This note is for consideration by the Ad Hoc Group on the Phase 2 Questionnaire at its meeting on 3 October 2000. The Ad Hoc Group will decide what follow-up to give to this note to guide discussion at the Working Group meeting on 4-5 October.
PHASE 2 QUESTIONNAIRE

(Note by the Secretariat)

Objective

This note outlines the possible elements of a questionnaire for Phase 2 of the evaluation process and provides questions for consideration by the Ad Hoc Group. The purpose of Phase 2 is to study the structures put in place to enforce the laws and rules implementing the Convention and to assess their application in practice. Apart from tax deductibility, the questionnaire does not cover the 1997 Recommendation which will be reviewed separately. Phase 2 would also serve an educational function as participants discuss problems and different approaches. Phase 2 will be carried out according to the Terms of Reference adopted by the Working Group in DAFFE/IME/BR(99)33/REV2.

The Phase 2 examinations will be carried out in order to obtain an overall impression of the functional equivalence of participants’ efforts to apply the Convention effectively. Obviously, one central issue will be of how participants have actually dealt with concrete cases that have arisen in their territories with respect to the Convention. Moreover, countries will also be asked to explain their general approach to the phenomenon of corruption. The institutional mechanisms put in place in individual countries to deal with cases covered by the Convention (prosecution authorities, means to provide mutual legal assistance, etc.) need to be examined. Participants will also be asked what promotional efforts they have undertaken to make the Convention better known (seminars, workshops, press communication, private sector dialogue, etc.).

During Phase 1, the WG identified deficiencies in the domestic legislation of some countries concerning the implementation of the Convention. In Phase 2, countries will be asked what remedial steps they have taken in the meantime if they have not already taken action to address them. However, as these are issues concerning individual countries only, they are not included in this general Phase 2 Questionnaire.

Also in Phase 1, the WG concluded that a number of issues are of a broader nature and therefore merit an in-depth horizontal analysis. These horizontal issues therefore will be dealt with separately from the Phase 2 Questionnaire. Nevertheless, parts of the Questionnaire are also relevant for these horizontal issues.

The Questionnaire will assist the Group in assessing how participants address the principal issues under the Convention in the application of their implementing laws, and in gaining a clear overview of how the Convention has been applied as a multilateral instrument.

Scope of Replies

The replies to the questionnaire should be precise and provide sufficient detail to permit an assessment of the actual application of the Convention’s implementing legislation.

Where appropriate, copies of relevant laws, regulations, administrative guidance, or court decisions should be provided in English or in French. In formulating replies to the questionnaire participants should also take account of the Commentaries.
Confidentiality

Consultations and discussions of the Working Group on the self- and mutual evaluations shall take place in camera. Non-governmental groups will have the possibility to express their views and submit information to the Working Group. Evaluation reports shall be confidential until their transmission to the Council at which time they would be made publicly available. A country concerned could, however, take whatever steps it felt appropriate to release information concerning its report, or to make it publicly available.

Deadline

Participants should address their replies to the questionnaire to the Secretariat within the time limits fixed by the Secretariat.

Submission of replies

Replies should be submitted in either English or French and preferably in electronic format.

Contact persons

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, if different from Phase 1 contacts.
QUESTIONS CONCERNING PHASE 2

A  GENERAL ISSUES

1. General approach

1.1 Please describe the characteristic features of the corruption phenomenon in your country, indicating notably its extent, its most common forms, the functions of the persons involved, and whether there is a connection between corruption and organised crime in your country.

1.2 Please describe your country’s policy with regard to the means put in place to fight corruption (besides implementing the Convention into domestic legislation), indicating the principal components of this policy including preventive measures and the priorities defined within this framework. Have there been any new legislative developments concerning combating corruption since your country examination in Phase 1?

1.3 Please explain the legal weight given to court decisions and secondary sources of law, such as the Commentaries to the Convention and articles in legal journals.

1.4 If relevant, have there been practical examples to show how your country has/has not been able to use the concept of “direct applicability” of the Convention in order to compensate for discrepancies or gaps in the national implementing legislation?

1.5 If you have dependent or overseas territories, what steps have your authorities taken to make the implementing legislation applicable to them?

1.6 If more than one level of government has legislative-making powers, and another level of government has enacted legislation that applies to the situation of foreign bribery, the relationship of these laws and whether one would supersede in certain circumstances should be explained.

2. Institutional Mechanisms

2.1 If there are there specific bodies specialised in the fight against corruption in your country, please specify their legal basis, composition, functions, and powers.

