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INVESTMENT COMMITTEE

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Working Group on Bribery in International Business Transactions

COMPILATION OF RECOMMENDATIONS MADE IN THE PHASE 2 REPORTS

This document, compiling the Recommendations made in the Phase 2 Reports as of 9 March 2006, is for background information under agenda item 5 of the meeting of the Working Group on Bribery to be held on 22-24 March 2006.

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Australia (January 2006)

C. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Australia, the Working Group (i) makes the following recommendations to Australia, and (ii) will follow-up certain issues when there has been sufficient practice.

1. Recommendations

Recommendations for Ensuring Effective Prevention, Detection and Investigation of Foreign Bribery

1. Concerning awareness and knowledge of the Convention and the offence of bribing a foreign public official in the Commonwealth Criminal Code, the Working Group recommends that Australia strengthen awareness by: (i) further promoting awareness within the Commonwealth public service, (ii) continuing efforts to raise the awareness of the private sector, including the distinction between bribery and facilitation payments and the record-keeping requirement for the defence of facilitation payments, (iii) paying special attention to raising the awareness of SMEs through, for instance, Australian diplomatic and trade missions in foreign countries, and (iv) raising the awareness of cash dealers of the foreign bribery offence as a predicate offence for the offence of money laundering, and providing them with guidance on identifying suspicious transactions.

2. Concerning the detection and investigation of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

(a) it is clarified in the publicly available explanatory document on the Case Categorisations Prioritisation Model (CCPM), that implementation of the Convention is to be given “high priority”;

(b) the AFP undertakes evaluations where appropriate of the veracity of allegations of foreign bribery involving Australian nationals and companies contained in (i) media reports from credible sources, (ii) publicly available court documents filed in foreign countries, and (iii) requests to Australia from foreign countries for mutual legal assistance;

(c) Australia clarify that all cases of foreign bribery be referred to the AFP by Commonwealth agencies;

(d) the process be revised under the National Guidelines for Referring Politically Sensitive Matters to the AFP so that referrals of politically sensitive cases of foreign bribery to the AFP are not potentially delayed by notification to the Minister of Justice and Customs, and

(e) the AFP take the following steps to ensure the effective transmission of information to it about foreign bribery cases: (i) enter into a formalized agreement with the Australian Prudential Regulation Authority (APRA) concerning areas of overlapping jurisdiction respecting foreign bribery, and (ii) consider establishing measures such as MOUs to ensure the direct referral of foreign bribery cases by State and Territorial police and anti-corruption bodies to the AFP even where a State or Territorial law establishes a bribery offence broad enough to cover foreign bribery. (Convention, Art. 5; Commentary 27; Revised Recommendation I, II)

3. Concerning the prevention and detection of foreign bribery through measures for disallowing the tax deductibility of bribe payments to foreign public officials, the Working Group recommends that the Australian Taxation Office (ATO):

(a) consider revising its Compliance Program to specifically include bribe payments to foreign public officials in their risk profile; and

(b) issue as soon as possible the bribery awareness audit guidelines that it is currently drafting on identifying bribe payments to foreign public officials and determining whether a particular payment meets one of the defences, and include within the bribery awareness audit guidelines a requirement that tax auditors report all information regarding foreign bribery to the Serious Non Compliance Business Line (SNC). (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)

4. Concerning other measures for preventing and detecting foreign bribery, the Working Group recommends that Australia:

(a) should require an external auditor who discovers indications of a possible illegal act of bribery to report the discovery to management and, as appropriate, to corporate monitoring bodies, and consider requiring external auditors to report indications of a possible illegal act to the competent authorities; (Revised Recommendation V.B.iii, iv)

(b) consider taking appropriate measures to ensure that members of the Australian Public Service who come into contact with companies involved in international business understand that the Australian Public Service Code of Conduct requires Commonwealth officials to report to the AFP credible evidence of foreign bribery offences that they uncover in the course of performing their duties, encourage and facilitate such reporting, and consider strengthening reporting provisions, such as those included in the Department of Foreign Affairs and Trade (DFAT) Overseas Code and Export Finance and Insurance Corporation (EFIC) internal rules; (Revised Recommendation I)

(c) ensure that AusAID staff are aware of the policy for responding to indications of foreign bribery in relation to ODA contacts, including the reporting of such indications to the AFP, amend the standard contract with AusAID to clarify that the Contractor shall not engage in foreign bribery in relation to the execution of the contract, and ensure that contracts with subcontractors contain a similar prohibition; (Revised Recommendation I, VI. iii) and

(d) consider reviewing the Commonwealth whistleblower provisions in the context of the on-going review on this subject to ensure effective whistleblower protections for Commonwealth officials and staff of Commonwealth agencies who report suspicions of foreign bribery, and consider introducing stronger whistleblower protections for private sector employees who report suspicions of foreign bribery. (Revised Recommendation I)

Recommendations for Ensuring Effective Prosecution and Sanction of Foreign Bribery and related Offences

5. Concerning the implementation of the offence of bribing a foreign public official under the Commonwealth Criminal Code, the Working Group recommends that Australia:

(a) clarify that the foreign bribery offence applies regardless of the results of the conduct or the alleged necessity of the payment; (Convention, Art. 1; Commentary 7)

(b) carry out its undertaking to amend as soon as possible the defence for conduct that is “lawful” in the foreign public official’s country to ensure consistency with Commentary 8 on the Convention; (Convention, Art. 1; Commentary 8) and

(c) carry out the undertaking to revise the existing publicly available guidance document on the foreign bribery offence as soon as possible to clarify the defence of facilitation payments. (Convention, Art. 1; Commentary 9)

6. Concerning the sanctions for the offence of bribing a foreign public official and the related offences of money laundering and false accounting, the Working Group recommends that Australia:

(a) increase the fine for legal persons for the foreign bribery offence to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as MNEs with headquarters in Australia; (Convention, Art. 3.1)

(b) with respect to companies that have been convicted of foreign bribery (i) consider introducing formal rules on the imposition of civil or administrative sanctions upon legal persons and individuals convicted of foreign bribery, so that public subsidies, licenses, government procurement contracts (including ODA procurement), and export credits and credit guarantees, could be denied or terminated, including through the provisions of the relevant contracts, as a sanction for foreign bribery in appropriate cases, and include provisions for the termination of such contracts in appropriate cases; and (ii) consider establishing a policy for denying access to contracting opportunities with public agencies, such as the public procurement agencies, EFIC and AusAID, as well as including provisions for the termination of such contracts in appropriate cases where contractors are convicted of foreign bribery after entering the contract; (Convention, Art. 3.4; Revised Recommendation II.v, VI ii) and

(c) continue compiling statistics on the offence of money laundering, including the level of sanctions and the confiscation of proceeds of crime. (Convention, Art. 7)

7. Concerning the discretion to prosecute the offence of bribing a foreign public official, the Working Group recommends that Australia clarify that the Guidelines on the Prosecution Policy of the Commonwealth prohibits consideration of the factors listed in Article 5 of the Convention. (Convention, Art. 5)

2. Follow-Up by the Working Group

8. The Working Group will follow-up the following issues once there has been sufficient practice:

(a) application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code; (Convention, Art. 1; Commentary 9)

(b) the application of the tax deduction for facilitation payments; ((1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)

(c) application of the criminal liability of legal persons for the bribery of foreign public officials; (Convention, Art. 2)

(d) the choice of proceeding with foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive, as well as the sanctions imposed on natural persons for foreign

bribery, to determine whether monetary sanctions, including fine penalties and confiscation, are imposed where appropriate; (Convention, Art. 3.1, 5)

(e) whether in practice Australia's capacity to provide mutual legal assistance in respect of legal persons is frustrated where the request emanates from a Party that has established the non-criminal liability of legal persons for the foreign bribery offence (The Working Group notes that this is a horizontal issue affecting many Parties.); and (Convention, Art. 9.1)

(f) the use of false accounting offences under the Corporations Act, including the level of sanctions. (Convention, Art. 8.1, 8.2)

Austria (February 2006)**RECOMMENDATIONS**

1. The Working Group welcomes Austria's recent efforts with regard to the introduction of criminal liability of legal persons and the fact that the law will enter into force on 1 January 2006. The Working Group notes that as of the time of the on-site visit, Austria had not yet established liability of legal persons for the offence of foreign bribery as required by the Convention. The lead examiners and the Working Group were accordingly unable to review the practical operation of such liability, as is contemplated in the Phase 2 process. The Working Group will assess the practical application of the new law both in the context of normal Phase 2 follow up procedures and once there has been sufficient practice.

2. Based on its findings regarding Austria's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the following recommendations to Austria under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

Part I. Recommendations***Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials***

3. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Austria:

- a) take measures, including appropriate training, to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that interact with Austrian companies that are active in foreign markets, including trade promotion, export credit and development aid agencies (Revised Recommendation, Paragraph I);
- b) take further action to effectively improve awareness among companies, and in particular small and medium sized companies active in foreign markets, of the legislation regarding foreign bribery and of the government's intention to enforce it, and to assist companies in their efforts to prevent foreign bribery (Revised Recommendation, Paragraph I);
- c) work with the accounting, auditing and legal professions to raise awareness of the foreign bribery offence and its status as a predicate offence for money laundering, and encourage those professions to develop specific training on foreign bribery in the framework of their professional education and training systems (Revised Recommendation, Paragraph I).

4. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Austria:

- a) establish procedures to be followed by employees of export credit, trade promotion and development aid agencies for reporting credible evidence of bribery of foreign public officials to competent prosecution authorities, and ensure that preventive anti-bribery clauses are applied by subsidiaries of OeKB (Revised Recommendation, Paragraph I);

- b) take measures to facilitate the reporting of suspicions of foreign bribery by private sector employees, including clarifying the effect of section 86 CPC and considering steps to better protect from retaliatory action employees who report in good faith suspicious facts involving foreign bribery (Revised Recommendation, Paragraph I);
- c) strengthen efforts to provide guidance to entities subject to money laundering reporting obligations in relation to foreign bribery and further assess and supervise the reporting practices of relevant entities; (Revised Recommendation, Paragraph I);
- d) require auditors to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and consider requiring auditors, in the face of inaction after appropriate disclosure within the company, to report all such suspicions to the competent law enforcement authorities (Revised Recommendation, Paragraph V.B).

Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences

5. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Austria:

- a) monitor and evaluate the performance of investigation and prosecution agencies with regard to foreign bribery allegations on an on-going basis, including in particular with regard to decisions not to open or to discontinue an investigation, and including in order to ensure that considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved do not influence the investigation or prosecution of foreign bribery cases (Convention, Article 5; Revised Recommendation, Paragraph I);
- b) take all necessary measures to ensure that Austria does not decline to render mutual legal assistance (MLA) in foreign bribery cases on the ground of bank secrecy, take all appropriate measures to ensure the provision of MLA in foreign bribery cases without undue delay, and consider developing methods to collect statistics regarding MLA while maintaining the efficiency of a decentralized system (Convention, Articles 9(1), 9(3));
- c) ensure that the necessary resources, including specialized expertise, are made available to prosecutors for the effective investigation and prosecution of the foreign bribery offence (Convention, Article 5; Revised Recommendation, Paragraph 1);
- d) take appropriate measures to ensure (i) that all bribes offered, promised or given to a foreign public official for any use of the official's position, whether or not within the official's authorised competence, constitute the basis for a foreign bribery offence; and (ii) that a foreign public official's acceptance of an undue advantage exceeding a small facilitation payment is deemed contrary to the official's duties and would therefore constitute the basis for an active foreign bribery offence (Convention, Article 1);
- e) issue and publicize guidelines to prosecutors clarifying that prosecution of allegations of bribery of foreign public officials by legal persons is always required in the public interest under the new law on the criminal liability of legal persons, subject only to clearly defined exceptions, and develop guidelines with regard to organisational measures for business with regard to the fight against bribery (Convention, Articles 2, 3, 5); and

- f) provide appropriate training to judges and law enforcement personnel, including prosecutors and the staff of the Federal Criminal Investigation Office (BKA), with respect to the investigation, prosecution and adjudication of foreign bribery cases (Revised Recommendation, Paragraph I).

6. With respect to related accounting/auditing and tax offences and obligations, the Working Group recommends that Austria:

- a) ensure that its law and practice adequately sanction accounting omissions, falsifications and fraud relating to foreign bribery, and re-examine whether the law applies to all companies subject to Austrian accounting and auditing laws and whether such sanctions are capable of being imposed on legal persons (Convention, Article 8); and
- b) revise the Guidelines on income tax so that they accurately reflect the applicable law, and provide training with regard to the relevant criminal law provisions to tax officials (Revised Recommendation, Paragraph IV).

7. With respect to sanctions, the Working Group recommends that Austria:

- a) increase the criminal sanctions applicable to foreign bribery and in particular to serious cases in order to provide for effective, proportional and dissuasive sanctions (Convention, Article 3(1));
- b) take all necessary measures to ensure that legal persons that engage in foreign bribery are subject to effective, proportionate and dissuasive criminal penalties, including in cases where the legal person may not have generated significant profits over the relevant period (Convention, Articles 2, 3(1));
- c) take appropriate measures to ensure that diversion and non-punishment pursuant to section 42 PC are excluded at least in all serious cases of foreign bribery (Convention, Article 3);
- d) compile statistics with regard to cases brought and types of sanctions imposed with regard to money laundering and accounting offences (Convention, Articles 7, 8).

Part II. Follow-up by the Working Group

8. The Working Group will follow up on the issues below, as practice develops, in order to assess:

- a) with respect to the expected entry into force of the law on the liability of legal persons, the application of the law as it applies to foreign bribery with regard to (i) liability generally and in particular liability in cases of foreign bribery involving agents; (ii) sanctions generally (Convention, Articles 2, 3); (iii) the application of nationality jurisdiction to legal persons (Convention, Article 4); (iv) the availability of MLA in criminal cases against legal persons (Convention, Article 9);
- b) the application of the foreign bribery provisions as case law develops, including with regard to the autonomy of the offence from any requirement of proof of the law of the foreign public official's country, the definition of "foreign public official" and the question of bribery through intermediaries (Convention, Article 1);

- c) the enforcement of accounting and auditing obligations (Convention, Article 8); and the implementation of anti-corruption policies by the Austrian Development Agency and export credit agencies.

Belgium (June 2005)**RECOMMENDATIONS**

1. Consequently, based on the findings of the Working Group with respect to Belgium's implementation of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Belgium. In addition, the Working Group recommends that certain issues should be re-examined as the case law evolves.

a) Recommendations***Recommendations to ensure the effectiveness of measures to prevent and detect the bribery of foreign public officials***

2. With respect to awareness-raising efforts to promote the OECD Convention and prosecution of the offence of bribery of foreign public officials under Belgian anti-corruption law, the Working Group recommends that Belgium:

- a. develop its efforts to raise awareness of the offence of bribery of foreign public officials within the administration and in the quasi-governmental sector, particularly for those employees likely to play a part in the detection and reporting of acts of transnational bribery, and those coming into contact with Belgian businesses exporting or investing abroad, as well as with the Belgian public (Revised Recommendation, Section I).
- b. take the necessary measures, in cooperation with the professional organisations and sectors of the economy concerned, to increase private sector awareness of the offence of bribery of foreign public officials, and to promote and assist in the implementation of preventive organisational measures within businesses present in foreign markets (Revised Recommendation, Sections I and V C. (i)).

3. With respect to other measures of prevention, the Working Group recommends that Belgium:

- c. examine the principles and procedures in force in all the bodies and authorities responsible for granting public subsidies, public procurement contracts or other advantages awarded by public authorities, in order to ensure that there is a fully efficient system for refusing such advantages to enterprises determined to have bribed foreign public officials (Revised Recommendation, Sections II v) and VI).

4. With respect to detection, the Working Group recommends that Belgium:

- d. adopt measures to ensure that employees who in good faith denounce suspected acts of bribery are given effective and adequate protection so that they can report those acts to the prosecuting authorities without fear of being dismissed or taken to court (Revised Recommendation, Section I).
- e. remind public officials, through a circular or other means, of their obligation under Article 29, paragraph 1 of the Criminal Investigation Code to inform the prosecuting authorities of any offence of bribery of foreign public officials that comes to their knowledge in the performance of their functions, and examine the appropriateness of instituting a comprehensive system of sanctions for non-compliance with this obligation (Revised Recommendation, Sections I and II(v)).

- f. prepare a circular as soon as possible for all tax officials, reminding them of the general prohibition, under criminal law, on giving any kind of advantage to a foreign public official (Convention, Article 1; Revised Recommendation, Section IV).
- g. clarify the requirement that auditors of company accounts who uncover evidence of possible acts of bribery must inform management and, as appropriate, the corporate monitoring bodies of the company, and consider making it an express legal obligation for auditors to report to the prosecuting authorities any involvement of the company whose accounts they audit in acts of bribery in foreign markets, in cases where the auditor has duly notified the corporate bodies concerned but they have failed to act (Convention, Article 8; Revised Recommendation, Section V iv)).
- h. set up multidisciplinary coordination among the different judicial and police departments, accompanied by a memorandum of understanding with the public services, with regard to the control and detection of bribery of public officials (Revised Recommendation, Section I).

