This note is for discussion at the meeting of the Working Group on 4-5 October 2000 under agenda item 7.
STATUS REPORT ON THE FIVE ISSUES RELATING TO CORRUPTION

(Note by the Secretariat)

1. This note briefly reviews the status of the five issues relating to corruption initially identified in need of further work by the Negotiating Conference on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

2. In December, 1997, the OECD Council decided that the Committee on International Investment and Multinational Enterprises (CIME), through its Working Group on Bribery in International Business Transactions, should examine on a priority basis the following five issues identified by the Negotiating Conference:


2. Advantages promised or given to any person in anticipation of that person becoming a foreign public official.

3. Bribery of foreign public officials as a predicate offence for money laundering legislation.

4. The role of foreign subsidiaries in bribery transactions.

5. The role of offshore centres in bribery transactions.

3. In August, 1998, all the signatories to the Convention were requested to respond to a questionnaire on the first four issues [the 1998 questionnaire -DAFFE/IME/BR(98)9REV1], to which 26 of them replied.1 The objective of the questionnaire was to assess to what extent these issues might already be covered by the Convention and legislation adopted to implement the Convention, as well as any other relevant existing laws. In January, 1999, the Secretariat released a report on all five of the issues [DAFFE/IME/BR(98)13/REV1], in which it presented an overview of the Working Group’s assessment of the adequacy of this coverage. This report was transmitted to the 1999 Ministerial meeting as C/MIN(99)5 [Annex 2].

4. In its most recent report to Ministers, [C/MIN(2000)8] the Group reported that these issues will be addressed further by the Working Group in the Fall.

1 These replies can be found in DAFFE/IME/BR/WD(98)4REV1, DAFFE/IME/BR/WD(98)4REV1/ADD1, and ADD2. Not all the countries examined in Phase 1 have responded to this questionnaire, and some of the countries that responded have not yet been examined under Phase 1.
Objective

5. The objective of this status report is to provide the Group with sufficient information to determine what direction any future work on these issues should take by (a) clarifying further the extent to which the Convention and countries’ implementing legislation adequately cover the issues and (b) where applicable, reviewing the measures that countries have in place to compensate for any lack of coverage therein.

Methodology

6. In order to assist the Group in deciding upon its future work in this area, this note, where applicable, reviews the status of the five issues in view of the information that has been gained from Phase 1 of the examination of countries’ implementation of the Convention, and revisits the responses to the questionnaire on the four issues in light of this new information. With respect to certain issues, it also presents new observations that may or may not be related to information derived from Phase 1.

B. THE FIVE ISSUES

I. Bribery Acts in Relation to Foreign Political Parties and Officers

Conclusions of Working Group before Phase 1

7. From the responses of participants to the questionnaire on the first four issues, the Working Group concluded that the Convention and countries’ implementing legislation cover the following cases of bribery involving foreign political parties and party officers [C/MIN(99)5, Annex 2 §6]:

1. Where the party officer is a public official or exercises a public function (Article 1.4).

2. In the case of a one-party state (Commentary 16, Article 1.4).

3. Where the transaction is between the briber and the public official and the political party is the third party beneficiary of the bribe transaction (Article 1.1).

4. Where the party officer is acting as an intermediary between the company officer and the public official (Article 1.1).

5. Where the party officer and the public official are “co-authors”[i.e. acting in collusion] Article 1.2.

8. The Working Group was of the opinion that the cases that were not covered were the cases where the public official was not involved in the bribery transaction or he/she was unaware or unwittingly provided the illegal act because of having been tricked, etc. The Group felt that these cases might be covered by national laws on, for instance, trading in influence, the misuse of company funds or illegal party financing [C/MIN(99)5, Annex 2 §7].

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2 The country reports of the 21 countries that were examined between April, 1999, and March, 2000, are contained in a Report by the CIME on the implementation of the Convention to Council at Ministerial Level [C/MIN(2000)8/ADD].
9. The Working Group also noted that it would be extremely difficult to define political parties and political party officers and that some countries would not be able to equate a foreign political party officer to a foreign public official [C/MIN(99)5, Annex 2 §5].

