heard that France believes it is important to not be oblivious to the emerging importance of this issue.
- Heard the United Kingdom's point that bribery in the private sector is not a mandatory offence under the UNCAC, and that this issue should be kept on the table. Heard Norway support the United Kingdom.
- Heard the Chair sum up that since there is no unanimity on this topic, it should be deleted from the review. However, it will be important to explain this decision to the business community.

*Article 2 – Liability of Legal Persons*

Effective liability of legal persons

- Heard that the United Kingdom believes option 2 goes beyond what was agreed in October, and prefers option 1. Heard that Germany prefers option 2, but feels that bullet points 3 (organisational measures) and 7 (corporate culture) are not appropriate. Heard that Poland believes option 2 is more appropriate. It is more prescriptive and more consistent with the Working Group's recommendations. Also heard that France prefers option 2, but does not agree that bullet point 7 on the impact of corporate culture should be adopted in light of the Phase 2 assessments.
- Heard the Chair question why certain delegations could live with Protocol 2 of the EU text on the protection of EU financial interests, but not bullet points 3 and 7.
- Noted that Canada prefers the opening language in option 2, but does not agree to some of the bullet points. For instance, Canada does not agree that a failure to adequately supervise a lower level person should be mentioned, and does not understand what is meant by "corporate culture". Canada also pointed out that the draft language options do not say anything about criminal or administrative liability. Heard Spain agree with Canada's points.
- Heard that New Zealand believes there is a lack of legal certainty about the issue of "corporate culture".
- Heard that the Netherlands does not oppose bullet point 7 on "corporate culture", because the Dutch law applies to decisions taken at various levels in companies.
- Noted that Japan disagrees with bullet point 4 on not restricting liability to cases where the natural perpetrator is identified, prosecuted or convicted, and believes that this runs counter to the Phase 2 assessments. Heard the United Kingdom echo Japan's concerns.
- Noted that France believes it is important to reach a consensus on the standards and that it would be useful to formalise the Group's experience rather than always referring to individual examinations as precedents. A Code of Good Practice would also avoid amending the Convention. Heard the United Kingdom agree and state that the Group's approach to making recommendations is pretty *ad hoc*. Heard Canada concur, but caution that it is unlikely the Group will find a standard acceptable to all delegations. Noted that New Zealand believes it is important to try to reach a consensus for the sake of transparency and clarity. New Zealand also pointed out that this exercise would require a lot of negotiation, but that it had been done in other forums, including the FATF. This flexible approach by FATF allowed compliance either by meeting general principles or by taking safe harbour in a detailed procedural model.
- Heard the United States seek clarification on what form the document to be prepared by the Secretariat for the March meeting should take on this issue – e.g. a good practice manual? The United States feels that this would be preferable to an interpretive note, and would avoid the question of treaty analysis. Heard Spain question if such a manual would present a menu of options for delegations to follow. Heard the United Kingdom support a menu of good practices.
- Heard the Chair sum up as follows:

- The Secretariat will prepare a low key room document in the form of a Good Practice Guideline on this issue for the March plenary.
- There is a preference for the simple language in the chapeau of option 2.
- There is heavy criticism of bullet point 3 on “organizational measures” and bullet point 7 on “corporate culture”.
- There is no criticism of bullet point 1.
- Bullet points 1 and 2 reflect the standards that have been established by the Group, except for the sub-point on a failure to adequately supervise.
- The Group must be careful to not move backwards from the standards that it has established.
- Bullet point 1 could be the bottom line, and then optional approaches good be provided. For instance, there would be no need to cover a failure to supervise if the approach chosen covers the acts of lower level employees. What matters is that the option chosen is effective.

#### Liability of foreign subsidiaries

- Heard France state that option 1 is superfluous.
- Heard Canada question the meaning of “authorises”.
- Heard the Chair state that “authorises” covers cases that might fall between the cracks of aiding and abetting, and that this is not a major issue.

