Working Group on Bribery in International Business Transactions

Consultation Paper

Review of the OECD Instruments on Combating Bribery of Foreign Public Officials in International Business Transactions Ten Years after Adoption

January 2008

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EXECUTIVE SUMMARY

The OECD Working Group on Bribery is conducting a review of the OECD anti-bribery instruments, as mandated by the OECD Council's 1997 Revised Recommendation on Combating Bribery in International Business Transactions. As part of its review, the Working Group on Bribery seeks to consult stakeholders and partners in the fight against the bribery of foreign public officials on major issues that have arisen in the course of monitoring implementation of those instruments since their adoption ten years ago.

This Consultation Paper forms the basis of the external consultation. It summarises the main cross-cutting issues that have arisen so far in the implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related OECD anti-bribery instruments.

The external consultation comprises a significant component of the OECD Working Group on Bribery's review of the OECD anti-bribery instruments. Stakeholders are therefore encouraged to answer the questions in the Introduction (Part I) as they relate to the issues of interest to them in Part II on the criminalization of the bribery of foreign public officials and Part III on the detection and prevention of such bribery. The consultation will take place from 10 January 2008 to 31 March 2008. The overall goal of the Working Group's review of the OECD anti-bribery instruments is to determine what steps might need to be taken to strengthen their implementation.

The cross-cutting issues raised in this Consultation Paper include the following under Part II on criminalization of the bribery of foreign public officials: challenges in implementing certain elements of the offence; corporate liability for the offence; sanctions; effective jurisdiction and co-operation in cases of overlapping jurisdiction; the exercise of investigative and prosecutorial discretion; statute of limitations; the detection and prevention of foreign bribery through anti-money laundering systems; fraudulent accounting for the purpose of bribing foreign public officials or hiding such bribery; mutual legal assistance for the purpose of foreign bribery investigations and proceedings; and continuing monitoring and follow-up of Parties' implementation of the OECD anti-bribery instruments.

Under Part III on the detection and prevention of foreign bribery, the cross-cutting issues include the following: awareness of foreign bribery; the detection and reporting of foreign bribery by public officials; the tax treatment of bribe payments; the role of internal company controls and external audits; the detection, deterrence and sanctioning of foreign bribery through public procurement contracting, including ODA-funded procurement; foreign bribery in relation to official export credit support; and co-operation with non-Parties to the OECD anti-bribery instruments.

The issues raised by this Consultation Paper will be of interest to a variety of individuals and organizations. Members of the private sector, including multi-national enterprises, small and medium enterprises involved in foreign business, and the accounting, auditing and legal professions, will be particularly interested in providing input, as will civil society organizations dedicated to the fight against corruption at the international and national levels. International and regional multi-lateral organizations that have domestic or trans-border corruption as part of their mandate will also want to provide input. Additionally, non-Parties to the OECD anti-bribery instruments will want to play an active role in the consultation, given that many of the issues raised in this Consultation Paper have an impact on their domestic anti-corruption programmes.

I. INTRODUCTION

Purpose of Consultation Paper

November 2007 marked the tenth anniversary of the adoption of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions. As the Working Group on Bribery continues to carry out its responsibility for overseeing implementation of these instruments, as well as the 1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials, it wants to ensure their effectiveness. This was foreseen by the OECD Council, which included, in its 1997 Revised Recommendation on Combating Bribery in International Business Transactions, a recommendation for the review of that instrument. The Working Group feels that for the review to be authoritative, it must canvass the views of the major stakeholders in the fight against foreign bribery, and therefore seeks input on the basis of this Consultation Paper.

This Consultation Paper summarises the Working Group on Bribery's analysis on the main cross-cutting issues that have emerged over the last decade in the implementation of the OECD anti-bribery instruments, and provides its anti-corruption partners with the opportunity to fully comment on those issues as well as provide input on the effectiveness of the instruments.

The main goal of the Working Group's review is to determine what steps might need to be taken to strengthen implementation of the OECD anti-bribery instruments. The Working Group foresees that this might be achieved through various measures, including possible revisions to the 1997 Revised Recommendation or the 1996 Recommendation on the tax treatment of bribes.

Background

The last ten years have been very productive years for the OECD Working Group on Bribery. It is hard to believe that before adoption of the OECD anti-bribery instruments bribing foreign public officials in international business transactions was considered the normal way of doing business in many parts of the world. These activities were even encouraged indirectly by the availability of tax breaks for bribes in many countries. The OECD Anti-Bribery Convention and related instruments were established due to serious moral and political concerns about such business practices, and their negative effect on good governance, economic development and a level playing field for international competition. To this day, the OECD Anti-Bribery Convention remains the only multilateral instrument in the world focused on the supply-side of foreign bribery.

Ten years after adoption of the OECD Anti-Bribery Convention all 37 Parties[1] have criminalized foreign bribery and disallowed tax deductions for bribe payments, as well as taken various further steps as required by the Convention and other OECD anti-bribery instruments.[2] The Working Group views these actions very positively, but also wants to make sure that all the Parties implement the OECD anti-bribery instruments effectively and pro-actively.

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1 The 37 Parties to the OECD Anti-Bribery Convention are the 30 OECD countries and the following non-OECD countries: Argentina, Brazil, Bulgaria, Chile, Estonia, Slovenia and South Africa.

2 The other OECD anti-bribery instruments include the following: the Commentaries on the OECD Anti-Bribery Convention, the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, and 1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials.

For this reason, the Working Group systematically monitors implementation of the instruments through a rigorous peer-review process involving two phases. Phase 1 comprises a technical assessment of Parties' foreign bribery legislation. Phase 2 involves a one-week on-site visit by a team of experts from two other Parties and the OECD Secretariat to meet with major stakeholders, including police, prosecutors, the private sector and civil society. The review process produces in-depth critical assessments of each Party's implementation of the instruments in the form of Phase 1 and Phase 2 reports. These reports include stringent recommendations for ensuring the full impact of the anti-bribery instruments. These recommendations do not seek a uniform approach by the Parties to implementing the Convention, but instead recognise that different legal systems may achieve the same results through different means (the concept known as "functional equivalence"). The number and nature of legislative amendments and institutional changes that have been made by Parties in response to the Working Group's recommendations demonstrate the strength of the peer-review process and the commitment of the Parties. The past ten years have also seen a substantial increase overall in the number of investigations and prosecutions of foreign bribery cases by the Parties to the OECD Anti-Bribery Convention, although regrettably few convictions have been obtained as yet by most Parties.

At about the half-way mark in the peer-review process, the Working Group decided to make a comparative study of the 21 Parties for which both the Phase 1 and Phase 2 reviews had been finalised by the end of 2005. The result is the 2006 Mid-Term Study, which identifies a number of cross-cutting issues that might have an impact on the implementation of the Convention. The findings of the Mid-Term Study form the basis of most of the issues for consultation in this Paper, in addition to regular consultations with civil society and the private sector. Since publishing the Mid-Term Study, the Working Group has almost completed the Phase 2 reviews, with only three reviews left to be completed in 2008 and 2009.

Over the last ten years, there have also been a number of developments outside the OECD that have an impact on the fight against the bribery of foreign public officials. These include the adoption of the United Nations Convention against Corruption in 2003, as well as regional instruments such as the Council of Europe Criminal Law Convention on Corruption in 1999, and the African Union Convention on Preventing and Combating Corruption in 2003, in addition to the Inter-American Convention against Corruption which was already adopted in 1996. These instruments have provided a tremendous boost to the global anti-corruption movement, by increasing awareness of the risks of bribery, and expanding the geographical scope of anti-corruption initiatives. Most importantly, these initiatives and the OECD anti-bribery instruments are complementary and mutually reinforcing.

Another major development over this period is the emergence of several countries that are not Parties to the OECD Anti-Bribery Convention as major economic players. Since one of the Convention's primary goals is to ensure a level playing field in international business transactions, this goal cannot be fully met unless all the world's major economic powers are on board in the fight against foreign bribery.

Request for Input

This Paper seeks your input on the effectiveness of the OECD anti-bribery instruments by presenting the various cross-cutting issues in two parts. Part II covers those issues related to the criminalisation of the bribery of foreign public officials in international business transactions, and Part III covers those issues related to the detection and prevention of such bribery. Whether you provide input on one or several issues, we want to give the fullest possible consideration to your input.

We therefore ask that you address the following questions:

QUESTIONS FOR CONSULTATION

1. **What are your general impressions concerning the effectiveness and implementation of the OECD anti-bribery instruments (*i.e.* the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the 1997 Revised Recommendation of the Council on Combating Bribery in International Business Transactions, and the 1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials) over the last ten years?**
2. **What additional insights do you have on any of the specific issues raised in this Consultation Paper?**
3. **What steps do you believe should be taken to address any of the specific issues raised in this Consultation Paper, including suggestions regarding the effectiveness of the OECD anti-bribery instruments?**

In responding to these questions, please provide supporting evidence.

Instructions on providing Input

The Working Group is grateful for your input on this Consultation Paper, which will help to inform the OECD Working Group on Bribery in its review of the OECD anti-bribery instruments. The deadline for receiving comments is **31 March 2008**. You are requested to forward your responses by E-mail to the following address:

Ms Christine Uriarte, Principal Administrator, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs, OECD: consultation.antibribery@oecd.org.

Responses, including the names and addresses of respondents, will be made public on the OECD Anti-Corruption Division webpage of the OECD website (www.oecd.org/daf/nocorruption) in the first half of 2008 unless confidentiality is specifically requested. In addition, The Working Group on Bribery will keep stakeholders informed of any subsequent actions in response to the Consultation Paper on the same webpage.

II. SUMMARY OF CROSS-CUTTING ISSUES ON THE CRIMINALISATION OF THE BRIBERY OF FOREIGN PUBLIC OFFICIALS

1. Offence of Bribing a Foreign Public Official

1.1 Bribes through intermediaries

1. Article 1 of the Convention requires the coverage of cases of bribing foreign public officials where a person intentionally offers, promises or gives an undue advantage to a foreign public official directly or through an intermediary. Since bribes are rarely given directly to foreign public officials, and are often transferred through, for instance, a local agent abroad, the non-coverage of cases where the bribe is made through an intermediary would represent a very large loophole. Indeed, a 2006 survey commissioned by Control Risks and Simmons & Simmons[3] showed that the vast majority of respondents[4] believed that corporations from their own countries either "occasionally", "regularly" or "nearly always" sought to circumvent laws on transnational bribery by using intermediaries.

2. All of the Parties to the Convention included in the Mid-Term Study stated that their foreign bribery offences are intended to cover bribing through an intermediary. Almost half of those Parties did not expressly cover bribing through an intermediary in their offence of bribing a foreign public official. Pursuant to the Convention the legislation of a Party is not required to expressly cover bribery through an intermediary, as long as its criminal law clearly provides for such an application. In this situation, the Working Group looks for supporting authority (*i.e.* case law or academic legal literature) that the situation would be covered in practice. Some Parties have provided such authority.

3. This issue is also relevant to a major concern of the private sector and civil society, and relates to two of the five issues identified by the OECD Council in 1997 to be examined on a priority basis by the Working Group on Bribery – the bribery of foreign political parties and party officials, and the role of foreign subsidiaries in bribery transactions -- since foreign political parties and party officials, and foreign subsidiaries may act as intermediaries in such transactions. The role of intermediary can also be played by other actors, including but not limited to the following: agents, including customs agents, sales representatives, consultants, suppliers, sub-contractors, joint venture partners and other business partners including lawyers.[5]

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[3] See pages 12-13 of "International Business Attitudes to Corruption – Survey 2006". The survey involved telephone interviews with 350 international companies based in Brazil, France, Germany, Hong Kong, Netherlands, United Kingdom and United States.