**Reassessment of Coverage as a Result of Phase 1**

10. Party officers who are public officials or are exercising public functions and party officers in one-party states, both relate to the definition of “foreign public official” in Article 1.4 of the Convention. The Convention covers the bribery of various types of foreign public officials, and all cases where a person is exercising a public function for a foreign country including for a public agency or public enterprise, regardless if he/she is formally designated as such. Although it would often be the case that a party officer in a one-party state exercises a public function, each case would have to be treated individually as in cases involving multi-party states.

11. Several countries examined so far in Phase 1 have not adopted in their implementing legislation an autonomous definition of “foreign public official”. For instance, two countries have not provided an express definition of “foreign public official”, but rely on the direct applicability of the definition in the Convention (Greece, Spain), one country refers to its own definition of a national public official (Norway), two countries refer to the definition of a public official in the foreign public official’s country (Mexico, and Belgium where the official is from within the EU), and two countries rely on both the definition of their own national officials and the definition in the foreign public official’s country (Austria, and Belgium where the official is from outside the EU).

12. Article 1 of the Convention also covers all cases where the bribery transaction is between the briber and a public official and the advantage is for a third party, and thus covers the case where the third party is a foreign political party or officer. However, it has been seen in Phase 1 that not all the countries have expressly covered cases involving third party beneficiaries (Japan, Korea, Mexico, Norway, Slovak Republic, and U.S.).

13. Concerning the coverage of the Convention where a foreign political party or party officer is involved as an intermediary, the Working Group reasoned that the Convention would not cover the case where the party or party officer acts as an intermediary unless the foreign public official is actually involved in the transaction [C/MIN(99)5, Annex 2 § 6, 7]. However, under the Convention, it is enough if the briber intends to bribe a foreign public official.

14. Phase 1 examinations showed that four countries have established relevant offences in their legislation which go beyond the requirements of the Convention (Australia, Mexico, Slovak Republic and U.S.), three of which cover bribes to a person for the purpose of influencing a foreign public official (Australia, Mexico and Slovak Republic). The fourth country’s offence explicitly covers payments made to a foreign political party or a foreign political party officer to influence an act or decision of the party or party officer or to use its or his/her influence to affect or influence any act or decision of a foreign government or instrumentality (U.S.).
15. The responses of participants to the questionnaire on the first four issues relating to corruption revealed that a variety of other existing legislative measures may capture bribery acts in relation to foreign political parties and officers. Some countries believe that in certain cases these acts would be captured by their conspiracy laws (New Zealand) or offences pertaining to private corruption (Belgium, Netherlands, Sweden and U.K.). Other relevant measures include criminal and non-criminal legislation on illegal party financing (Belgium and Italy, 1998 reply) and the misuse of corporate assets (France, 1998 reply), as well as legislation requiring the registration in public accounts of contributions to political parties above a specified amount (Norway). At least two countries have laws regarding trading in influence, but in one case the offence is directed at the passive side of the transaction (Turkey) and in the other case more information about the law is needed (Greece).

16. The responses to the questionnaire on the first four issues further disclosed that, in addition to the observation already made by the Working Group that it would be difficult for some countries to define political parties and political party officers (Hungary confirms this and the U.S. doesn’t provide a definition under the FCPA), it would be impossible for some countries to establish an offence directed at the bribery of a non-natural person including a political party (Sweden and Poland make a statement to this effect and Mexico and Slovak Republic’s trading in influence offences only apply to the bribery of a natural person).

Summary

17. It would appear that the Convention covers most of the types of bribery in relation to political parties and political party officers. However, this assessment depends on how countries will apply in practice, their laws implementing article 1 of the Convention. In particular, Phase 2 will need to make a careful examination of how countries have applied the definition of foreign public official, cases of where the advantage is for third parties or where the party or party official is a third party beneficiary, cases of intermediaries (regardless of the knowledge or involvement of the foreign public official) and cases of complicity (co-authors).

18. On the other hand, the Convention would not cover:

(a) A bribe to a foreign political party or officer for the purpose of obtaining an act or decision of the party or officer acting in its or his/her own capacity (not exercising a public function).

(b) A bribe to a foreign political party or officer for the purpose of inducing it or him/her to influence a foreign public official.