Recommendations to ensure the effective prosecution of the offence of bribery of foreign public officials and related offences

- 5. With respect to prosecution, the Working Group recommends that Belgium:
 - i. formally clarify, by circulars or any other official means, its criminal policy with regard to active bribery of foreign public officials, to encourage police and prosecutors to systematically seek to establish the liability of persons suspected of having committed the offence (Revised Recommendation, Section I).
 - j. carry out an adequate training policy for those involved in criminal proceedings (police, prosecutors and examining magistrates) for the offence and establish a specialised branch to deal with economic and financial crime cases (Revised Recommendation, Section I; Annex to the Revised Recommendation, Paragraph 6).
 - k. define an autonomous notion of foreign public official that fully complies with the requirements of the Convention and, with the same aim, take remedial legislative measures to ensure the full effectiveness of Belgium's extra-territorial and universal jurisdictions over bribery of foreign public officials committed outside Belgium (Convention, Article 1; Phase 1 Evaluation; Convention, Articles 4 and 5).
 - l. clarify, within the framework of the bill currently being drafted to amend the law concerning the criminal liability of legal persons, how the mental element is imputed for the intentional offence of transnational bribery, in order to facilitate prosecution (Convention, Articles 2 and 3; Revised Recommendation, Section I).
 - m. ensure, as part of the ongoing reform of mutual legal assistance in criminal matters, on the one hand, that simplified national procedures are introduced for active and passive mutual assistance in the absence of an international agreement (Convention, Article 9); and, on the other hand, that it is clarified that invoking Belgium's essential interests to deny mutual legal assistance in cases of foreign bribery will not be influenced by the considerations mentioned in Article 5 of the Convention (Convention, Article 5).
- 6. With regard to sanctions, the Working Group recommends that Belgium:
 - n. draw the attention of prosecutors to the importance of vigorously pursuing accounting violations that could conceal the payment of a bribe to a foreign public official (Convention, Article 3; Revised Recommendation, Section V A) iii)).

- o. consider, either as part of the revision of the law on criminal liability of corporations or by any other means, the disqualification by law from public procurement of enterprises that are convicted of bribery of foreign public officials, (Convention, Article 3; Revised Recommendation, Section VI ii)).
- p. introduce expeditiously into Belgian tax law a general prohibition on the tax deductibility of any kind of advantage given to a foreign public official (Phase 1 Report; Revised Recommendation, Sections II vii) and IV).

b) Follow-up by the Working Group

7. The Working Group will follow up the following issues, in the light of developments in case law and practice, in order to verify:

- q. whether the current definition of bribery under Article 246 of the Criminal Code specifically covers the giving of an advantage (Convention, Article 1).
- r. whether the treatment of the offence of bribery of a foreign public official confirms that the notion of the exercise of the official functions of a public official is broadly conceived (Convention, Article 1).
- s. whether the human and material resources allotted to the federal police and their attribution allow for effective prosecution of complex cases of foreign bribery (Revised Recommendation, Section I).

Bulgaria (June 2003)

D. RECOMMENDATIONS

In conclusion, based on the findings of the Working Group with respect to Bulgaria's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Bulgaria. In addition, the Working Group recommends that certain issues be revisited as case-law develops.

a) Recommendations

Recommendations for Ensuring Effective Mechanisms for Preventing and Detecting Foreign Bribery

With respect to awareness raising with a view to promoting the implementation of the anti-bribery legislation, the Working Group recommends that Bulgaria:

1. Take measures to raise the level of awareness of the foreign bribery offence among officials in government agencies that could play a role in detecting and reporting it and undertake effective public awareness activities for the purpose of educating and advising the private sector on the offence. (Revised Recommendation, Article I)
2. Develop the role of the Bulgarian Trade Promotion Agency in awareness-raising and in deterrence, by considering measures which prevent public funds being spent on assistance, or official support given, to companies involved in foreign bribery. (Revised Recommendation, Article I)
3. Work proactively with the accounting, auditing and legal professions to establish training and awareness-raising activities about the foreign bribery offence in order to maximise the opportunities for prevention and deterrence within the business community. (Revised Recommendation, Article I).
4. Maintain statistics as to the number, sources and subsequent processing of allegations of violations of the laws against foreign bribery and consider ways of making sufficient information available as a matter of public record on cases of bribery heard by the courts, including acquittals, convictions and interpretations of the law, to meet the needs of judges, lawyers and those engaged in research, as well as the media and the public. (Revised Recommendation, Article I).

With respect to other preventive measures, the Working Group recommends that Bulgaria:

5. Encourage the introduction of codes of conduct and compliance policies in corporations. (Revised Recommendation, Article VI).
6. Consider operating a policy of excluding any individuals, or any entities whose directors or officers have been found to have been involved in foreign bribery from eligibility for government contracts (Convention, Article 3; Revised Recommendation, Article VI).

With respect to the reporting of foreign bribery to the appropriate authorities, the Working Group recommends that Bulgaria:

7. Consider the introduction of measures of whistleblower protection sufficient to protect employees, both in the public and private sectors, from dismissal in order to encourage individuals to report suspected cases of foreign bribery without fear of retaliation. (Convention, Article 5).
8. Bearing in mind the vital role of accountants in uncovering and reporting foreign bribery, consider measures designed to encourage increased reporting by members of the profession; and consider requiring auditors to report indications of possible illegal bribery to the competent authorities. (Convention, Article 8, Revised Recommendation, Article V B 4).
9. Encourage the enforcement agencies to provide appropriate feedback on reports that are made, in order to assist the tax and other authorities in improving their detection and reporting capabilities with regard to foreign bribery. (Revised Recommendation, Articles I and II (ii)).

With respect to detection, the Working Group recommends that Bulgaria

10. Provide all officials having a role in the detection, reporting and enforcement of the foreign bribery offence with detailed and regularly updated training about the content of the offence, and guidance, in the form of guidelines or typologies where appropriate, on the circumstances in which it occurs and how to recognise it. (Revised Recommendation, Article I)
11. Establish clear guidelines for the tax authorities to encourage the detection of foreign bribery, and consider introducing an express denial of deductibility in order to strengthen the mechanisms available for detecting and deterring the offence. (Revised Recommendation, Article IV).
12. Take steps to ensure that the officials responsible for processing requests for information under the Access to Public Information Act are properly trained so that information necessary for the detection and reporting of foreign bribery is available to the fullest extent allowed by that statute. (Revised Recommendation, Article I).

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Money-Laundering Offences

13. The Working Group noted Bulgaria's non-compliance with Article 2 of the Convention and therefore encourages it to proceed diligently with the recently instituted measures aimed at fulfilling the requirements of the Convention by establishing the liability of legal persons for the bribery of a foreign public official, and put in place sanctions that are effective, proportionate and dissuasive, including, in particular, confiscation in cases where the proceeds or assets are in the hands of a legal entity. (Convention, Articles 2, 3).

The Working Group recommends that Bulgaria:

14. Consider putting in place a centralised mechanism for the periodic review and evaluation of the effectiveness of the enforcement efforts of the different agencies involved in the fight against foreign bribery. (Convention, Article 5).

15. Employ special investigative techniques in respect of the foreign bribery offence where needed, and: (i) ensure that they are available in cases involving requests to lift judicial immunity and (ii) clarify the procedures for applying for authorisation to use such techniques, in order to ensure that these are consistently applied and the time-limits respected. (Convention, Article 5).
16. Examine the rules applicable to the lifting of bank secrecy in the course of financial investigations and the manner in which they are currently applied, to ensure that the process is simple and consistently implemented. (Convention, Articles 5, 9).
17. Consider, within the constitutional principles of the State, measures that may be taken in order to ensure that judicial immunity does not impede effective investigation, prosecution and adjudication in foreign bribery cases. (Convention, Article 5).

b) Follow-up by the Working Group

The Working Group will follow up on the issues below, as the case-law on the foreign bribery offence develops, to assess:

18. The application of sanctions, in particular the fines now available under Articles 304 and 305a of the Penal Code, in order to determine whether they are sufficiently effective, proportionate and dissuasive to deter and penalise the offence of foreign bribery. (Convention, Article 3).
19. Whether the existing language defining the elements of the offence of foreign bribery is sufficiently clear to be used in practice in cases where a benefit is directed to a third party. (Convention, Article 1).

The Working Group will furthermore monitor developments in the following area:

20. Whether the proposed Law on the Amendment and Supplements to the Law on Measures Against Money Laundering is passed by the National Assembly (Convention, Article 8).

Canada (March 2004)**C. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP**

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Canada, the Working Group (i) makes the recommendations to Canada under part 1, and (ii) will follow-up the issues in part 2 when there has been sufficient practice in Canada in respect of cases involving the bribery of foreign public officials.

1. Recommendations***Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery***

1. The Working Group recommends that, with respect to promoting awareness of the Convention and the CFPOA, Canada establish a more systematic and coordinated approach to promoting awareness, and increase efforts to promote awareness of the CFPOA in all the government agencies involved in the implementation of the CFPOA. (Revised Recommendation, Paragraph I)
2. Concerning the investigation and prosecution of cases involving the bribery of foreign public officials, the Working Group recommends that Canada consider establishing a coordinating role for one of the principal agencies responsible for the implementation of the CFPOA for purposes including the following: 1. Collecting information from the police and prosecutorial authorities at the federal and provincial levels about investigations and prosecutions to ensure that, for instance, resources are not duplicated where more than one authority has jurisdiction; and 2. Maintaining specialized knowledge on the CFPOA to be available to the provincial (and where applicable, municipal) authorities involved in the enforcement of the offence. (Revised Recommendation, Paragraph I)
3. With respect to the prevention and detection of the bribery of foreign public officials through accounting requirements, external audit and internal company controls, the Working Group recommends that Canada:
 - a) Consider the introduction of amendments to the federal Canada Business Corporations Act (CBCA) to prohibit the making of off-the-books accounts and transactions, the recording of non-existent transactions, and the use of false documentation, and consult with the provinces in an effort to ensure that the provincial legislation also meets these standards [Convention, Article 8.1; Revised Recommendation, Paragraph V. A. (i)]
 - b) Review the relevant legislation in consultation with the provinces to consider: 1. whether the requirements to submit to an independent external audit are adequate, in view of the rule that permits large private corporations to exempt themselves from the requirement; and 2. broadening the prohibitions for participating in audits in order to improve auditor independence. [Revised Recommendation, Paragraphs V. B. (i) and (ii)]
 - c) Consider requiring the auditor to report indications of foreign bribery to the competent authorities.¹ [Revised Recommendation, Paragraph V. B. (iv)]

¹ The Working Group notes that this is a general issue for many Parties.

- d) Encourage the development and adoption of adequate internal company controls, including standards of conduct. [Revised Recommendation, Paragraph V. C. (i)]
4. With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Canada:
- a) Consider clarifying the policy statements on reporting wrongdoing and illegal acts in the workplace with a clear statement that an employee may either follow the internal disclosure procedure or report an offence directly to the law enforcement authorities, and that there should be no administrative or disciplinary measures applied to an employee who, in good faith, does decide to report directly to the law enforcement authorities. (Revised Recommendation, Paragraph I)
 - b) Issue specific instructions to foreign representations, including embassy personnel, concerning the steps that should be taken where credible allegations arise that a Canadian company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Canada.² (Revised Recommendation, Paragraph I)
 - c) Review the prohibition under the federal Income Tax Act against reporting non-tax criminal offences detected in the course of tax audits performed by the Canadian Customs and Revenue Agency to the law enforcement authorities. (Revised Recommendation, Paragraph I)
 - d) Review the disclosure policy and procedure of the Canadian International Development Agency (CIDA) and Export Development Canada (EDC) to ensure that there is disclosure to the law enforcement authorities or the Federal Prosecution Service of the Department of Justice, where, in the course of transacting business with a company, credible evidence arises that a violation of the CFPOA has occurred.³ (Revised Recommendation, Paragraph I)

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution and Sanctioning of Foreign Bribery Offences

5. The Working Group recommends that Canada:
- a) Consider issuing some form of guidance to assist in the interpretation of the exception under section 3 (4) of the CFPOA for facilitation payments. (Convention, Article 1; Commentary 9 to Convention)
 - b) Consider amending the part of the definition of “business” in section 2 of the CFPOA that results in the requirement that the purpose of the bribe be for obtaining an advantage in the course of business for profit. (Convention, Article 1)
 - c) Reconsider the decision to not establish nationality jurisdiction over the offence of bribing a foreign public official. In the event that Canada does not change its position, the Working

2 The Working Group notes that this is a general issue for many Parties.

3 The Working Group notes that this is an issue for other Parties. This recommendation shall not be interpreted as a suggestion that the policies of EDC do not meet the standards set out in the Action Statement on Bribery and Officially Supported Export Credits.

Group recommends that this issue continue to be monitored. (Convention, Article 4.2 and 4.4; Phase 1 Evaluation)

- d) With respect to prosecutorial discretion and the guidelines in the FPS Deskbook, clarify that, in investigating and prosecuting the bribery of a foreign public official, there are no proper considerations of national economic interest, the potential effect on relations with another state, or the identity of the natural or legal entities involved, and establish guidance to prosecutors on how to proceed when they decline to prosecute a case that potentially involves one of the public interest factors listed in the FPS Deskbook. (Convention, Article 5)
- e) Consider revisiting the policies of agencies such as Export Development Canada (EDC), the Canadian International Development Agency (CIDA) and Public Works and Government Services Canada (PWGSC) on dealing with applicants convicted of bribery and corruption, given that Canada does not impose additional civil or administrative sanctions upon a person or company convicted of the bribery of a foreign public official. [Convention, Article 3.4, Revised Recommendation, Paragraphs II v) and VI ii)]⁴
- f) Compile statistical information on the sanctions for the offence of bribing a foreign public official as well as related omissions and falsifications in respect of the books, records and accounts of companies, in a manner that differentiates between the sanctions for legal persons versus natural persons and includes information about the forfeiture of bribes and the proceeds of bribery. It is also recommended that Canada consider differentiating between the sanctions obtained through the plea-bargaining process and those obtained through ordinary trial proceedings (Convention, Article 3.1, 3.3 and 8.2).

2. Follow-up by the Working Group

- 6. The Working Group will follow-up the following issues once there has been sufficient practice under the CFPOA:
 - a) Application of the revised law on the liability of legal persons [Bill C-45 “An Act to amend the Criminal Code (criminal liability of organizations)”], which was introduced in the House of Commons on 12 June 2003, to CFPOA cases. (Convention, Article 2; Phase 1 Evaluation)
 - b) Application of the exception under section 3 (3) of the CFPOA for reasonable expenses incurred in good faith.
 - c) Application of sanctions to natural and legal persons for offences under the CFPOA as well as related omissions and falsifications in respect of the books, records and accounts of companies. [Convention, Article 3.1, 3.3 and 8.2; Phase 1 Evaluation; Revised Recommendation, Paragraph V. A. (ii)]
- 7. In addition, the Working Group will follow-up implementation of the various initiatives⁵ announced by the Government of Canada following the on-site visit.

4 This recommendation shall not be interpreted as a suggestion that the policies of EDC do not meet the standards set out in the Action Statement (of the OECD Working Party on Export Credits and Credit Guarantees) on Bribery and Officially Supported Export Credits.

5 Following the on-site visit, the Canadian authorities announced that it would be undertaking initiatives including the following:

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- Ensure that the DFAIT media relations division has an accurate understanding of the CFPOA (in response to the release of erroneous information about the application of the CFPOA to the media).
 - Amend the CIDA document “Anti-Corruption Programming: A Primer” to provide accurate information about the facilitation payments exception in the CFPOA
 - RCMP will take steps to add the CFPOA to the list of offences for which it has the mandate to investigate in its PROOF document.
 - The CCRA began developing a section in its Audit Manual to deal with the application of section 67.5 of the Income Tax Act as it relates to outlays and expenses incurred under section 3 of the CFPOA. As well, CCRA undertook to revise its Investigation Manual to include a reference to the CFPOA.
 - Team Canada plans to add links on the CFPOA to its Export Source website and will refer to the CFPOA in the next edition of “Step-by-Step Guide to Exporting”.
 - Awareness training sessions will be held in order to assist federal public servants in interpreting the two policy documents regarding the internal disclosure of information on offences committed by government officials.
 - The Minister of Finance of Québec announced in the budget speech of 11 March 2003 that the Québec Income Tax Act would be amended to disallow payments for the purpose of doing anything that is an offence under section 3 of the CFPOA, and that the amendment would operate retroactively to the date the CFPOA came into force.
 - In order to reinforce the practice that has evolved concerning the sharing of information about cases between the police agencies, the RCMP has undertaken to work with its partners to establish a protocol whereby police agencies would inform the RCMP about cases involving the CFPOA.
 - The FPS Deskbook will be amended to reinforce the recommendation already contained therein about the recording of reasons for decisions to not prosecute.
 - CIDA’s auditors are exploring the possibility of conducting joint audits with other donors to more effectively verify and trace the use of funds where an applicant has been convicted of bribery.
 - The Government of Canada announced that on 12 June 2003 a Bill was introduced into Parliament [Bill C-46 “An Act to amend the Criminal Code (Capital Markets fraud and evidence-gathering)”], which, inter alia, 1. creates an offence of threatening or retaliating against employees who report unlawful conduct to the law enforcement authorities, and 2. establishes the authority for a justice or judge to issue general and specific production orders for the obtaining of documents from persons, including financial institutions, other than those under investigation.
 - Establish a legislative and regulatory framework regarding the reporting by lawyers and legal firms of money laundering transactions to competent authorities.

Finland (May 2002)

E. SUMMARY AND RECOMMENDATIONS

1. Summary

A high level of transparency and accessibility are well-entrenched characteristics of the Finnish government. This was particularly evident during the consultations with the private sector and civil society, which praised the Finnish government for its openness and custom of consulting with them about legislative and policy initiatives.

Pursuant to the Finnish Constitution, the legality of the civil service and the actions of civil servants are monitored by two independent bodies: the Office of the Parliamentary Ombudsman and the Office of the Chancellor of Justice. These bodies have the authority to receive complaints from anyone, regardless of nationality and regardless of the country where the complaint originates, concerning the conduct of all the various Finnish government officials involved in the implementation of the Convention in practice (e.g. police investigations, the handling of requests for mutual legal assistance and extradition).

For two years in a row (2000 and 2001), TI has rated the level of perceived corruption in Finland's public service as the lowest out of approximately 90 countries studied. The Working Group recognises the commendable record of the Finnish government in this regard.