[4] The respondent companies to this particular question were from: Brazil, France, Germany, Netherlands, United Kingdom and United States.

[5] The OECD "Guidelines for Multinational Enterprises" refer to "business partners, including suppliers and sub-contractors" under Chapter II on "General Policies", and also "agents" under Chapter VI on "Combating Bribery". The International Chamber of Commerce rules of conduct and recommendations ("Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations")

1.2 Bribes that benefit third parties

4. Article 1 of the Convention requires the coverage of cases where a bribe is offered, promised or given to a foreign public official "for that official or for a third party". Foreign public officials often want to obtain benefits for a third party, such as a political party, party official, charity, spouse, friend, business partner or company in which the foreign public official holds a beneficial interest. Bribery in relation to political parties and party officials has been identified as a priority issue by civil society and is one of the five issues identified by the OECD Council in 1997 to be examined on a priority basis by the Working Group on Bribery.

5. Thus it would be a significant obstacle to the effective implementation of the Convention if a briber were able to avoid liability for the foreign bribery offence by transferring the benefit directly to a third party, rather than to the foreign public official who would then transfer it to the third party.

6. For this reason, the Working Group has been particularly diligent in its inquiries where a Party's offence of bribing a foreign public official does not expressly cover the case where an agreement has been reached between the briber and the foreign public official to transmit the bribe directly to a third party, requiring supporting legal authority for the proposition that it is covered. Two Parties have already responded by amending their offences of bribing a foreign public official to address concerns of the Working Group in this regard.

1.3 Facilitation payments[6]

7. Commentary 9 on the Convention provides that "small 'facilitation' payments do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 [of Article 1 of the Convention] and, accordingly are not an offence", and that "such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned". Some Parties to the Convention have expressly established an exception for facilitation payments that is intended to implement Commentary 9. A few Parties have not expressly established such an exception, but apply one in practice. The rest of the Parties have chosen to not implement Commentary 9.

8. The Mid-Term Study shows that the Working Group has consistently asked Parties that provide an exception for "small facilitation payments" to ensure that the exception is clear and does not exceed the limits in Commentary 9.

1.4 Definition of foreign public official

9. Article 1 of the Convention provides a comprehensive and autonomous definition of "foreign public official". It is clear from the amount of focus in the Phase 1 and Phase 2 Reports of the Working Group on the adequacy of Parties' definitions of "foreign public official" that the Working Group views the definition as critical to the effectiveness of Parties' foreign bribery offences.

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refer to agents and other intermediaries including sales representatives, customs agents, lawyers and consultants. Transparency International's "Business Principles for Countering Bribery" refer to business relationships with subsidiaries, joint venture partners, agents and contractors.

6 "Small facilitation payments" are also discussed under Part III. 3 of this Paper on "Tax Treatment of Bribe Payments" and III. 4.1 on "Internal Company Controls".

10. The Mid-Term Study discloses two main issues in the Phase 2 Reports regarding implementation of the definition of "foreign public official". Firstly, some Parties have not established an autonomous definition, relying at least to some degree on the definition of a public official under the law of the foreign public official's country. In such cases it could be difficult to prove that the person bribed was a public official under the law of his or her country. Proving this would necessitate co-operation on the part of the foreign country, including the timely provision of mutual legal assistance. Moreover, even where mutual legal assistance is forthcoming, the definition of a public official in the foreign country might not be as broad as the definition in the Convention

11. The second issue concerns Commentary 14 on the Convention, which defines a "public enterprise" as including any enterprise over which a government or governments "directly or indirectly exercise a dominant influence". The Working Group recommends follow-up of this issue where, contrary to Commentary 14, a Party's definition of "foreign public official" does not cover indirect control by a foreign government or the case where a foreign government exercises *de facto* control over an enterprise but does not for example hold in excess of 50 per cent of the voting shares.

1.5 Solicitation by foreign public officials[7]

12. Although the Convention focuses exclusively on the "supply-side" of the bribery transaction, it is within the scope of this review to examine any ambiguities regarding the relationship between the commission of the offence of foreign bribery by the briber and solicitation ("demand side") by a foreign public official, given that Article 1 of the Convention does not contemplate a defence to the offence of bribing a foreign public official where solicitation has occurred. Indeed the Mid-Term Study reveals that some Parties have incorporated defences into the offence of bribing a foreign public official that take into account, at least to a certain degree, solicitation by the foreign public official.

13. One such defence, known widely as "effective regret", normally applies where the foreign public official solicits the bribe, and the briber voluntarily reports without delay to the law enforcement authorities that he or she bribed the official. The other form of defence applies where the foreign public official applies some pressure or coercion to obtain the bribe. The latter form does not necessarily draw a clear line between extortion and solicitation, with the result that it might apply in cases where, for instance, a particular public procurement contract can only be obtained with a bribe, and the company in question has already made a significant financial outlay in anticipation of obtaining the contract. Although these two forms of defences might serve policy interests in fighting the bribery of domestic public officials, as sanctioning the actions of corrupt domestic public officials might be viewed as the primary concern, this policy rationale is not persuasive for the bribery of foreign public officials. Even in Parties where jurisdiction can be established over the acts of the foreign public official, there are significant challenges in applying such jurisdiction.

1.6 Bribery of foreign political party officials

14. To some extent the bribery of foreign political party officials is addressed earlier in this Paper in the discussion on the elements of the offence of bribing a foreign public official, specifically

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7 Solicitation by foreign public officials is also discussed under Part III. 4.1 on "Internal Company Controls".

in relation to the coverage of bribes through intermediaries and bribes that benefit third parties.[8] In summary, Part II of the Paper shows that an effective coverage of these situations under Parties' foreign bribery offences would cover the bribery of a foreign public official where a foreign political party official is used as an intermediary, as well as the bribery of a foreign public official where the benefit goes to a foreign political party official or foreign political party.

15. Thus the Convention does not address the following two specific situations: (a) the bribery of a foreign political party official so that he or she influences a foreign public official, "in order that the official act or refrain from acting in relation to the performance of officials duties, in order to obtain or retain business or other improper advantage in the conduct of international business" (*i.e.* "trading in influence"); and (b) the bribery of a foreign political party official in order to obtain or retain business or other improper advantage in the conduct of international business". Discussions at a high-level meeting organised in October 2000 by Transparency International in La Pietra, Italy suggested that the former situation is more likely to be exploited.[9] However, regarding the latter situation, political party officials in single-party states could potentially be bribed to obtain improper advantages in the conduct of international business, since they exercise the powers of the State.[10]

16. "Trading in influence", is only covered in a very limited way by the Convention.[11] However, the broader notion of "trading in influence" (*i.e.* the bribery of any person in order to influence a public official) is covered by other international and regional multilateral instruments (*i.e.* State Parties to the African Union Convention on Preventing and Combating Corruption are required to establish such an offence, and State Parties to the United Nations Convention against Corruption and the Council of Europe Criminal Law Convention on Corruption[12] must consider establishing such an offence). It is the view of many Parties that this issue is covered by their criminal law.

17. The importance of bribery acts in relation to foreign political parties and party officials is underlined by the decision of the OECD Council in 1997 that this is one of the five issues that should be examined on a priority basis by the Working Group on Bribery. Moreover, in 2000, the "La Pietra Recommendations" were presented to the OECD, in which the participants stated that "political party corruption is a major problem in most countries around the world", and "bribe payments to party officials have played an important role in major bribery scandals around the world". The main

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8 See discussion under II. 1.1. "Bribes through Intermediaries", and II. 1.2 "Bribes that Benefit Third Parties".

9 The "La Pietra meeting" was chaired by Transparency International, and the 28 invited participants were anti-corruption experts from the private sector, public institutions and civil society activists and academics. Invited observers included Dr. Mark Pieth, the Chairman of the Working Group on Bribery; the former Vice-Chairman, Dr. Giorgio Sacerdoti; Rainer Geiger, Deputy Director of the OECD Directorate for Financial and Enterprise Affairs; and a member of the United States delegation to the Working Group on Bribery.

10 Commentary 16 on the Convention states that through their de facto performance of public functions, persons not formally designated as public officials, such as political party officials in single party states, may be considered to be foreign public officials under the legal provisions of some countries.

11 The Convention only covers "trading in influence" where a foreign public official is bribed to influence another foreign public official (See example under Commentary 19 on the Convention.)

12 Under article 37.1 of the Council of Europe Criminal Law Convention on Corruption, State Parties may raise a reservation to establishing the "trading in influence" offence.

recommendation issued to the OECD was that "the OECD should ensure that bribe payments to foreign political parties and their officials are effectively prohibited through its instruments".[13]

18. Addressing the bribery of foreign political parties and party officials raises the following two important challenges: (a) drawing the distinction between improper influence and lobbying in particular to ensure that freedom of speech is not violated; and (b) defining foreign political parties and party officials. The latter challenge was identified as a cross-cutting concern by Parties to the Convention that participated in a 1998 OECD questionnaire on four of the five priority issues identified by the OECD Council in 1997 for further examination by the Working Group on Bribery. Moreover, the Working Group's overriding priority continues to be the effective enforcement of the prohibition against the bribery of foreign public officials under the Convention.

1.7 Bribery of foreign private sector agents

19. In June 2005, the Chair of the International Chamber of Commerce (ICC) Commission on Anti-Corruption sent a letter to the Secretary-General of the OECD regarding its concerns about "private sector bribery", and the need to engage in "substantive work" on the issue. The letter also included the suggestion that the 1997 Revised Recommendation be amended to provide a clear prohibition of private sector bribery. Then in September 2006, the ICC sent a further letter and memorandum repeating its concerns about private sector corruption, which it viewed as being neglected despite its growing adverse impact on world trade and economic progress. The ICC referred to studies it had conducted and participated in regarding private commercial bribery.[14] It also stated that it would be appropriate to amend the 1997 Revised Recommendation or adopt a new Recommendation that "strongly recommends" that each Party to the Convention "take such legislative and other measures as may be necessary to establish that it is a criminal offence under its law" to engage in bribery in the private sector "and that this crime, as well as its prosecution, be made a high enforcement priority".

20. A joint publication by the Max Planck Institute for Foreign and International Criminal Law and the ICC[15] provides a comparative analysis of the approach to private-sector bribery taken in thirteen countries, and observes that none of the countries surveyed provided a comprehensive approach to combating private-sector bribery, nor provided sufficient empirical information. In addition, the analysis showed that that there is a wide variation of legal approaches among the countries' policies on combating private-sector bribery

21. Bribery in the private sector is an optional offence under the United Nations Convention against Corruption and a mandatory offence under the Council of Europe Convention on Corruption. The Working Group recognises that this issue is not so far in its mandate and is cautious about extending its mandate to cover this issue, a perspective shared by Transparency International (TI), which stated in its October 2006 recommendations that since coverage of private sector bribery would represent "a major extension of the scope of the OECD Convention and the workload of the Working Group", action going beyond a study of this phenomenon "should be deferred until after the OECD's prohibition against public sector bribery has been successfully implemented".

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13 See the full text of the "La Pietra Recommendations" at: www.transparency.org/content/download/2544/14788.

14 See: "Private Commercial Bribery: A Comparison of National and Supranational Legal Structures" (2003, Heine G., Huber B., Rose T.O. Joint publication by Max Planck Institute for Foreign and International Criminal Law and ICC Publishing, Paris, 2003).

15 *Id*.