#### Next steps

##### *Decoupling the Review from Phase 3*

- Heard interventions on whether to decouple the review of the instruments from establishing the Phase 3 process, in order to not delay the commencement of the Phase 3 assessments.
- Heard that Canada does not see much danger in proceeding with Phase 3 right away.
- Heard that the United Kingdom is concerned about proceeding with Phase 3 without crystallising the Group’s standards.
- Noted that Greece believes it is necessary to move along with Phase 3 to keep up the pressure.
- Heard that Switzerland does not support decoupling.
- Heard that France believes decoupling should be avoided as far as possible, but that the results of the study group on small facilitation payments are needed first.
- Heard France also propose an intensive session on the review of the instruments at the March 2009 plenary. Spain also supported more time to discuss the review of the instruments.

- Heard that Greece has no objection to a final push at the March 2009 plenary, and believes that a final decision about decoupling should be made at the end of the March meeting. Heard New Zealand agree.
- Heard the Chair note that the review produces material for the horizontal part of the Phase 3 evaluations.
- Agreed to spend two full days during the March plenary to intensively discuss the substance and form of the review of the instruments. The decision on whether to decouple would be taken following this session.

*Informal Seminar on Accounting and Auditing*

- Heard the Chair explain that the Management Group discussed the idea of holding an informal seminar to look at internal company controls and external auditing for the March plenary. Such a seminar could involve the accounting and auditing profession, regulators and experts who understand the specific difficulties facing the auditing profession regarding the detection and reporting of foreign bribery.
- Agreed to hold such a seminar on Monday, 16 March 2009, immediately preceding the March plenary.
- Noted the Chair's request that delegations provide suggestions to the Secretariat regarding this seminar.

**b) *Article 5 of the Convention: Issues concerning the exercise of investigation and prosecutorial discretion***

*The Working Group:*

- Noted the document "Article 5 of the Convention: Issues concerning the Exercise of Investigation and Prosecutorial Discretion" [DAF/INV/BR/WD(2008)16].
- Heard the Chair acknowledge that the paper was issued too late for delegations to fully consider it for the December plenary, but that this was understandable. The Chair therefore proposed to shift discussion on this matter to the March 2009 plenary.
- The Chair added that delaying discussion until March would give time for the Secretariat to amend the document. It would also enable delegations to submit feedback.
- Agreed to discuss this issue at the March plenary.

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

*The Working Group:*

- Noted Room Document 6 on the "Draft Recommendation on Tax measures for further combating bribery of foreign public officials in international Business Transactions" which includes the last changes to the document [CTPA/CFA/WP8/NOE2(2007)7/REV2/ADD2/REV1/CONF] prepared by the Centre for Tax Policy and Administration.

- Heard the Chair remind the Working Group that this document is submitted for its discussion following its consideration by the Working Party on Tax Avoidance and Evasion (Working Party 8).
- Heard a representative of the Centre for Tax Policy and Administration (CTPA) describe the status of this revised version of the draft Recommendation and explain that the Secretariat was not able to distribute the document to the Group earlier because the deadline for WP8's written consultation was Friday, 5 December. WP8 reached consensus on all changes reflected in Room Document n° 6 except on paragraph I, (i), 2<sup>nd</sup> bullet point. The representative of the CTPA further explained that the WGB's comments on this redraft will be included in a new version of the text which will be sent back to the WP8 for further written comments by mid-January.
- Heard the Chair observe that most of this revised version is in tune with the views expressed by the WGB in October but that he sees a potential problem with the replacement of "further Recommends" by "Encourages" in paragraph II. He stressed that the WGB is going far beyond such "encouragement" in its Phase 2 recommendations when it insists on the necessity for tax authorities to report suspicions of bribes. He expressed concern that if the WGB were to endorse only "encouragement", it would roll back previous recommendations and water down its own standards. He suggested that, under these circumstances, paragraph I may be sufficient and paragraph II may be omitted.
- Noted that Switzerland, Canada and New Zealand supported the idea of "Encouraging", such reporting whereas Germany, the United Kingdom, France, Sweden and the Netherlands were in favour of "Recommending" it – as provided in former draft.
- Heard the Chair quote recommendations made to Canada, the Czech Republic, Finland, Luxemburg and Switzerland; and refer to the insistence of the Group towards New Zealand the day before. He asked the Group for its view on the meaning and bearing of such recommendations. He expressed surprise that the standard the Group has been developing consistently in the course of monitoring could be reviewed when looked at it in a synthetic way.
- Heard the Chair further indicate that, from a procedural point of view, it is possible that the WGB could let the WP8 decide, as suggested notably by Canada and Spain – but that this would raise the question whether the Group would then be held to that standard. He reminded the Group of a similar situation with the recommendation prepared by the Export Credit Group which rolled back a standard developed by the WGB and obliged the Group to review its own standard accordingly.
- Heard Canada express the view that recommendations are not necessarily accepted by the Country concerned as: i) they are "consensus minus one" recommendations; and ii) there are two different types of recommendations. Countries are bound to those which bear on the failure to implement the Convention, but those which deal with ways of improving implementation are not mandatory. For example, the WGB made a recommendation to Canada on reporting by tax authorities which they eventually decided – after discussion with their Department of finance – not to implement. Heard Canada explain that they are serious about monitoring and their obligations, but are not in agreement with accepting new obligations through the monitoring process. Heard the UK support Canada on this procedural point and noted the further procedural point that any one veto would require leaving the issue as is, despite UK preference for new "Recommending" language.