During the on-site visit, it was evident that up to now the Finnish government has based its policy on implementing the Convention and Revised Recommendation on the low level of corruption in the Finnish government. However, more attention should be given to the opportunities of and pressures on Finnish companies and foreign companies located in Finland to bribe in order to compete in sensitive national markets.

In conclusion, based on the findings of the Working Group with respect to Finland's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Finland. In addition, the Working Group recommends that certain issues (para. 9.) be revisited following the development of litigation of the foreign bribery offences.

2. Recommendations

Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

The Working Group recommends that Finland:

- a) Undertake effective public awareness activities for the purpose of educating and advising the public and private sectors about the Convention and consider involving interested business associations and other non-governmental bodies in the delivery of these initiatives. (Revised Recommendation, Article I)
- b) Clarify internally the responsibilities of state authorities for the implementation of the Convention. (Convention, Article 5)

With respect to the reporting of suspected bribery to the appropriate authorities, the Working Group recommends that Finland:

- a) Establish clear guidelines to the effect that tax inspectors are obligated to report cases of suspected foreign bribery and tax fraud to the investigative authorities. [Revised Recommendation, Articles II (ii) and IV]
- b) Evaluate whether an obligation that persons responsible for keeping accounts report suspected bribery transactions would improve the prevention and detection of foreign bribery cases. (Revised Recommendation, Article V)
- c) Require auditors to report indications of a possible foreign bribery offence to management and, where appropriate, corporate monitoring bodies, and consider requiring that such body in turn has a duty to report suspicions of bribery to the investigative authorities. [Revised Recommendation, Article V B, (iii) and (iv)]
- d) Ensure that in practice the absence of an express obligation in the law requiring that money exchange bureaux report suspicious transactions to the Money Laundering Clearing House (MLCH) does not decrease the effective implementation of money laundering legislation, and undertake a consistent and effective approach to monitoring the compliance of real estate agencies with their reporting obligations to the MLCH. (Convention, Article 7)

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Accounting and Money Laundering Offences

The Working Group recommends that Finland:

- a) Consider providing guidance to law enforcement agencies and prosecutors clarifying the application of the relevant Penal Code provisions to legal persons in respect of prosecutorial discretion, the statute of limitations and coverage of the law regarding state-owned/controlled companies. (Convention, Articles 2, 5 and 6)
- b) Provide statistical information to the Working Group about the application of sanctions under the legislation implementing the Convention (i.e., the foreign bribery, accounting, and money laundering offences) to evaluate whether penalties are proportionate, dissuasive and effective in practice. (Convention, Article 3.1; Phase 1 Evaluation, section 4).
- c) Inform accounting professionals of the practical consequences of the recent Supreme Court decision in which it was decided that anyone who exercises actual authority in respect of bookkeeping could be prosecuted for an accounting offence, to clarify responsibility and raise public awareness in this regard. (Convention, Article 8.2)

3. Follow-up by the Working Group based on the Development of Litigation

The Working Group will follow up the issues below as litigation of the foreign bribery offences develops:

- a) Decisions of relevant authorities, including the courts, in regard to the differentiation between aggravated and non-aggravated bribery. (Convention, Article 1.1)
- b) Decisions of relevant authorities, including the courts, with regard to cases involving bribes to foreign public officials through intermediaries. (Convention, Article 1.1)
- c) The application of the foreign bribery offence to determine whether it is necessary to prove that, pursuant to the laws of the foreign public official's country, the foreign public official

- had the exact powers to provide the act or omission that the briber intended to obtain. (Convention, Article 1.1; Commentary 3)
- d) The application of sanctions under the legislation implementing the Convention (i.e. the foreign bribery, money laundering and accounting offences) and in the framework of this assessment the Working Group will also:
- (i) review the application of confiscation due to the absence of the authority of the court to order monetary sanctions of a comparable effect and the seemingly low sanctions that have been applied to domestic bribery offences. (Convention, Article 3.3; Phase 1 Evaluation, section 2)
 - (ii) assess the impact of the Criminal Code provisions on the lapsing of sanctions (in respect of fines, confiscation and imprisonment) (Convention, Article 3.1)
- e) The consequences in practice of the non-applicability of the accounting offences to legal persons to determine whether Finland is able to effectively address accounting offences connected with the concealment of foreign bribery. (Convention, Article 8.2; Commentary 29; Phase 1 Evaluation, section 5).

France (January 2004)

D. RECOMMENDATIONS

In conclusion, based on the findings of the Working Group with respect to France's implementation of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to France. In addition, the Working Group recommends that certain issues be revisited as the case-law continues to develop.

a) Recommendations

Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials

With respect to awareness raising efforts to promote the implementation of the Act of 30 June 2000 amending the Criminal Code and the Code of Criminal Procedure with regard to the fight against corruption, the Working Group recommends that France:

1. Continue and strengthen its efforts vis-à-vis enterprises, including small and medium-sized enterprises that do business internationally, and encourage companies to develop and adopt internal control mechanisms, including putting in place ethics committees and warning systems for employees, as well as codes of conduct specifically addressing the issue of transnational bribery. [Revised Recommendation, Articles I and V.C.i)]

Regarding detection, the Working Group recommends that France:

2. Issue regular reminders, via inter-ministerial circulars or any other official channel, to all public officials, and particularly those working for agencies invested with supervisory powers, of their obligation to advise the Public Prosecutor promptly of any violation of the Act of 30 June 2000, pursuant to Article 40 subsection 2 of the Code of Criminal Procedure, and that they be reminded, in this regard, of the disciplinary sanctions applicable in the event of non-compliance with this obligation, having regard in particular to the broad discretion that is granted to them in this area. [Revised Recommendation, Article I]
3. Issue regular reminders to diplomatic missions of specific instructions concerning measures to be taken when there are presumptions that a French enterprise or individual has bribed or attempted to bribe a foreign public official, including reminders of their obligation to advise promptly the Public Prosecutor. [Revised Recommendation, Article I]
4. Establish procedures to be followed by employees of the Coface and the Agence Française de Développement for reporting credible evidence of the bribery of a foreign public official to the Public Prosecutor's office and encourage these agencies to set up policies to evaluate the eligibility of enterprises that have been found guilty in the past of acts of foreign bribery for financial assistance provided by these agencies. [Revised Recommendation, Article I]
5. Consider introducing stronger protective measures for employees who report suspicious facts that may indicate bribery in order to encourage them to report such facts without fear of retaliation in the form of dismissal. [Convention, Article 5; Revised Recommendation, Article I].

6. Make use of the new law on financial security to enhance the awareness of auditors and provide them with further training regarding the provisions of the Act of 30 June 2000, in connection with their obligation to report any illicit act to the Public Prosecutor's office, and to subject those who fail to comply with that obligation to more severe disciplinary measures. [Convention, Article 8; Revised Recommendation, Article V]
7. In order to enhance the overall effectiveness of French provisions to fight corruption, make financial and professional organisations which are subject to the obligation to declare suspicious transactions to TRACFIN (the financial intelligence unit) more aware of the provisions of the Act of 30 June 2000, and ensure that available sanctions are applied effectively to all those organisations and professions that are subject to this obligation. [Revised Recommendation, Article I]

Recommendations for ensuring adequate mechanisms for the effective prosecution of offences of bribery of foreign public officials and related offences

The Working Group recommends that France:

8. Given the current exceptional regime assigning to the Public Prosecutor the sole authority to prosecute cases involving the bribery of foreign public officials of States that are not Members of the European Union, and given the hierarchical structure of the Public Prosecutors' office which is by law subject to the executive, facilitate the prosecution based on complaints lodged by victims in cases involving the bribery of public officials of any foreign State, on the same basis as that provided for bribery of French public officials. [Convention, Article 5; Revised Recommendation, Article VI]
9. Take the necessary steps to extend to an appropriate period the statute of limitations applicable to the offence of bribery of foreign public officials so as to ensure the effective prosecution of the offence, and to facilitate responses to requests for extradition. [Convention, Article 6]
10. Ensure that, within the framework of the reorganisation of the judiciary specialized in economic and financial offences, sufficient human and financial resources are allocated to investigations and legal proceedings in cases of bribery of foreign public officials, particularly in respect of the new central anti-bribery brigade, the economic and financial poles and specialised training for magistrates assigned to these poles, as well as the processing of requests for international mutual assistance. [Convention, Article 9; Revised Recommendation Articles I and VII; Annex to the Revised Recommendation, Paragraph 6]
11. Draw the attention of magistrates to the importance of applying effectively the criminal liability of legal persons in cases where enterprises are prosecuted for the bribery of foreign public officials and encourage them to impose, wherever possible, the penalty of confiscation and, to that end, to take the necessary steps to make them aware of the usefulness of such a penalty to sanction the offence of bribery of foreign public officials. [Convention, Articles 2 and 3]
12. To compile statistics on the number of proceedings involving acts of transnational bribery that have resulted in prosecution or in the shelving of the proceedings, before or after investigation, in order to facilitate assessment and, where appropriate, encourage changes to the relevant criminal policy. [Revised Recommendation, Article 1].
13. To carry out the requisite consultations with a view to ensuring that appropriate fiscal provisions, in compliance with Article IV of the revised Recommendation of 1997 on the non-deductibility of bribes, are enacted as soon as possible in French territories that enjoy an autonomous tax status, taking into

account the relative risk factors that are associated with them. [Revised Recommendation, Article IV; Phase 1 Evaluation]

b) Follow-up by the Working Group

The Working Group will follow up the issues below, as the case-law and practice continue to develop, in order to evaluate:

14. The application of sanctions with a view to determining whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, in particular, the practice of the courts with regard to the criminal liability of legal persons for the offence of active bribery of foreign public officials. [Convention, Articles 2 and 3]
15. Whether the current wording – notions of "without right", "at any time", and foreign public officials, and the case law concept of "corruption pact" – as well as the treatment given to the role played by the intermediary in the transmission of a bribe are sufficiently clear to allow effective prosecution of the offence of bribery of a foreign public official. [Convention, Article 1]
16. Whether the current basis of personal jurisdiction, which makes prosecution contingent on the prior lodging of a complaint by the victim or the official authorities, is an effective means of combating the bribery of foreign public officials having regard to the type of offence in question and the reluctance that certain foreign authorities may have in reporting on the acts of their own public officials. [Convention, Article 4]
17. The effectiveness of existing mechanisms at the disposal of the tax administration to identify and reject as deductible expenses bribes paid for export contracts. [Revised Recommendation, Article IV]

The Working Group will furthermore follow up on the issue of provision of mutual legal assistance by France, to ensure that it is not influenced, in the context of the fight against bribery of foreign public officials, by economic considerations. [Convention, Article 9; Revised Recommendation, Article VII]

Germany (June 2003)**E. RECOMMENDATIONS**

The Working Group commends Germany for their efforts and co-operation in providing information throughout the whole examination process, including during the on-site visit. Germany has extensive experience with investigation and prosecution of domestic bribery offences, as well as other economic crimes, which is relevant for investigating and prosecuting foreign bribery cases. The experience in practice with respect to these offences facilitated the Working Group's examination of the application of the Convention and the Revised Recommendation in Germany.

In conclusion, based on the findings of the Working Group with respect to Germany's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Germany. In addition, the Working Group recommends that a number of issues be revisited as case law develops.

1) Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

1. The Working Group recommends that Germany increase its efforts to raise the level of general awareness of the foreign bribery offence and the Convention. With respect to the private sector, the Working Group recommends that Germany encourage the continued development and adoption of adequate corporate compliance programmes including for small and medium sized enterprises doing business internationally [Revised Recommendation, Articles I and V.C(i)].

2. With respect to the police and the prosecutorial authorities, the Working Group recommends that Germany:

1. Ensure that the issue of foreign bribery is adequately addressed within training programmes (Revised Recommendation, Article I);
2. Evaluate whether sufficient resources are being allocated for the purpose of investigating and prosecuting foreign bribery cases (Commentary, 27; Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 6).

3. With respect to the tax authorities, the Working Group recommends that Germany undertake to reduce the time-lag with regard to the performance of tax audits of the largest companies (Revised Recommendation, Articles I and IV);

4. The Working Group recommends that Germany continue to keep under review whether the existing mechanisms for the inter-Land communication and co-operation for criminal investigations and prosecutions are effective, including the sharing of experience in prosecuting foreign bribery cases (Revised Recommendation, Article I).

5. With respect to the reporting of suspected bribery or money laundering to the appropriate authorities, the Working Group recommends that Germany:

1. Consider clarifying the obligation to report suspicious transactions for auditors and tax consultants, for example, by issuing guidelines (Revised Recommendation, Article I);

2. Consider the establishment of mechanisms such as an Ombudsman, anti-corruption unit or hotline in order to facilitate reporting of suspicion of bribery by members of public administration (Revised Recommendation, Article I).

2) Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences

6. The Working Group recommends that Germany compile at the federal level for future assessment information on investigations of the foreign bribery offence for both natural and legal persons, and sanctions of the foreign bribery offence for both natural and legal persons (Convention, Article 3; Phase 1 Evaluation, section 2);

7. The Working Group recommends that Germany take measures to ensure the effectiveness of the liability of legal persons which could include providing guidelines on the use of prosecutorial discretion, and further increasing the maximum levels of monetary sanctions (Convention, Articles 2 and 3; Phase 1 Evaluation, section 2).

8. The Working Group recommends that, as concerns the prosecution of natural persons, Germany consider issuing guidelines which could help provide a uniform application of sections 153a and 153c of the Code of Criminal Procedure, as well as a uniform exercise of discretion between domestic and foreign bribery cases (Convention, Article 5; Commentary, 27; Phase 1 Evaluation, section 3).

3) Follow-up by the Working Group

9. The Working Group will follow up the issues below:

1. The effectiveness of the reporting of the suspected bribery transactions by the tax authorities in practice (Revised Recommendation, Article I);
2. The effectiveness of the operation of the new financial intelligence unit within the BKA under the new Money Laundering Act in practice (Revised Recommendation, Article I);
3. The application of sanctions under the legislation implementing the Convention (i.e. the foreign bribery, money laundering and accounting offences) [Convention, Articles 3, 7 and 8.2; Revised Recommendation, Article V.A(iii)];
4. The impact of the exception for the money laundering offence where the predicate offence is bribery of a foreign MP, on the effective detection of foreign bribery in practice (Convention, Article 7; Revised Recommendation, Article I);
5. The adequacy of the statute of limitations for the foreign bribery offence (Convention, Article 6);
6. Whether, in practice, the sanctions against legal persons for the foreign bribery offence are effective, proportionate and dissuasive (Convention, Articles 2 and 3; Phase 1 Evaluation, section 2).

Greece (April 2005)**F. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP**

Based its findings on Greece's implementation of the Convention and the Revised Recommendation, the Working Group (1) makes the following recommendations to Greece and (2) will follow up certain issues as cases emerge.

1. Recommendations***Recommendations concerning Detection and Prevention of Foreign Bribery***

1. With respect to raising awareness of the Convention, the Revised Recommendation and Law 2656/1998, the Working Group recommends that:

- (a) Greece take measures to further raise the level of awareness of the foreign bribery offence among officials in government agencies that could play a role in detecting and reporting it, and undertake effective public awareness activities for the purpose of educating and advising the private sector on the offence (Revised Recommendation I);
- (b) Greece further raise awareness of these instruments within the public sector, particularly in the Ministries of Finance and Economy, Justice, and the Interior, Public Administration and Decentralisation, the Hellenic Capital Markets Commission, the Export Credit Insurance Organisation, Hellenic Aid and among tax officials (Revised Recommendation I);
- (c) Greece work proactively with the accounting, auditing and legal professions to establish training and awareness-raising activities about the foreign bribery offence in order to maximise the opportunities for prevention and deterrence within the business community (Revised Recommendation I);
- (d) the Export Credit Insurance Organisation, Hellenic Aid and the Hellenic Capital Markets Commission make greater efforts to promote these instruments and the consequences of engaging in bribery to their clients and prospective clients (Revised Recommendation I);
- (e) Greece issue guidance to foreign representations and embassy personnel concerning the steps that should be taken where non-frivolous allegations arise that a Greek company or individual has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities in Greece (Revised Recommendation I).

2. With respect to measures to disallow the tax deductibility of bribe payments to foreign public officials, the Working Group recommends that Greece consider introducing an express denial of deductibility in order to strengthen the mechanisms available for detecting and deterring the offence (Revised Recommendations IV).

3. With respect to prevention and detection of foreign bribery through accounting and auditing, the Working Group recommends that Greece devise guidelines on reporting foreign bribery and false accounting for accountants and auditors, and require external auditors to report indications of bribery to corporate monitoring bodies (such as the Hellenic Capital Markets Commission) as appropriate (Revised Recommendations V.B.iii and V.B.iv).

4. Concerning other measures to prevent and detect foreign bribery, the Working Group recommends that Greece undertake initiatives to (i) remind employees of their legal obligation to report crimes, and (ii) consider introducing specific measures to further protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of retribution (Convention, Article 5; Revised Recommendation I).

Recommendations Pertaining Investigation of Foreign Bribery

5. With respect to investigation of foreign bribery, the Working Group recommends that Greece:
- (a) establish procedures for co-ordination, sharing information and resolving conflicts of competence between the Internal Affairs Division of the Hellenic Police and the Special Investigations Service, and consider assigning the competence for investigating domestic and foreign bribery to a single law enforcement agency, and provide further training on the practical aspects of foreign bribery investigations to members of the relevant law enforcement agencies (Revised Recommendation I);
 - (b) ensure that the National School of Judicature continue its training programmes on foreign bribery for prosecutors and judges, including new recruits (Revised Recommendation I).

