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COMMITTEE ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES

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Working Group on Bribery in International Business Transactions (CIME)

**PHASE 1 QUESTIONNAIRE : FIRST SELF-EVALUATION AND MUTUAL
REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997
RECOMMENDATION.**

Participants were invited to comment on the second revision of the questionnaire [DAFFE/IME/BR(98)8/ADD1/REV2]. No comments were received by the Secretariat and this questionnaire is now issued as the final text. It is submitted to the Working Group for its meeting on 3rd-5th November as background for agenda item 6.

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PHASE 1 QUESTIONNAIRE: FIRST SELF-EVALUATION AND MUTUAL REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

Objective

1. The principal objective of Phase 1 of the monitoring procedure agreed in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and outlined in the 1997 Recommendation on Combating Bribery in International Business Transactions is to assess how the legal system of each participant fulfils the legal requirements of the Convention. Participants will also seek to obtain an initial appreciation of actions to implement the Recommendation.
2. A questionnaire is not strictly necessary to the procedure of Phase 1. Each participant could simply be asked to explain how it meets the requirements of each article and paragraph of the Convention, taking into account the information in the Commentaries. The questionnaire is intended to remind participants of the points which should be addressed in the description of how their laws and legal systems fulfil the requirements of the Convention and help ensure consistency in the structure of replies in order to facilitate reading by other participants.

Scope

3. Because Phase 1 focuses on the conformity of laws and legal systems with the Convention it is an important basis for all future mutual evaluation. The replies to the questionnaire should be precise and provide sufficient detail to permit an assessment of conformity with the Convention.
4. In replying to this questionnaire, for most participants, it will not be sufficient merely to refer to the laws enacted to implement the Convention (or Recommendation). Other laws or aspects of the legal system which are not being modified in view of these instruments, will nonetheless be an integral part of their implementation. Replies should include references to other relevant laws, regulations and judicial precedent as well as to other conventions or treaties or the constitution if they affect implementation of the Convention. Where appropriate, copies of relevant laws, regulations or administrative guidance should be provided, if possible, in English or in French.
5. In formulating replies to the questionnaire participants should take into account the Commentaries which provide guidance on how the Convention should be interpreted.

Confidentiality

6. Participants are reminded that answers to this questionnaire as well as any reports based on them will be confidential and will not be released publicly without the express permission of participants to the Working Group on Bribery.

Deadline

7. The deadline for submission of replies to the questionnaire is 31 December 1998. Participants whose implementing legislation is only in draft stage at that time can submit modifications to their replies once the legislation is enacted.

Submission of replies

8. It would greatly facilitate the task of the Secretariat and other participants if replies could be submitted in either English or French and in electronic format.

Contact persons

9. Please insert here the name and contact numbers of a person(s) within your country who can be contacted in relation to the reply to the questionnaire

A. QUESTIONS CONCERNING IMPLEMENTATION OF THE CONVENTION

Formal Issues

- F. 1. Signature of the Convention: date
- F. 2. Ratification of the Convention: date
- F. 3. Enactment of any necessary implementing legislation: date
- F. 4. Entry into force of any necessary implementing legislation: date

Substantive issues

0. The Convention as a whole

0.1. Describe the general approach of your national law to implementing the Convention (1 page maximum length).(Note Commentaries 1 and 2.)

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

1.1. Describe how your national law and legal system implement the requirements of Article 1, concerning [] the offence of bribery of foreign public officials. In this description pay particular attention to explaining how your law treats the elements in the following checklist. The Commentaries corresponding to the Article provide guidance on the interpretation of certain elements.

- any person
- intentionally
- to offer, promise or give
- any undue pecuniary or other advantage
- whether directly or through intermediaries
- to a foreign public official

From Article 1.4: For the purpose of this Convention:

a. “foreign public official” means any person holding a legislative, administrative or judicial office whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprises; and any official or agent of a public international organisation;

b. “foreign country” includes all levels and subdivisions of government

- for that official or for a third party

- in order that the official act or refrain from acting in relation to the performance of official duties

From Article 1.4 c) “Act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence.

- in order to obtain or retain business or other improper advantage
- in the conduct of international business

1.2. On what basis does your legal system establish complicity in the bribery of a foreign public official as a criminal offence?

1.3. How does your legal system treat attempt and/or conspiracy to bribe a domestic public official? How are attempt and/or conspiracy treated with respect to bribery of a foreign public official?

Ref Article 1: 1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business. (Note Commentaries 1 to 10.)

2. Each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party. (Note Commentary 11.)

3. The offences set out in paragraphs 1 and 2 above are hereinafter referred to as “bribery of a foreign public official”.

4. For the purpose of this Convention:

a. “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation; (Note Commentaries 12 to 17.)

b. “foreign country” includes all levels and subdivisions of government, from national to local; (Note Commentary 18)

c. “act or refrain from acting in relation to the performance of official duties” includes any use of the public official’s position, whether or not within the official’s authorised competence. (Note Commentary 19.)