- Heard the Chair emphasize that the discussion has to do with the WGB's own standards and processes – and also with the principles of monitoring and peer pressure. He reminded the Group that although recommendations are adopted with consensus minus one, the abstaining country changes every time. Therefore, the group is building recommendations on consensus overall. He expressed his disagreement with Canada's view that there are two different levels of recommendations and referred to issues such as whistleblowing or the non-criminal side of money laundering which are not enshrined in the letter of the Convention or the 1997 Recommendation but nevertheless give rise to recommendations by the Group.
- Heard France agree that if the Group were to go back on all the recommendations it made in the framework of its peer reviews, it would be extraordinarily self defeating and that double standards would be extremely critical to Countries. France further underlined that if the group wants to leave things exactly as they are stated in the Convention, the whole monitoring process would be unnecessary.
- Heard Greece express concern that the WGB seems to operate on two different layers: when acting as examiner and when “codifying” standards. Greece described the situation as schizophrenic and suggested that the Group may need time to reflect on the meaning of its own work and processes before pronouncing on the text of the joint Recommendation.
- Heard Sweden support the ideas expressed by Greece.
- Noted that New Zealand would eventually be prepared to agree with a “Recommendation to consider” instead of “Encourages” as suggested by Spain.
- Heard a representative of Legal Affairs recall the definition of a Recommendation in the sense of the OECD Convention and stress that generally when countries adopt a Recommendation, they will do their utmost to fully implement it. A Recommendation is a vehicle for change and Member countries need not to be in conformity with the standards and objectives agreed in the Recommendation on the day it is adopted.
- Heard the Chair conclude that: i) the WGB is not unanimous on paragraph II of the Recommendation; ii) that the problem lies deeper, as it refers the Group to the meaning of its own processes and in particular to its standards developed over ten years by unanimity minus one; and iii) that given the seriousness of the discussion, a further work in March will be necessary.

## **9. Phase 3**

### **a) *Evaluation procedure***

#### *The Working Group:*

- Noted the Secretariat's revised note DAF/INV/BR(2008)25/REV1 for discussion.
- Heard Sweden agree that monitoring under the Convention should be permanent but that the current language of paragraphs 2 and 3 of the note appear to discourage or preclude the Group from changing the format of its review and learning from its continued experiences in monitoring. Heard the United States observe that the adoption of a procedural document is a resource-intensive exercise. Heard the Chair suggest that paragraph 2 could be extended to establish a built-in mechanism for the review of the procedural document for monitoring prior to

the commencement of each round of evaluation. Heard the United States and Canada support this idea. Heard the United States observe that naming the document the “Phase 3 Evaluation Procedure” may not be appropriate.