2.2 Are there any special investigative techniques that can be used in your country in cases of corruption?

2.3 What measures are in place to ensure that persons or bodies in charge of combating corruption enjoy the necessary independence and autonomy to perform their functions?

2.4 What resources (financial and human) have been made available for anti-corruption activities?

2.5 Have there been any cases in your country of officials reporting corruption cases to their superiors, to prosecutors, or other public authority? Are there safeguards for such officials?

2.6 Have there been instances where competitors have filed complaints or provided information, or where company employees have brought a violation to the attention of the authorities? Do procedures
exist for the public to provide information (e.g., hot lines)? Are there safeguards to protect “whistle-blowers”?

2.7 Does the possibility exist in your country to obtain legal advice from your authorities about whether certain prospective transactions would constitute the offence of bribing a foreign public official? If yes, please describe the process and explain to what extent, if any, the opinion would be binding on the courts.

3. Public Awareness

3.1 What activities have been undertaken or what activities are planned to make the Convention better known in your country and to promote ethical values in society (e.g. workshops, seminars, public campaigns, encouraging compliance in the private sector, training programs for lawyers, judges, etc.)?

3.2 Are you aware of guidelines or any other type of code of conduct in public institutions and private companies, aimed at communicating a corporate culture devoted to transparency and discouraging corruption?

3.3 Does your government maintain contact and organise consultations with business, labour, and NGOs in anti-corruption activities?

4. Practical Cases covered by the Convention

4.1 Have there been any concrete cases in your country that fall under the scope of the Convention? If yes, please describe the facts and explain how your authorities have dealt with it. If you do not have cases, what may be the reasons?

B. APPLICATION OF THE CONVENTION

Preliminary remark: The following questions have been designed to provide participants with some guidance in addressing the relevant issues concerning the application of their implementing legislation. Ideally, participants would answer these questions by referring to concrete cases that have arisen under their implementing legislation with regard to the bribery of foreign public officials (whether or not these cases have been successfully prosecuted). However, if a country cannot provide examples that relate directly to the bribery of foreign public officials, it is invited to provide other relevant examples. Cases of bribery of domestic public officials would be the best alternative.

5. Article 1. The Offence

5.1 Please describe how your courts have applied the offence in cases involving bribery of foreign public officials (by natural or legal persons). In answering this question, please pay particular attention to the following elements:

a) Have cases been dismissed due to successful pleading of defences (either general or defences specific to the bribery offence)?

b) How have your courts interpreted the following elements: intent, the offer, promise or giving of a bribe, undue pecuniary or other advantage (provide examples of advantages that have been covered), intermediaries (provide examples, where available), third party beneficiaries (especially cases where the
benefit went directly to the third party), in relation to performance of official duties (what acts/omissions have been covered), obtaining or retaining business or other improper advantage (where relevant, how have the courts applied facilitation payments or bona fide expenses), and international business.

c) Many countries did not adopt in their national laws, per se, the autonomous definition of foreign public official provided in the Convention. Can you please describe how the definition adopted in your legislation has been applied to foreign bribery cases and whether you have encountered any difficulties?

d) Please provide examples of cases involving incitement, aiding, abetting, or authorisation, attempt (if relevant), conspiracy (if relevant).

6. Responsibility of Legal Persons

6.1 Can you provide examples of the application of the law ascribing the liability of legal persons (including state enterprises) to the bribery of foreign public officials? In describing the cases, please pay careful attention to describing the types of entities that have been prosecuted and how the standard of liability (e.g. breach of supervisory duty, leading person theory, etc.) has been applied to foreign bribery.

6.2 Concerning the relationship of liability between the legal person and the natural person:

   a. What has been the outcome when the individual(s) responsible for the bribery transaction (e.g. directors, managers, shareholders) has (have) not been convicted or identified before assigning liability to the legal person?
   b. Is responsibility of the legal person determined in the same proceedings as the individual(s) responsible for the bribe or as a consequence of the proceedings in relation to the individual(s)?
   c. If the standard of liability for legal persons involves the identification of someone in the legal person who is responsible for the bribe, would information about the identity of the directors, shareholders and beneficial owners be available on a timely basis to the investigating authorities? Please explain what information would be available and how it would have to be obtained.

6.3 Does the state have the same powers for investigating an offence in relation to a legal person as in relation to a natural person (e.g. search and seizure, including the search and seizure of bank records, subpoenaing witnesses, etc.)?

7. Sanctions

-- Natural and Legal Persons

7.1 Please describe all the sanctions (criminal, administrative, civil) that have been applied in practice to natural persons for the offence of bribing a foreign public official and compare them with those that have been applied for domestic bribery as well as other similar offences (e.g. fraud, theft and embezzlement).

