EXPERT MEETING OF THE OECD ANTI-BRIBERY CONVENTION:

THE ROAD AHEAD

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STRENGTHENING INTERNATIONAL COORDINATION AND COOPERATION

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1. Since the OECD Working Group on Bribery was created in 1994, the campaign against foreign bribery that was launched under OECD auspices has made great progress. The Working Group's efforts led swiftly to adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 21 November 1997. The Convention entered into force in 1999, and its provisions were immediately thereafter transposed into the domestic law of the signatory States. The adjustment of domestic law to comply with the requirements of the Convention, a process that was subjected to peer review during phase 1 of the Working Group's follow-up, was to a large extent achieved by 2001 in most countries. Since then, national measures for combating foreign bribery have been the object of mutual evaluation under phase 2 of the monitoring process.

Despite the significant progress made over the last 10 years in terms of legislation and regulation, there is still much to be done. As the phase 2 reports show, there is still little awareness of the phenomenon of foreign bribery. Bribery is still a common practice in many fields where companies engage in international business. The oversight staff of firms, such as their auditors, accountants and even their ethics officers, are not always in a position to react effectively against the payment of bribes. As to government authorities, they do not necessarily make use of all the tools available for combating acts of bribery, and they do not always appreciate the complexity of such practices. Enforcement of the Convention is thus hampered by inadequate training for the competent authorities and the weakness of their human and material resources. This applies as much to the police and justice authorities, on the law enforcement side, as to the taxation, foreign trade and development assistance authorities, embassies and consulates etc., whose preventive role is crucial.

Generally speaking, while the bribery of foreign officials has remained rife in most of the world since 1997, very few criminal investigations have been launched, and prosecutions are even rarer. The number of convictions handed down by the courts is very low. The phase 2 country monitoring reports by the Working Group and studies conducted by civil society reveal a pressing need to improve the situation.

2. In this context, actions of three kinds could be considered. The first involves the OECD Working Group on Bribery, which should continue the mutual evaluation of signatory States' application of the Convention since it came into force. To this end, a third follow-up phase is now in the course of preparation. On the other hand, it is essential for the Working Group to maintain the "*tour de table*" process to keep track, as effectively as possible, of the way concrete cases of foreign bribery are handled[1].

The second kind of action is in the hands of the States Parties themselves. They need to persevere in raising awareness about the bribery phenomenon, in training competent personnel, and in allocating sufficient resources. The phase 3 follow-up should place the emphasis on these essential points. Moreover, it goes without saying that when the Working Group has identified gaps in national legislation, the States parties concerned should be expected to remedy any breaches of their international obligations immediately, if they have not already done so.

The third approach is squarely international. Given the transnational nature of the crime in question, it is essential to improve international coordination of laws and national enforcement systems, and to strengthen cooperation among government authorities in the anti-bribery campaign. It is worth noting, moreover, that good cooperation between countries can in some cases make up for insufficient resources. International cooperation and coordination are addressed in several provisions of the Convention, but they have received too little attention to date. A number of practical difficulties, revealed during the *tour de table* discussions, arise from shortcomings in these fields. This is particularly true when it comes to mutual legal assistance (Article 9 of the Convention) and the determination of jurisdiction where more than one party is in a position to prosecute a case under its domestic law (Article 4.3 of the Convention). These two points are the focus of this study.

I. MUTUAL LEGAL ASSISTANCE

3. Mutual legal assistance is essential for the successful investigation and prosecution of bribery. Because of the transnational nature of the acts of bribery cited in Article 1 of the Convention, it is unlikely that all the evidence proving that such a crime has been committed can be collected in the sole State pursuing an investigation or prosecution, whether that State is acting on the basis of territorial jurisdiction (Article 4 .1) or on the basis of jurisdiction to prosecute its nationals for offences committed abroad (Article 4.2). The problem will be slightly different, however, depending on whether the State requested for mutual legal assistance is a party to the Convention.

[1] The "*tour de table*" is a meeting that the Working Group holds at regular intervals to discuss, on the one hand, the legislative progress made by countries and, on the other, the investigative and prosecutorial measures taken by States in concrete cases of foreign bribery.

A. Mutual legal assistance among States parties to the Convention

4. When the requested State is a party to the Convention, it must provide "prompt and effective" assistance pursuant to Article 9.

5. However, the execution of international rogatory commissions is often a lengthy process, and this can undermine the effectiveness of the investigation (particularly when the statute of limitations looms) and make it difficult to guarantee individuals' rights (given the need to go to trial within a reasonable time). In the European Union context, requests for mutual legal assistance can now be handled directly between the judicial authorities, i.e. without going through diplomatic channels. Similarly, there can be spontaneous exchanges of information (see Articles 6 and 7 of the Convention on Mutual Legal Assistance among Members of the European Union of 29 May 2000). Simplifying the procedures for applying the OECD Anti-Bribery Convention in this way would have the dual merits of accelerating and reinforcing relations among prosecutors who, as we shall see in the second part of this report, are not always interested solely in facilitating execution of international rogatory commissions.