- Concerning the focus of Phase 3 (second paragraph of the Executive Summary), heard the United States suggest that the text in the second sentence of paragraph 6 of the earlier draft of the note should be returned to the text in paragraph 4 of the current draft.
- Concerning the discussion of on-going cases during on-site visits (paragraph 18 of the note), heard Canada and the United Kingdom express concern that the current text does not expressly recognise the need to protect operational information about investigations and prosecutions. Heard the Chair observe that the text is recommendatory in its language, and suggest that the following text from the Phase 2 monitoring information booklet could be used by the Secretariat to reformulate paragraph 18: (i) “During on-site visits, a country should not be required to disclose information that is otherwise protected by a country’s laws and regulations” (page 38, paragraph 9); “Ideally, participants would answer these questions 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”(page 51, final paragraph); and “Please describe how your authorities have applied the offence in cases involving bribery of foreign public officials (by natural or legal persons)” (page 52, paragraph 4.1). Concerning the penultimate sentence in the paragraph 18, heard Argentina suggest that the words “taking into account its domestic legislation” be added to the end of that sentence.
- Concerning the expertise of lead examiners, heard France, Germany and Argentina express concern that the second and following sentences in paragraph 21 of the note are too proscriptive and do not allow sufficient flexibility for the lead examining countries. Heard the United States and United Kingdom express support for retaining the second sentence in its current form and heard the US reflect that a main feature of the Phase 3 evaluation will be the foreign bribery offence and enforcement. Further heard the United States and Head of the Anti-Corruption Division note that the second sentence is recommendatory. Heard the Head of the Anti-Corruption Division suggest that the second sentence be retained, and the third sentence rephrased to state that “Lead examiners are encouraged to liaise with the Secretariat with the aim of assembling relevant expertise in the evaluation team”.
- Concerning the composition and format of on-site visit panels (paragraphs 23-29 of the note), noted that the current text is unnecessarily detailed. Agreed to delete paragraphs 26-29 inclusive, except for the final sentence of paragraph 29. Further agreed that the final sentence of paragraph 29 should be amended so that the non-intervention principle applies to the conduct of all non-government panels.
- Concerning the content of draft reports (paragraph 37 and Annex 3 of the note), heard Norway question whether the first sentence should refer to “observations” of lead examiners rather than “recommendations”. Further heard Norway suggest that the preliminary draft report should include draft recommendations for adoption by the Working Group. Heard the Chair and the United Kingdom express the view that this would significantly impair the evaluation process, in light of the three-reading process for adoption of reports. Agreed with the proposal by the Secretariat that, as a compromise, the draft evaluation report could include a compilation of the lead examiners’ commentaries.

- Concerning the sequence of follow-up reports (part C of the note), heard the United States, Canada and United Kingdom observe that the requirement to make follow-up reports each year was very resource-intensive and may not be an effective tool in the context of a permanent review mechanism of four-year cycles. Heard France acknowledge the need to avoid cumbersome procedures, while at the same time stressing the importance of maintaining an adequate level of peer pressure. Agreed with the proposal by Greece for a more flexible approach, namely that: (i) by default, an evaluated country will be required to submit a written follow-up report within two years of the adoption of the evaluation report; (ii) at the time that the WGB adopts an evaluation report, it will consider whether the evaluated country should report orally in 12 months on any specific recommendation(s) contained in the evaluation report; and (iii) at the time that the WGB considers the written follow-up report of the evaluated country, it will decide whether the country should report orally in a further 12 months on any outstanding recommendation(s).
- Concerning the Phase 3 questionnaire (Annex 2 of the note), heard Germany ask when the draft questionnaire will be made available for discussion by the Group. Heard the Head of the Anti-Corruption Division observe that any significant progress on the establishment of a standard questionnaire is largely dependent upon the outcome of the Group's review of anti-bribery instruments. Heard the Chair suggest that a first, simple and limited, draft of the questionnaire should be considered by the Group in March 2009.

**b) *Proposed schedule of evaluation***

*The Working Group:*

- Noted the Secretariat's proposed schedule for Phase 3 evaluations, as set out in the Annex to document DAF/INV/BR(2008)35.
- Heard the Chair invite delegations to enter into bilateral discussions with the Secretariat regarding any issues countries may have with the draft schedule.
- Heard France, Switzerland and the United Kingdom ask whether it was realistic for the first Phase 3 evaluations to be held as scheduled (which would require answers to the Phase 3 questionnaire to be provided in June 2009) given that a Phase 3 questionnaire has not yet been agreed upon and in light of the state of progress in the review of instruments. Heard the Chair comment that the Group may need to consider decoupling the Phase 3 mechanism from the review of instruments. Heard the Head of the Anti-Corruption Division indicate that, in all likelihood, it may be necessary to delay the commencement of Phase 3 evaluations to accommodate the adoption of a Phase 3 questionnaire.
- Agreed that the Secretariat should give further consideration to the proposed schedule of evaluations for Phase 3 and report back to the Group in March 2009.