22. Nevertheless, permissiveness toward private sector bribery could result in a business climate conducive to foreign bribery, particularly given that the private sector in many countries is larger than the public sector, thus providing more opportunities for corrupt dealings. Moreover, the distinction between public sector and private sector officials is not always clear, especially in countries where there has been significant privatisation, including in high-risk areas such as energy, telecommunications and transport.

2. Liability of Legal Persons for Bribing a Foreign Public Official

2.1 Form of liability

23. Article 2 of the Convention states that "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". Commentary 20 expands on Article 2 as follows: "In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall not be required to establish such criminal responsibility".

24. Committed to the principle of "functional equivalence" enshrined in the Convention, the Working Group has focused on the effectiveness of Parties' systems for the liability of legal persons, rather than the form that such liability has taken, including the following: the awareness of police, prosecutors and the judiciary of the availability of such liability; the availability of effective investigative techniques; whether the proceedings must be part of the same proceedings for the natural perpetrator(s); the level and forms of sanctions available; the ability to obtain and provide mutual legal assistance for proceedings against legal persons; and the overall level of enforcement activity against legal persons. This is consistent with the overall focus of the Convention on deterring, detecting and sanctioning the bribery of foreign public officials through a punitive approach.

25. In the Mid-Term Study, the Working Group concluded that it might be expedient to assess whether one form of liability lends it itself to a more effective treatment of foreign bribery cases involving legal persons, and that such an analysis could help Parties to the Convention determine whether to revise their systems, and help non-Parties in the process of drafting anti-corruption legislation determine which system to adopt. However, at this stage, there has not been a large enough body of enforcement actions to make a conclusive assessment. Nevertheless, by deciding that such an assessment is warranted, the Working Group has accepted the principle that each Party to the Convention must demonstrate that the form of liability chosen is effective.

2.2 Standard of liability

26. The Mid-Term Study recognises that globally the domestic laws on the liability of legal persons for criminal offences are in a state of flux due to an evolution in the way of thinking about their responsibility for wrongdoing. Indeed, there is growing recognition of the need to address wrongdoing perpetrated within organisational structures, in particular given that corporate operations and decision-making are becoming increasingly diffuse and complex. Given this evolving state of affairs, it is not surprising that there is some variance between the standards of liability introduced by the Parties to the Convention for legal persons that commit the offence of bribing a foreign public official. The Mid-Term Study provides an analysis and comparison of these standards, and highlights the following three cross-cutting factors which could have an impact on the liability of legal persons for the foreign bribery offence: (a) limiting the basis of the liability to the acts of senior persons such as high-level managers, officers and directors; (b) requiring the identification, prosecution or conviction of a natural person in order to proceed against the legal person; and (c) not covering the case where a legal person bribes on behalf of a related legal person.

27. Regarding the first cross-cutting issue, limiting the liability of a legal person for bribing a foreign public official to cases where the bribe was perpetrated by a senior person might not cover certain situations, in particular offences committed by legal persons with decentralised decision-making processes. For instance, it might not cover the case where someone other than a senior person who has been delegated the authority to act on behalf of the legal person in international business transactions bribes a foreign public official. A system of administrative or criminal liability for legal persons that addresses this kind of situation reflects emerging international trends.[16]

28. The second cross-cutting issue arises due to the observation of the Working Group that some Parties' laws or enforcement practices might restrict the liability of legal persons to cases where the natural perpetrator has been identified, prosecuted or convicted. The Working Group has routinely emphasised in its Phase 2 reports that increasingly complex corporate decision-making does not necessarily lend itself to the identification of specific individuals involved in corporate wrongdoing. Moreover, when collective decision-making is involved, it may be more practical and appropriate to proceed against the legal person alone, rather than a mere agent or low level employee who may have bribed due to corporate pressure.

29. The third cross-cutting issue arises where Parties' laws restrict the liability of legal persons for the foreign bribery offence to cases where the bribe benefits the legal person that gave the bribe. Such a law would not cover cases where a legal person bribes on behalf of a related legal person, including a subsidiary, holding company, or member of the same industrial structure (business conglomerate).

2.3 Application to state-owned/controlled companies

30. Another cross-cutting issue identified in the Mid-Term Study is the application of the liability of legal persons for the foreign bribery offence to state-owned and state-controlled companies, due to ambiguities in this respect under the legal systems of a number of Parties to the Convention. Whenever this issue arises in the Phase 2 reports, the Working Group routinely recommends follow-up or an amendment to ensure that such entities are subject to liability for the foreign bribery offence.

31. An effective application of liability for foreign bribery to state-owned and state-controlled entities is particularly important given that they are often involved in high risk sectors, such as energy, mining, defence, water and sanitation. These entities can be involved in large-scale infrastructure projects in regions at high-risk for corruption, including weak governance zones and post-conflict settings.

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16 See for example, Article 18(2) of the Council of Europe Criminal Law Convention on Corruption, which requires State Parties to ensure that "a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority". Article 3(2) of the European Union Second Protocol to the Convention on the European Communities' Financial Interests also refers to the concept of "lack of supervision or control".

3. Sanctions

3.1 Confiscation

32. Confiscation is perhaps the most effective means for deterring and sanctioning the bribery of foreign public officials because it divests bribers of the proceeds obtained by the bribery transaction. The Mid-Term Study also underlines that confiscation might compensate for the moderate monetary sanctions available in many Parties to the Convention for the offence of bribing a foreign public official.

33. The Mid-Term Study raises an issue about the application of Article 3.3 of the Convention, which requires that Parties take necessary measures to provide that the bribe and the proceeds of bribing a foreign public official, or property that corresponds to the value of such proceeds, are subject to seizure and confiscation, or that monetary sanctions of comparable effect are applicable. By the time of the Mid-Term Study, there were no examples of the confiscation of the bribe or the proceeds of bribing a foreign public official; although two Parties had extensive experience confiscating the proceeds of other offences.

34. The absence of examples of the confiscation of the proceeds of bribing foreign public officials is likely due to two factors – complexities and uncertainties regarding their quantification. The effective quantification of the proceeds of bribing foreign public officials requires complicated financial analysis involving forensic accounting expertise, and will often necessitate obtaining mutual legal assistance from foreign jurisdictions, including offshore centres where relevant accounting and banking records are kept. This kind of analysis is expensive, resource intensive and time consuming. These challenges are compounded by the uncertainty of how the proceeds of bribing a foreign public official are to be quantified. How are the proceeds of a contract obtained through foreign bribery measured? For instance, are the costs of obtaining and executing the contract deducted, including the costs of the bribe, labour, equipment and taxes? These questions can only be answered through practice and the sharing of experience among the Parties to the Convention.

3.2 Additional civil or administrative sanctions

35. Article 3.4 of the Convention states that "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", thus recognising that in order for sanctions for the bribery of foreign public officials to be sufficiently "effective, proportionate and dissuasive", more may be needed than the traditional punitive sanctions such as fines, confiscation and imprisonment. For instance, a temporary or permanent disqualification from contracting opportunities with the government could hit companies much harder than a fine sanction, which, depending on the size of the company, might easily be absorbed as a cost of doing business.

36. The first point of interpretation by the Working Group that has emerged in the course of monitoring implementation of Article 3.4 of the Convention is that the term "person" is not restricted to natural persons and thus includes legal persons. This is of crucial importance as in many cases, in addition to individuals, private sector companies and non-governmental organisations (NGOs) contract with the government in relation to, for instance, public procurement, official development assistance (ODA) funded projects and official export credit support.

37. Secondly, the Mid-Term Study shows that two different techniques for imposing additional administrative sanctions to individuals and companies have emerged among the Parties to the Convention.[17] The first technique is more direct, involving the automatic disqualification of a company or individual convicted of bribing a foreign public official from obtaining state funding or participating in government contracting opportunities, such as public procurement, ODA-related contracting and official export credit support. The automatic application of such a sanction can be applied through different measures, including a court order imposing the sanction upon conviction for foreign bribery, or by entering the conviction into some kind of a register which automatically disqualifies the individual or company from contracting with the government. The effectiveness of the latter technique depends on whether the information in the register is available to all levels and sub-levels of the government, and whether government bodies diligently consult the register.

38. The second technique leaves it to government contracting bodies to decide on the rules and policies for dealing with persons, companies and organisations convicted of bribing foreign public officials. This technique is by far the one most frequently employed by the Parties. Invariably, where a Party has chosen this technique, the Working Group has recommended follow-up to ensure that the government contracting bodies are effectively denying contracting opportunities because: (a) Government contracting bodies might not uniformly apply their policies in this regard; and (b) they might not have effective access to information about individuals and companies that have been convicted of bribing foreign public officials.

39. A further issue that has not arisen in the course of the Phase 2 monitoring, but is timely nevertheless due to a recent decision of the International Centre for Settlement of Investment Disputes (ICSID),[18] concerns the enforceability of a contract obtained by bribing a foreign public official.[19] The Arbitration Tribunal, citing international anti-bribery instruments, including the OECD Anti-Bribery Convention, determined that bribery is contrary to international public policy, and thus the contract in question could not be upheld. On the basis of the application of the relevant national laws chosen by the Parties to the dispute, the Tribunal also determined that because the contract was procured by a bribe, it was legally voidable, and thus the Claimant was not legally entitled to maintain any of its claims there under. The Working Group considers that this decision illustrates the possibility that, pursuant to Article 3.4 of the Convention, "additional civil" sanctions that Parties shall consider imposing upon conviction for foreign bribery could include the unenforceability of the contract obtained by bribing a foreign public official.

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17 For instance, the Working Group has so far found that rules on debarment in public procurement are applied by Parties in a rather inconsistent manner. ["Fighting Corruption and Promoting Integrity in Public Procurement" (Pieth, M., page 21, OECD, 2005)].

18 World Duty Free Company Ltd. (Claimant) and The Republic of Kenya (Respondent) (4 October 2006).

19 The Claimant company stated to the Arbitration Tribunal that in order to do business with the Respondent government, it was required to make a "personal donation" to the President of the Kenyan government in the amount of USD 2 million, and that the donation was part of the consideration paid to obtain the contract. The Respondent government argued before the Arbitration Tribunal that the contract was unenforceable because it was procured by paying a bribe of USD 2 million to the then President.

4. Jurisdiction

4.1 Territorial jurisdiction

40. Article 4.1 of the Convention obligates Parties to the Convention to establish territorial jurisdiction over the bribery of a foreign public official when the offence is committed "in whole or in part" in its territory, and Commentary 25 on the Convention states that the "territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required". The Mid-Term Study points out that the effectiveness of a Party's territorial jurisdiction over foreign bribery offences committed in part in the Party's territory comes into play when the offence is largely committed abroad by an individual or legal person who is a foreign national. This issue is particularly relevant to the acts of foreign subsidiaries. Whether the authorities in a parent company's country can take action against the parent company where one of its foreign subsidiaries bribes a foreign public official is also one of the five priority issues identified by the OECD Council in 1997 for further examination by the Working Group on Bribery.

4.2 Nationality jurisdiction

41. Article 4.2 of the Convention states that "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". Commentary 26 on the Convention clarifies that "nationality jurisdiction is to be established according to the general principles and conditions in the legal system of each Party" as well as that "the requirement of dual criminality should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute".

42. Given that the offence of bribing a foreign public official will normally take place abroad, the application of Article 4.2 by the Parties to the Convention is considered a fundamental issue regarding implementation of the Convention, and is the subject of an in-depth discussion in the Mid-Term Study. The Working Group highlights the following four issues regarding the application of nationality jurisdiction in the Mid-Term Study: (a) All of the Parties to the Convention covered by the Mid-Term Study, except for one (and perhaps two more Parties that were not included in the Mid-Term Study and have not yet undergone their Phase 2 examinations), have established nationality jurisdiction for the foreign bribery offence; (b) the application of nationality jurisdiction remains largely untested by the Parties due to the low number of cases; (c) the application of nationality jurisdiction may require the fulfilment of certain requirements, such as dual criminality, or special restrictions; and (d) the application of nationality jurisdiction to legal persons remains untested.