7.2 Please describe all the sanctions (criminal, administrative, civil) that have been applied in practice to legal persons found liable for bribing foreign public officials and compare them with the
sanctions that have been applied for domestic bribery as well as other similar offences (e.g. fraud, theft and embezzlement).

7.3 In cases where persons have been found liable for foreign bribery cases, how has the court determined the sanction to be applied? What grounds did it rely on for determining the severity of the sentence (including non-imposition of a sanction)?

7.4 If your country provides a procedure for out-of court settlements (e.g. plea-bargaining), please describe how this process has been applied to cases of foreign bribery and include information about the resulting sanctions.

8. Seizure and Confiscation

-- Pre-trial Search, Seizure and Confiscation

8.1 Please provide cases where your authorities have granted or denied pre-trial search, seizure and confiscation in relation to the bribe and the proceeds of bribing a foreign public official.

8.2 Please provide cases where your authorities requested access to bank records or other financial records held by a financial institution for the purpose of obtaining information, searching and seizing, or freezing property in relation to the bribery of foreign public officials and note any difficulties encountered in carrying out these powers.

-- Confiscation or Comparable Monetary Sanctions

8.3 Please describe how confiscation of the bribe and the proceeds has been exercised in relation to the foreign bribery offence. In responding, please answer the following questions:

a) In practice, have the authorities confiscated the bribe and the proceeds of bribing a foreign public official or just one or the other? In practice, how far have the authorities been able to trace the assets generated by the foreign bribery offence (i.e. where they have been converted from their original form)? Have the authorities encountered difficulties in tracing the proceeds?

b) If confiscation is not possible, because the assets cannot be traced, or are no longer available (because, for instance, they are in the possession of a bona fide third party, or they have been gambled away) or confiscation is not available under your laws, what monetary sanctions of a comparable effect have been applied?

c) If confiscation of the bribe when it is still in the possession of the briber is available, can you provide examples of having applied this power in practice?

d) Can you report cases concerning legal persons subject to confiscation? If so, is it available on the same terms as it is for natural persons?
9. **Jurisdiction**

--- **Territorial Jurisdiction**

9.1 In practice, have there been any difficulties in establishing territorial jurisdiction over cases of bribery of a foreign public official? For natural persons? For legal persons? In particular, if your country has identified certain requirements such as government authorisation, the requirement that a particular person report the offence (e.g. an employer or a victim), or that some test is met (e.g. that prosecution is in the public interest), how has this requirement(s) been applied in practice to the foreign bribery offence?

--- **Nationality Jurisdiction**

9.2 In practice, have there been any difficulties in establishing nationality jurisdiction over cases of bribery of a foreign public official? For natural persons? For legal persons? In particular, if a requirement(s) must be satisfied for the establishment of nationality jurisdiction, such as reciprocity, dual criminality, government authorisation, the requirement that a particular person report the offence (e.g. an employer), or that some test is met (e.g. that the prosecution is in the public interest), how has this requirement(s) been applied in practice to the foreign bribery offence?

9.3 Please explain what criteria your courts have applied in determining whether a legal person is a “national”. Under what circumstances would a foreign subsidiary abroad be covered?

9.4 Can you report whether your country has established jurisdiction over cases where a foreigner (non-national) working for a domestic company bribes a foreign public official abroad?

10. **Enforcement**

10.1 How long has it taken your authorities to conclude the prosecution of any foreign bribery cases that have occurred to date? Are there any time limits for any of the stages of the criminal process from investigation to appeal?

10.1 In practice, does the prosecution of a case of foreign bribery depend on the consent of a person or body other than the normal prosecutorial authorities (e.g. Minister of Justice)? On what grounds did this authority grant or deny consent?

10.1 If there are examples of where the determination of whether to prosecute a case of bribing a foreign public official involved consideration of the public interest, on what grounds was it decided that the public interest was or was not satisfied and by whom?

10.1 What standard of proof has been employed at all the relevant stages of your criminal process in relation to the offence of bribing a foreign public official, including the obtaining of a search warrant, access to bank records, pre-trial seizure and confiscation, formal complaint, preliminary hearing, trial, provision of MLA and provision of extradition?

10.1 If you give victims the opportunity to intervene at any stage of the proceedings, please provide examples of how you identify the victim in the case of bribery of foreign public officials. In particular, can victims compel prosecution or have an impact on the sentence?
10.1 In the investigation of alleged cases of bribing a foreign public official or in responding to requests for MLA regarding foreign bribery, have your authorities denied access to information or witnesses due to a protected privacy interest such as professional secrecy?