**10. *Export Credits and Bribery***

*The Working Group:*

- Heard the oral report delivered by the Secretariat of the Working Party on Export Credits and Credit Guarantees (ECG) on the 2008 Review of Members' Responses to the 2006 Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits. In particular, heard the ECG Secretariat report that most Parties exceed the standards set in the 2006

Recommendation on Bribery and Officially Supported Export Credits. Also heard that the 2008 Review highlights certain issues for further reflection, notably the definition of "credible evidence", the need to encourage applicants to put in place appropriate managements systems to combat bribery, and whether and how agents' commissions are covered by export credit insurance and due diligence measures.

- Enquired how the issue of agents' commissions is dealt with by the ECG, and heard explanations from the ECG Secretariat that the issue is addressed differently in the different Export Credit Agencies.
- Enquired whether the ECG is planning to carry out any type of mutual evaluation on the implementation of the 2006 Recommendation on Bribery and Officially Supported Export Credits. Noted the comment by the Chair that, during the Phase 2 reviews, the WGB has, de facto, evaluated implementation of the export credit standards. In the future, it would be useful to rely on the expertise within the ECG to review the implementation of the 2006 Recommendation on Bribery and Officially Supported Export Credits. Heard the ECG Secretariat report that discussions on the development of a peer review process are taking place in the ECG, but have not yet been finalised.

## 11. Working Group statistics on enforcement

### *Collection and dissemination of statistics on foreign bribery*

- Discussed the Revised Note on the Collection and Dissemination of Statistics on Foreign Bribery [DAF/INV/BR(2006)26REV3] and the annexed tables.
- Heard the Secretariat outline the principal change to the previous proposal. In light of comments from member states, the proposed scope for the collection of statistics was now divided into two parts: (1) information to be provided by all countries; and (2) information to be provided on a voluntary basis. A narrow range of statistics would be provided by all countries. This would essentially cover the outcomes of criminal and administrative/civil proceedings. Voluntary reporting was proposed for all of the remaining previously-proposed scope. Some countries had supported reporting in all of the proposed areas and none had opposed voluntary reporting.
- Heard France reaffirm its support for the issuance of statistics. The process would involve a learning process, but it was important to start. France had no problem with providing data on actual decisions. France could also provide the requested numerical information with regard to ongoing proceedings. It noted its previous proposal to subdivide the column for unsuccessful investigations into those dropped because of lack of evidence and those dropped for other reasons. France also made some technical suggestions about the treatment of monetary sanctions and suspended sentences. France noted that areas where it had previous concerns about its ability to provide information now involved voluntary reporting. It further noted that in some cases, cases may be reported for statistics purposes using only the charge that resulted in the most serious penalty. It might be necessary to look at secondary charges in some cases, which could raise difficulties, but best efforts would be made.
- Heard Germany expressed appreciation for the revised note addressing its previously-stated concerns and for adopting a voluntary approach. Germany noted its previous opposition to providing statistics to the Working Group. It noted that its opposition did not result from concerns about its enforcement record, which was generally good. However, it continued to have some procedural concerns. It was concerned about whether accurate statistics can be provided.

For example, in Germany, cases may be reported by the Lander for statistics purposes using only the charge that resulted in the most serious penalty; this could result in underreporting of enforcement with regard to foreign bribery. Germany also questioned whether the Working Group would just rely on the information provided by each country or whether there would be a mechanism to check on the quality of information provided. It was unclear if the Secretariat would be able to do this effectively. It agreed with France that foreign-bribery related accounting misconduct should be excluded from the scope of mandatory reporting. It also noted that it could have difficulties in providing information in some areas, such as ongoing investigations, due to data protection laws or its federal system. However, Germany noted it did not oppose moving forward in a voluntary manner and would supply as much information as possible in order to make this an effective tool for peer review.