43. Regarding the first issue, the Party included in the Mid-Term Study which has not established nationality jurisdiction for the foreign bribery offence supports its decision with the following basic arguments: (a) territorial jurisdiction is a very broad basis for jurisdiction under its laws; and (b) the Convention does not establish a treaty obligation to establish nationality jurisdiction for the bribery of foreign public officials, but requires that jurisdiction be exercised in accordance with the same principles as for other offences.[20]

44. The second and third issues raised in the Mid-Term Study might be related, since the infrequent use of nationality jurisdiction by the Parties to the Convention could be linked to the need

[20] Regarding the second argument, the Party in question explains that its principles for establishing nationality jurisdiction are to establish it only when there is a treaty obligation to do so. It also points out that it allows extradition of its nationals.

to satisfy certain requirements. In particular, in about one-half of the Parties covered by the Mid-Term Study, nationality jurisdiction over foreign bribery is subject to a dual criminality requirement, which varies in restrictiveness between the Parties. For many of the Parties, it is not clear how strictly the requirement would be interpreted (*i.e.* whether it is sufficient that the act in question constitutes any offence or whether the specific offence of foreign bribery must exist under the foreign country's law), and for other Parties very specific requirements must be satisfied. For instance, dual criminality might not be deemed satisfied unless a sentence could have been imposed in the foreign jurisdiction. The degree of restrictiveness of the dual criminality requirement could also have an impact on whether the bribery of a public official from a third country would be covered (*i.e.* an official from country "C" is bribed in country "B" by a company from country "A"), as well as the extent of co-operation needed from the foreign authorities to prove the relevant evidentiary requirements.

45. Concerning the fourth issue, the Mid-Term Study reveals that although most Parties assume nationality jurisdiction will apply to legal persons, there is often an absence of practical experience. In addition, it is often unclear how the nationality of a legal person would be determined – *e.g.* whether it is based on the laws under which the entity is organised, the location of the legal person's effective seat of operations, where it is listed if its shares are traded on the stock-exchange, or the nationality of the natural person who committed the offence on behalf of the legal person. If the nationality of an entity is based on the nationality of the natural perpetrator, the case would not be covered where a legal person uses a non-national to bribe a foreign public official abroad. Indeed, this has been identified by the Working Group as a horizontal issue potentially affecting many Parties to the Convention.

4.3 Consultation and co-operation

Consulting and co-operating to reconcile overlapping jurisdiction

46. Article 4.3 of the Convention states that "where 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". The need for effective cross-jurisdictional co-operation is particularly critical in cases where industry consortia are involved in the bribery of foreign public officials, especially given that these kinds of transactions are occurring more frequently and international consortia are active in high risk sectors, including defence and energy contracting. When foreign bribery cases involving consortia arise, multiple jurisdictions may be involved, since various aspects of the foreign bribery offence may take place in several jurisdictions, and the companies' headquarters may be located in various Parties to the Convention. This results in overlapping jurisdiction which needs to be resolved efficiently through an efficient sharing of information to ensure that ultimately prosecution takes place in the most appropriate jurisdiction(s).

47. The Mid-Term Study reveals that the Parties to the Convention have established different approaches for implementing Article 4.3. Most Parties take an *ad hoc*, case-by-case approach, while others have specific rules. For example one Party cannot initiate proceedings if a foreign jurisdiction has already done so; whereas in another Party foreign proceedings are not an obstacle to prosecuting the same person. One Party is prepared to handle requests for consultations, but would not request consultations with other Parties.

48. The Mid-Term Study also highlights the importance of not deferring to another Party's concurrent jurisdiction before having completed a comprehensive investigation, as to do so could impede the overall level of information about the offence available to be shared with all the relevant Parties. On the other hand, Parties will need to co-operate at the investigative stage to ensure that

multiple investigations do not unduly restrict the rights and interests of defendants, victims and witnesses, who may be summoned to attend pre-trial proceedings in several jurisdictions and forced to obtain expensive legal representation to attend repeated proceedings.

5. Investigative and Prosecutorial Discretion

49. Article 5 of the Convention mandates that the "investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party, and that "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". The goal of this provision is to protect the independence of investigative and prosecutorial decision-making from political and economic interests.

50. The importance given to the implementation of Article 5 by the Working Group cannot be overstated; issues on the investigation and prosecution of foreign bribery cases are a major focus in the Mid-Term Study and the Phase 2 examinations, and the Working Group has identified enforcement as one of the key horizontal issues for the next monitoring phase. The Mid-Term Study points out that the potential for political and economic considerations to influence investigative and prosecutorial discretion is particularly relevant in the field of foreign bribery, due to, for instance, the potential for political embarrassment on the part of the governments of the briber and the foreign public official, and the potentially grave effect that a prosecution of a large company could have on the economy of the Party in question. The potential for the prohibited considerations under Article 5 to influence investigative and prosecutorial decision-making is raised in the Mid-Term Study.

51. For instance, some Parties require that decisions to prosecute allegations of foreign bribery be approved by a political level of government, thus there might be a potential for political interference and consideration of the prohibited factors under Article 5. A safeguard against political interference that has been adopted by at least one Party is a requirement for the recording of the reasons for not opening investigations or prosecutions of foreign bribery cases and for terminating cases that had been under investigation or prosecution, where "public interest" factors come into play.

52. The Mid-Term Study also reveals certain problems regarding the implementation of Article 5 that might arise due to the interpretation given by some Parties to the requirement that a prosecution is in the "public interest". For instance, in one Party, for a prosecution to be in the "public interest", it must not require the disclosure of information that would be injurious to international relations, national defence or national security. This Party has taken steps to ensure that prosecutors record their reasons for declining to prosecute cases on the basis of any "public interest" factors. In another Party a prosecution can be terminated where it would pose a risk of serious detriment to the Party. In certain other Parties, the definition of what is in the "public interest" is vague, and thus it is not clear that it does not necessarily include any of the prohibited considerations under Article 5 of the Convention. Wherever the "public interest" has been invoked by a Party as a prerequisite for investigation and/or prosecution, the Working Group has sought clarification that the "public interest" requires the investigation and prosecution of significant foreign bribery cases, or recommended the issuance of prosecutorial guidelines on what constitutes the "public interest" in foreign bribery cases.

53. Commentary 27 on the Convention addresses the potential for political and economic interests to creep in to prosecutorial decision-making. While recognising the "fundamental nature of national regimes of prosecutorial discretion" it also clarifies *inter alia* that "in order to protect the independence of prosecution, such discretion is to be exercised on the basis of professional motives

and is not to be subject to improper influence by concerns of a political nature". [21] This balancing of principles leads to the question of what considerations other than the strength of the evidence might be permissible in relation to investigatory and prosecutorial decision-making in foreign bribery cases. During the negotiation of the Convention, substantial debate took place in the Working Group about the appropriate criteria for limiting prosecutorial discretion. The limiting criteria under Article 5 were agreed upon; however, the Working Group found it difficult to find a formula regarding the type and degree of permissible discretion, and thus agreed that this issue should be given adequate attention during the peer-review process.[22]

54. This issue took on new importance, when recently an investigation by one Party into a potentially major case involving the alleged bribery of a foreign public official was terminated, reportedly due to the need to safeguard national and international security. The Working Group voiced serious concerns about the Party's decision to terminate the investigation, and plans to further examine the application of Article 5 to such cases.

6. Statute of Limitations

55. Statutes of limitations are statutory rules that refer to the period within which a criminal action can be brought. Article 6 of the Convention requires that any statute of limitations with respect to the bribery of a foreign public official provide for an "adequate period of time for the investigation and prosecution" of the offence.

56. The Mid-Term Study indicates that the adequacy of the statute of limitations for the offence of foreign bribery was raised in all the Phase 2 reports. It emerged that statutes of limitations were entrenched in all the Parties' criminal justice systems, except for two parties with a common law system that did not impose any statute of limitations on the foreign bribery offence. The limitations period for the other Parties ranged from two to fifteen years. These periods are subject to various procedural rules. The period usually begins to run on the day on which the crime was committed, and in some Parties the period can be interrupted or suspended for certain procedural acts (*e.g*. arrest, requests for mutual legal assistance, search and seizure).

57. The Working Group has not identified a benchmark for Parties' statutes of limitations. According to the Mid-Term Study, there has not been enough practice to accurately assess the impact of Parties' limitations periods on the effectiveness of foreign bribery investigations and prosecutions. However, the Working Group has identified this as an issue warranting a horizontal review, recognising that foreign bribery investigations are usually long running because of their high-degree of complexity. Such investigations require in-depth financial analysis, and often require mutual legal assistance from one or more countries.

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21 Commentary 27 on the Convention incorporates by reference paragraph 6 of the Annex to the 1997 OECD Revised Recommendation. Paragraph 6 of the Annex recommends, *inter alia*, the following: (i) Complaints of victims should be seriously investigated by the competent authorities; and (ii) National governments should provide adequate resources to prosecuting authorities so as to permit effective prosecution of bribery of foreign public officials.

22 See: International Trade Corruption Monitor 1999 (pages F-1033-F-1034 of Part F, "Travaux Préparatoires of the OECD Convention Combating Bribery of Foreign Officials").

7. Money Laundering

58. Article 7 of the Convention states that "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". Commentary 28 on the Convention clarifies the following two points: (a) Parties are required to make the bribery of a foreign public official a predicate offence for money laundering legislation on the same terms as has been done for the active or passive bribery of its own public officials; and (b) when a Party has made only passive bribery of its own public officials a predicate offence for money laundering, the laundering of the bribe payment to a foreign public official shall also be subject to money laundering legislation. In addition to the reference to money laundering in the Convention and Commentaries, in 1997 the OECD Council decided that the Working Group on Bribery should examine the "bribery of foreign public officials as a predicate offence for money laundering legislation" on a priority basis.

59. Given that the 40 Recommendations of the Financial Action Task Force (FATF),[23] issued in 2003, make "bribery and corruption" a mandatory predicate offence for the purpose of the offence of money laundering, every Party to the Convention has by now made the bribery of a domestic public official a predicate offence for the offence of money laundering. Consequently, pursuant to Article 7 of the Convention, each Party to the Convention is required to make the bribery of a foreign public official a predicate offence for money laundering legislation. Indeed, the Mid-Term Study explains that all the examined Parties criminalised money laundering in relation to the bribery of a foreign public official to some degree, and that, as required by Article 7 of the Convention, all the Parties appear to treat money laundering in relation to foreign bribery in the same manner as for domestic bribery. However, to date very few Parties have detected foreign bribery through their anti-money laundering systems. The Mid-Term Study advances certain explanations for the low detection, including that money laundering in relation to foreign bribery (unlike other crimes) might be inherently less susceptible to detection by suspicious transaction reporting, but concedes that the available data is insufficient to draw such a conclusion. Nevertheless, the Mid-Term Study identifies two important areas in which certain Parties to the Convention could enhance the effectiveness of their anti-money laundering systems in relation to foreign bribery.