19. Only the implementing legislation of one country covers both these categories of bribery acts (U.S.) and the implementing legislation of some of the others covers the second category (Australia, Mexico and Slovak Republic). Many countries either do not address these issues at all (Argentina, Finland, Germany, Hungary, Japan, Korea and Portugal), or identify a variety of criminal and non-criminal approaches that may be applicable.

3 The relevant question asked participants to address how their implementing legislation treats the case where the contribution were to a foreign political party for the purpose of obtaining a contract or advantage from a foreign public official. Most countries did not restrict their answer to treatment thereof under their implementing legislation.
II. Advantages Promised or Given to any Person in Anticipation of that Person Becoming a Foreign Public Official (Candidates for Public Office)

Conclusions of the Working Group before Phase 1

20. The Working Group addressed the issue of advantages promised or given to any person in anticipation of that person becoming a foreign public official in terms of the following two hypothetical cases [DAFFE/IME/BR(98)REV1]4:

(a) An offer or promise is made to a candidate for public office before the election, the payment (or part thereof) and the quid pro quo occurs after the candidate is elected (i.e. has become a foreign public official).

(b) An offer or promise or payment in full is made to a candidate for public office before the election, and the quid pro quo occurs when the candidate is a public official.

21. Based on the responses to the questionnaire on the four issues, the Working Group concluded that the Convention would cover the case where the payment (in full or in part) and the pro quo are delivered after the candidate becomes a foreign public official. Where the payment is not made but only promised, there may alternative ways to get the company officer (misuse of company assets, campaign financing laws). In some countries, where the payment is not made because the candidate does not become a public official, the case might be covered by “attempt”.

22. The Group further concluded that it is unlikely that the Convention would cover the second case irrespective of whether a payment has been made to a candidate since the candidate at no time is invested with the qualification to deliver the quo. Some countries noted that treating the offer or promise to the candidate as a preparatory act, an attempt, or a conspiracy might also not be possible because in their legal systems, there cannot be an attempt to corrupt since corruption itself is a preparatory act.

23. The Group noted that the application of different national laws to the issue of candidates would create a problem of non-homogenous coverage. Moreover, the Working Group noted that defining candidates for foreign public office may be problematic (Germany and Hungary made statements to this effect in their responses to the questionnaire).

Reassessment of Coverage as a Result of Phase 1

24. Two countries that have been examined in Phase 1 have provided for offences that expressly apply to the bribery of candidates (Belgium and the U.S.). One of these countries extends the bribery offence to persons who are candidates for a public function (Belgium), whereas the other covers bribes to any candidate for foreign political office (U.S.). Neither of these countries’ legislation contains a definition of the applicable candidates. Phase 2 monitoring should provide information on how these offences have been or will be applied.

25. Two of the other countries examined in Phase 1 appear to have offences that are constructed broadly enough that they might capture the bribery of a person in anticipation of him/her becoming a

4 The cases that participants addressed in the questionnaire (see footnote 1) do not correspond exactly to the description thereof in the Working Group’s assessment. The first case does not specify the timing of the payment. The second case specifies that the payment is made before the election, but does not specify whether the foreign public official provides the illegal quo.
foreign public official, regardless of the timing of the payment (Australia and Canada). However, these countries have not made representations to this effect\(^5\), and the Group did not address this in their evaluations. In one case the offence applies to offering, etc. a benefit to another person with the intention of influencing a foreign public official (Australia). In the other case the offence applies to the offering, etc. of an advantage to any person for the benefit of a foreign public official (Canada). It will be necessary to follow-up the application of offences constructed in this way to determine whether they are in practice broad enough to address this kind of bribery.

**Summary**

26. The coverage of candidates for foreign public office under the Convention would appear difficult for various reasons. The case where the candidate becomes a public official and the payment is made after he/she becomes a public official is covered in the same way as a bribery case under article 1. A variety of approaches in national laws might cover other cases involving a promise or offer (but no payment) to a candidate that becomes a public official, or offers, promises, or payments to candidates before they are public officials (or that do not become public officials) leads invariably to non-homogeneous coverage. There is also the definitional problem relating to candidate for foreign public office.