- Heard Canada note that perseverance had been required to reach the present solution. It indicated that it would provide all required information and as much voluntary information as possible. It suggested the use of the term “enforcement data” rather than statistics.
- Heard the United States fully support the publication of statistical information. It expressed strong appreciation for the conceptual approach proposed in the Note. It expressed confidence in its ability to gather the requested information. It suggested possible clarifications to the presentation of the tables because of the different counting methods that are used, appropriately, for investigations and proceedings.
- Heard Switzerland express support for the collection of statistics. It expressed concern about whether statistics for 2008 would be available by mid-February 2009, the date proposed in the Note for the provision of information by member states. It requested clarification with regard to the relevant time period.
- Heard the UK note its increased number of investigations as a positive aspect of its recent evaluation and that it supported balance and accuracy in the reporting of enforcement action. The UK noted that definitional issues and concerns over a level playing field of scrutiny had arisen with regard to the non-inclusion of certain high-profile allegations in the matrix of allegations and it expressed concern that such issues could also arise with regard to statistics on enforcement. However, given the flexibility shown in the revised note and the close attention it paid to potential problems, the UK could support the current proposal.
- The UK asked Germany to clarify whether the UK had correctly understood that Germany could provide information about the conclusions (outcomes) of cases on a mandatory basis and all the rest of the proposed information on a voluntary basis. In response, Germany indicated that it would have to check the details. It noted that it had already provided some of the conclusions to cases in its annual oral report and that that information could certainly be provided. Further information about the exact scope of information that could be provided would require expert consultations.
- The Secretariat thanked delegations for the helpful comments. It suggested that the quality of statistics could be addressed to some degree by addressing the issue of statistics in the Phase 3 process. Given limited remaining time in the plenary session, the Secretariat proposed that the remaining issues, which were more technical, could be addressed directly by the Secretariat with interested delegations.

## 12. WGB dialogue with P.R. China

### *The Working Group:*

- Heard Mr. Xiangren KONG, Deputy Director-General at the Ministry of Supervision, say that China is honoured to attend the plenary meeting and share experiences with the Working Group. This is the second time he has attended a plenary meeting (the last was in January 2007). Mr. Kong appreciates the opportunity to learn more about the OECD's peer review mechanism.
- The Chinese Ministry of Supervision has a history of successful co-operation with the OECD. China has been active in the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, a Chinese delegation attended the events in Rome surrounding the 10<sup>th</sup> anniversary of the OECD Anti-Bribery Convention in November 2007, and a group from the OECD Anti-Corruption Secretariat visited China in May 2008. As a result of this collaboration, China has strengthened its efforts to fight transnational bribery. China is also very supportive of the inclusion of a review mechanism for the UNCAC.
- Mr. Kong presented developments in fighting business bribery in China since January 2007. China has taken a five-part approach, which includes: (1) education and publicity to prevent business bribery; (2) intensifying efforts to investigate cases (28 000 cases have been investigated between January 2007 and June 2008, about 4 800 of which involved public servants); (3) new laws and regulations based on international standards, including revisions to criminal laws on bribery and money laundering; (4) creation of a new department responsible for auditing overseas departments and organisations; (5) fostering innovative actions to discourage bribery. China has encouraged civil society to play a key role in the fight against bribery.
- China has made significant progress in the area of whistleblower protections. Because whistleblowers are often employees of the companies being reported, they must be protected. The Chinese system generates an anonymous code and serial number for each report, which can be used by the whistleblower to edit and modify requests. Rewards between 500 and 20 000 Chinese yen are offered to whistleblowers.
- The Ministry of Supervision operates a nationwide centre for reporting corruption. It publicises the centre widely on television and online, as public reporting of possible corruption is an important factor. The "Department of Letters and Visits" was established 30 years ago; now it mostly receives phone calls and e-mails. One province investigated seven cases based on calls to the Department, resulting in convictions of 8 countries which were put on a blacklist. China has also used television programmes and advertisements during "prime time" to raise public awareness of business bribery.
- Heard the Chair thank China for a very impressive presentation, and welcome their participation in the Working Group's discussions. He said that China is now a major player in international business, and that the Working Group is anxious to involve China in levelling the playing field for all companies. He asked: what happens when a Chinese company bribes a foreign public official?
- Heard China respond that there is no specific law regarding bribery of foreign public officials in China. However, in the past two years, the government has started to pay more attention to actions by Chinese companies overseas. It is now drafting a code of conduct for Chinese companies operating overseas, which will investigate and punish bribery that happens outside of

China. With more Chinese companies conducting business abroad, China will put in place a plan that treats bribery of foreign officials the same as bribery of Chinese officials.