60. First, to ensure consistency with Article 7 of the Convention, the offence of money laundering must cover cases where the predicate offence of bribing a foreign public official takes place abroad. In addition, even where this situation is covered, overly restrictive dual criminality requirements such as the need for a conviction for the predicate offence or the requirement that the foreign country also has a foreign bribery offence might present enforcement challenges. Second, the Mid-Term Study points out that only some Parties extend liability for the offence of money laundering to legal persons, even though "corporate vehicles" are widely used to facilitate the commission of crimes, including money laundering, since they often offer the opportunity to conceal beneficial ownership and control.

61. Regarding the remark in the Mid-Term Study that money laundering in relation to foreign bribery might be more difficult to detect by suspicious transaction reporting than other offences, the Phase 2 reports of certain Parties might shed light on the reason for this. Several Parties prohibit the laundering of the bribe payment as well as the proceeds of bribing a foreign public official. However, bearing in mind that Commentary 20 on the Convention does not technically require that both forms

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[23] Each Party to the Convention is either a member of the FATF or a member of an FATF-style regional body, and thus is either directly or indirectly bound by the FATF's 40 Recommendations.

of illicit funds be subject to money laundering legislation, it is notable that two Parties only prohibit the laundering of bribe payments, and one of these Parties concedes that it does not target the proceeds derived from bribing because of the difficulty in quantifying such proceeds.[24] Quantifying the proceeds of bribing foreign public officials necessitates resource and time intensive financial analysis. In addition, where a contract such as one for a public works project is obtained by bribing a foreign public official, the proceeds from that contract would likely appear legitimate to the financial institutions to which the proceeds are transferred. Thus, in the absence of some kind of tipping-off or other independent information, it is unlikely that the proceeds from a seemingly legitimate contract would raise suspicions.

62. On the other hand, a bribe payment made to a corrupt official is more likely to raise suspicions, and is much easier to quantify than the proceeds obtained from bribing that official. However, a bribe payment represents the proceeds of bribery from the point of view of the passive briber, and therefore might not necessarily lead to a suspicious transactions report regarding the active briber. Appropriate awareness-raising in relation to the bodies and individuals responsible for making suspicious transactions reports, as well as the law enforcement authorities responsible for acting on them, can help to alleviate this problem.

63. A further issue which might warrant more focus concerns the detection of money laundering transactions involving politically exposed persons (PEPs) who constitute foreign public officials. Since PEPs include by definition persons who constitute high-level foreign public officials (*e.g.* foreign Heads of State or of government; foreign senior government judicial or military officials, and senior executives of foreign state-owned or controlled companies),[25] the effective implementation of Recommendation 6 of the FATF 40 Recommendations on the detection and prevention of money laundering activities involving PEPs could have a positive impact on the fight against the bribery of foreign public officials.[26]

8. Fraudulent Accounting for the Purpose of Bribing Foreign Public Officials or Hiding Such Bribery

64. Article 8 of the Convention requires Parties to prohibit various fraudulent accounting practices for the purpose of bribing foreign public officials or of hiding such bribery, and also requires the establishment of "effective, proportionate and dissuasive civil, administrative or criminal penalties" for violating such prohibitions. The Mid-Term Study underlines the importance of rules on fraudulent accounting as a tool for detecting the bribery of foreign public officials, which is inherently difficult to detect because it is committed in secret and involves two satisfied parties.

65. The Mid-Term Study recognises that there has been an improvement in the rules regarding the maintenance of books and records in virtually all of the Parties to the Convention, due to the

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24 Commentary 20 on the Convention states *inter alia*: "When a Party has made only passive bribery of its own public officials a predicate offence for money laundering purposes, this article requires that the laundering of the bribe payment be subject to money laundering legislation".

25 See the Interpretive Note to Recommendation 6 of the FATF 40 Recommendations, which provides a list of PEPs.

26 Recommendation 6 of the FATF 40 Recommendations recommends the following enhanced due diligence measures on PEPs: (a) risk management systems for determining whether a customer is a PEP; (b) senior management approval for establishing business relationships with such customers; (c) reasonable measures to establish a PEP's source of wealth and source of funds: and (d) enhanced ongoing monitoring of the business relationship.

adoption of international accounting standards and the publicity regarding certain high-profile accounting scandals. This trend should enhance the detection and deterrence of the bribery of foreign public officials. However, the Mid-Term Study also targets certain areas in which Parties' rules on fraudulent accounting could be improved, such as by specifically prohibiting fraudulent accounting in relation to the bribery of foreign public officials. Although the Convention does not require such specificity, more general rules inevitably give rise to certain ambiguities.

66. For instance, general fraudulent accounting offences usually do not apply unless certain "materiality" thresholds have been met. The standard that must be met in order for a fraudulent accounting act or an omission to be considered "material" is often vague. Sometimes "materiality" depends on a numerical threshold or percentage of revenue, assets, etc. Sometimes it requires that there has been an impact on the financial statement of the company and therefore on investors, or that shareholders or creditors have been damaged. As a result, even relatively large payments to foreign public officials would not necessarily trigger the "materiality" threshold, especially for large companies, unless "materiality" also takes into account certain qualitative factors, such as the effect of fraudulent accounting for the purpose of bribing a foreign public official or hiding such bribery on costs (*e.g.* fines, confiscation and the cost of legal proceedings), future income (*i.e.* due the loss of future contracts, and damage to the company's reputation), and the overall damage to its competitive position.

67. Another important issue identified in the Mid-Term Study is the scope of application of the fraudulent accounting offence in a number of Parties. Some Parties only apply the offence to listed companies. This would leave out, for instance, very large, unlisted, family-owned companies, including in economies where they predominate. Some Parties apply the offence to management or the board of directors, but not directly to accountants, auditors and others responsible for the maintenance of books and records. It is also generally unclear whether Parties can apply the fraudulent accounting offence to legal persons.

9. Mutual Legal Assistance[27]

68. The Mid-Term Study asserts that perhaps the most significant obstacle faced by Parties in investigating and prosecuting foreign bribery cases is the difficulty in obtaining mutual legal assistance (MLA) from non-Parties regarding the bribery of foreign public officials that takes place in those countries. Indeed, the unavailability of MLA from non-Parties might be the single most important reason for terminating an investigation. A Party might not even initiate an investigation believing that the country in which the bribery transaction took place will not co-operate.

69. Commentary 30 on the Convention states that "Parties will have also accepted, through paragraph 8 of the Agreed Common Elements annexed to the 1997 OECD Recommendation, to explore and undertake means to improve the efficiency of mutual legal assistance". In view of the findings in the Mid-Term Study regarding the challenges in obtaining MLA from non-Parties, it seems appropriate for the Parties to explore and undertake means to assist non-Parties in providing MLA upon request from Parties to the Convention. Work in this regard has already commenced at the OECD.

70. For instance, the Asian Development Bank/OECD Anti-Corruption Initiative for Asia-Pacific, which includes 24 non-Parties, has undertaken a review of the legal and institutional framework for

[27] Paragraph VII of the 1997 Revised Recommendation and paragraph 8 of the Annex also address actions that Member countries need to take to ensure effective international co-operation in foreign bribery cases, including entering "into new agreements or arrangements for this purpose".

extradition and MLA in corruption cases in the 27 jurisdictions that have endorsed the Anti-Corruption Action Plan for Asia-Pacific. This work, including a recently published report (www.oecd.org/dataoecd/28/47/37900503.pdf),[28] aims to facilitate international co-operation in the field of anti-corruption, and could provide the Working Group with a useful basis for determining how the relevant non-Parties could be assisted, including through training programmes and seminars. The Steering Group of the Asia Development Bank/OECD Anti-Corruption Initiative for Asia-Pacific and the Anti-Corruption Network for Eastern Europe and Central Asia could provide convenient channels for providing such assistance. Similar work with other regions could complement and enhance the ability of the Parties to the Convention to enforce the Convention.

71. Parties to the Convention might also face difficulties in obtaining effective MLA from certain non-Parties due to the absence of bilateral or multilateral treaties with those non-Parties. Parties to the Convention could therefore usefully take appropriate steps, where necessary, to conclude such treaties with all of their important trade and investment partners, including non-Parties. Such action is consistent with Paragraph VII ii) of the 1997 Revised Recommendation, which recommends that Member countries "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". Since there are currently over 100 State Parties to the United Nations Convention against Corruption (UNCAC),[29] treaties with non-Member countries that apply to foreign bribery should become more prevalent. Parties to the Convention could also ensure that international crime liaison officers are present in their major trading partners to ensure police-to-police co-operation in foreign bribery cases.

72. Since Article 9.1 of the Convention requires that Parties provide to the fullest extent possible prompt and effective legal assistance to other Parties to the Convention for offences within the scope of the Convention, the Working Group also focuses on inter-Party co-operation. Indeed the Mid-Term Study reveals certain issues regarding MLA between Parties as well as between Parties and non-Parties, which require further study, including: (a) the effect of a requirement of a treaty to be able to provide MLA; and (b) the evidentiary threshold that must be met in order for some Parties to be able to provide MLA.[30]

73. Furthermore, the Phase 2 monitoring process reveals that it is important that, where appropriate,[31] Parties to the Convention are proactive in exhausting informal means of obtaining MLA from Parties and non-Parties in relation to foreign bribery cases, including through the use of regulatory channels (*e.g.* securities regulators)[32], specialised bodies such as financial intelligence units, and tax authorities.

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28 "Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific: Frameworks and practices in 27 Asian and Pacific jurisdictions (Thematic review – Preliminary report)" [Asian Development Bank, OECD (2007)] (www.oecd.org/dataoecd/28/47/37900503.pdf)

29 As of 10 January 2008, there are 104 State Parties to the UNCAC.

30 The Mid-Term Study points out that not all Parties have evidentiary thresholds for providing MLA, and thus this is not an issue for every Party.

31 The Working Group recognises that the use of certain alternative means of gathering evidence from abroad are not necessarily legal for all Parties, and that unless gathered through formal means, the evidence might not be admissible in proceedings. The Working Group is not advocating the use of alternative means in these cases.

32 See for example, Principles 11-13 of the International Organisation of Securities Commissions (IOSCO) (May 2003, "Objectives and Principles of Securities Regulation, IOSCO).

10. Monitoring and Follow-up

74. Article 12 of the Convention states that "Parties shall co-operate in carrying out a systematic follow-up to monitor and promote the full implementation of this Convention" and that this "shall be done in the framework of the OECD Working Group on Bribery in International Business Transactions and according to its terms of reference…" Commentary 34 on the Convention clarifies the relevant terms of reference of the Working Group, which include the following: (a) a system of self-evaluation based on a questionnaire; and (b) a system of mutual evaluation, involving an examination of each Party based on a report providing an objective assessment of the Party's progress.

75. In order to effectively monitor implementation of the Convention, the Working Group developed two evaluative phases. Phase 1, which began in April 1999, involves an examination of each Party's relevant legislation for assessing compliance with the Convention. So far, all the Parties to the Convention have completed their Phase 1 evaluation, except for South Africa which joined the Convention in June 2007.[33] Phase 2, which began in 2001, focuses on the enforcement of the relevant laws, and involves a 5-day on-site visit to the Party under examination in order to meet with police, prosecutors, key ministry officials, and representatives from the private sector and civil society. Phase 2 is currently scheduled to be completed by the end of the first quarter of 2008.

76. The peer-review monitoring system developed by the Working Group is rigorous and comprehensive. The objective and critical nature of the Working Group's Mid-Term Study, which has provided the basis for most of this Paper, demonstrates the demanding nature of the evaluation process, and the Working Group's overriding focus on ensuring the effective implementation of the Convention. The recommendations of the Working Group made to each Party in the Phase 1 and Phase 2 reports have led to numerous legislative and institutional reforms for the purpose of improving compliance with the Convention. In addition, where the Working Group has not been satisfied with the outcome of a Phase 2 examination, it has recommended another such examination, although more focused on the specific problem areas (Phase 2bis).