2. Article 2: Responsibility of Legal Persons

2.1. Does your national law or legal system establish criminal responsibility of legal persons for the bribery of a foreign public official? If it does, describe with a significant level of detail how criminal liability of legal persons is applied. Address questions such as:

Which legal entities or which companies are subject to criminal responsibility? Are state-owned or state-controlled companies subject to criminal responsibility?

Is the criminal responsibility of the legal person based on a strict liability concept, or does it depend on a culpable act by a representative of the company?

Is the criminal responsibility of the legal person engaged by the act of a high level executive of the entity or by the act of any employee?

2.2. If the answer to the initial question in 2.1 above is “no”, describe with a significant level of detail how your national law or legal system establishes the liability of legal persons for the bribery of a foreign public official. As in 2.1, address questions such as:

Which legal entities or which companies are subject to responsibility for bribery of a foreign public official? Are state-owned or state-controlled companies subject to responsibility for the offence?

Is the responsibility of the legal person based on a strict liability concept, or does it depend on a culpable act by a representative of the company?

Is the responsibility of the legal person engaged by the act of a high level executive of the entity or by the act of any employee?

Ref. Article 2: Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official. (Note Commentary 20.)

3. Article 3: Sanctions

3.1. Describe the criminal penalties which your legal system applies to bribery of domestic public officials.

3.2. Describe the effective, proportionate and dissuasive (nature and level of) criminal penalties for bribery of a foreign public official for natural, and, if applicable, legal persons.

3.3. For natural persons, are the penalties of deprivation of liberty in cases of bribery of a foreign public official sufficient to enable effective mutual legal assistance? Explain.

3.4. **Are the penalties of deprivation of liberty in cases of bribery of a foreign public official sufficient to enable extradition? Explain.**

3.5 If, under your legal system, criminal responsibility is not applicable to legal persons (and hence criminal penalties for legal persons are not described in the reply to 3.1 and 3.2 above) describe the effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, applicable to legal persons for bribery of foreign public officials.

3.6. By what laws or other dispositions does your legal system provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation?

3.7. If your legal system does not provide for seizure and confiscation of the bribe, the proceeds of the bribery of a foreign public official, or the property the value of which corresponds to that of such proceeds (the reply to 3.5 is null), describe how your legal system applies monetary sanctions of comparable effect.

3.8. Does your legal system impose additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official? If the answer is “no”, has your country considered the imposition of such additional sanctions?

Ref. Article 3: 1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. The range of penalties shall be comparable to that applicable to the bribery of the Party’s own public officials and shall, in the case of natural persons, include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition.

2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.

3. Each Party shall take such measures as may be necessary to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable. (Note Commentaries 21, 22 and 23.)

4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official. (Note Commentary 24.)

4. Article 4: Jurisdiction

4.1. Does your country establish jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory? In what way does your legal system adopt a broad interpretation of the territorial basis for jurisdiction? Explain the cases in which a partial connection of the offence to the territory would enable jurisdiction to be established.

4.2. Does your country have jurisdiction to prosecute its nationals for offences committed abroad? If the answer is “yes”, does it establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles? Describe the conditions under which your country would have jurisdiction to prosecute a national for the offence of bribery of a foreign public official.

4.3. What procedures do you have in place to allow consultations and eventual transfer of a case to another Party which can also establish jurisdiction over an alleged offence described in this Convention?

4.4. Has your country reviewed whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials. Have any steps been taken to improve the basis for establishing jurisdiction?

Ref. Article 4: 1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory. (Note Commentary 25)

2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles. (Note Commentary 26.)

3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps.

5. Article 5: Enforcement

5.1. Describe the rules and principles which govern investigation and prosecution of the bribery of a foreign public official. In particular, under what circumstances are your authorities permitted to initiate, suspend **and** terminate an investigation or prosecution?

5.2. **Can the investigation and/or prosecution of the bribery of a foreign public official 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?** For what reasons, **and** under what circumstances?

Ref. Article 5: Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved. (Note Commentary 27.)

6. Article 6: Statute of Limitations

6.1. In your legal system, what, if any, is the statute of limitations applicable to the offence of bribery of a foreign public official?

Ref. Article 6: Any statute of limitations applicable to the offence of bribery of a foreign public official shall allow an adequate period of time for the investigation and prosecution of this offence.

7. Article 7: Money laundering

7.1. Is bribery of a domestic public official a predicate offence for the purpose of application of your country's money laundering legislation? Explain your approach. Does it matter where the bribery occurred?

7.2. Is bribery of a foreign public official a predicate offence of the purpose of application of your country's money laundering legislation? Explain your approach. Does it matter where the bribery occurred?