Recommendations Pertaining to Prosecution and Sanctioning of Foreign Bribery

6. With respect to the prosecution of foreign bribery, the Working Group recommends that Greece:
- (a) eliminate the requirement of a complaint from the government of the country in which the crime was committed before asserting nationality jurisdiction to prosecute foreign bribery (Convention Article 4(2));
 - (b) amend its legislation to exclude the application of Article 30(2) of the Code of Penal Procedure (which exempts “political offences” and “offences through which the international relations of the state may be disturbed” from prosecution) from foreign bribery cases (Convention Article 5 and Commentary 27);
 - (c) ensure delays in proceedings do not result in the expiry of limitation periods in foreign bribery cases (Convention Article 6);
 - (d) ensure that liability of legal persons for foreign bribery is effective, particularly regarding (i) the threshold for imposing liability, and (ii) the categories of persons whose acts may trigger the liability of a legal person (Convention Article 2).

7. With respect to sanctions for foreign bribery, the Working Group recommends that Greece ensure that the amount of an administrative fine against a legal person does not depend solely on the value of a contract obtained by the briber (Convention Article 3(2)).

2. Follow-up by the Working Group

8. The Working Group will follow up the issues below as cases and practice develop in Greece:
- (a) whether Law 2656/1998 covers the following situations (i) bribery of a foreign public official who uses his/her position in excess of his/her powers, and (ii) a briber who is the best-qualified bidder (Convention Article 1);

- (b) the application of the defence of “effective regret” in Article 236 of the Penal Code in foreign bribery cases (Convention Article 1);
- (c) whether the effective seat theory provides a sufficiently broad jurisdictional base for imposing liability against legal persons for foreign bribery (Convention Articles 2 and 4);
- (d) effectiveness of the system of concurrent proceedings against the principal offender and a legal person in Greece, and whether in practice proceedings against legal persons will be taken independently of proceedings against a principal offender, including whether conviction of the principal is a prerequisite (Convention Article 2);
- (e) sanctions imposed against natural persons (including confiscation) for foreign bribery based on statistics provided by Greece (Convention Article 3);
- (f) whether sanctions imposed against legal persons for foreign bribery are effective, proportionate and dissuasive, in view of Article 5 of Law 2656/1998 which imposes an administrative fine of up to three times the value of the benefit (Convention 3(2)).

Hungary (May 2005)

C. RECOMMENDATIONS

Based on its findings regarding Hungary's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the following recommendations to Hungary under part I; and (ii) will follow up the issues in part II when there is sufficient relevant practice.

Part I. Recommendations

Recommendations for ensuring effective prevention and detection of the bribery of foreign public officials

1. With respect to awareness raising and prevention-related activities to promote the implementation of the Convention and the Revised Recommendation, the Working Group recommends that Hungary:

- a) take further action to raise the level of awareness of the foreign bribery offence and the need for its enforcement among those agencies that work with Hungarian companies active in foreign markets, including trade promotion agencies and officials [Revised Recommendation, Paragraph I];
- b) ensure that, in light of the transfer of anti-corruption responsibilities from the Prime Minister's Office Secretariat Responsible for Public Assets to the Ministry of Justice in December 2004, the Ministry of Justice has appropriate resources to carry out its new role. [Revised Recommendation, Paragraph I];
- c) put in place practical training for those actively involved in enforcement of the foreign bribery offence, including in particular for the Central Investigation Office of the Public Prosecution Service (CIOPPS) and the Anti-Corruption Unit (ACU) at the National Police Headquarters [Revised Recommendation, Paragraph I];
- d) ensure that considerations of national economic interest, the potential effect on relations with another State, or the identity of the natural or legal person involved shall not be taken into account in the investigation or prosecution of foreign bribery cases [Convention, Article 5];
- e) take appropriate action to improve awareness among companies and others of the foreign bribery law and of the intention to enforce it [Revised Recommendation, Paragraph I];
- f) take measures to raise awareness of the foreign bribery offence among the accounting, auditing and legal professions, and to ensure that accounting and auditing issues related to bribery are regularly examined in the context of the mandatory training requirements for auditors. [Revised Recommendation, Paragraph I].

2. With respect to the detection and reporting of the offence of bribing a foreign public official and related offences to the competent authorities, the Working Group recommends that Hungary:

- a) consider expanding the scope of article 255B CC, which sanctions the failure to report domestic bribery by public officials, to provide sanctions for the non-reporting of foreign bribery offences [Revised Recommendation, Paragraph I];
- b) provide guidance and training to tax officials on the application of the new rules prohibiting tax deductibility, including the detection of bribe payments disguised as legitimate allowable expenses [Revised Recommendation, Paragraph 1];
- c) take appropriate measures to require auditors by law to report all suspicions of bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies, and consider requiring auditors, in the face of inaction after appropriate disclosure within the company, to report all such suspicions to the competent law enforcement authorities [Revised Recommendation, Paragraph V.B];
- d) consider introducing stronger measures to protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of retaliatory action [Revised Recommendation, Paragraph 1];
- e) take appropriate steps to improve the flow of information and feedback between the relevant actors in the anti-money laundering system [Revised Recommendation, Paragraph 1].

Recommendations for ensuring effective investigation and prosecution of offences of bribery of foreign public officials and related offences

3. With respect to the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that Hungary:

- a) clarify the competence of CIOPPS regarding foreign bribery cases, and take effective measures to ensure that CIOPPS promptly receives relevant information concerning such cases, notably by ensuring that the police and prosecutorial authorities are aware that they should refer foreign bribery cases to CIOPPS [Convention, Article 5; Revised Recommendation, Paragraph 1];
- b) ensure that the necessary resources are made available, in particular at CIOPPS, for the effective investigation and prosecution of the foreign bribery offence, and consider enabling the same prosecutor to follow a case throughout the entire investigation and prosecution, including at the trial stage [Convention, Article 5; Revised Recommendation, Paragraph 1];
- c) consider taking appropriate measures to make MLA available to all Parties to the Convention in cases involving administrative or civil proceedings against legal persons for foreign bribery and ensure that sufficient resources are available to effectively carry out MLA obligations [Convention Article 9(1); Revised Recommendation, Paragraph VII(iii)];
- d) in order to increase transparency, include instructions by senior prosecutors in the case file, and review possibilities for challenging decisions to close investigations, notably through private prosecutions by competitors [Convention, Article 5; Revised Recommendation Paragraph 1];
- e) extend the statute of limitations applicable to the offence under article 258/B(1) CC to an appropriate time so as to ensure the effective prosecution of the offence, in line with the period for the offence under article 258/B(2), and allow for sufficiently long investigation periods [Convention, Article 6; Revised Recommendation Paragraph 1];

- f) consider, within the constitutional principles of the State, measures that may be taken in order to ensure that immunity does not impede effective investigation, prosecution and adjudication in foreign bribery cases [Convention, Article 5; Revised Recommendation Paragraph 1].

4. With respect to the criminal liability of legal persons for foreign bribery, the Working Group recommends that Hungary:

- a) amend the law on the criminal liability of legal persons to eliminate, insofar as they apply to foreign bribery cases, (1) the requirement that a natural person be convicted and punished as a prerequisite to the liability of a legal person; (2) the requirement that the bribe must have aimed at or resulted in the legal entity gaining "*financial*" advantage or profit; and (3) the requirement that the bribe must have aimed at giving or have actually given such an advantage to the specific legal entity subject to prosecution. [Convention, Articles 2 and 3];
- b) consider (1) defining more clearly and more broadly than by the reference to a "*chief executive*" the class of persons whose failure to supervise can trigger the liability of the legal person; and (2) establishing minimum standards with regard to appropriate supervision by such persons in order to avoid liability [Convention, Articles 2 and 3].

5. With respect to related tax and accounting/auditing offences, the Working Group recommends that Hungary:

- a) take appropriate measures to enforce accounting and auditing offences more effectively, particularly in connection with bribery cases [Convention, Article 8];
- b) take all necessary measures to ensure that no conviction for foreign bribery is required to deny the deductibility of the suspected bribe, and review the operation of the time limit for reopening a tax case [Revised Recommendation Paragraph IV].

6. With respect to sanctions, the Working Group recommends that Hungary:

- a) consider introducing additional civil or administrative sanctions for natural persons convicted of foreign bribery, analogous to those applicable to legal persons, and compile relevant statistical information [Convention, Article 3; Revised Recommendation, Paragraph 1];
- b) consider taking measures to improve the effectiveness of sanctions on companies convicted of bribery [Convention Article 3(1), (4)].

Part II. Follow-up by the Working Group

7. The Working Group will follow-up on the issues below, as practice develops, in order to assess:

- a) in light of the recent entry into force of the law on the liability of legal persons, the absence of case law and the inability to review the Explanatory Memorandum concerning the new law, the application and interpretation of the law as it applies to foreign bribery [Convention, Articles 2, 3];
- b) the application of the foreign bribery provisions as case law develops, including with regard to the definition of foreign public official and the question of bribery through intermediaries [Convention, Article 1];

- c) whether the defence of duress is limited to threats of physical or psychological damage [Convention, Article 1];
- d) jurisdiction over cases of bribery of foreign public officials, notably as regards legal persons and offences committed in whole or in part abroad [Convention, Article 4];
- e) actions taken when Hungary refuses to extradite based on the Hungarian nationality of the person whose extradition is requested [Convention, Article 10(3)];
- f) the application of sanctions by the courts and the use of confiscation and confiscation of assets measures in cases of bribery of foreign public officials, to ensure they are effective, proportionate and dissuasive [Convention, Article 3].

Iceland (February 2003)

D. RECOMMENDATIONS

In conclusion, based on the findings of the Working Group with respect to Iceland's application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Iceland. In addition, the Working Group recommends that a number of issues be revisited as case law develops.

1) Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery

The Working Group recommends that Iceland develop further efforts to raise the level of general awareness of the offence of bribery in international business transactions as well as enhance mechanisms for the detection of bribery offences (Revised Recommendation, Article I).

With respect to the public sector, the Working Group particularly recommends that Iceland:

1. enhance awareness and establish appropriate procedural guidelines and training for the detection of foreign bribery within the agencies responsible for detecting and/or investigating the offences usually related to bribery offences. (Revised Recommendation, Articles I and IV);
2. clarify and publicise the extent of the obligation of all public officials to report bribery offences of which they become aware, and in particular consider introducing a clearer obligation for all tax officials to inform and co-operate with the law enforcement authorities on any suspicion of bribery; (Revised Recommendation, Article I);
3. maintain the efficiency and specialisation of the Unit for investigation and prosecution of serious economic and environmental crimes; (Revised Recommendation, Article I);

With respect to the private sector, the Working Group recommends that Iceland:

4. co-operate with private sector organisations in order to raise awareness of companies, and in particular encourage and promote internal corporate compliance programmes for exporting companies. In addition, guidance by private sector organisations on how to deal with solicitation of bribes would be useful (Revised Recommendation, Articles I and V.C.i and iv);

With respect to accounting and audit profession, the Working Group recommends that Iceland:

5. encourage the accounting and auditing profession to organise special training sessions focussed on bribery and related offences, in the framework of their professional education and training system (Revised Recommendation, Article I);
6. encourage the adoption of a code of ethics by the auditing profession and reflect further on the rules on the independence of auditors; (Revised Recommendation, Article V.B.ii);
7. require auditors to report indications of a possible illegal act of bribery committed by any employee or person acting on behalf of a company to management and, as appropriate, to corporate monitoring bodies without delay. In addition, the Working Group recommends that Iceland consider requiring

auditors to report such indications to the competent authorities; (Revised Recommendation, Article V.B.iii and iv).

2) Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Tax and Money Laundering Offences

The Working Group recommends that Iceland consider the following modifications to its legislation by:

8. aligning the language concerning third party beneficiaries in section 109 GPC concerning bribery of a foreign public official with section 128 GPC concerning passive bribery so that third party beneficiaries are clearly covered; (Convention, Article 1);
9. reviewing the provisions dealing with bribery and considering appropriate changes in order to ensure complete consistency in the terms used in such provisions (e.g. Section 19c of the GPC and Section 1 of Act 144/1998 concerning the natural person triggering the liability of legal persons; Section 109 of the GPC and Section 52 of Act 75/1981 concerning the nature of the bribe and the definition of public officials); (Convention, Articles 1 and 2; Revised Recommendation, Article IV).

3) Follow-up by the Working Group

In light of the small number of cases of domestic bribery and the absence of case law concerning bribery of foreign public officials, it is very difficult to assess how the Icelandic legislation will be applied in practice. The Working Group will therefore revisit the case law regarding bribery in a general way as it develops. (Convention, Articles 1, 3, 5). This concerns in particular:

10. the elements of the offence explored in Phase 1 that are specific to the offence of corruption and whose interpretation cannot be inferred from the application of other similar offences, as well as the coverage of intermediaries and the interpretation of the term “foreign public official”; (Convention, Article 1 and Commentaries 4 to 10 and 12 to 19)
11. the criminal liability of legal persons, to ascertain within a reasonable period whether the foreign bribery offence is effectively applied to legal persons; (Convention, Article 2);
12. the application in practice of the universal jurisdiction and international co-operation obligations under the Convention and the effectiveness of the provisions on confiscation, in particular with respect to the possibilities of confiscation from third parties; (Convention, Articles 3, 4, 9 and 10).
13. the extent to which Icelandic authorities direct more attention on money laundering linked to forms of criminality other than drug offences, including the bribery of a foreign public official. (Convention, Article 7).

Italy (November 2004)

C. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

1. The Working Group is appreciative of Italy's hard work in preparing and hosting the on-site visit, and of their efforts to provide information throughout the examination process. Nevertheless, the Working Group regrets that Italy did not accede to the request of the lead examiners to visit Milan for one day to interview law enforcement representatives of that city with first-hand experience in foreign and domestic bribery cases, as well as Milan's significant financial and industrial sectors.

2. Based on its findings regarding Italy's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the recommendations to Italy under part 1, and (ii) will follow up the issues in part 2 when there are sufficient cases of foreign bribery in Italy.

1. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery

3. With respect to promoting awareness of the Convention and the offence of bribing a foreign public official under article 322bis of the Italian Criminal Code, the Working Group recommends that Italy:

- (a) Provide additional training to police, prosecutors and magistrates on the foreign bribery offence and increase efforts to promote awareness of the foreign bribery offence and the Convention in all the government agencies involved in the implementation of the offence, notably those dealing with Italian companies operating abroad (Revised Recommendation, Paragraph I);
- (b) Remind all public official of their obligation under article 331 of the Code of Criminal Procedure to report suspicions of foreign bribery offences detected in the course of performing their duties to the law enforcement authorities and of the sanctions for a failure to report. (Revised Recommendation, Paragraph I);
- (c) Sustain the current proactive awareness-raising activities by institutions such as the Ministry of Foreign Affairs through its diplomatic missions abroad, and pursue its initiatives to raise awareness in the private sector, notably where SMEs are concerned (Revised Recommendation, Paragraph I).

4. With respect to whistleblowing protection, the Working Group recommends that Italy consider introducing stronger measures to protect employees who report suspicious facts involving bribery in order to encourage them to report such facts without fear of retribution (Convention, Article 5; Revised Recommendation, Paragraph I).

5. With respect to the prevention and detection of foreign bribery through accounting requirements, the Working Group urges the expeditious amendment of the provisions on false accounting in the Civil Code to ensure full conformity with article 8 of the Convention. In particular, Italy is recommended to ensure that its legislation provides effective, proportionate and dissuasive sanctions for all cases of false accounting regardless of (a) monetary thresholds, (b) whether the offence is committed in relation to listed or non-listed companies, and (c) whether the offence causes damage to shareholders or creditors (Convention, Article 8).

6. With respect to the role of an independent external audit in the detection of foreign bribery, the Working Group recommends that Italy consider broadening the categories of companies subject to independent external audits to include certain non-listed companies with a high turnover, and ensure that “facts deemed to be censurable” in article 155 (2) of Decree 58/1998, which are required to be reported by external auditors to CONSOB (the regulator of the Italian securities market) and the board of directors of a company, include foreign bribery (Revised Recommendation, Paragraph V.B. (i), (iii) and (iv)).

7. With respect to the prevention and detection of foreign bribery through anti-money laundering measures, the Working Group urges the expeditious adoption of the bill criminalising money laundering by a person who commits the predicate offence, and establishing the liability of legal persons for money laundering (Convention, Article 7; Revised Recommendation, Paragraphs II.i and III).

8. With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Italy pay particular attention to information arising as a result of tax amnesty programmes in order to prevent the misuse of these programmes for the dissimulation of bribes (Revised Recommendation, Paragraph IV).

Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences

9. With respect to the prosecution and sanctioning of foreign bribery, the Working Group recommends that Italy:

- (a) Amend its legislation to exclude the defence of *concussione* from the offence of foreign bribery (Convention, Article 1 and Commentary 1);
- (b) Take the necessary steps to extend the length of the “ultimate” limitation period (*i.e.* the period of completion of prosecutions including all appeals) for the offence of foreign bribery (Convention, Article 6);⁶
- (c) Encourage its officials at the Ministry of Justice who specialise in mutual legal assistance to work more closely with law enforcement in the preparation of outgoing requests for assistance, and organise meetings to facilitate an exchange of experiences and concerns amongst officials who are involved in mutual legal assistance (Revised Recommendation, Paragraphs II.vii and VII).

2. Follow-up by the Working Group

10. The Working Group shall follow-up the following issues once there has been sufficient practice in Italy:

- (a) The effectiveness of the code of conduct of SACE (Italy’s export credit agency) in preventing foreign bribery (Revised Recommendation, Paragraph I);
- (b) The application of the offence of *istigazione alla corruzione* and attempts to the foreign bribery offence in particular to verify whether it is committed irrespective of, *inter alia*, the value of the advantage and its results (Convention, Article 1; Commentary 7);
- (c) With respect to the prosecution of foreign bribery:

⁶ The Working Group notes that this is a general issue for many Parties.