77. Adoption by the Working Group of its Phase 2 reports is now followed-up at two junctures to assess whether Parties are satisfactorily implementing its recommendations – one year following adoption of a Party's report it is required to provide an oral report to the Working Group on progress in implementing its recommendations, and two years following adoption of the report the Party is required to provide a written report, which is published by the Working Group along with its summary and conclusions.

78. Moreover, the Working Group is currently developing a post-Phase 2 assessment procedure, which would build on Phase 1 and Phase 2.

[33] South Africa is due to undergo the Phase 1 examination in 2008.

III. SUMMARY OF CROSS-CUTTING ISSUES ON THE DETECTION AND PREVENTION OF THE BRIBERY OF FOREIGN PUBLIC OFFICIALS

1. Need for Increased Awareness of Foreign Bribery

79. The Mid-Term Study concludes that a substantial part of the Phase 2 on-site visits and the Phase 2 reports is dedicated to the level of awareness of the Convention and the offence of bribing a foreign public official possessed by the various relevant public sector bodies and officials, the private sector and civil society. Indeed a large proportion of the Working Group's Phase 2 recommendations target the need for increased awareness. The Mid-Term Study reveals the following cross-cutting issues on awareness by critical players in the combat against foreign bribery:

- Inconsistent levels of awareness across the Parties by law enforcement authorities, including police, prosecutors and members of the judiciary.

- Inconsistent levels of awareness across the Parties by public agencies or institutions directly and indirectly involved in implementing the Convention, including tax and customs authorities, officials from official export credit support and official development assistance (ODA) agencies, public procurement officials, and foreign diplomatic missions.

- In many Parties accounting and auditing professionals have a low level of awareness.

- Overall, small and medium–sized enterprises (SMEs) lack sufficient awareness. Given that in some Parties SMEs are responsible for the largest share of exports, their lack of awareness creates a serious risk of foreign bribery.[34]

80. The level of awareness of these critical players affects every aspect of the implementation of the Convention. For instance, in the absence of sufficient awareness, law enforcement authorities are less likely to detect, investigate and prosecute foreign bribery cases, and public officials from key agencies such as regarding customs, tax, official export credit support and ODA as well as embassies are unlikely to detect and report foreign bribery transactions to the law enforcement authorities.

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34 The low level of awareness of SMEs of corruption risks has also been observed outside the Working Group on Bribery. For instance, a 2006 survey of companies based in seven jurisdictions (United Kingdom, United States, Germany, France, the Netherlands, Brazil and Hong Kong) performed by Control Risks and Simmons & Simmons showed that "smaller companies were significantly less likely (than larger companies) to have either anti-bribery codes or bans on facilitation payments" (See: "International Business Attitudes to Corruption – Survey 2006"). A recent report by the United Kingdom-based Association of Chartered Certified Accountants (ACCA), based on responses of 558 ACCA members to a survey, found that "bribery and corruption are just as likely to affect SMEs as large companies, yet only one fifth of SMEs feel able to distinguish between bribery and corruption or corporate hospitality and facilitation fees". The report also found that "over two thirds (69%) of respondents agree that SMEs are likely to be confronted with bribery and corruption in the course of their business dealings, yet fewer than half thought that SMEs understand the law in this area". (See: "Bribery and Corruption: The Impact on UK SMEs" (2007, ACCA).

The private sector is less likely to take preventive measures such as the adoption of internal compliance programmes, with the result that foreign bribery offences are more likely to occur, and accounting and auditing professionals are less likely to look specifically for evidence of foreign bribery transactions in the books and records of companies, and are less likely to report internally or externally any such transactions if they do happen to detect them. Large companies, which generally have a higher level of awareness than SMEs, might consider that the risk of prosecution (due to the low awareness and thus low priority placed on foreign bribery by the law enforcement authorities) is not significant enough to warrant the cost of anti-foreign bribery measures in their corporate compliance programmes. SMEs might not even realise that bribing foreign public officials is prohibited.

81. A low level of public awareness does not lead to public reporting of foreign bribery offences or meaningful media attention to cases. Moreover, a low level of public awareness translates into a low level of societal condemnation of foreign bribery, with the result that law enforcement authorities are unlikely to treat foreign bribery cases as a priority, especially in view that investigating and prosecuting such cases is a lengthy and costly process, involving, for instance, the need for mutual legal assistance and complicated financial analysis.

82. In light of the very serious consequences of an inadequate level of awareness on the overall implementation of the Convention, the Mid-Term Study concludes that "the Working Group might therefore want to consider establishing a clear minimum standard on what awareness-raising measures should be taken by a Party, and address these at the on-site visits and in the Phase 2 reports in a concise and systematic manner". Any initiative in this respect would need to take into account the underlying principle in the Convention of "functional equivalence", and thus aim at achieving a uniform outcome without requiring uniform awareness-raising mechanisms.

2. Detection and Reporting of Foreign Bribery in the Public Sector

83. Since certain public agencies and institutions regularly come into contact with individuals, organisations and companies that do business in foreign countries, they are in a privileged position to detect the bribery of foreign public officials perpetrated by those individuals and companies and report such bribery to the law enforcement authorities. These public officials can be divided into the following two broad categories: (a) officials from agencies that contract directly with individuals and companies involved in international business, such as officials involved in granting official export credit support and delivering official development assistance (ODA); and (b) officials from agencies that come into contact with such individuals and companies on a non-contractual basis, such as tax authorities, customs officials, and officials from foreign representations.

2.1 Officials from agencies with contractual relationships with business: ODA and official credit support agencies[35]

84. Officials from agencies that contract directly with individuals, organisations and companies involved in international business could detect the bribery of foreign public officials perpetrated by them either at the stage of applying to obtain a contract or after the contract has been entered. During these two stages, the contracting body is privy to important information about the applicant's

[35] Other issues related to ODA and official export credit support are dealt with as follows: (a) Disqualification, etc., of contracting opportunities under II. 3.2. "Additional Civil or Administrative Sanctions"; (b) awareness under III. 1. "Need for Increased Awareness of Foreign Bribery"; (c) III. 6. "Foreign Bribery in relation to ODA-Funded Procurement"; and (d) III. 7. "Foreign Bribery in relation to Official Export Credit Support".

or contractor's activities abroad. Two types of agencies that are particularly at risk for dealing with companies that might be involved in corrupt transactions abroad are official export credit support and ODA agencies.

85. The Mid-Term Study notes that the Phase 2 reports contain a large number of recommendations on reporting by official export credit support and ODA officials. With respect to official export credit support, the Mid-Term Study also notes that the reporting of foreign bribery offences to law enforcement authorities is a "general issue for many Parties". Several Phase 2 reports also recommend the introduction of an obligation for official export credit agency and ODA agency staff to report indications of foreign bribery to the law enforcement authorities, or to put in place a procedure that would bring this information to their attention, as well as to remind staff of the obligation to report where one already exists.

86. The Mid-Term Study suggests that the reason for the large number of Phase 2 recommendations on detection and reporting by these agencies might reflect that the 1997 Revised Recommendation does not provide any guidance in this respect for either ODA officials or export credit officials. Some guidance was provided in the 2000 Action Statement on Bribery and Officially Supported Export Credits. Based on experience in its implementation, feedback from the Working Group on Bribery and input from civil society, the OECD Export Credit Group strengthened the Action Statement and converted it into the OECD Council Recommendation on Bribery and Officially Supported Export Credits on 14 December 2006. The new Recommendation broadens the previous scope of the reporting obligation under the Action Statement by not restricting its application to after export credit support is approved. The new Recommendation also requires its Members to develop and implement "procedures to disclose to their law enforcement authorities instances of credible evidence…" The new Recommendation therefore addresses two major problems identified by the Working Group in the Phase 2 examinations. With respect to the high level of proof necessary to require the making of a report to the law enforcement authorities, the new Recommendation uses the term "credible evidence", which it defines as "evidence of a quality which, after critical analysis, a court would find to be reasonable and sufficient grounds upon which to base a decision on the issue if no contrary evidence were submitted".

2.2 Reporting by public officials from agencies not having contractual relationships with businesses

87. With respect to the general reporting obligations for Parties' public officials, the Mid-Term Study observes essentially the following three trends: (a) Almost half of the Parties provide an express statutory requirement in the law or elsewhere for reporting suspicions of foreign bribery directly to the law enforcement authorities; (b) some Parties provide a non-statutory reporting obligation; and (c) some Parties do not provide a clear mandatory reporting obligation. Furthermore, one Party provides an obligation to report to the law enforcement authorities if internal reporting procedures have been exhausted, and another Party sanctions any external reporting. Another important observation is that even where reporting to the law enforcement authorities is mandatory, Parties' public officials are not necessarily aware of the obligation or they may be reluctant to report due to inadequate whistleblower protections. Again, as in the case of ODA and export credit officials, the Mid-Term Study provides a large number of recommendations on the need for clear reporting obligations for public officials in general.

88. In addition to reporting obligations by public officials in general, the Mid-Term Study addresses those of two specific categories of officials – *i.e.* tax authorities and foreign representations including embassy personnel. The tax treatment of bribe payments is a major area of compliance

under the OECD anti-bribery instruments, encompassing many issues, including the reporting obligations of the tax authorities, and thus is dealt with separately in this Paper.[36] Regarding a Party's foreign representations, two Phase 2 reports recognise that the steps to be taken by them where a credible allegation arises that a company from that Party has bribed or taken steps to bribe a foreign public official, including the reporting of such allegations to the competent authorities, is "a general issue for may Parties".

89. Due to their dealings with individuals and companies involved in international business, public officials from certain ministries and agencies are favourably placed for detecting and reporting the bribery of foreign public officials. The most effective reporting obligation for these officials is one clearly articulated in the law or other appropriate instrument, and which is not too cumbersome to execute. Public officials also need to be fully aware of this obligation. In addition, an effective reporting system provides adequate safeguards to ensure that reports can be made without fear of retribution and retaliation.

Whistleblower protections

90. In the absence of comprehensive whistleblower protections, public officials are unlikely to report suspicions of the bribery of foreign public officials involving other public officials as well as suspicions involving companies or individuals with close links to the government. Concerns about balancing an obligation to report with the interest of maintaining the confidentiality of companies' operations might also deter reporting. The Mid-Term Study reports that comprehensive whistleblower protections are notably absent in many Parties, including for whistle-blowing in the public administration.[37] Moreover, the Phase 2 reports disclose that for whistle-blowing protections to be effective they should: (a) provide a guarantee of confidentiality (*e.g.* via a hotline); (b) apply where the whistle-blowing concerns either an act by another public official or an act outside the public administration; and (c) apply where the whistle-blowing follows internal procedures as well as where the whistle-blower goes directly to the law enforcement authorities, particularly in certain situations (*e.g.* internal whistle-blowing has not produced adequate results or internal reporting raises the risk of victimisation).

3. Tax Treatment of Bribe Payments

91. Paragraph IV of the 1997 Revised Recommendation "urges the prompt implementation by Member countries" of the 1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials (1996 Recommendation). The 1996 Recommendation "recommends that those Parties that do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility". It also states that "such action may be facilitated by the trend to treat bribes to foreign public officials as illegal". In addition, the 1996 Recommendation "instructs the Committee on Fiscal Affairs (CFA),[38] in co-operation with the Committee on International Investment and Multinational Enterprises (CIME) to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate". Commentary 37 on the

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36 See discussion on the tax treatment of bribe payments to foreign public officials under III. 3. "Tax Treatment of Bribe Payments".