6. In addition, in complicated cases that require close and continuous cooperation among the law enforcement authorities of different States, joint -inter-State - investigating teams could be very useful. This method allows evidence to be assembled in one State in accordance with local legal requirements but in such a way that it can also be usefully exploited by the judicial authorities of the other State. The European Convention on Mutual Legal Assistance (Article 13) provides for such cooperation, and the United Nations Convention against Corruption of 31 October 2003 (Article 49) mentions it as well, without going into detail. This could be an interesting avenue for OECD Convention States to explore.

7. Finally, the effectiveness of mutual legal cooperation could certainly be enhanced through closer working relations between the national investigation and prosecution authorities. In this context, prosecutors should take the Working Group's *tours de table* very seriously. Thought could be given as to how best to guarantee that seriousness.

<u>Issues for further consideration</u>:

1. Simplified mutual legal assistance through direct dealings between judicial authorities.
2. Joint investigation teams
3. Active participation by national prosecutors in the *tour de table*.

B. Mutual legal assistance with a State not party to the Convention

8. When legal assistance is requested of a State that is not a party to the Convention, Article 9 does not apply. Such requests must therefore be executed in accordance with multilateral or bilateral conventions for mutual legal assistance, when they exist. This situation can give rise to the following difficulties.

9. *From a strictly legal viewpoint*, the main problem has to do with dual criminality. The fact is that bribery is not necessarily a crime in all other States. Even if a request for legal assistance might be receivable for corruption in general, it could fail because the bribery of foreign public officials is not specifically a crime (cf. Article 9.2 of the Convention). As well, the granting of mutual legal assistance could be stymied by banking secrecy (cf. Article 9.3 of the Convention)

These two questions are covered by the United Nations Convention against Corruption. Article 43.2 provides that the condition of dual criminality is deemed to be fulfilled irrespective of whether the laws of the requested State classify or denominate the offence in the same way as the requesting State. Article 46.8 stipulates that States may not decline to render mutual legal assistance on the ground of bank secrecy. If all States were parties to the United Nations Convention, whether or not they are parties to the OECD Convention, the two problems would be circumvented, at least in legal terms. Consequently, ratification of the United Nations Convention could perhaps be a political priority for States party to the OECD Convention, with the OECD Working Group perhaps in future being empowered to monitor this matter. Thought could also be given to seeking other solutions.

10. From a practical viewpoint, improving cooperation between the judicial authorities of States parties and those of third countries would seem essential. In a report of 16 October 2003 entitled "Overcoming Obstacles to Enforcement of the OECD Convention on Combating Bribery of Foreign Officials", Transparency International suggests that the Working Group should organize periodic meetings attended by law enforcement officials from Convention States and from non-party States – in particular developing countries – for the purpose of improving channels for cooperation on foreign bribery cases. This idea surely merits consideration.

Issues for further consideration :

4. Encourage all OECD Convention States to ratify the United Nations Convention against Corruption.
5. Arrange periodic meetings with the law enforcement authorities of Convention parties and non-parties.

II. DETERMINATION OF JURISDICTION

11. Regardless of the nationality of the public official who has been bribed, the crime of foreign bribery often involves several other States that may have simultaneous jurisdiction, either under the heading of territoriality when the different aspects of the offence were committed in separate jurisdictions, or under the heading of both territoriality and the nationality of the author of the offence when the territory in which the offence was committed and the nationality of the offender are different. These situations of multiple or overlapping jurisdiction can produce unfortunate consequences of two kinds. First, it is possible that the authorities of several States with jurisdiction under the OECD Convention could open an investigation and begin prosecution, in other words they could "compete" for the case. It is also possible that the authorities of each State might hide behind the jurisdiction of other States and refused to investigate. This situation is sometimes referred to as a "false negative conflict of jurisdiction": the conflict itself is not negative, in the sense that at least one State has jurisdiction, but it is not really "positive" because no State takes action.

A. Multiple investigations and prosecutions

12. It should be a good thing, *prima facie*, if the authorities in several States conduct parallel investigations into the same case. This means that a maximum of evidence will be compiled, and requests for mutual assistance can readily be honoured. However, two points deserve close attention here.

First, these parallel efforts need to be organized under the best possible conditions of effectiveness. To this end, it is essential that the investigation and prosecution authorities maintain close contact.

Second, in order to protect individual rights, care must be taken to avoid concurrent proceedings in different States, at least when this can be done without impeding the search for evidence. Once a definitive court ruling has been handed down in one of the States, at latest, proceedings underway in the other States should cease. Otherwise, this could result in violation of the principle of double jeopardy or *ne bis in idem*. In order to determine as quickly as possible the State best placed to exercise jurisdiction (a requirement of Article 4.3), prosecutors should consult at the outset of their investigation and throughout the course of proceedings.