- (i) Whether conflicts of competence amongst Italian public prosecutors lead to delays and a waste of resources, thereby decreasing the effectiveness of foreign bribery investigations (Revised Recommendation, Paragraph I);
 - (ii) Italy's ability to provide and obtain mutual legal assistance in foreign bribery investigations involving legal persons (Revised Recommendation, Paragraphs II.vii and VII);
 - (iii) The use of the powers of the Minister of Justice in deciding whether to assert nationality jurisdiction to prosecute a natural person (Convention, Articles 4 and 5).
- (d) With respect to the liability of legal persons:
- (i) Whether Italy can effectively prosecute legal persons in the following cases: 1. in the absence of proceedings against natural persons; 2. where the legal person is a state-owned or state-controlled company; 3. where a foreign legal person bribes a non-Italian official in Italy; and 4. where an Italian legal person uses a non-Italian national to bribe a foreign public official while outside Italy⁷ (Convention, Article 2);
 - (ii) The application of the “defence of organisational models” (*i.e.* the adoption of an organisational and management model, including internal control and compliance procedures, to prevent offences of the kind that occurred) (Convention, Article 2);
- (e) With respect to sanctions, the level of sanctions applied to natural and legal persons, including the level of fines, application of confiscation, prohibitive sanctions, suspended sentences and the use of *patteggiamento* based on information provided by Italy (Convention, Article 3);
- (f) With respect to the power of the *Corte dei Conti* (State Audit Court) to audit public bodies, the application of that power to public or publicly-managed entities (1) involved in international transactions, (2) involved in contracting opportunities with Italian companies through public procurement or development aid, and (3) that are not subject to an external audit requirement (Revised Recommendation, Paragraph V.B.(i)).

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The Working Group notes that this is a general issue for many Parties.

Japan (March 2005)**D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP**

1. The Working Group appreciates the efforts made by Japan since the Phase 1 examination to amend its laws concerning and related to the offence of bribing a foreign public official to rectify areas in which the Working Group deemed it was not in compliance with the Convention. The Working Group also acknowledges the efforts made by the Japanese authorities to translate legislation and documents throughout the examination process, and provide timely responses to the draft Phase 2 Report of the lead examiners.

2. At the December 2004 Working Group meeting, the Working Group found that the Japanese Government had failed to provide sufficient information to enable it to perform an objective assessment of Japan's implementation of the Convention, as the Japanese authorities did not disclose the existence or non-existence of any foreign bribery investigations due to a claim of secrecy. Thus, the Working Group recommended that Japan provide within 30 days non-identifying information about non-"filed" investigations of bribing foreign public officials (i.e. the number of such investigations opened and closed, the reasons for closing any such cases, and the legal, evidentiary, mutual assistance, and other problems encountered in such investigations). Pursuant to this recommendation, the Japanese authorities submitted limited non-identifying information about four investigations which are no longer in progress. The Working Group notes that the Japanese authorities only canvassed three major District Public Prosecutors Offices and three major Police Prefectures about the existence of non-"filed" investigations. It also notes that essentially the only information disclosed about these four investigations was that the Japanese authorities did not pursue the investigations mainly due to the absence of nationality jurisdiction for foreign bribery and because of inadequate evidence.

3. In light of the information provided during the Phase 2 review, including the follow-up information presented by Japan at the Working Group meeting of January 2005, it is the finding of the Working Group that Japan has not demonstrated sufficient efforts to enforce the offence of bribing a foreign public official. However, the Japanese authorities stated that, since nationality jurisdiction came into force in January 2005, they will now be able to pursue foreign bribery cases more aggressively.

4. In view of these circumstances, another on-site evaluation will need to take place in Japan in approximately one year for the purpose of reviewing efforts that have been made to investigate and prosecute foreign bribery cases. The on-site visit shall be approximately two to three days and shall include meetings with prosecutors, police officers and other persons and bodies deemed relevant by the lead examiners with respect to non-filed investigations reported at the January 2005 meeting, as well as new investigations. The Working Group expects that the Japanese authorities will disclose during the on-site evaluation, the concrete but non-identifying information about the nature of any problems encountered in investigating and prosecuting foreign bribery cases, as well as how the relevant laws have been applied in practice, in particular those on the establishment of nationality and territorial jurisdiction. The Working Group further expects that the Japanese authorities will provide at the on-site visit all relevant non-identifying information about "filed" as well as non-"filed" investigations, including:

- (i) The time frame of the offences and the investigations, including the time spent investigating the cases,
- (ii) Whether access to financial records and MLA was requested, and if not why,

- (iii) Whether suspects and witnesses were interviewed, and if not why,
- (iv) Whether search warrants were served to obtain access to company records or other evidence, and if not why,
- (v) Whether information was requested from the tax authorities, and if not why, and
- (vi) How the police and prosecutors co-ordinated in the investigation.

5. The Working Group recommends that the Japanese authorities assess as a priority the impediments to effective investigation and prosecution. In this regard, based on the information provided by Japan during the January 2005 meeting, the Working Group urges Japan to make use of MLA at the non-“filed” investigation stage, increase co-ordination of the law enforcement efforts between prosecution and police, and address any difficulty encountered in establishing and enforcing territorial jurisdiction in order to enable Japan to advance non-“filed” investigations concerning foreign bribery offences.

6. Having regard to the object and purpose of the Convention, the Working Group also recommends that the Japanese authorities assess if and how the Japanese law prevents disclosure of non-identifying information concerning the investigation and prosecution of foreign bribery offences. The Working Group stresses that such disclosure is a necessary pre-condition for an effective monitoring mechanism as provided for in article 12 of the Convention.

7. In addition, based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Japan, the Working Group (i) makes further recommendations to Japan under Part I, and (ii) will follow-up the issues under Part II where there has been sufficient practice in Japan.

I. Recommendations

Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery

8. With respect to promoting awareness of the Convention and the offence of bribing a foreign public official established in the *Unfair Competition Prevention Law* (UCPL), the Working Group recommends that Japan make efforts to increase the awareness of:

- (i) key agencies including the Ministry of Economy, Trade and Industry (METI), Ministry of Justice, Ministry of Foreign Affairs and Ministry of Finance about the important links between foreign bribery and other areas of government activity, such as public procurement, export credit, official development assistance and anti-monopoly cases;
- (ii) police and prosecutors through training specifically targeting the foreign bribery offence either separately or in the context of overall anti-corruption and corporate crime training;
- (iii) agencies involved in contracting relationships with companies doing business abroad including the Japan Fair Trade Commission (JFTC), Securities and Exchange Commission (SESC), Financial Services Agency (FSA), Japan Bank for International Co-operation (JBIC), Nippon Export and Investment Insurance Agency (NEXI), and Japan International Co-operation Agency (JICA); and
- (iv) the legal profession. (Revised Recommendation, Paragraph I)

9. With respect to the reporting of the offence of bribing a foreign public official to the competent authorities, the Working Group recommends that Japan:

- (a) Consider establishing, notwithstanding the secrecy provisions under the National Public Service Law and the Local Public Service Law, an obligation for all public officials; and establishing procedures requiring all employees of relevant entities including JBIC, NEXI and JICA, to report as a matter of course to the law enforcement authorities any payments suspected of being bribes to foreign public officials; (Revised Recommendation, Paragraph I)
- (b) Establish as a matter of priority a formal system to enable METI to effectively process allegations of foreign bribery and pass them on to the law enforcement authorities, given its role as the government agency responsible for the implementation of the UCPL, which includes the foreign bribery offence, and the METI Guidelines and the resulting likelihood that it will receive allegations; (Revised Recommendation, Paragraphs I and II)
- (c) Clarify that external auditors are required to report indications of possible illegal acts of bribery to management and, as appropriate, to corporate monitoring bodies, and consider providing an exception to the duty of confidentiality by requiring external auditors to report indications of a possible illegal act of bribery to competent authorities;⁸ (Revised Recommendation V.B.(iii) and (iv))
- (d) In applying its legislation in the field of whistle-blowing, improve the protection of persons who report directly to the law enforcement authorities; and pursue its efforts to make such measures more widely known among companies and the general public; (Revised Recommendation, Paragraph I) and
- (e) Consider establishing a centralised mechanism for the purpose of facilitating the sharing of information and co-ordination of investigations and prosecutions of transnational bribery cases.

10. With respect to the prevention and detection of foreign bribery through accounting requirements, external audit and internal company controls, the Working Group recommends that Japan:

- (a) Ensure that all of the activities listed under article 8.1 of the Convention are prohibited, including the establishment of off-the-books accounts and the recording of non-existent expenditures, for the purpose of bribing foreign public officials or of hiding such bribery, and ensure the provision of effective, proportionate and dissuasive penalties for such omissions and falsifications; (Convention, Article 8) and
- (b) Encourage the development and adoption of adequate internal company controls, including standards of conduct, and provide companies with more guidance concerning the establishment of effective internal auditing and supervisory mechanisms (including how to respond to solicitation from foreign public officials). (Revised Recommendation, Paragraph V.B.)

11. With respect to the detection and prevention of foreign bribery through money laundering legislation, the Working Group recommends that the Government of Japan encourage the *Diet* (Parliament) to pass as a matter of priority the Bill to amend the *Anti-Organised Crime Law* in order to include the proceeds of bribing a foreign public official in the definition of “crime proceeds” for the purpose of the application of the money laundering offences. (Convention, Article 7)

⁸ The Working Group notes that this is a general issue for many Parties.

Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences

12. With respect to the implementation of the offence of bribing a foreign public official under the UCPL, the Working Group recommends that Japan:

- (a) Through its Supreme Public Prosecutors Office, undertake an internal review of the reasons for the absence of “filed” investigations and prosecutions of foreign bribery cases; (Convention, Article 5, Revised Recommendation, Paragraph I and II i)
- (b) Review the interpretations of “facilitation payments” and “international business transactions” provided in the METI Guidelines and all other relevant guidance issued by the Japanese authorities including METI, to ensure that they conform to the Convention and Commentaries on the Convention and do not mislead companies about what acts are covered by the foreign bribery offence. The Working Group further recommends that METI conduct this review in consultation with the Ministry of Justice and other relevant ministries as well as with the prosecutorial authorities through the Ministry of Justice; (Convention, Article 1)
- (c) Consider clarifying that all cases where a foreign public official directs the transmission of the benefit to a third party are covered, not just those where the official receives “in substance” the benefit; (Convention, Article 1)
- (d) Take necessary steps to extend to an appropriate period the statute of limitations applicable to the offence of bribery of foreign public officials so as to ensure the effective prosecution of the offence; (Convention, Article 6) and
- (e) Compile statistical information on the sanctions imposed for violations of the foreign bribery offence under the UCPL, including the confiscation of the bribe, suspension of sanctions and use of the summary procedure. (Convention, Article 3.1 and 3.3)

13. With respect to the tax treatment of bribes to foreign public officials, the Working Group is not sufficiently satisfied that Japan is in full compliance with the 1996 Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials, and therefore recommends that Japan enact legislation or amend its regulations as a matter of priority to effectively prohibit the tax deductibility of any bribe payments to foreign public officials made by any individuals or companies of any size. (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)

II. Follow-up by the Working Group

14. The Working Group will follow-up the following issues once there has been sufficient practice:

- (a) Developments in Japanese law with respect to the recommendations of the Subcommittee on Corporate Activities related to International Business Transactions, Trade and Economic Co-operation Committee, Industrial Structure Council, including the recommendation to undertake a study of the appropriateness of including the foreign bribery offence in the UCPL. It is also recommended that Japan report the findings of the study to the Working Group. (Convention, Article 1)
- (b) Whether (i) a legal person is liable where the bribe is for the benefit of a company related to the legal person from which the bribe emanated, (ii) the liability of a legal person depends upon the conviction or punishment of the natural person who perpetrated the offence, and (iii) legal persons are subject to the new provision on nationality jurisdiction; (Convention, Article 2)

- (c) Whether the sanctions imposed pursuant to the UCPL for the foreign bribery offence as a whole are effective, proportionate and dissuasive taking into account: (i) monetary sanctions, and (ii) the application of the expected amendment to the AOCL for confiscating the proceeds of bribing a foreign public official; (Convention, Article 3.1 and 3.3)
- (d) The anti-money laundering system focusing on: (i) the absence of coverage of some non-financial businesses and professions from the reporting requirements; (ii) the penalties for the single failure to make a “Suspicious Transaction Report” or perform customer identification; (iii) the obligation under article 239(2) of the Code of Criminal Procedure for public officials to make an “accusation” to the law enforcement authorities when they consider that there exists an offence; and (iv) the level of feedback from the law enforcement authorities concerning suspicious transactions reports made to them; (Convention, Article 7) and
- (e) The policies of agencies such as JBIC, NEXI and JICA and Japan’s public procurement authorities on dealing with applicants convicted of foreign bribery or otherwise determined to have bribed a foreign public official, to determine whether these policies are a sufficient deterrence. (Convention Article 3.2; Revised Recommendation Articles II(v) and VI)

Korea (November 2004)

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

1. Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Korea, the Working Group (i) makes the recommendations to Korea under part 1, and (ii) will follow-up the issues in part 2 when there has been sufficient practice in Korea in respect of cases involving the bribery of foreign public officials.

Recommendations

Recommendations for Ensuring Effective Prevention and Detection of Foreign Bribery

2. With respect to promoting awareness of the Convention and the Act on Preventing Bribery of Foreign Public Officials in International Business Transactions (FBPA), the Working Group recommends that Korea takes steps to increase awareness of the investigative, prosecutorial and judicial authorities, including the provision of training programmes on the Convention and the FBPA for current and future members of these bodies; agencies indirectly involved in implementing the Convention; and SMEs, particularly through agencies that advise and support them (Revised Recommendation, Paragraph I).

3. With respect to the prevention and detection of foreign bribery through accounting requirements, external audit and internal company controls, the Working Group recommends that Korea:

- (a) Considers requiring the reporting of indications of bribery to the competent authorities by external auditors or management committees (Revised Recommendation, Paragraphs V.B.iii and iv);⁹ and
- (b) Considers ensuring that government and government-funded agencies that provide contracting opportunities to Korean companies, such as the Korea Export Insurance Corporation (KEIC), the Export-Import Bank and the Korea International Cooperation Agency (KOICA), have the authority to audit companies suspected or convicted of bribing foreign public officials to determine whether funds obtained from the agency have been used as part or all of the bribe (Revised Recommendation, Paragraph V.B.i).

4. With respect to other measures for preventing and detecting foreign bribery, the Working Group recommends that Korea:

- (a) Considers extending the whistleblower protection provided by the Anti-Corruption Act to those who report foreign bribery to KICAC, and to those who report suspicions of foreign bribery to government agencies other than KICAC (Revised Recommendation, Paragraph I);
- (b) Reviews the disclosure policies and procedures of the Korea International Cooperation Agency to ensure that there is disclosure to the competent authorities where, in the course of transacting

9. The Working Group notes that this is a general issue for many Parties.

business with a company, credible evidence arises that a violation of the FBPA has occurred (Revised Recommendation, Paragraph I);¹⁰

- (c) Ensures Korean overseas representations are more pro-active in making Korean companies doing business in foreign markets aware of the Convention and the FBPA, and advises Korean overseas representations on the steps that should be taken (including reporting the matter to competent authorities) when there are credible allegations that a Korean company or individual has bribed or taken steps to bribe a foreign public official (Revised Recommendation, Paragraph I);¹¹ and
- (d) Ensures that the defence of social customs under article 20 of the Criminal Act is not applicable to the offence of foreign bribery under the FBPA (Convention, Article 3.1).

5. With respect to measures to disallow the deductibility of bribe payments to foreign public officials, the Working Group recommends that Korea:

- (a) Amends its tax legislation to clarify that bribes to foreign public officials in violation of the FBPA are not tax-deductible (Revised Recommendation, Paragraph IV); and
- (b) Communicates effectively to tax examiners (through training programmes, guidelines or manuals, and distribution of the OECD Bribery Awareness Handbook for Tax Examiners) the non-deductibility of bribes and the need to be attentive to any outflows of money from a taxpayer that could represent bribes to foreign public officials (Revised Recommendation, Paragraphs I and IV).

Recommendations for Ensuring Effective Prosecution and Sanctioning of Foreign Bribery Offences

6. With respect to measures for ensuring the effective prosecution of foreign bribery offences, the Working Group recommends that Korea:

- (a) Clarifies that article 3.1 of the FBPA covers the situation where a bribe is transmitted directly to a third party, consistent with the offence of bribing a domestic public official under the Criminal Act (Convention, Article 1.1); and
- (b) Reviews the Explanatory Manual published by the Ministry of Justice to ensure that the guidelines contained therein are consistent with the Convention and the FBPA (Convention, Article 1.1).

7. With respect to measures for ensuring effective sanctioning of foreign bribery offences and accounting and auditing offences (where relevant), the Working Group recommends that Korea:

- (a) Takes steps to ensure that the actual fines for foreign bribery are effective, proportionate and dissuasive, especially in light of the absence of the confiscation of the proceeds of bribery, and considers increasing the penalties for false accounting and fraudulent auditing (Convention, Articles 3.1 and 8.2; Revised Recommendation, Paragraph V.A.iii);

10. The Working Group notes that this is an issue for many Parties. The recommendation shall not be interpreted as a suggestion that the policies of the Korea International Cooperation Agency do not meet the standards set out in the Recommendations of the Development Co-operation Directorate.