- Heard the OECD Legal Directorate note that the UNCAC, which China has ratified, requires signatories to have a foreign bribery offence; China will therefore have to change its laws. He also asked if bribery of officials in Hong Kong or Macau is treated as bribery of foreign officials, or domestic officials.
- Heard China reply that such incidents would be treated according to the laws of Hong Kong or Macau.
- Heard Japan ask if China would be able to help with MLA requests, as China itself does not have a foreign bribery offence.
- Heard China reply that the government will actively respond to any MLA request. The Ministry of Justice is responsible for MLA, and China has MLA agreements with more than 50 countries (including Japan).
- Heard the United States welcome China's interest in the Working Group and in ratifying the UNCAC. The OECD's Anti-Bribery Convention is a well-established instrument, and the Working Group is available to help China with any questions that come up in UNCAC implementation.
- Heard China state that it is very interested in the OECD's peer review mechanism and experience in fighting corruption; its attendance at two Working Group meetings in two years shows this interest. China cannot now say if it intends to ratify the OECD Anti-Bribery Convention and become a full member of the Working Group; however, as it is now becoming a major player in international trade, the government is looking to increase its understanding of the Convention and its evaluation mechanism. Mr. Kong himself personally hopes that China will one day become a regular participant in Working Group meetings, and he looks forward to continuing cooperation and communication with the Working Group.
- Heard the OECD Legal Counsel express great interest in associating China with the Working Group, particularly in the context of the OECD Council's May 2007 decision to enter into enhanced engagement with China. The Working Group is frank and effective, but not confrontational. The OECD hopes that China will be able to attend its meetings in a different capacity soon.
- Heard China state that the Working Group is a good example of how well OECD peer review mechanisms can work.
- Heard the Chair thank China for the open and heartening exchange of views.
- Decided (without the presence of the Chinese delegation) to invite P.R. China as an ad hoc observer to its meetings in 2009.

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

#### *Report on*

- Heard the Secretariat present the December 2008 Anti-Corruption Outreach Newsletter, which sums up the group's activities with non-Members.
- The 6<sup>th</sup> Regional Anti-Corruption Conference for Asia-Pacific, sponsored through the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific – took place in Singapore on 26-28 November. It was an open event, which included participation by the private sector and civil society. The conference lasted 2 days and addressed the offer of bribes as a key topic. There were about 150 participants, and OECD Deputy Secretary Mario Amano opened the meeting.
- The Steering Group meeting for the ADB/OECD Initiative was held back-to-back with the Conference. The Steering Group confirmed the work programme for 2009-2011, and also prepared for the March 2009 meeting which will focus on prevention of corruption and how to help countries meet the criteria of the UNCAC checklist.
- Peer reviews may be carried out in the Asia-Pacific region, but on a voluntary basis. Reviewed countries could pick their examiners and pick the scope of the review. Importantly, the members of the Initiative unanimously decided to devote their next tentative review to criminalisation issues – and more specifically the criminalisation of foreign bribery.
- The group has also decided to engage in an evaluation of its work. The group is now ten years old, and it appears that things are moving forward. The Initiative is funded not by the OECD, but by donors; fiscal issues in relation to the Initiative are a concern. The review will be conducted by an outside consultant and funded externally. The cost for the evaluation has been estimated at USD 189 000 for travel, per diem and fees to support two consultants for two months. The Secretariat will inform the Working Group of the outcomes of this review in order to draw conclusions.
- Heard Japan state that they participated in the Singapore meetings, and offer to participate in and contribute to the evaluation of the Asia-Pacific Initiative.
- Heard Switzerland thank the Secretariat for the feedback on the Initiative. For Switzerland, it is not clear what is financed by the official OECD budget – especially in the context of enhanced engagement with selected non-Members in the Asian region. Switzerland also called for a stronger link between the work of the Initiative and that of the Working Group on Bribery. The delegate suggested this issue be raised in the context of discussions on the Working Group's priorities for outreach. She asked for additional information about possible problems in financing these Initiatives.
- Heard the Secretariat state that funding enhanced engagement and the related work requirements was recently discussed by the OECD Council External Relations Committee. Questions were asked about the Working Group's funding of outreach activities in Asia; however, there is no specific budget for work with the three countries involved. Rather, there is a limited budget that allows us to engage in dialogue with countries interested in acceding to the OECD Anti-Bribery Convention.
- Heard the Secretariat present a new Initiative in Africa, based somewhat on the Initiative in the Asia-Pacific region. The Anti-Bribery and Business Integrity in Africa Initiative is a partnership