13. The needs of investigative efficiency and the protection of defendants suggest that the exchange of information among prosecutors should be reinforced. Such cooperation could take place at two levels: first, in concrete cases (perhaps through the use of joint investigation teams), and second in a more detached context that would allow prosecutors to keep each other informed at regular intervals of the methods they are using and the results they are obtaining, to exchange information of a more general nature, and to work together to coordinate their actions. In short, it would take the form of a reciprocal information and training mechanism. Taken together, exchanges at these two levels could allow anti-bribery prosecutors to "network".

Issues for further consideration:

6. Case conferences between prosecutors
7. Regular meetings to exchange information and training among prosecutors.

B. Failure of the law enforcement authorities to act

14. The problem that arises when the law enforcement authorities refuse to take action despite having jurisdiction could certainly be addressed, initially, in the same way as that of multiple proceedings. In fact, the exchange of information and joint monitoring of concrete cases could encourage a decision to entrust prosecution to one or other of the States concerned. In any case, it would avoid a situation where the authorities involved hand off the case to their counterparts without having thoroughly considered the matter.

However, it is unlikely that this exchange of information will take place spontaneously. The Working Group could play a role in sparking discussion, in a manner that would have to be studied.

As well, if the State authorities are unable to reach agreement on the most appropriate jurisdiction, or if no State takes action, some form of outside intervention might be desirable. The Working Group could take it upon itself to offer mediation services between the parties involved, in order to resolve the stalemate.

Issues for further consideration:

8. The Working Group's role in instigating discussion.
9. The Working Group's role as mediator in cases of persistent disagreement.

ANNEX

ANTI -BRIBERY INSTRUMENTS OF THE OECD

Article 4 of the Convention – Jurisdiction

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

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

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

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

Article 9 of the Convention – Mutual Legal Assistance

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

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

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

Official commentary n° 32 on article 9 paragraph 2

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

Recommendation n° 7 of the Revised Recommendation of the Council on Combating Bribery in International Business Transactions of 23 May 1997

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

i) consult and otherwise co-operate with appropriate authorities in other countries in investigations and other legal proceedings concerning specific cases of such bribery through such means as sharing of information (spontaneously or upon request), provision of evidence and extradition;

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

iii) ensure that their national laws afford an adequate basis for this co-operation and, in particular, in accordance with paragraph 8 of the Annex.

UNITED NATIONS CONVENTION AGAINST CORRUPTION

Article 43 – International cooperation

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

Article 46 – Mutual legal assistance

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

Article 49 – Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

CONVENTION OF THE EUROPEAN UNION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

Article 6 - Transmission of requests for mutual assistance

1. Requests for mutual assistance and spontaneous exchanges of information referred to in Article 7 shall be made in writing, or by any means capable of producing a written record under conditions allowing the receiving Member State to establish authenticity. Such requests shall be made directly between judicial authorities with territorial competence for initiating and executing them, and shall be returned through the same channels unless otherwise specified in this Article. Any information laid by a Member State with a view to proceedings before the courts of another Member State within the meaning of Article 21 of the European Mutual Assistance Convention and Article 42 of the Benelux Treaty may be the subject of direct communications between the competent judicial authorities.

2. Paragraph 1 shall not prejudice the possibility of requests being sent or returned in specific cases: (a) between a central authority of a Member State and a central authority of another Member State; or (b) between a judicial authority of one Member State and a central authority of another Member State.

3. Notwithstanding paragraph 1, the United Kingdom and Ireland, respectively, may, when giving the notification provided for in Article 27(2), declare that requests and communications to it, as specified in the declaration, must be sent via its central authority. These Member States may at any time by a further declaration limit the scope of such a declaration for the purpose of giving greater effect to paragraph 1. They shall do so when the provisions on mutual assistance of the Schengen Implementation Convention are put into effect for them. Any Member State may apply the principle of reciprocity in relation to the declarations referred to above.

4. Any request for mutual assistance may, in case of urgency, be made via the International Criminal Police Organisation (Interpol) or any body competent under provisions adopted pursuant to the Treaty on European Union.

5. Where, in respect of requests pursuant to Articles 12, 13 or 14, the competent authority is a judicial authority or a central authority in one Member State and a police or customs authority in the other Member State, requests may be made and answered directly between these authorities. Paragraph 4 shall apply to these contacts.

6. Where, in respect of requests for mutual assistance in relation to proceedings as envisaged in Article 3(1), the competent authority is a judicial authority or a central authority in one Member State and an administrative authority in the other Member State, requests may be made and answered directly between these authorities.