11. The Working Group notes that this is a general issue for many Parties.

- (b) Compiles statistical information on the sanctions imposed for violations of the FBPA, including confiscation of bribes and suspensions of sentences (Convention, Articles 3.1 and 3.3); and
- (c) Ensures that the authorities responsible for development aid and privatisation can take appropriate actions, such as considering informing the competent authorities and the possible addition of non-criminal sanctions, where persons and companies are determined to have bribed foreign public officials (Convention, Article 3.4; Revised Recommendation, Paragraph VI.ii).¹²

Follow-up by the Working Group

8. The Working Group will follow-up the following issues once there has been sufficient practice under the FBPA:

- (a) With respect to the offence of bribing a foreign public official under the FBPA, application of the following:
 - (i) The exception for “small pecuniary or other advantages” (Convention, Article 1.1; Commentary 9 on the Convention);
 - (ii) Jurisprudence that provides an exception to bribery where a payment or gift is offered as a social courtesy (Convention, Article 1.1);
 - (iii) Non-applicability of the law on attempts to foreign bribery, including attempts through intermediaries (Convention, Article 1.2);
 - (iv) The definition of “foreign public official” to persons performing public functions for foreign public enterprises, in particular the interpretation of “de facto or effective control” by a foreign government(s), and the non-application of the definition to the bribery of North Korean public officials (Convention, Article 1.4; Commentary 14 on the Convention); and
 - (v) The adequacy of the statute of limitations for the foreign bribery offence (Convention, Article 6).
- (b) With respect to the liability of legal persons for the offences of bribing a foreign public official pursuant to article 4 of the FBPA and fraudulent accounting pursuant to article 21 of the Act on External Audit of Stock Companies, the application of these provisions (where appropriate) to the following situations:
 - (i) A bribe is given by a representative, agent, employee, etc. of a legal person in relation to the business of another legal person in the same enterprise group (chaebol) (Convention, Article 2);
 - (ii) A legal person pays due attention or exercises proper supervision to prevent foreign bribery (Convention, Article 2);

12. This recommendation shall not be interpreted as a suggestion that the policies of the Korea International Cooperation Agency do not meet the standards under the Recommendations of the Development Cooperation Directorate.

- (iii) A conviction/sanction has not been imposed on the natural person responsible for the offences of foreign bribery and fraudulent accounting (Convention, Articles 2 and 8.2); and
 - (iv) Foreign bribery that is committed abroad, including bribery by a natural person who is not a Korean national where the legal person has been complicit in the bribery offence (Convention, Articles 2 and 4.1).
- (c) Sanctions under the FBPA, particularly regarding (1) the determination of profit in calculating the fine, where the profit exceeds the prescribed thresholds; and (2) the impact of the absence of authority to confiscate the proceeds of bribery (Convention, Articles 3.1 and 3.3);
 - (d) The application of the money laundering offence to the laundering of funds and property related to violations of the FBPA, including the laundering of proceeds of foreign bribery obtained by the briber and laundering in relation to violations of the FBPA perpetrated by legal persons (Convention, Article 7; Revised Recommendation, Paragraphs II.i and III);
 - (e) The effectiveness of Korea's money laundering reporting system, particularly in view of (i) the monetary thresholds for reporting suspicious transactions; (ii) the absence of coverage of non-financial businesses and professions; (iii) the information in guidelines and typologies concerning foreign bribery; (iv) the level of resources of KoFIU; and (v) the exclusion of proceeds of foreign bribery from the notion of "criminal proceeds" (Revised Recommendation, Paragraph I); and
 - (f) The application of the Framework Act on National Taxes and the Criminal Procedure Act to disclosure by the National Tax Service to the competent authorities of evidence of foreign bribery detected during tax audits spontaneously without any requests (Revised Recommendation, Paragraph I).

Luxembourg (May 2004)

RECOMMENDATIONS

1. In conclusion, based on the findings of the Working Group with respect to Luxembourg's application of the Convention and Revised Recommendation, the Working Group makes the following recommendations to Luxembourg. In addition, the Working Group recommends that certain issues be revisited as case law evolves.

a) Recommendations

Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials

2. With respect to awareness raising activities to promote the implementation of the Law of 15 January 2001 relating to corruption and amending the Criminal Code, the Code of Criminal Procedure and the Act of 4 December 1967 on Income Tax, the Working Group recommends that Luxembourg:

- a) Take necessary measures, in cooperation with the professional organisations and the business circles concerned, to raise awareness among the private sector regarding the offence of bribery of foreign public officials, and promote the implementation within enterprises of preventive organisational measures – internal control mechanisms, ethics committees, and warning systems for employees –, as well as the adoption of codes of conduct specifically addressing the issue of foreign bribery. [Revised Recommendation, Articles I and V.C.(i)]
- b) Take necessary measures to raise awareness of the offence among the administration, notably among those officials that may play a role in detecting and reporting acts of bribery and those in contact with Luxembourg enterprises exporting or investing abroad (in particular diplomatic missions of Luxembourg abroad), the Luxembourg public and professional bodies. [Revised Recommendation, Article I]

3. With respect to detection, the Working Group recommends that Luxembourg:

- c) Issue regular reminders to public officials of their obligation under article 23 (2) of the Code of Criminal Procedure to inform prosecuting authorities of any offence of bribery of a foreign public official that they may become aware of in the exercise of their duties, and of disciplinary sanctions applicable in the event of non-compliance with this obligation, and ensure effective application of such sanctions. [Revised Recommendation, Article I]
- d) Encourage the implementation of a similar reporting procedure to the prosecuting authorities for officials not subject to the provisions of article 23 (2) of the Code of Criminal Procedure working for bodies vested with supervisory powers with regard to corruption in the attribution of public subsidies (notably certain officials of the Ducroire and Lux Développement). [Revised Recommendation, Articles I and II.(v)]
- e) Develop clear instructions for the Tax Administration prescribing verifications to be carried out in order to detect possible offences of bribery of foreign public officials, and remind these officials of their obligation to alert the prosecuting authorities of any offence that they may become aware of in this regard, and ensure that sufficient human and financial resources are

made available to the tax authorities for effective controls. [Revised Recommendation, Articles II.(ii) and IV]

- f) Adopt measures to ensure effective protection of any person collaborating with the law enforcement authorities, notably employees who report in good faith suspected cases of bribery. [Revised Recommendation, Article I]
- g) Given the particular importance of the Luxembourg financial centre, continue ongoing efforts in the context of the Action Plan against Money Laundering in order to ensure rigorous implementation by the entire banking and financial sector of legislative and regulatory measures aimed at preventing and detecting money laundering of funds that may be related to the bribery of foreign public officials on international markets, and ensure that non-compliance with the legal obligation to report be sanctioned in a dissuasive manner. [Convention, Article 7; Revised Recommendation, Article II.(iv)]
- h) Bearing in mind the important role of accounts auditing in the detection of suspicious operations related to bribery of foreign public officials, and in the context of ongoing efforts by Luxembourg aimed at ensuring greater transparency in corporate accounting, ensure compliance by accountants and external and internal auditors with their obligation to inform prosecuting authorities of any suspected money laundering related to corruption. In this regard, Luxembourg authorities are invited to further raise awareness of such professionals to the provisions of the anti-bribery legislation, notably by introducing stricter auditing procedures, and to ensure that non-compliance with the reporting obligation be effectively sanctioned. [Convention, Article 8; Revised Recommendation, Articles I et V]
- i) Establish effective interdisciplinary cooperation and coordination among the bodies concerned (administrative, financial and law enforcement) with regard to supervisory, detection and sanctioning powers, and, in this regard, ensure that professional secrecy does not constitute an impediment. [Revised Recommendation, Article I]

Recommendations for ensuring adequate mechanisms for the effective prosecution of offences of bribery of foreign public officials and related offences

4. With respect to prosecution, the Working Group recommends that Luxembourg:
 - j) Grant determined financial support with a view to ensuring sufficient human and financial resources as well as specific training to law enforcement professionals (police, prosecution, investigating magistrates and judges) to guarantee effective prosecution of the foreign bribery offence and related offences, notably those related to accounting, without prejudice to the execution of request for mutual legal assistance [Convention, Articles 5 and 9; Revised Recommendation, Article I; Annex to the Revised Recommendation, Paragraphs 6 and 8]
 - k) Compile relevant statistical information regarding the number, source and treatment of bribery offences (prosecution, judgment and sanction) in order to facilitate evaluation, and, if necessary, develop criminal policy in this regard. [Revised Recommendation, Article I]
 - l) In order to ensure effective prosecution of offences of active bribery of foreign public officials, and given the currently limited investigative powers at the preliminary enquiry stage, firstly, consider extending such powers, and, secondly, ensure that, at the stage where investigation is initiated, the threshold taken into account by the prosecuting authorities is not too high concerning the level of proof gathered in the course of the enquiry. [Convention, Article 5; Revised Recommendation, Article I]

- m) Formally remind prosecuting authorities (via circulars or directives, or any other official channel) of the importance of prosecuting bribers, as an essential condition for the effective application of the foreign bribery offence, and, similarly, draw their attention to the importance of prosecuting money laundering offences related to bribery on foreign markets, without referring to the place of occurrence of the predicate offence or to the place of residence of the alleged offender. [Convention, Articles 1, 3 and 5; Revised Recommendation, Article I; Convention, Articles 8 and 9; Revised Recommendation, Articles I, II.(iii), and V.A.(iii)]
- n) Taking note of Luxembourg's continued non-compliance with Article 2 of the Convention, establish in Luxembourg law a clear liability of legal persons for bribery of foreign public officials within a year of the Phase 2 evaluation of Luxembourg, and put in place sanctions that are effective, proportionate and dissuasive. [Convention, Articles 2 and 3]

5. With respect to sanctions, the Working Group recommends that Luxembourg:

- o) Raise awareness among prosecuting authorities on the importance of rigorously applying the range of sanctions provided for in criminal law which may be effective and dissuasive with respect to corruption, including confiscation measures, and encourage prosecuting authorities to lodge the range of appeals provided for under the law, should the decisions handed down be too lenient. [Convention, Article 3; Revised Recommendation, Article I]
- p) Raise awareness among tax authorities regarding the importance of making rigorous use of all sanctions available under the Luxembourg tax legislation in order to deter any attempt on the part of taxpayers to pass bribes paid abroad as deductible charges. [Revised Recommendation, Article IV]

b) Follow-up by the Working Group

6. The Working Group will follow-up in the issues below, as case law and practice develop, in order to assess:

- q) Whether the current terms – “without right” and case law concept of “corruption pact” – are sufficiently clear to allow for effective prosecution of the foreign bribery offence. [Convention, Article 1]
- r) To what extent bribers are being prosecuted and the application of sanctions handed down, notably with regard to confiscation, in order to determine whether these sanctions are sufficiently effective, proportionate and dissuasive to prevent and combat the offence of bribery of foreign public officials. [Convention, Articles 1 and 3]

7. The Working Group requests the Luxembourg authorities to report, in accordance with the Phase 2 Guidelines, on measures taken to fulfil the recommendations by the Group, and reserves the right to conduct a second on-site evaluation of Luxembourg, in view of the reports by Luxembourg authorities.

Mexico (September 2004)**E. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP**

1. Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to Mexico. The Working Group further intends to follow up on certain issues.

Recommendations***Recommendations for Ensuring Effective Measures for Preventing Transnational Bribery***

2. With respect to awareness raising, the Working Group recommends that Mexico:
- a) In addition to the broad awareness raising campaign on corruption in general, undertake targeted actions to raise the level of awareness of the transnational bribery offence and the Convention, focusing on the obligations of Mexican companies that invest and export abroad; (Revised Recommendation, Article I)
 - b) Further develop targeted programmes for the agencies and other governmental bodies most likely to come into contact with companies engaging in business abroad, such as Bancomext and Mexican embassies and strongly encourage such institutions to play a more active role in raising awareness among Mexican companies about the Convention. In this respect, the Working Group acknowledges the initiatives of the Ministry of Foreign Affairs, following the on-site visit, aiming to raise awareness of Mexican embassies and encourages Mexico to pursue its efforts; (Revised Recommendation, Article I)
 - c) Enhance awareness of the transnational bribery offence by ensuring that federal policies and initiatives are channelled to lower levels of the administration, States and municipalities; (Revised Recommendation, Article I) and
 - d) Encourage the accounting, auditing and legal professions to develop a core of specific courses and training to raise the level of awareness and knowledge on the offence of bribery committed by Mexican individuals and companies abroad, and of Mexican multinational companies in particular, in view of their increasing role in international business transactions. (Convention, Article 8; Revised Recommendation, Article I)
3. With respect to other preventive measures, the Working Group recommends that Mexico develop specific tools for the prevention of bribery of foreign public officials directed at Mexican companies exporting and investing abroad, and in particular:
- a) Further develop its partnership with business with the aim of identifying and disseminating “best practices” concerning anti-corruption policies to better prevent transnational bribery; (Revised Recommendation, Article I)
 - b) Consider establishing a list of companies having been involved in bribery, including companies involved in transnational bribery and circulating such list to all federal agencies in order to inform them of the potential risk of dealing with these companies, as well as for the possible

application of additional non-criminal sanctions, as recommended in recommendation 6, d) (Revised Recommendation Article VI)

- c) Encourage Bancomext to require details on agents' commissions when providing support, in view of the fact that such commissions are commonly used to disguise bribes to foreign public officials; (Revised Recommendation, Article II v) and
- d) Undertake strategic analysis on the characteristics of the offence of money laundering in order to assess areas for possible improvement in its prevention and detection. (Revised Recommendation, Article I)

Recommendations for Ensuring Adequate Mechanisms for the Effective Detection, Prosecution and Sanctioning of Transnational Bribery Offences

4. With respect to the reporting of transnational bribery to the appropriate authorities, the Working Group recommends that Mexico:

- a) Ensure that all public officials are made aware of and comply with their duty to report transnational bribery offences pursuant to article 117 of the Federal Criminal Procedure Code (FCPC), and consider introducing specific sanctions for breaching the obligation under article 117 FCPC; (Convention, Article 3, Revised Recommendation, Article I)
- b) Ensure that the duty to report offences pursuant to article 116 of the FCPC (obliging citizens to report any crime to the authorities) extends to accountants and auditors, and ensure that professional rules on confidentiality do not contradict the FCPC;¹³ (Convention, Article 8; Revised Recommendation, Article I)
- c) Facilitate the reporting of transnational bribery cases and provide reporting channels equivalent to those available for domestic bribery; (Revised Recommendation, Article I) and
- d) Welcoming the consensus existing between the business sector, public officials and civil society, consider the adoption of general whistleblower protection sufficient to protect employees from dismissal or other forms of retaliation in respect of the reporting of foreign bribery. (Convention, Article 5; Revised Recommendation, Article I)

5. With respect to other measures to improve detection, the Working Group recommends that Mexico:

- a) Ensure that adequate resources be devoted to investigation and prosecution of bribery of foreign public officials, and consider the setting up of a specialised unit dealing with bribery of foreign public officials; (Revised Recommendation, Article I)
- b) Ensure that the police and prosecutors become more proactive, in particular by relying on different detection tools in addition to reports by complainants, continue to improve their training, and develop analytical tools and financial investigation techniques; (Revised Recommendation, Article I) and
- c) Accelerate and streamline the processing of suspicious transaction reports in respect of suspected money laundering. (Convention, Article 7; Revised Recommendation, Article I)

¹³ The Working Group notes that this is a general issue in many Parties.

6. With respect to investigation, prosecution and sanctioning, the Working Group recommends that Mexico:

- a) Provide internal guidelines for the use of the police and prosecutors – and encourage the judiciary to issue interpretative criteria – that highlight the differences between the offences of bribery of Mexican public officials and bribery of foreign public officials; (Revised Recommendation, Article I)
- b) Amend article 222 bis of the Federal Penal Code in order to ensure that third party beneficiaries are covered and that the definition of foreign public officials is in line with the autonomous definition of the OECD Convention;¹⁴ (Convention, Article 1)
- c) In order to meet the standard of other Parties to the Convention, revise the current provisions on legal persons to:
 - eliminate the prerequisite of the conviction of a natural person,
 - eliminate the prerequisite that the offence must be committed by means provided by the legal entity “for such purpose”, and
 - ensure that State-owned and State-controlled entities are subject to liability under the transnational bribery offence,
 - increase significantly the level of sanctions; (Convention, Articles 2 and 3; Phase 1 Evaluation).
- d) Consider the introduction of additional sanctions on legal persons, such as the temporary or permanent disqualification from participation in public procurement and public works, and a general exclusion from entitlement to public benefits or aid; (Convention, Article 3; Phase 1 Evaluation, paragraph 3)
- e) Pursue its efforts to introduce witness protection for investigations of transnational bribery within the framework of judicial reform; (Revised Recommendation, Article I)
- f) Review the current system of access to bank information with a view to ensuring prompt and effective access; (Convention, Articles 5, 9; Revised Recommendation, Article VII) and
- g) Reconsider the current practice providing mutual legal assistance based on reciprocity in the absence of bilateral agreements, in order to ensure that such practice is consistent with article 9 of the Convention. (Convention, Article 9; Revised Recommendation, Article VII)

Follow-up by the Working Group

7. In light of the small number and nature of cases of bribery at the federal level and the absence of case law concerning bribery of foreign public officials, it is not possible to clearly assess how the Mexican legislation will be applied in practice. The Working Group will therefore revisit the case law in a general way as it develops. This concerns in particular:

¹⁴ The Working Group acknowledges that the bill submitted to the Parliament during the Spring session satisfactorily addresses these issues.

- a) The application of the offence to bribes given directly or through the foreign public official to third party beneficiaries and the interpretation of the term “foreign public official”; (Convention, Article 1; Phase 1 Evaluation, paragraph 2) and
- b) The application of sanctions with a view to determining whether they are effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, particularly: the basis on which intangible bribes are quantified in respect of natural persons, and the practical application of fines both to natural and legal persons. (Convention, Article 3; Phase 1 Evaluation, paragraphs 3, 4)

Norway (April 2004)**C. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP**

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Norway, the Working Group (i) makes the recommendations to Norway under part 1, and (ii) will follow-up the issues in part 2 when there has been sufficient practice in Norway in respect of cases involving the bribery of foreign public officials.