between the OECD and the African Development Bank (AfDB) that will support the efforts of African governments and businesses to fight bribery and corruption and boost corporate integrity. The letter of intent creating this Initiative has been signed by both the OECD and the AfDB. A meeting to define a programme of work for the Initiative and ways to reduce corruption in Africa is scheduled for June 2009. An external consultant will be hired to undertake a stocktaking of Initiatives underway in the region in order to identify target areas for action.

- Heard Germany express that the Working Group has ranked activities with emerging economies as a priority issue, but they do not have a prominent place in the review of the instruments thus far. The delegate suggested that the March plenary include a discussion on how the Working Group can promote relations with emerging economies.
- Heard the Chair state that outreach activities are a budgetary issue. Also, the DAF Directorate allotted funding for enhanced engagement yesterday, but it is unclear how it will be allotted.
- Heard Robert Ley, Acting Deputy Director for DAF, state that funding is a constant preoccupation. The Council and Secretary-General aim to determine the budget for the next two years at the meeting on 18 December, but a significant number of loose ends remain. The External Relations Committee has been examining funding for enhanced engagement with the five target countries. The Council considers anti-corruption as a very important issue, and they identified work with enhanced engagement countries on anti-corruption issues as an area of work that was insufficiently funded, so there is a demand for more funding. At this stage it is unclear how that will translate in the budget process.

#### **14. Reports by International Organisations**

*The Working Group:*

- No international organisations were present.

#### **15. Any other business and oral report on the informal experts' meeting on typology**

*The Working Group:*

- Heard the Netherlands (Puk van der Linde) report on the Informal Expert Meeting for the typology on "The Role of Intermediaries in Foreign Bribery", which took place on Monday 8 December. Many delegations, some accompanied by prosecutors, took part in the morning session; the afternoon session was opened to also include participation by NGOs, the business community and TUAC. Mr. van der Linde co-chaired the meeting with Claire Daams of Switzerland. The first order of business was to come up with a definition of "intermediary" (or "agent") – Wikipedia defines it as: "a third party that offers *intermediation* services between two trading parties." Attendees then discussed the various kinds of intermediaries (consultants, agents, etc.). Often a number of intermediaries are used in sequence, making it difficult to determine the final recipient of a bribe. This is extremely important for prosecution, and also the responsibility of a company that trades abroad (regarding corporate responsibility in the criminal field).
- The group tried to determine risk-prone sectors, and determine regions where the problem is particularly coming to the fore; however, the discussion was not very conclusive. Also, the value of intermediaries must be acknowledged. There are countries where legislation mandating the use of local intermediaries for trading.

- Attendees clearly identified cases of “willful blindness” from parent companies, highlighting the importance of legislation that includes corporate criminal responsibility. This will allow appropriate prosecutions to move forward. Peter Clark, former delegate to the Working Group from the United States, noted that while companies may have codes of conduct, an active implementation policy is necessary as well. This was apparent when a representative of Siemens outlined its policy to promote integrity. (There were many questions from the floor on this topic.) In the end, participants felt that this issue still merits much work and much attention. The Secretariat will do some preparatory work with a view to presenting a first concept draft to the March meeting, with more concrete proposals to be put forward in June 2009. The meeting was a useful exercise to come to grips with an issue that deserves the group’s attention.

**16. Preliminary assessments for OECD membership (restricted session to OECD members only)**

- See separate document [DAF/INV/BR/ACS(2008)10], available to the OECD Members of the Working Group.

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