27. Among the countries that have been examined in Phase 1, two countries have established offences that expressly apply to some form of candidate. In addition, two other countries have established offences that would appear broad enough that they might capture the bribery of a person in anticipation of him/her becoming a foreign public official. However, it will have to be seen how these offences are applied in practice through the monitoring of enforcement in Phase 2.

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\(^5\) However, one country feels that these cases could be covered by conspiracy to commit the principal offence.
III. Bribery of Foreign Public Officials as a predicate offence for money laundering

Conclusions of the Working Group before Phase 1

28. The Working Group noted the requirements of Article 7 of the Convention with respect to Parties that have made domestic bribery a predicate offence for money laundering legislation (“national treatment”). It also noted that the FATF Recommendation asks countries to broaden the scope of predicate offences to all “serious crimes”, leaving countries to determine what those serious crimes would be.

29. A number of countries expressed concern that the treatment of money laundering in the Convention may result in uneven application between countries that make bribery of domestic public officials a predicate offence for money laundering and those that do not. As concerns this issue of “national treatment”, the Group recognised that the Convention requires only that if domestic bribery is a predicate offence for money laundering, this same result should apply to bribery of foreign public officials, on the same terms.

30. In the 1998 questionnaire, the issue of the reporting obligations attaching to money laundering legislation was also raised. Countries were asked to consider the case where a company deposits or transfers the proceeds of a contract that was obtained by virtue of a bribe. The Group considered whether under money laundering legislation, a bank officer, who has reason to believe that the funds are the proceeds of contract obtained by bribery of a public official or is a bribe payment to a public official, would be obliged to report the deposit to the appropriate authorities and whether prosecutors would have a basis for acting against the bank officer for failure to report [C/MIN(99)5, annex 2, §23-24].

31. Replies to the 1998 questionnaire showed that in many cases, countries make bribery a predicate offence for money laundering legislation. A few make only passive, not active, bribery a predicate offence. These countries provide for reporting obligations on the part of the bank officer who has reason to believe that the deposit is a bribe payment to a domestic public official. Where this applies to bribe payments to domestic officials, the countries apply the legislation also with regard to bribe payments to foreign public officials.

32. From the replies, the Group concluded that the treatment of the proceeds of a contract obtained by bribery was less clear. Some countries do provide for an obligation on the part of bank officers to report transactions that they have reason to believe are proceeds of a contract obtained by bribery and they apply this obligation where the bribe was to a domestic or foreign public official. Other countries said that it was difficult to identify what funds were part of the proceeds of a contract obtained by bribery and what funds were parts of legal transactions and so make no provision for reporting obligations. [C/MIN(99)5, annex 2, §25-26]

Reassessment of coverage as result of Phase 1

33. “National Treatment”: After 21 examinations in Phase 1, it appears that all the countries already examined comply with article 7 of the Convention, as they establish foreign bribery as a predicate offence “on the same terms” as has been done in relation to domestic bribery. However, the results from Phase 1 revealed some variations between the various countries:

- In 16 countries domestic and foreign bribery are predicate offences.
- In one country, only passive bribery is covered. (Japan)
- In one country neither domestic nor foreign bribery are predicate offences. (Korea)
• In two countries domestic as well as foreign bribery might be predicate offences depending on gravity of the predicate offence, importance of the proceeds. (Spain, Slovak Republic)

Some countries have already changed their legislation to incorporate certain offences of bribery in the list of predicate offences (Japan, Hungary), or have plans to do so (Korea).

34. Even among the 16 countries having established domestic and foreign bribery as predicate offences for the purpose of their money laundering legislation, there are some differences in applying it to the bribe payments. For example, in some countries, forfeiture is possible in relation to the bribe itself only when it is laundered during the course of delivery to the foreign public official (United States, Czech Republic), or, on the contrary, is not possible unless the bribe has been received, as it would not yet be a "criminal acquisition" (Sweden).

35. Phase 1 examinations also showed that all the countries in which bribery is a predicate offence for the purpose of the application of its money laundering legislation apply this without regard to the place where the bribery occurred. However, we do not know what the practical implications of this would be except for a few countries where dual criminality would be required, most countries did not specify the conditions under which they would be able to prosecute this case. This will also need to be followed-up in Phase 2.