1. Recommendations***Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials***

With respect to awareness raising, the Working Group recommends that Norway:

1. Pursue existing efforts undertaken to raise awareness of the offence of bribery in international business transactions, in particular where small and medium size enterprises are concerned (Revised Recommendation, Article I);
2. Communicate to the business sector that, under the new legislation, facilitation payments are not allowed (Revised Recommendation, Article I);
3. Undertake further actions through institutions which are in a position to have privileged contacts with Norwegian enterprises exporting abroad, such as GIEK (the Norwegian export credit agency) or the Ministry of Foreign Affairs, notably through its diplomatic missions abroad (Revised Recommendation, Article I);
4. Consider, in this context, establishing a coordinating body to oversee awareness raising activities undertaken by Norwegian public authorities and relating to bribery of foreign public officials (Revised Recommendation, Article I).

With respect to detection, the Working Group recommends that Norway:

5. Pursue its efforts to develop further cooperation between the public institutions which could usefully contribute to the detection of the offence of bribery of foreign public officials and the law enforcement authorities (Revised Recommendation, Article I);
6. Consider the introduction of a general obligation for staff of public institutions to report suspicions of corruption by Norwegian companies to the competent authorities (Revised Recommendation, Article I);
7. Bearing in mind the vital role of auditors in uncovering and reporting bribery offences, raise awareness concerning the obligation for auditors to report any suspect **activity** that would indicate an unlawful act of bribery to law enforcement authorities (Convention, Article 8; Revised Recommendation, Article V.B.iv);
8. Continue ongoing reflection undertaken by several public bodies in Norway on the issue of whistleblower protection, with a view to introducing measures to ensure adequate protection against

sanctions to employees who report suspected cases of bribery of foreign public officials (Revised Recommendation, Article I).

Recommendations for ensuring effective prosecution and sanctioning of bribery of foreign public officials

With respect to prosecution, the Working Group recommends that Norway:

9. Ensure that sufficient financial and human resources continue to be allocated to Økokrim and economic sections of police districts in order to retain full ability to carry out international investigations in cases of transnational bribery (Convention, Article 5; Revised Recommendation, Article I; Annex to the Revised Recommendation, Paragraph 6);
10. Given the recently introduced distinction between basic and aggravated bribery, ensure that law enforcement authorities are fully aware of the range of investigative tools available, and have sufficient expertise to make broad use of these, where appropriate; and consider extending the availability of witness protection programmes to foreign bribery cases (Revised Recommendation, Article I);
11. Draw attention of the law enforcement and judicial authorities to the importance of making full use of the various economic sanctions available on the bribers, taking into account the particular circumstances surrounding cases of transnational bribery (Convention Article 3).

2. *Follow-up by the Working Group*

In light of the recent amendment to the offence of domestic and transnational bribery introduced in Norwegian law, and in the absence of definitive case law concerning bribery of foreign public officials, the Working Group will follow up:

12. The application of the new offence in practice as litigation of the bribery offence develops, in particular the notion of impropriety of the advantage (Convention, Article 1.1);
13. The criminal liability of legal persons, to ascertain that the bribery offence is effectively applied to legal persons, either through court decisions or optional fines and confiscation (Convention, Articles 2 and 4);
14. The consequences of the distinction between basic and aggravated bribery in terms of the length of the limitation period, and in terms of whether different modalities of interruption adequately suspend the operation of the statute of limitation, especially where legal persons are involved (Convention, Articles 1.1, 6);
15. The application of sanctions, notably the practice with regard to confiscation of both the instruments and the proceeds, in order to determine whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of active bribery of foreign public officials (Convention, Article 3).

Slovak Republic (*November 2005*)

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

1. Based on its findings on Slovakia's implementation of the Convention and the Revised Recommendation, the Working Group (1) makes the following recommendations to Slovakia and (2) will follow up certain issues as cases emerge.

1. Recommendations

Recommendations Concerning Prevention, Detection and Awareness of Foreign Bribery

2. Concerning raising awareness of the Convention, the Revised Recommendation and the foreign bribery offence, the Working Group recommends that:

- (a) Slovakia take further action to raise awareness in the private sector, especially among (1) the private sector and the business community, and particularly those enterprises which operate internationally, (2) the accounting, auditing and legal professions, (3) clients and potential clients of EXIMBANKA SR, and (4) companies and individuals who are involved in projects funded by official development assistance;
- (b) Slovakia raise awareness of foreign bribery among public officials, particularly those of (1) EXIMBANKA SR, (2) the Ministry of Foreign Affairs involved in official development assistance, (3) the tax authority, (4) the Supreme Audit Office, and (5) foreign representations, including embassies; and
- (c) the Ministry of Justice publish the manual on the Convention at the earliest possible date (Revised Recommendation I).

3. Concerning the prevention and detection of foreign bribery through taxation, the Working Group recommends that Slovakia:

- (a) introduce an express denial of tax deductibility of bribe payments to foreign public officials (Revised Recommendation IV); and
- (b) provide guidelines, instructions and training to tax examiners on detecting foreign bribery during tax audits (Revised Recommendation I).

4. Concerning prevention and detection of foreign bribery through export credits, the Working Group recommends that EXIMBANKA SR require a client to disclose sufficient information, such as details on agents' commissions, which would enable EXIMBANKA SR to verify whether the client has engaged in foreign bribery (Revised Recommendation I).

5. Concerning prevention and detection of foreign bribery through accounting and auditing, the Working Group recommends that Slovakia:

- (a) ensure that accounting and auditing issues related to bribery are regularly examined in the context of the mandatory training requirements for auditors, including auditors of the Supreme Audit Office (Revised Recommendation I); and

- (b) require external auditors to report indications of a possible illegal act of bribery to internal corporate monitoring bodies as appropriate, and consider requiring external auditors to report such indications to competent authorities (Revised Recommendations V.B.iii and V.B.iv).

6. Concerning prevention and detection of foreign bribery through anti-money laundering measures, the Working Group recommends that Slovakia provide better guidance to entities that are required to report suspicious transactions, for instance, by providing typologies on money laundering where the predicate offence is bribery (Convention, Article 7; Revised Recommendation I).

7. Concerning reporting of foreign bribery cases, the Working Group recommends that Slovakia:

- (a) raise the awareness within the private sector and among public officials of the legal obligation under the Slovak Penal Code to report foreign bribery to law enforcement authorities;
- (b) continue its efforts to make whistleblower protection under Section 13 of the Labour Code more widely known among companies and the general public; and
- (c) maintain statistics as to the number and sources of allegations of bribery (Revised Recommendation I).

Recommendations Pertaining to Investigation of Foreign Bribery

8. Concerning investigation of foreign bribery, the Working Group recommends that:

- (a) the Slovak Police Academy continue to train police officers and recruits (including those who are not members of the Bureau of the Fight against Corruption) on investigating foreign bribery, including the practical aspects of bribery investigations; and
- (b) Slovakia further enhance the co-operation among law enforcement agencies that are involved in combating foreign bribery (Revised Recommendation I).

Recommendations Pertaining to Prosecution and Sanctioning of Foreign Bribery and Related Offences

9. Concerning the offence of foreign bribery, the Working Group recommends that Slovakia (a) amend its legislation to exclude the defence of “effective regret” from the offence of foreign bribery, and (b) ensure the provision of immunity to co-operating offenders is not an impediment to the effective enforcement of the foreign bribery offence (Convention, Article 1).

10. Concerning prosecution of foreign bribery, the Working Group recommends that:

- (a) Slovakia ensure that the Special Court and the Office of the Special Prosecutor are effective in the fight against foreign bribery. In particular, they recommend that Slovakia ensure that these institutions are adequately staffed with prosecutors and judges; and
- (b) the Slovak Judicial Academy organise training programmes on foreign bribery for the Special Judges and Special Prosecutors, including new recruits (Revised Recommendation I).

11. Concerning the liability of legal persons for foreign bribery, the Working Group strongly recommends that Slovakia establish such liability without delay, and put in place sanctions that are effective, proportionate and dissuasive (Convention, Articles 2 and 3(2)).

12. Concerning the offence of money laundering, the Working Group recommends that Slovakia take appropriate measures to enforce its money laundering offence more effectively, particularly in connection with bribery cases (Convention, Article 7).
13. Concerning the offence of false accounting, the Working Group recommends that Slovakia:
- (a) take appropriate measures to enforce accounting and auditing offences more effectively in connection with bribery cases; and
 - (b) ensure that the sanctions for false accounting in practice are effective, proportionate and dissuasive (Convention, Article 8).
14. Concerning sanctions, the Working Group recommends that Slovakia continue to compile statistics on the criminal, civil and administrative sanctions (including confiscation) for domestic and foreign bribery, money laundering and false accounting (particularly those under the Act on Accounting) (Convention, Articles 3, 7 and 8(2)).

2. Follow-up by the Working Group

15. The Working Group will follow up the issues below as cases and practice develop in Slovakia:
- (a) whether the Slovak Penal Code covers the bribery of (1) a judge or an official of an international judicial institution that is not accepted by the Slovak Republic, and (2) an official or agent of a public international organisation of which Slovakia is not a member and with which Slovakia does not have a “conventional relationship” (Convention, Article 1);
 - (b) the application of the provision of immunity to co-operating offenders in foreign bribery cases (Convention, Article 1);
 - (c) the application of the defence of socially acceptable gifts in foreign bribery cases (Convention, Article 1); and
 - (d) the application of sanctions under the legislation implementing the Convention (*i.e.* the foreign bribery, money laundering and false accounting offences) (Convention, Articles 3, 7 and 8(2); Revised Recommendation V.A(iii)).

Sweden (June 2005)

1. Based on its findings on Sweden's implementation of the Convention and the Revised Recommendation, the Working Group makes the recommendations to Sweden under Part 1 and will follow up the issues under Part 2 when there has been sufficient practice in Sweden.

1. Recommendations

Recommendations concerning Awareness-Raising, Prevention and Detection of Bribery of Foreign Public Officials

2. With respect to general measures to raise awareness of, to prevent and to detect bribery of foreign public officials, the Working Group recommends that Sweden:

- (a) continue efforts to make Swedish companies more aware of their exposure to solicitations of bribery by foreign public officials (Revised Recommendation I);
- (b) raise the awareness of the offence of bribery of a foreign public official among public officials, particularly those of the Swedish Export Credit Guarantees Board, the Swedish Export Credit Corporation and the National Board for Public Procurement (Revised Recommendations I and II.v).

3. With respect to the prevention and detection of bribery of foreign public officials in the arms export sector, the Working Group recommends that Sweden encourage the Swedish defence industry to develop strong anti-corruption measures, and ensure that the decision-making bodies for providing licenses for exporting military equipment and dual-use goods consider whether applicants have been involved in bribery as well as the level of risk of corruption in relation to arms procurement in the destination country (Revised Recommendations I and II.v).

4. With respect to the role of Swedish foreign representations, including embassy personnel, in preventing and detecting bribery of foreign public officials, the Working Group recommends that Sweden take further measures to increase the awareness of foreign representations of corruption issues and of the steps that should be taken where credible allegations arise that a Swedish company or individual has bribed, or taken steps to bribe, a foreign public official, including encouraging the reporting of such allegations to the competent authorities in Sweden (Revised Recommendation I).

5. With respect to the prevention and detection of bribery of foreign public officials in official development assistance (ODA), the Working Group recommends that:

- (a) the Anticorruption Regulation of May, 2001 of the Swedish International Development Agency should be amended to clarify that "corruption" includes the bribery of foreign public officials and that the identification of loss or damage is not necessary to report suspicions of bribery of foreign public officials, and
- (b) the competent authorities in ODA take steps to ensure an effective system for reporting suspicions of bribery of foreign public officials to law enforcement authorities in Sweden and/or abroad (Revised Recommendation I).

6. With respect to the prevention and detection of bribery of foreign public officials through accounting and auditing, the Working Group recommends that Sweden should:

- (a) require an auditor to report indications of a possible illegal act of bribery to the board of directors of the audited entity regardless of who within the company structure perpetrated the offence (Revised Recommendation V.B.(iii)); and
- (b) consider requiring the auditor to report indications of a possible illegal act of bribery to the competent authorities regardless of (i) who within the company structure perpetrated the offence, (ii) whether the economic damage from the suspected crime has been compensated and other prejudicial effects of the action have been remedied, and (iii) whether the offence is considered of minor significance (Revised Recommendation V.B.(iv)).

7. With respect to the prevention and detection of bribery of foreign public officials through anti-money laundering measures, the Working Group recommends that Sweden analyse the reasons for the low number of investigations and prosecutions compared to the number of suspicious transaction reports, with a view to increasing the effectiveness of the money laundering reporting system for the purpose of detecting and preventing the offence of bribing a foreign public official (Convention, Article 7; Revised Recommendation I).

Recommendations Pertaining Investigation of Bribery of Foreign Public Officials

8. With respect to investigations of bribery of foreign public officials, the Working Group encourages Sweden to spontaneously share information regarding cases of bribery of foreign public officials with authorities in other countries, when such information might assist the receiving authority in initiating or carrying out an investigation, prosecution or judicial proceeding or lead to a request for mutual legal assistance (Revised Recommendations I, II.vii and VII.i).

Recommendations for Ensuring Effective Prosecution and Sanctioning of Bribery of Foreign Public Officials

9. With respect to the offence of bribing a foreign public official, the Working Group recommends that Sweden ensure that the notion of a foreign public official in Chapter 20, section 2 of the Penal Code covers all officials and agents, including those elected, of a public international organisation of which Sweden is not a member (Convention, Article 1(4)).

10. With respect to the liability of and sanctions for legal persons for bribery of foreign public officials, the Working Group:

- (a) urges the Swedish government to complete as a matter of priority, its proposal for reforming the system of liability of legal persons, and recommends that this reform (i) review whether there are any legal or practical obstacles to imposing corporate fines, and (ii) increase the maximum fine for bribery of foreign public officials to an appropriate level, given the size and global importance of Swedish companies;
- (b) recommends that Sweden ensure that confiscation of the bribe and the proceeds of bribery shall be applied in practice against legal persons as a sanction for bribery of a foreign public official; and
- (c) recommends that Sweden draw to the attention of investigating, prosecutorial and judicial authorities (i) the mandatory nature of corporate fines and (ii) the application of corporate fines to intentional crimes (Convention, Articles 2 and 3(2)).

11. With respect to the reversal of the rule of mandatory prosecution for the prosecution of bribery of a foreign public official, the Working Group recommends that Sweden issue guidelines to prosecutors clarifying that prosecution of bribery of foreign public officials is always required in the public interest

subject only to the normal exceptions under Chapter 20, section 7 of the Code of Judicial Procedure, and take effective measures to bring these guidelines to the attention of all prosecutors (Convention, Article 5).

12. With respect to a decision of whether to prosecute a case of bribery of a foreign public official committed outside of Sweden, the Working Group recommends that Sweden consider the appropriateness of the requirement of government authorisations to prosecute such cases. Sweden is invited to compile relevant information to assist the Working Group in monitoring this issue (Convention, Article 5).

13. With respect to sanctions for bribery of foreign public officials, the Working Group:

- (a) encourages the Swedish authorities to pursue their work in order to broaden the grounds for the confiscation of criminal proceeds, and recommends that Sweden draw the attention of the investigating, prosecutorial and judicial authorities to the importance of imposing confiscation on the bribers (Convention, Article 3(3));
- (b) recommends that Sweden devise procedures to verify whether a participant in public procurement has been convicted of bribery of foreign public officials, and consider debarring legal persons subject to corporate fines for bribery of foreign public officials from participating in public procurement (Convention, Article 3(4); Revised Recommendations II.v and VI.ii); and
- (c) recommends that the Swedish International Development Cooperation Agency (Sida) and Swedfund review the standard contracts that they use with their clients in order to ensure that they contain provisions that specifically prohibit the bribery of foreign public officials related to the contracts (Convention, Article 3(4); Revised Recommendation II.v and VI.iii).

2. Follow-up by the Working Group

14. The Working Group shall follow-up the following issues once there has been sufficient practice:

- (a) The operation of the offence of bribery of foreign public officials, including (i) the criteria for determining when bribery is aggravated or simple, (ii) the operation of certain elements of the offence of bribery of foreign public officials, including the notion of “impropriety” (Convention, Article 1);
- (b) Whether in practice legal or procedural obstacles are encountered in proceeding against the legal person where the natural person who bribes a foreign public official has not been proceeded against, or has not been convicted and/or sanctioned (Convention, Article 2);
- (c) The level of sanctions and application of confiscation measures to offence of bribery of foreign public officials (Convention, Article 3);
- (d) The application of nationality jurisdiction to the offence of bribing a foreign public official, in particular:
 - (i) the requirement of dual criminality and the obtaining of information through mutual legal assistance and other channels to establish dual criminality (Convention, Article 4(2)); and

- (ii) the application of sanctions to Swedish legal persons for the offence of bribery of foreign public officials where the offence takes place abroad and is perpetrated by a non-Swedish natural person¹⁵ (Convention, Article 2);
- (e) The system for assigning cases and allocating resources in prosecutions and investigations of bribery of foreign public officials (Convention, Article 5);
- (f) Whether and when the offences that cover the concept of money laundering apply where the predicate offence occurs abroad (Convention, Article 7); and
- (g) The effectiveness in practice of mutual legal assistance for non-criminal proceedings against legal persons brought by other parties to the Convention (Convention, Article 9; Revised Recommendation II.vii).

¹⁵ The Working Group notes that the latter issue should also be monitored on a horizontal basis.

Switzerland (*December 2004*)

RECOMMENDATIONS

1. Consequently, on the basis of the Working Group's conclusions concerning Switzerland's application of the Convention and the revised Recommendation, the Working Group makes the following recommendations to Switzerland. In addition, the Working Group recommends that certain issues should be re-examined in the light of on-going case law and practice.

a) Recommendations

Recommendations to ensure the effectiveness of measures to prevent or detect the bribery of foreign public officials

2. With regard to awareness-building efforts to promote the OECD Convention and the offence of bribing a foreign public official under the anti-bribery provisions of Swiss law, the Working Group recommends that Switzerland:

18. Pursue and amplify its awareness-building efforts directed at the private sector, paying particular attention, in co-operation with the relevant economic players, to small and medium-sized enterprises operating internationally [Revised Recommendation, Articles I and V.C.i)].