37 Whistleblower protections in the private sector are discussed under III. 4.1 "Internal Company Controls".

38 The following non-OECD member countries are observers in the Committee on Fiscal Affairs (CFA): Argentina, Chile, China, Russia and South Africa.

Convention confirms that full participation in the Working Group on Bribery requires acceptance of the 1996 Recommendation.

92. Implementation of the 1996 Recommendation has been diligently monitored in Phase 1 and Phase 2 by the Investment Committee (previously CIME) through its Working Group on Bribery in co-operation with the Committee on Fiscal Affairs (CFA). Co-operation between the two bodies operates at two stages of the Phase 2 process. Before embarking on a Phase 2 country examination the secretariats of the CFA and Working Group share information on the tax treatment of bribe payments to foreign public officials by the Party under examination. During the preparation of the Phase 2 Report, the Working Group liaises with the CFA on the analysis of the information obtained during the on-site visit.

93. The Working Group and the CFA also co-operated on the preparation of the analysis of the cross-cutting tax issues for the Mid-Term Study. At its meeting on 1 February 2007, the CFA decided to pursue the tax issues identified in the Mid-Term Study, and tasked its Working Party Number 8 (WP8) with addressing those issues. The CFA and the Working Group have agreed that the CFA will take the lead on any amendments to the 1996 Recommendation, due to its expertise on tax matters, with the co-operation and assistance of the Working Group. In order to assist the CFA in preparing the amendments, the Working Group has agreed with the CFA to include proposals on amendments to the 1996 Recommendation in this Consultation Paper. This will enable the Working Group to provide useful feedback to the CFA regarding any potential amendments.

94. The main tax-related issues identified in the Mid-Term Study are as follows:[39]

(a) Nine Parties to the Convention did not expressly prohibit the deductibility of bribes to foreign public officials under their tax laws.[40] While an express prohibition sends a strong message to companies that the bribery of foreign public officials is unacceptable, and helps to ensure that tax authorities play an active role in the detection of bribes to foreign public officials in the course of their tax audits, such a provision may take different forms.

For most of these Parties that did not expressly prohibit the tax deductibility of bribe payments, the Working Group believed that the non-tax deductibility of such payments needed to be clarified in the law, and due to the significant number of recommendations in the Phase 2 reports regarding this issue, the Working Group concluded in the Mid-Term Study that it might consider whether the 1996 Recommendation needs to be amended to require an express prohibition. It further concluded that it could consider whether in some instances (*i.e.* where a Party has a simplified tax code that does not provide any non-allowable expenses, but only provides categories of allowable expenses under which bribe payments could not be disguised), an express prohibition might be counterproductive to other important tax policy goals of that Party. Since their Phase 2 examinations, certain Parties have amended their tax laws to expressly prohibit the deductibility of bribes to foreign public officials.

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39 Two other issues identified in the Mid-Term Study that did not constitute cross-cutting issues were the following: (a) the need to ensure that the prohibition against the tax deductibility of bribe payments extends to all levels of government, including provinces and states, as well as overseas territories and other related jurisdictions; and (b) the need to ensure that the prohibition applies to bribes that are paid abroad.

40 It should be noted that the Phase 2 Reports of the Working Group consider provisions that deny the deductibility of bribes (*i.e.* not just bribes to foreign public officials) as express prohibitions.

The Working Group has taken a flexible approach to this issue, recognising, for instance, that a provision in a Party's tax law that prohibits a deduction for costs incurred in relation to the commission of all criminal offences might be just as effective as a provision that specifically denies the tax deductibility of bribes to foreign public officials, depending on all the relevant circumstances.

(b) The Phase 2 reports did not systematically assess whether Parties with exceptions for small facilitation payments, as permitted by Commentary 9 on the Convention, provide a tax deduction for such payments.[41] One Party expressly provided for such a deduction in its tax law, and the Working Group recommended follow-up of the issue and also recommended that the Party's bribery awareness guidelines provide advice on how to determine whether a particular payment to a foreign public official constitutes a facilitation payment. In addition, the Working Group recognises that it is possible that other Parties implicitly provide a deduction for facilitation payments. The overall effect of this issue on the implementation and credibility of the Convention was demonstrated when, following the publication of the Mid-Term Study in June 2006, the Party that expressly provides a deduction for facilitation payments came under intense public criticism for the availability of such a deduction, due to allegations that one of its companies had obtained substantial deductions for facilitation payments.

(c) Only one Party imposed a statutory duty on tax authorities to report suspicions of crimes to the appropriate law enforcement authorities. The majority of Parties provided a general duty under the law for public officials to report suspicions of crimes to the competent authorities. The majority of the remaining Parties permitted but did not mandate such reporting, with one Party prohibiting its tax authorities from reporting suspicions of foreign bribery to the law enforcement authorities due to the duty of confidentiality. The Mid-Term Study discloses variable levels of awareness of the reporting obligation amongst the tax authorities. It also identifies several potential obstacles to effective reporting, including the duty to keep tax information confidential, and ambiguous qualifications on when reporting is permitted or required (*e.g.* only for "serious" cases, or the offence is "sufficiently well-established"). These observations were matched by a low number of foreign bribery cases having been detected and reported by the tax authorities to the law enforcement authorities.

As a result, the Mid-Term Study concluded that, given the important role that tax authorities could play in the detection and deterrence of foreign bribery, the Working Group might decide to consider whether the 1996 Recommendation needs to be amended to encourage Parties to require their tax authorities to report foreign bribery to the law enforcement authorities. The Working Group also concluded that work in this regard could include consideration of the level of proof that should trigger such reporting.

(d) The need to increase the awareness of the public sector, including tax authorities, of the offence of bribing a foreign public official is dealt with under another part of this Consultation Paper.[42] However, it is worth mentioning here that the Phase 2 examination teams routinely assess the awareness of the tax authorities of the non-tax deductibility of bribe payments, including their awareness of the need to diligently ensure that bribe

41 Also see the discussion on the application of the defence of "facilitation payments" to the offence of bribing a foreign public official under item 1.3 of Part II of this Consultation Paper.

42 See discussion under III. 1. "Need for Increased Awareness of Foreign Bribery".

payments have not been disguised under allowable expenses such as social and entertainment expenses or commissions. An important part of the Phase 2 examinations in this respect looks at whether the OECD Bribery Awareness Handbook for Tax Examiners (www.oecd.org/ctp/nobribes), published by the CFA and available in sixteen languages, has been made available to the tax examiners, and whether training and guidance on its use has been provided.[43]

4. Role of Internal Company Controls and External Audits

95. Paragraph V of the 1997 Revised Recommendation addresses the following three issues: (a) adequate accounting requirements; (b) independent external audit; and (c) internal company controls. The issue of fraudulent accounting, which is also addressed under Article 8 of the Convention, is discussed under Part II of this Consultation Paper on "Proposals on the Criminalisation of the Bribery of Foreign Public Officials".[44] The second two issues are discussed here, as well as an issue that is not currently addressed in the 1997 Revised Recommendation – *i.e.* the internal audit function.

96. Internal controls, internal audits and external audits are discussed separately in this part of the Paper. However, it is recognised that in practice they are complementary and interconnected as integral components of a company's compliance system. It is also recognised that use of a company's financial records to bribe a foreign public official or to hide such bribery often occurs as a result of a breakdown of the system of corporate governance, or because there was not an adequate system to begin with. Thus sound principles of corporate governance and management commitment to those principles form the foundation for the prevention of foreign bribery. Moreover, if these are not in place, the internal and external audit functions cannot operate effectively, and thus will be hampered in playing their part in preventing and detecting foreign bribery.

4.1 Internal company controls

97. Paragraph V C i) of the 1997 Revised Recommendation provides four recommendations regarding internal company controls, which recommend that Member countries should encourage the following: (a) the development and adoption of adequate internal company controls, including standards of conduct; (b) that company management make statements in their annual reports about their internal control mechanisms, including those which contribute to preventing bribery; (c) the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards; and (d) that companies provide channels for communication by, and protection for, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors.

98. Before reviewing the conclusions of the Working Group in the Mid-Term Study on ways to move forward in the development of effective internal company controls for preventing and detecting the bribery of foreign public officials, it is important to acknowledge the progress that has been made globally in this area in recent years. Due to legal incentives created by instruments such as the OECD Anti-Bribery Convention, many companies, business associations and NGOs have

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43 The "OECD Bribery Awareness Handbook for Tax Examiners", is available in the following languages: Chinese, Dutch, English, Estonian, French, German, Italian, Japanese, Korean, Latvian, Lithuanian, Norwegian, Portuguese, Russian, Slovak and Spanish.

44 See discussion under II. 8 "Fraudulent Accounting for purpose of Bribing Foreign Public Officials or Hiding such Bribery".

adopted and published codes of ethics and other forms of internal compliance measures that should help to combat the bribery of foreign public officials. Important standards in this area have been published by Transparency International[45] and the International Chamber of Commerce[46]. The OECD also published the new OECD Principles of Corporate Governance in 2004, which are fundamental to ensuring that companies respect the law.[47]

99. Nevertheless, the Mid-Term Study makes two important overall observations about companies' internal compliance systems for fighting foreign bribery. First, it observes that the majority of Parties have not provided a consistent level of encouragement to their companies to adopt voluntary controls, with practically all Parties except for one adopting a voluntary approach through various degrees of state involvement. It also notes that some Parties have not taken any steps to promote their adoption, and that one Party has actively encouraged its companies to set up internal control mechanisms for detecting bribery. A few Parties indirectly provide a strong incentive in the law for adopting effective internal compliance programmes, by providing a defence to the offence of bribing a foreign public official if an appropriate internal compliance programme was in place at the time the offence was committed. In some other Parties the existence of such a programme might be considered a mitigating factor in sentencing. In two Parties the stock exchange requires companies to justify the absence of an internal compliance programme, and in one Party companies are required to disclose in their annual reports how they have implemented recommendations by the stock exchange on good governance. Furthermore, one Party published guidelines for companies that wish to voluntarily establish internal compliance programmes specifically for combating foreign bribery.

100. The second important overall observation in the Mid-Term Study is that, although large multinational companies generally have adequate internal compliance controls, small and medium enterprises (SMEs) generally do not, even in Parties where they represent the majority of businesses involved in international business. This is partly because most SMEs are not listed, and therefore are not normally subject to rules on internal control and reporting mechanisms, and also because, due to their size, SMEs have limited resources for managing foreign bribery risks. As a result SMEs are particularly at risk for foreign bribery.[48]

101. Standards on internal controls have been issued in recent years by, for instance, TI, ICC and OECD, which might be usefully adapted for the field of foreign bribery. For practical purposes, these standards can be broken down into the following three main categories: (a) establishment of an effective corporate compliance programme for detecting and preventing the bribery of foreign public officials; (b) commitment of management; and (c) effective reporting of suspicions of foreign bribery.

102. With respect to the effective reporting of foreign bribery, the Mid-Term Study shows that, with a few exceptions, companies did not generally offer whistleblower protections and that Parties did not encourage companies to protect whistleblowers.[49] However, the willingness of employees to

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45 See: "Business Principles for Countering Bribery: An Essential Tool for Business" (2003, TI); and "Fighting Corruption – A Corporate Practices Manual (2003, ICC).

46 See: "Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations" (2005, ICC).

47 The OECD Principles of Corporate Governance 2004 can be found at: www.oecd.org/daf/corporateaffairs.

48 See complementary discussion on level of awareness by SMEs of foreign bribery under III. 1 "Need for Increased Awareness of Foreign Bribery".