11. Statute of Limitations

11.1 Please explain how your country’s statute of limitations has been applied to the offence of bribing a foreign public official, including how it is determined when the triggering event occurred and whether suspension, interruption, reinstatement or extension thereof should be provided.

11.2 Can you provide figures concerning bribery cases where prosecution could not proceed because the statute of limitations had expired?

12. Money Laundering

12.1 Please explain how your money laundering legislation has been applied where the predicate offence was the bribery of a foreign public official, and include answers to the following questions:

   a) What sanctions (including confiscation or monetary sanctions of comparable effect and sanctions under the laws that regulate the financial system) have been applied to cases involving bribery by natural and legal persons?
   b) Can you provide examples of the application of the money laundering offence where the defendant should have known or was negligent as to whether the proceeds were derived from the commission of the offence of bribing a foreign public official?
   c) Where the predicate offence takes place abroad have the courts required that certain additional conditions be met (e.g. dual criminality or a conviction of the predicate offence)?
   d) Please explain any differences in the application of the money laundering offence where the predicate offence has been the bribery of a domestic public official.

12.2 Has your country applied sanctions for money laundering to employees and officers of financial institutions who have assisted or co-operated in laundering the illegal gains from the bribery of foreign public officials?

12.3 Have financial institutions provided information to the competent authorities about suspicious transactions involving the proceeds of bribing foreign public officials?

13. Accounting and Auditing Standards

13.1 Please provide examples of the civil, administrative and criminal penalties that have been applied for omissions and falsifications of books, records, accounts and financial statements of companies for the purpose of bribing foreign public officials or of hiding such bribery.

13.2 Please provide examples of prosecutions of the bribery of foreign public officials in your country that were initiated by a report by an auditor of a suspicious transaction to the company management, a corporate monitoring body or the competent authorities.
14. Mutual Legal Assistance

14.1 Please describe the requests for MLA your authorities have received (including requests for financial information such as bank records) regarding the bribery of a foreign public official, and include answers to the following questions:

   a) How many requests have your authorities received since the Convention entered into force in your country? How many requests have been granted/rejected and on what grounds?
   b) How many requests have you made to other countries? How many of them were granted/rejected and on what grounds?
   c) Have you been able to reply to requests promptly (see Article 9)? Are there time limits for responding to requests for the various forms of MLA?
   d) How have any requirements (such as dual criminality or reciprocity) been applied?
   e) Have you granted or denied requests for MLA concerning a legal person; if so, under what circumstances?

14.2 If your authorities have received requests for MLA regarding the offence of money laundering where the predicate offence is the bribery of a foreign public official, please explain how you responded, and comment on whether you provided the same range of MLA as has been provided for other offences?

14.3 Have your authorities been able to promptly grant MLA in cases where a request is for (a) information from a financial institution, such as a customers name or about a customer’s transaction, or (b) information about a company, including the identity of the owner, proof of incorporation, legal form, address, the name of directors, etc.?

15. Extradition

15.1 Please describe the requests for extradition that you have received in relation to the offence of bribing a foreign public official, and include answers to the following:

   a) How many requests have your authorities received since the Convention entered into force for your country? How many requests have been granted/rejected and on what grounds?
   b) How many requests have you made to other countries? How many of them were granted/rejected and on what grounds?
   c) How have any requirements that must be met in order to grant extradition (such as dual criminality, reciprocity or comparability of legal systems) been applied?
   d) If you have denied any requests for extradition on the basis that the requests concerned your nationals, were these cases submitted to your own prosecutorial authorities?
   e) How long has it taken for your authorities to respond to these requests? Are there time limits for granting/denying extradition.

C. APPLICATION OF THE REVISED RECOMMENDATION

16. Tax Deductibility of Bribes

16.1 Do you provide guidance to your tax examiners in guidelines, tax manuals etc on how to identify suspicious payments likely to be bribes? If so give a brief summary.
16.2 In identifying whether a particular payment constitutes a bribe payment, please describe the categories of expenses, and methods of payment that your tax examiners would examine to identify suspicious payments that could be bribe payments to a foreign public official.

16.3 In the case of a suspicious payment or presumption of abuse, does the burden of proof shift from the tax examiner to the tax payer (to prove that the payment is legitimate)?

16.4 Do your tax authorities share information about suspicious transactions with the prosecutorial authorities?

16.5 Have your tax authorities permitted tax deductions for payments to foreign public officials that fall within an exception to the offence (e.g. small facilitation payments or a payment permitted by the written law of the foreign public official’s country - Commentaries 8, 9), or a defence to the offence?