Ref. Article 7: Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred. (Note Commentary 28.)

8. Article 8: Accounting

8.1. In the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, does your country prohibit

- the establishment of off-the-books accounts,
- the making of off-the-books or inadequately identified transactions,
- the recording of non-existent expenditures,

- the entry of liabilities with incorrect identification of their object,
- the use of false documents

for the purpose of bribing foreign public officials or of hiding such bribery?

8.2. Which companies are subject to these laws and regulations?

8.3. Describe the civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of such companies.

Ref. Article 8: 1. In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery. (Note Commentary 29.)

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

9. Article 9: Mutual legal assistance

9.1. Under which laws, treaties and arrangements will your country be able to provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person?

9.2. Will such assistance be conditional on dual criminality? If so, will dual criminality be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention?

9.3. Will it be possible for your authorities to decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy? **If yes, please explain.**

Ref. Article 9: 1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance. (Note Commentaries 30 and 31.)

2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention. (Note Commentary 32.)

3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy.

10. Article 10: Extradition

10.1. Is bribery of a foreign public official deemed to be an extraditable offence under your country's law and the extradition treaties between your country and Parties?

10.2. In the absence of an extradition treaty with another Party, does your country consider that this Convention is a legal basis for extradition in respect of the offence of bribery of a foreign public official?

10.3. Can your country extradite its nationals for the offence of bribery of a foreign public official?

10.4. If the answer to 10.3 is "no", in cases where nationality is the sole reason for declining a request to extradite a person for bribery of a foreign public official, what **rules and procedures** exist so that the case will be submitted to your country's competent authorities for the purpose of prosecution?

10.5. Is the existence of dual criminality a condition for extradition? If so, is that condition deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention?

Ref. Article 10: 1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.

2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official. (Note Commentary 33.)

3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.

4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention.

11. Article 11: Responsible authorities

11.1. Has your country notified to the OECD Secretary-General an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for the matters of consultation (Art 4.3), mutual legal assistance (Art. 9) and extradition (Art. 10)?

Ref. Article 11: For the purposes of Article 4, paragraph 3, on consultation, Article 9, on mutual legal assistance and Article 10, on extradition, each Party shall notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party, without prejudice to other arrangements between Parties.

B. QUESTIONS CONCERNING IMPLEMENTATION OF THE 1997 RECOMMENDATION

1. General

1.1. Has your country taken any measures, other than those reported in response to questions in section A above, to meet the goal set forth in Section I of the Recommendation, i.e., to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions?

1.2. Has your country examined the areas listed in paragraphs i) through vii) of Section II of the Recommendation and taken any concrete and meaningful steps to meet the goal set forth in Section I of the Recommendation?

2. Criminalisation of Bribery of Foreign Public Officials

(See Section A above.)

3. Tax deductibility

3.1. Describe how the tax laws and regulations of your country treat bribes of foreign public officials, in particular whether such bribes are deductible.

As part of reports on implementation of the revised Recommendation, the Secretariat will make available to the Working Group the information compiled by the Committee on Fiscal Affairs concerning implementation of Section IV of the Recommendation.

4. Accounting Requirements, External Audit and Internal Company Controls

4.1. Are your country's laws, rules and practices with respect to accounting requirements, external audit and internal company controls consistent with the principles set forth in Section V of the Recommendation? Explain briefly. (Note questions 8.1, 8.2, and 8.3 in Section A above.)

4.2. Has your country either reviewed or modified laws, rules and practices with respect to accounting requirements, external audit and internal company controls in view of the principles set forth in Section V of the Recommendation? Has your country taken steps to improve the use of such laws, rules and practices in order to prevent and detect bribery of foreign public officials in international business transactions?

5. Public Procurement

The Working Group will receive a report concerning the World Trade Organisation's progress in developing an agreement on transparency in government procurement to be presented during 1999 or the early part of 2000.

5.1. Do your country's laws and regulations permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of your national laws? (Note question 3.7 in section A above.)

5.2. Does your country apply procurement sanctions to enterprises that are determined to have bribed domestic public officials? Are such sanctions applicable in cases of bribery of foreign public officials?

As part of reports on implementation of the revised Recommendation, the Secretariat will make available to the Working Group the information compiled by the Development Assistance Committee concerning implementation of paragraph iii) of Section VI of the Recommendation.

6. International Co-operation

Paragraph 8 of the Agreed Common Elements which are annexed to the revised Recommendation recommends that "means should be explored and undertaken to improve the efficiency of mutual legal assistance." (The commitments undertaken with respect to Article 9 of the Convention would seem to supersede the recommendations in Section VII of the revised Recommendation and the other recommendations in paragraph 8 of its Annex.)

6.1. Has your country explored or taken any steps to improve the efficiency of the mutual legal assistance that you are able to render to other participants in cases of bribery of foreign public officials.