Summary

36. While recognising that there is a link between bribery and money laundering, the Group felt that other international organisations were more appropriately mandated to address money laundering issues. [C/MIN(99)5, annex 2, §29; 35]. In 1999 and 2000, the Working Group called attention to their conclusion that it considers bribery, as defined in the Convention, a serious offence also for the purposes of money laundering legislation. It also invited such bodies as the FATF and the UN to note the view of the Group that bribery, as defined in the OECD Convention, should be a predicate offence for money laundering [C/MIN(2000)8, §35]. The Ministerial communiqué of 27 June 2000 (paragraph 30), concluded that “to strengthen the fight against corruption, bribery of foreign public officials should be made a serious crime triggering the application of money laundering legislation.”

37. Article 7 of the Convention only refers to the obligation to apply “national treatment” to cases of bribery of a foreign public official. If the Working Group limits its assessment to a yes or no reply, it will conclude that there is full compliance with Article 7; however the effectiveness of money laundering legislation can be very different from one country to another and this issue will need to be followed up in Phase 2. The Group will also need to review whether the FATF has taken, or plans to take, action with regard to the recommendation by Ministers that it make bribery as defined in the Convention, a serious crime for the purposes of money laundering legislation.

38. The priority of the Working Group remains implementation of the Convention and the related Recommendations [C/MIN(99)5, annex 2, §29]. Besides the question of bribery as a predicate offence, "the Working Group identified the following key areas as most relevant for ensuring the effectiveness of the OECD anti-bribery instruments: regulatory issues, corporate vehicles and mutual legal assistance, bank, and relevant professional secrecy" [C/MIN(2000)8, §35]. Some specific aspects of company laws are dealt with in the context of issue IV, the role of foreign subsidiaries in bribery transactions, and some specific

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6 7 countries are not members of the FATF: Bulgaria, Chile, Czech Republic, Hungary, Korea, Poland, and Slovak Republic.
aspects of financial institutions and MLA are addressed in issue V, on the role of offshore centres in bribery transactions.

IV. The Role of Foreign Subsidiaries in Bribery Transactions

39. The question of the role of foreign subsidiaries is essentially whether authorities in the country of the headquarters of the corporation can take action against officers of the company headquarters, or the company, if its foreign subsidiary bribes a foreign public official. [C/MIN(99)5, annex 2, §31]

Conclusions of the Working Group before Phase 1

40. Members of the Working Group were of the opinion that the issue of how to deal with foreign subsidiaries is linked to how countries deal with notions of corporate responsibility in their national company laws. There was concern that the different approaches in jurisdiction may hamper effective implementation and lead to uneven application of the Convention. [C/MIN(99)5, annex 2, §32]

41. Concerning company headquarters or company officers, the assessment by the Working Group showed that the Convention and national implementing laws would cover the case where company headquarters had authorised the bribe. Using the nationality basis of jurisdiction would also allow application of the Convention to cases where nationals of the company headquarters were involved in the bribery transaction provided they recognised the criminal liability of legal persons. For other cases, where the company “knows” or “should have known” about the bribe, application of the civil concepts of corporate responsibility would most likely capture those instances [C/MIN(99)5, annexe 2 §38].

42. As regards application to the foreign subsidiary itself, most countries thought that where the bribery transaction occurred entirely abroad and where no nationals of the corporate headquarters home country were involved, it would be extremely difficult to exercise jurisdiction in this case. However, if nationals were involved, then under the extended nationality principle, some countries would be able to take action against the foreign subsidiary provided they recognise criminal liability of companies [C/MIN(99)5, annex 2 §37].

43. The Group recommended that countries introduce the concept of corporate responsibility of the parent in the supervision of the activities of the foreign subsidiary, and considered that civil sanctions arising from the lack of effective supervision of foreign subsidiaries merited further examination. It also recommended the encouragement of corporate governance schemes in headquarters and subsidiaries to promote self-regulation.