7. Any Member State may declare, when giving the notification provided for in Article 27(2), that it is not bound by the first sentence of paragraph 5 or by paragraph 6 of this Article, or both or that it will apply those provisions only under certain conditions which it shall specify. Such a declaration may be withdrawn or amended at any time.

8. The following requests or communications shall be made through the central authorities of the Member States:

(a) requests for temporary transfer or transit of persons held in custody as referred to in Article 9 of this Convention, in Article 11 of the European Mutual Assistance Convention and in Article 33 of the Benelux Treaty;
(b) notices of information from judicial records as referred to in Article 22 of the European Mutual Assistance Convention and Article 43 of the Benelux Treaty. However, requests for copies of convictions and measures as referred to in Article 4 of the Additional Protocol to the European Mutual Assistance Convention may be made directly to the competent authorities.

Article 7 – Spontaneous exchange of information

1. Within the limits of their national law, the competent authorities of the Member States may exchange information, without a request to that effect, relating to criminal offences and the infringements of rules of law referred to in Article 3(1), the punishment or handling of which falls within the competence of the receiving authority at the time the Information is provided.

2. The providing authority may, pursuant to its national law, impose conditions on the use of such information by the receiving authority.

3. The receiving authority shall be bound by those conditions.

Article 13 – Joint investigation teams

1. By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team shall be set out in the agreement. A joint investigation team may, in particular, be set up where:

(a) a Member State's investigations into criminal offences require difficult and demanding investigations having links with other Member States;

(b) a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated, concerted action in the Member States involved. A request for the setting up of a joint investigation team may be made by any of the Member States concerned. The team shall be set up in one of the Member States in which the investigations are expected to be carried out.

2. In addition to the information referred to in the relevant provisions of Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, requests for the setting up of a joint investigation team shall include proposals for the composition of the team.

3. A joint investigation team shall operate in the territory of the Member States setting up the team under the following general conditions:

(a) the Leader of the team shall be a representative of the competent authority participating in criminal investigations from the Member State in which the team operates. The leader of the team shall act within the Limits of his or her competence under national law;

(b) the team shall carry out its operations in accordance with the law of the Member State in which it operates. The members of the team shall carry out their tasks under the leadership of the person referred to in subparagraph (a), taking into account the conditions set by their own authorities in the agreement an setting up the team;

c) the Member State in which the team operates shall make the necessary organisational arrangements for it to do so.

4. In this Article, members of the joint investigation team from Member States other than the Member State in which the team operates are referred to as being 'seconded' to the team.

5. Seconded members of the joint investigation team shall be entitled to be present when investigative measures are taken in the Member State of operation. However, the Leader of the team may, for particular reasons, in accordance with the law of the Member State where the team operates, decide otherwise.

6. Seconded members of the joint investigation team may, in accordance with the law of the Member State where the team operates, be entrusted by the leader of the team with the task of taking certain investigative measures where this has been approved by the competent authorities of the Member State of operation and the seconding Member State.

7. Where the joint investigation team needs investigative measures to be taken in one of the Member States setting up the team, members seconded to the team by that Member State may request their own competent authorities to take those measures. Those measures shall be considered in that Member State under the conditions which would apply if they were requested in a national investigation.

8. Where the joint investigation team needs assistance from a Member State other than those which have set up the team, or from a third State, the request for assistance may be made by the competent authorities of the State of operations to the competent authorities of the other State concerned in accordance with the relevant instruments or arrangements.

9. A member of the joint investigation team may, in accordance with his or her national Law and within the limits of his or her competence, provide the team with information available in the Member State which has seconded him or her for the purpose of the criminal investigations conducted by the team.

10. Information lawfully obtained by a member or seconded member while part of a joint investigation team which is not otherwise available to the competent authorities of the Member States concerned may be used for the following purposes:

(a) for the purposes for which the team has been set up;

(b) subject to the prior consent of the Member State where the information became available, for detecting, investigation and prosecuting other criminal offences. Such consent may be withheld only in cases where such use would endanger criminal investigations in the Member State concerned or in respect of which that Member State could refuse mutual assistance;

(c) for preventing an immediate and serious threat to public security, and without prejudice to subparagraph (b) if subsequently a criminal investigation is opened;

(d) for other purposes to the extent that this is agreed between Member States setting up the team.

11. This Article shall be without prejudice to any other existing provisions or arrangements on the setting up or operation of joint investigation teams.

12. To the extent that the laws of the Member States concerned or the provisions of any legal instrument applicable between them permit, arrangements may be agreed for persons other than representatives of the competent authorities of the Member States setting up the joint investigation team to take part in the activities of the team. Such persons may, for example, include officials of bodies set up pursuant to the Treaty on European Union. The rights conferred upon the members or seconded members of the team by virtue of this Article shall not apply to these persons unless the agreement expressly states otherwise.