19. Pursue its efforts to raise awareness within the public administration, paying attention in particular to cantonal and federal employees who could play a role in detecting and reporting acts of bribery [Revised Recommendation, Articles I and VI. ii)].

3. With respect to other preventive measures, the Working Group recommends that Switzerland:

a) Pursue its efforts to ensure greater transparency in corporate accounts and the independence of auditing bodies, and encourage the Swiss Institute of Certified Accountants and Tax Consultants to complete promptly the on-going process of amendment of auditing standards [Convention, Article 8; Revised Recommendation, Article V.A.iii); Annex to the Revised Recommendation, paragraph 7].

4. With regard to detection, the Working Group recommends that Switzerland:

a) Consider the establishment in federal legislation of a formal obligation for any federal authority, civil servant or public official, including those in charge of export credits, to report indications of a possible act of bribery to competent authorities, and engage consultations with the cantons so as to encourage them to institute a similar obligation in cantonal legislation where such an obligation is currently lacking. [Revised Recommendation, Article I].

b) Proceed, in accordance with Switzerland's expressed position, to the drafting of a circular for federal and cantonal tax authorities specifying the nature and tax aspects of the foreign bribery offence, so as to encourage detection of acts of bribery abroad, and to review disclosure rules to ensure that officials discovering suspicious facts report them to the competent judicial authorities [Revised Recommendation, Article IV].

c) Examine measures to ensure effective protection for persons cooperating with enforcement authorities, and especially for employees who in good faith report suspected acts of bribery so as to encourage

such persons to report them without fear of dismissal [Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 6].

- d) Given the important role of the auditing of accounts in detecting suspicious transactions related to the bribery of foreign public officials, consider extending mandatory reporting obligations for auditors contained in the draft bill to amend the Code of Obligations, by establishing an express obligation for auditors to report to the prosecutorial authorities any evidence of possible corrupt practices by the entities whose accounts they audit in the event that the entities' executive bodies, after being duly advised, refrain from taking action [Revised Recommendation, Article V iv)].
- e) Raise the awareness of supervisory authorities about the importance of utilising the full range of available sanctions so as to punish more dissuasively any infringements of vigilance requirements established with regard to the fight against money-laundering and of the obligation to report suspected money laundering related to foreign bribery [Convention, Article 7; Revised Recommendation, Article I].

Recommendation to ensure effective prosecution of the offence of bribing foreign public officials and related offences

5. With regard to prosecution and sanctions, the Working Group recommends that Switzerland:

- a) Pursue the efforts undertaken to bolster the effectiveness of the prosecution of offences relating to the bribery of foreign public officials, by considering measures to streamline the process of appeal with respect to mutual judicial assistance requests [Convention, Article 5 9; Revised Recommendation, Article I; Annex to the Revised Recommendation, paragraph 8].
- b) In order to strengthen the overall effectiveness of sanctions for the offence of bribery of foreign public officials, consider, in the context of the amendment of the federal law on public procurement, the temporary or permanent disqualification from any public procurement of enterprises convicted of bribing foreign public officials, and consider a similar approach for export credits [Convention, Article 3.4; Revised Recommendation, Article II.v) and Article VI.ii)].

b) Follow-up by the Working Group

6. The Working Group will follow up on the issues listed below, in light of evolving practice, in order to check:

- a) With respect to the liability of legal persons, whether, taking into account the notion of defective organisation, the application of article 100quater of the Criminal Code provides for effective, proportional and dissuasive sanctions for foreign bribery [Convention Article 2, 3(1).]
- b) Whether, recognising the positive efforts undertaken, Switzerland continues to make available to the prosecutorial authorities of the Confederation the necessary resources to ensure the effective enforcement of the offence of bribery of foreign public officials [Convention Article 5, Revised Recommendation, Art. I; Annex to the Revised Recommendation, paragraph 6].
- c) Whether enforcement of Article 322^{septies} of the Criminal Code by the judicial authorities leads to: (i) a broad interpretation of the definition of the exercise of the official functions of a head of state; (ii) its application in cases involving solicitation by the foreign public official; and (iii) an application of the notion of foreign public official that includes heads of state and a country's highest authorities [Convention, Article 1].

- d) The application of the notion of socially accepted practices, including the question of whether it is excluded from the scope of application of Article 322^{septies} of the Criminal Code in accordance with the opinion expressed by Switzerland [Convention, Article I].
- e) Whether, excluding the case of small facilitation payments, an official's acceptance of an improper advantage constitutes the basis for the offence of bribery [Convention, Article 1 (1)].
- f) Whether the current basis for territorial jurisdiction, in light of the rule that the commission in Switzerland by a foreigner of an act of instigation, authorisation or complicity in the bribery of foreign public officials committed by a foreigner is deemed to take place abroad, is sufficiently effective to combat the bribery of foreign public officials [Convention, Articles 4(1), 4(4)].

United-Kingdom (*March 2005*)

D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW UP

1. The Working Group is appreciative of the hard work of the United Kingdom in preparing and hosting the on-site visit, and of their efforts to provide information throughout the examination process.
2. In the Phase 1 bis report the Working Group took note that the United Kingdom authorities had confirmed their government's commitment to pursuing the wider reform of corruption law, and that Part 12 of the Anti-Terrorism, Crime and Security Act 2001 would be repealed and replaced as a part of that reform. The Working Group recommended at that time that the United Kingdom proceed at the earliest opportunity to enact a comprehensive anti-corruption statute.
3. The Working Group notes that since Phase 1 bis the United Kingdom has not enacted any new foreign bribery statute. The Working Group therefore recommends that the United Kingdom enact at the earliest possible date comprehensive legislation whose scope clearly includes the bribery of a foreign public official. The Working Group will conduct an evaluation of the new law when it comes into force, and reserves the right to conduct a further on-site evaluation of the United Kingdom on the application in practice of the new law.
4. The Working Group notes that no company or individual has been indicted or tried for the offence of bribing a foreign public official since the ratification of the Convention by the UK.
5. Based on its findings regarding the United Kingdom's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the following recommendations to the United Kingdom under part I, and (ii) will follow up the issues in part II when there is sufficient relevant practice.

Part I. Recommendations

Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials

6. With respect to awareness raising activities to promote the implementation of the Convention and the foreign bribery offence relating to bribery and corruption and amending the Prevention of the Corruption Acts 1889 to 1916, the Working Group recommends that the United Kingdom:
 - a) enhance existing efforts to raise awareness of the Convention and the foreign bribery offence among law enforcement authorities including the Police, judicial authorities and UK public officials involved with UK companies operating abroad. [Revised Recommendation, Paragraph I;
 - b) undertake further public awareness activities for the purpose of increasing the level of awareness of the Convention and the foreign bribery offence among trade unions and small and medium sized enterprises (SMEs) doing business internationally [Revised Recommendation, Paragraph I];
 - c) take appropriate measures to publicise, including in all explanatory material distributed to UK companies, the conditions under which parent and affiliate companies can be liable in connection with foreign bribery, and encourage UK companies to report to UK authorities, as

well as to other appropriate authorities, instances of foreign bribery they come across in the course of their operations [Revised Recommendation, Paragraph I].

7. With respect to the reporting of the offence of bribing a foreign public official to the competent authorities, the Working Group recommends that the United Kingdom:

- a) establish a clear obligation for civil servants to report possible instances of bribery to the relevant authorities [Revised Recommendation, Paragraph I];
- b) in applying its legislation in the field of whistleblowing, improve protection of persons who report directly to law enforcement authorities; and pursue its efforts to make such measures more widely known among companies and the general public [Revised Recommendation, Paragraph I].

8. With respect to the prevention and detection of foreign bribery, the Working Group recommends that the United Kingdom:

- a) proceed diligently with the adoption of reforms clarifying and unifying the UK accounting legislation with the International Accounting Standards, to ensure the fraudulent accounting offence is in full conformity with Article 8 of the Convention [Convention, Article 8; Revised Recommendation, Paragraph V.A.];
- b) proceed with the adoption of guidance for auditors in order to explain and clarify their reporting obligation concerning possible acts of foreign bribery [Revised Recommendation, Paragraphs I, V.B.(iii) and V.B.(iv)];
- c) ensure sufficient time and resources are available to tax authorities to review tax information and allow for the detection of possible criminal conduct, including foreign bribery offences [Revised Recommendations, Paragraph I and IV].

Recommendations for ensuring adequate mechanisms for the effective investigation and prosecution of offences of bribery of foreign public officials and related offences

9. With respect to investigation, the Working Group recommends that the United Kingdom:

- a) ensure that the role of the Serious Fraud Office (SFO) in foreign bribery investigations is confirmed and that appropriate human and financial resources are provided, and consider monitoring and evaluating the performance of the SFO and other relevant agencies with regard to foreign bribery allegations on an on-going basis, including in particular with regard to decisions not to open or to discontinue an investigation [Convention, Article 5; Revised Recommendation, Paragraph I];
- b) amend the Memorandum of Understanding to clarify that the Ministry of Defence Police's investigative jurisdiction is limited to cases where the Ministry of Defence is a party to the contract [Convention, Article 5; Revised Recommendation, Paragraph I];
- c) reconsider obligations in the Memorandum of Understanding specific to foreign bribery investigations requiring disclosure of information about the investigation to non-investigatory government departments (notably the Foreign and Commonwealth Office and the Ministry of Defence) [Convention, Article 5; Revised Recommendation, Paragraph I];

- d) increase resources for the prompt and effective handling of mutual legal assistance requests [Convention, Articles 9 and 10; Revised Recommendation, Paragraphs II.vii and VII].

10. With respect to prosecution, the Working Group recommends that the United Kingdom:

- a) amend where appropriate the Code for Crown Prosecutors, the Crown Prosecution Service Manual and other relevant documents to ensure that the investigation and prosecution of bribery of foreign public officials shall not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved [Convention, Article 5];
- b) in light of the longstanding absence of any consent requirement for the common law bribery offence, consider the appropriateness of Law Officers consent for cases of foreign bribery [Convention, Article 5; Revised Recommendation, Paragraph I];
- c) broaden the level of persons engaging the criminal liability of legal persons for foreign bribery offences [Convention, Article 2].

11. With respect to Crown Dependencies and Overseas Territories, the Working Group recommends that the United Kingdom, within the rules governing their relationship:

- a) verify compliance of Guernsey's new legislation with the OECD Convention, invite the Jersey authorities to enact a comprehensive anti-corruption statute at the earliest possible date in order to extend the OECD Convention to the islands [Convention, Article 1];
- b) continue to encourage the Overseas Territories to adopt the necessary legislation in line with the principles of the Convention and Revised Recommendation, and support them in their efforts [Convention, Article 1].

12. With respect to sanctions, the Working Group recommends that the United Kingdom:

- a) consider adopting a regime of additional administrative or civil sanctions for legal persons that engage in foreign bribery [Convention, Article 3];
- b) considers revisiting the policies of agencies such as Department for International Development and Export Credit and Guarantees Department on dealing with applicants convicted of foreign bribery, to determine whether these policies are a sufficient deterrence [Revised Recommendation, Paragraph I and Paragraph VI (iii)];
- c) encourage prosecutors to actively pursue the necessary procedures for confiscation in all appropriate foreign bribery cases [Convention, Article 3].

Part II. Follow-up by the Working Group

13. The Working Group will follow-up on the issues below, as practice develops, in order to assess:

- a) the application of sanctions with a view to determining whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, in particular, the practice of the courts with regard to the criminal liability of legal persons for the offence of active bribery of foreign public officials [Convention, Articles 2 and 3];

- b) the effectiveness of the investigations carried out by the Ministry of Defence Police in relation to foreign bribery offences in defence contracts [Convention, Article 5 ; Revised Recommendation, Paragraph I];
- c) with respect to money laundering, the application of the new provisions under the Proceeds of Crime Act 2002, particularly with respect to the application of offences of failure to report, the levels of sanctions in practice, and the efforts made to raise awareness and elaborate guidelines/typologies covering foreign bribery offences [Convention, Article 7; Revised Recommendation, Paragraphs II.(i) and III];
- d) the application in practice of the territorial and nationality jurisdiction for foreign bribery offences, given the absence of cases to date regarding the establishment of jurisdiction over offences that have taken place wholly or substantially abroad [Convention, Article 4];
- e) the possible effect of the tendency to simplify cases and to use alternative charges on the implementation of the Convention in the UK [Convention, Article 5; Revised Recommendation, Paragraph I];
- f) the application of the evidentiary threshold for providing mutual legal assistance and extradition. In this respect the UK should compile quantitative information to assist the Working Group in its follow-up assessment [Convention, Article 9];
- g) the recent changes of the ECGD procedures to combat bribery and corruption with regard to any weakening of the rules that could reduce the ability of the ECGD to detect and prevent foreign bribery [Revised Recommendation, Paragraph I and Paragraph VI (iii)].

United-States (October 2002)**D. RECOMMENDATIONS**

1. In conclusion, based on the findings of the Working Group with respect to the United States' application of the Convention and the Revised Recommendation, the Working Group makes the following recommendations to the United States. In addition, the Working Group recommends that certain issues be revisited as the case-law continues to develop.

a) Recommendations***Recommendations for Ensuring Effective Measures for Preventing and Detecting Foreign Bribery***

2. With respect to awareness raising to promote the implementation of the FCPA, the Working Group recommends that the United States:

a) Enhance existing efforts to reach small and medium sized enterprises doing business internationally, both in order to raise the level of their awareness of the FCPA and to equip them with tools and information which are specifically tailored to their needs and resources. (Revised Recommendation, Article 1)

b) Undertake further public awareness activities for the purpose of increasing the level of awareness of the FCPA in the accounting profession. (Revised Recommendation, Article 1)

3. With respect to other preventive measures, the Working Group recommends that the United States, based on the expertise built up during years of applying and interpreting the FCPA:

a) Consider issuing public guidance, whether as guidelines or otherwise, suitable to assist businesses in complying with the FCPA generally, and in particular to equip them with risk management tools useful in structuring international transactions. (Revised Recommendation, Article 1)

b) Consider developing specific guidance in relation to the facilitation payments exception (Convention, Commentary 9; Phase 1 Evaluation, paragraph 1.3).

c) With respect to the defence of reasonable and bona fide expenditure, there were questions raised concerning the need for this defence. If it is to be maintained, the Working Group recommends that appropriate guidance be provided. (Phase 1 Evaluation, paragraph 1.3).

4. The Working Group further recommends that the United States:

a) Encourage the development and adoption of compliance programs tailored to the needs of SMEs doing business internationally. (Revised Recommendation, Article V. C (i))

b) Consider making the books and records provisions of the FCPA applicable to certain non-issuers based on the level of foreign business they transact, so as to possibly improve the level of deterrence and detection of FCPA violations. (Convention, Article 8; Revised Recommendation, Article V)

5. With respect to detection, the Working Group recommends that the United States:
- a) Advocate clarification of auditing standards especially as to materiality, and strengthen controls over auditors in order to enhance the detection of foreign bribery. (Convention, Article 8; Revised Recommendation, Article V)
 - b) Undertake to maintain statistics as to the number, sources and subsequent processing of allegations of FCPA violations in order to put in place measures to enhance the capabilities of the United States in detecting foreign bribery. (Revised Recommendation, Article 1; Annex to the Revised Recommendation, paragraph 6)

Recommendations for Ensuring Adequate Mechanisms for the Effective Prosecution of Foreign Bribery Offences and the related Accounting and Money Laundering Offences

6. The Working Group recommends that the United States:
- a) Make a clear public statement, in the light of the OECD Convention, identifying the criteria applied in determining the priorities both of the Department of Justice and of the Securities and Exchange Commission in prosecuting FCPA cases. (Convention, Article 5)
 - b) Enhance the existing organisational enforcement infrastructure by setting up a mechanism, including the compilation of relevant statistics, for the periodic review and evaluation of the overall FCPA enforcement effort (Convention, Article 5).
 - c) Consider whether more focus should be given to criminal prosecutions in the framework of anti-money laundering legislation for failure to report suspicious activity, to enhance the overall effectiveness of the FCPA. (Convention, Article 7)
 - d) Consider whether the statute of limitations applicable to the offence of bribery of a foreign public official, as well as to other criminal offences involving the obtaining of evidence located abroad, allows for an adequate period of time for the investigation and prosecution of the offence, and if necessary, take steps to secure an appropriate increase in the period. (Convention, Article 6)
 - e) Consider amendments to the FCPA to clarify that it is an offence to offer, promise or give a bribe “in order to obtain or retain business or other improper advantage in the conduct of international business”. (Convention, Article 1; Phase 1 Evaluation, paragraph 1.4)

b) Follow-up by the Working Group

7. The Working Group will follow up the issues below, as the case-law continues to develop, to examine:
- a) Whether amendments are required to the FCPA to supplement or clarify the existing language defining the elements of the offence of foreign bribery with regard to (i) cases where a benefit is directed to a third party by a foreign official; and (ii) the scope of the definition of a “foreign public official”, in particular with respect to persons holding judicial office and the directors, officers and employees of state-controlled enterprises or instrumentalities (Convention, Article 1; Phase 1 Evaluation, paragraphs 1.2)

- b) Whether the current basis for nationality jurisdiction, as established by the 1998 amendments to the FCPA, is effective in the fight against bribery of foreign public officials (Convention, Article 4)
8. The Working Group will furthermore monitor developments in the following area:
- a) Whether, by November 2002, the base level offence classification of foreign bribery for sentencing purposes has been increased so that penalties are comparable to those applicable to domestic bribery (Convention, Article 3; Phase 1 Evaluation, paragraph 2.1).