Reassessment of coverage as result of Phase 1

44. The results of the Phase 1 examinations show that almost half of the countries examined apply criminal responsibility for legal persons, and four more plan to introduce it within the next two years. However, in those where responsibility for legal persons exists, Phase 1 examinations confirmed a lack of a uniform standard for triggering corporate liability. Even where the bribery transaction occurs partially in the territory of the parent corporation, liability for the acts of foreign subsidiaries abroad will not be uniformly invoked, because of the various ways that parties apply corporate responsibility. For instance, under the laws of some Parties, a person with a leading role in the parent corporation must have been directly involved in the bribery transaction. In some cases the person must have actually perpetrated the

Australia, Belgium, Canada, Finland, Iceland, Japan, Korea, Mexico, Norway, Sweden, UK, US.

Austria, Czech Rep., Slovak Rep. and Switzerland
bribe himself/herself in order to trigger corporate liability. Under the laws of at least one Party, the person acting on behalf of the corporation must have been convicted of the foreign bribery offence in order for corporate liability to apply. On the other hand, some Parties’ laws contemplate corporate liability where the bribery transaction results from a breach of a supervisory duty or where the “corporate culture” would have facilitated bribery (Australia).

45. Phase 1 examinations revealed differences also in the application of nationality jurisdiction. First, in certain cases (Canada, Japan, UK) where nationality jurisdiction is sometimes applied, these countries did not do so for foreign bribery cases since, in their view, they had complied with the conditions attaching to the applicability of nationality jurisdiction in the Convention. Second, where countries do apply nationality jurisdiction, Phase 1 showed that this varied according to the conditions countries attach to the application of nationality jurisdiction. These can include, cumulatively or alternatively, dual criminality (Austria, Belgium, Finland, Greece, Mexico, Slovak Republic, Spain, Sweden, Switzerland), reciprocity (Belgium for non-European Union countries), a complaint or request by the injured party or the State of the public official (Greece, Spain), an official consultation with the State of the public official (Belgium), etc. There are other cases where countries can exercise passive nationality jurisdiction or jurisdiction over non-nationals, under different conditions (Czech Republic, Austria, Bulgaria, France 1998 reply).

Summary

46. As regards the role of foreign subsidiaries in bribery transactions, there is an obvious lack of uniform coverage. Phase 1 examinations revealed the extent of non-homogenous coverage of foreign subsidiaries in particular as concerns the standard of liability of legal persons and the ability to claim jurisdiction over company officers, or the parent company, or the subsidiary itself, for acts carried out abroad by foreign subsidiaries. The conclusions reached by the Group as a result of the 1998 questionnaire will need to be re-examined in light of how countries will apply corporate responsibility over legal persons, including the standards of liability.

47. A meeting to discuss corporate responsibility is scheduled for October 4, 2000 to clarify the standards of liability in common law and civil law countries, as well as the differences between countries belonging to a same group. This meeting might provide some options for the Group on whether and how to carry out further work in this area.

V. The Role of Offshore Financial Centres

48. As part of the issues relating to corruption, the OECD Council mandated the Working Group to examine the role of offshore financial centres in bribery transactions. There was general concern that the central problem was one of a lack of financial and commercial transparency. The Working Group convened two special meetings on 11 February 1999 and 29 February 2000, to identify those practices that might impede the effective implementation of the OECD Convention and to take stock of the initiatives undertaken by different international bodies that address problems relating to offshore centres.

49. The Working Group noted that despite the international standards already promulgated in these areas, there are clear deficits in addressing some of the risks associated with the use of financial centres for bribery and corrupt transactions. It identified three key areas for introducing minimum standards of transparency and co-operation in relation to the role of offshore financial centres: financial rules and regulations, company law, and mutual legal assistance.
Concerning regulatory issues: a) identification of clients («know your customer»); b) transaction operations (increased diligence in certain cases); and c) notification, the Working Group decided to send a statement to Ministers inviting FATF and other regulatory bodies to further develop existing standards that reflect the aim of preventing corrupt transactions.

In response to growing awareness of the importance of good corporate governance, the OECD Corporate Governance Steering Group has developed a set of standards and guidelines representing the first international initiative to develop the core elements of a good corporate governance regime. The Steering Group, in co-operation with the Bribery Working Group, is conducting analytical work on the misuse of corporate vehicles (see Outline of Study, attached).

Concerning mutual legal assistance, and bank (and professional) secrecy, the Group decided to consider whether further work is required beyond the minimum norms that exist in the OECD Convention.