49 For a discussion on whistleblower protections in the public sector, see III. 2.2 on "Reporting by Public Officials…"

report foreign bribery is seriously curtailed by the absence of effective whistleblower protections under the law, even if company policy is favourable to reporting.[50]

Internal audit function

103. The internal audit profession is not regulated, but internal auditors may be subject to professional duties by virtue of their membership in a professional auditing association, such as the Institute of Internal Auditors (IIA).[51] For instance, the IIA issues the International Standards for the Professional Practice of Internal Auditing, including a "Practice Advisory" on the "Auditor's Responsibilities relating to Fraud Risk Assessment, Prevention, and Detection". This Practice Advisory states that "the Internal Auditor should have sufficient knowledge to identify the indicators of fraud but is not expected to have the expertise of a person whose primary responsibility is detecting and investigating fraud".[52] The term "fraud" is broadly defined by the IIA as encompassing "an array of irregularities and illegal acts characterised by intentional deception" that "can be perpetrated for the benefit or to the detriment of the organisation and by persons outside as well as inside the organisation", and in practice "fraud" is considered to include bribery.[53] Given that internal auditors may have a professional duty to prevent and detect "illegal acts" in the books and records of companies, it is critical that they are aware that the bribery of foreign public officials constitutes such an act. Since the Phase 2 examination process has not hitherto routinely targeted the role of internal auditors, their level of awareness of the foreign bribery offence is not generally known.

104. Internal auditors also have the potential to positively influence management's and the board's willingness and ability to combat foreign bribery due to the integral relationship between the internal audit function and those responsible for the management and oversight of internal controls.[54] Internal auditors might also provide a safety-net for preventing, detecting and reporting the bribery of foreign public officials in respect of companies that are not required to submit to an external audit. For companies that are also externally audited, the internal audit function provides the basis for an effective external audit.

4.2 Independent external audit

105. Paragraph VB iii) of the 1997 Recommendation recommends that "Member countries should require the (independent external) auditor who discovers indications of a possible illegal act of bribery to report this discovery to management, and, as appropriate, to corporate monitoring bodies". Paragraph VB iv) recommends that "Member countries should consider requiring the (independent external) auditor to report indications of a possible illegal act of bribery to the competent authorities".

106. The Mid-Term Study identifies the following three issues in relation to independent external audits in Parties' national systems: (a) whether the requirement of an external audit applies

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50 *Id.*

51 The Institute of Internal Auditors is an international professional association. It currently has 130 000 members, and provides certification, education and technological guidance to the auditing profession.

52 See Practice Advisory 1210.A2-2, IIA.

53 *Id.*

54 The term "board" in this document denotes the different national models of board structures.

to an adequate spectrum of companies; (b) whether there is an adequate obligation for reporting to the competent authorities; and (c) whether the standard is adequate for triggering a report of foreign bribery either internally or externally to the competent authorities.

Companies subject to external audit

107. The Mid-Term Study explains that there is significant variation between the Parties regarding the rules on which companies are required to be subject to external audits. Many Parties require external audits for companies over a certain size, although the size threshold varies among the Parties. Some Parties only require listed companies to submit to an external audit, with the result that very large unlisted companies with substantial international business are exempt from the requirement.

Reporting to the competent authorities

108. The Mid-Term Study also reports that there have been very few cases of foreign bribery to date detected through the actions of external auditors, and that four Phase 2 reports identify the reporting of indications of foreign bribery by external auditors to the competent authorities as a "general issue for many Parties". Indeed, despite Paragraph VB iv) of the 1997 Revised Recommendation, which recommends that "Member countries should consider requiring the (external) auditor to report indications of a possible illegal act of bribery to the competent authorities", relatively few Parties have imposed such a legal requirement on external auditors. In some Parties, external auditors are permitted but not required to report suspicions of crimes to outside authorities. For many Parties, reporting by external auditors to outside authorities is prohibited or excluded in practice due to the application of confidentiality requirements.

109. In practice, even where external reporting is required or permitted, external auditors generally feel constrained by confidentiality requirements, which might appear to conflict with rules on reporting. This general reluctance to report to the competent authorities is reinforced by International Standard of Auditing Rule 240 (ISA 240), which states that the responsibility of auditors to consider fraud and error in an audit of financial statements "ordinarily precludes reporting fraud and error to a party outside the client entity", unless the duty of confidentiality has been overridden by national law. Thus, in the absence of a clear directive in the law to report foreign bribery to the law enforcement authorities, external auditors are unlikely to deviate from ISA 240. In fact, even a clear directive in the law might not be sufficient to encourage external auditors, who are considered accountable to the shareholders, to act as whistleblowers.

110. At the same time, the Working Group recognises that any reporting obligation that could result in the disclosure of illegal activities to the competent authorities, including through publicly available reports to the shareholders or even a technique known as "noisy withdrawal" (*e.g.* the auditor is required to withdraw from his or her post if senior management or the board does not respond adequately to suspicions of an illegal act, and this would be reflected in the report to shareholders), could be resisted due to the reluctance of external auditors to be turned into whistleblowers. In view of this reluctance, auditors might have an incentive to maintain less complete records, or companies might restrict auditor access.

Standard for triggering a report

111. The Mid-Term Study documents that many Parties impose a material requirement on the duty to report indications of possible illegal acts internally or externally to the competent authorities. Different Parties impose different materiality thresholds, including the following: (a) violations that have an impact on the company's assets or financial statements; (b) violations that

are perpetrated by specific organs or persons in the company, such as management or a member of the board; and (c) violations that amount to actual crimes rather than just suspicions. The application of any of these materiality thresholds could result in the non-reporting of indications of the bribery of a foreign public official, including cases involving substantial bribe payments to obtain substantial foreign contracts.

5. Public Procurement

112. Public procurement contracting can play a significant role in detecting, deterring and sanctioning the bribery of foreign public officials. Since public procurement agencies contract with companies and individuals involved in substantial international business, they are well-placed to detect foreign bribery transactions. They can also deter foreign bribery by ensuring that they do not contract with companies and individuals that have bribed or are likely to bribe foreign public officials. Additionally, because public procurement contracts are often very lucrative, and comprise up to eighty percent of world merchandise and commercial services exports,[55] disqualification, suspension or termination from public procurement contracting for the bribery of foreign public officials could hit companies quite hard. The importance of public procurement contracting in the fight against foreign bribery is intensified when it is involved in sectors that are at high-risk for corruption, including construction, in particular large infrastructure projects, large engineering projects such as power stations and hydroelectric dams, mining infrastructure, oil and gas extraction and infrastructure, as well as defence contracting.[56]

113. The OECD has given special attention to the fight against corruption in public procurement through various avenues. In 2004, the French Ministry of Economy, Finance and Industry hosted a conference of the OECD Global Forum on Governance on "Fighting Corruption and Promoting Integrity in Public Procurement". A publication summarising the discussions and contributions to the conference was published in 2005.[57] In January 2007, the Working Group on Bribery endorsed the typology of bribery described in the publication "Bribery in Public Procurement: Methods, Actors and Counter-Measures", which builds on discussions among experts who participated in an OECD seminar in March 2006.

114. With respect to the OECD anti-bribery instruments, the 1997 Revised Recommendation addresses public procurement in two places. First, under Paragraph II v) it recommends that Member countries examine the use of *inter alia* "public procurement contracts or other public advantages" so that they can "be denied as a sanction for bribery in appropriate cases". Second, Paragraph VI provides two relevant recommendations. Under subparagraph i) it recommends that "Member countries should support the efforts in the World Trade Organisation to pursue an agreement on transparency in government procurement". Subparagraph ii) recommends that "Member countries' laws and regulations should permit authorities to suspend from competition for public contracts enterprises determined to have bribed foreign public officials in contravention of that Member's national laws, and to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials".

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55 See: "Fighting Corruption in International Business Transactions: Major Considerations Regarding Public Procurement" [Pieth, M. in "Fighting Corruption and Promoting Integrity in Public Procurement" (OECD, 2005)].

56 *Id*.

57 See "Fighting Corruption and Promoting Integrity in Public Procurement" (OECD, 2005).

115. Part II of this Consultation Paper looks at disqualification from government contracting, and the termination of contracts already in place, including public procurement contracting as an additional civil or administrative sanction for a legal person or individual subject to sanctions for the bribery of a foreign public official. In addition, Part III of this Paper already looks at the awareness of public procurement authorities of the risks of foreign bribery,[58] as well as the obligation on members of the public administration (including public procurement authorities) to report suspicions of foreign bribery[59]. There is also a certain amount of overlap between the issues concerning public procurement and those concerning ODA-funded procurement, which is discussed in Part III of this Paper.[60] The discussion here therefore centres on the following two remaining issues: (a) the need to perform due diligence before awarding and during the execution of public procurement contracts; and (b) disqualification, suspension and termination from public procurement contracting in relation to applicants and contractors that are "determined" to have bribed foreign public officials.

Need for due diligence

116. Various due diligence measures are increasingly performed by public procurement agencies to assess the risk of foreign bribery by an applicant for a public procurement contract or a contractor. These include verifying whether applicants and contractors or anyone working on their behalf have been previously convicted of the bribery of foreign public officials or are currently facing such charges. Methods for obtaining this kind of information include the following: (a) asking applicants and contractors for full disclosure in this regard, requiring a certificate of no criminal convictions, or by requiring anti-bribery undertakings/declarations for this purpose; (b) coordinating with other public agencies that might have contracted with the applicant, such as agencies involved in ODA-funded procurement and official export credit support; and (c) verifying whether applicants and contractors are listed on publicly available debarment lists of specific international financial institutions including the World Bank.

Disqualification, suspension and termination

117. Regarding the disqualification, suspension and termination from public procurement contracting of applicants and contractors that are "determined" to have bribed foreign public officials, a footnote to Paragraph VI ii) of the 1997 Revised Recommendation clarifies that "Member countries' systems for applying sanctions for bribery of domestic officials differ as to whether the determination of bribery is based on a criminal conviction, indictment or administrative procedure, but in all cases it is based on substantial evidence".

118. Thus, in contrast to Article 3.4 of the Convention, which requires Parties to consider the application of additional administrative or civil sanctions upon a person who has been convicted for the bribery of a foreign public official, a conviction may not be required under Paragraph VI ii) depending on how a Party's legal system interprets "substantial evidence".

119. Parties may need the latitude to disqualify, suspend or terminate public procurement contracting opportunities in the absence of court decisions for various reasons. For instance, they will often need to take action before lengthy foreign bribery investigations, prosecutions and court proceedings are completed, or certain foreign bribery cases might not have been investigated or prosecuted due to obstacles to obtaining evidence or establishing jurisdiction.

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58 See discussion under III. 1 "Need for Increased Awareness of Foreign Bribery".

59 See discussion under III. 2. "Detection and Reporting of Foreign Bribery in the Public Sector".

60 See discussion under III. 6. on "Foreign Bribery in relation to ODA-Funded Procurement".

6. Foreign Bribery in Relation to ODA-Funded Procurement

120. Paragraph VI iii) of the 1997 Revised Recommendation states that "in accordance with the Recommendations of the Development Assistance Committee, Member countries should require anti-corruption provisions in bilateral aid-funded procurement, promote the proper implementation of anti-corruption provisions in international development institutions, and work closely with development partners to combat corruption in all development co-operation efforts". By incorporating the Development Assistance Committee (DAC) Recommendation, which is only addressed to DAC members, into the 1997 Recommendation, it becomes applicable to all OECD Member and non-Member countries that adhere to the 1997 Recommendation. The DAC sent out a survey to its members (as well as multilateral organisations such as the World Bank and the UN, which are observers in the DAC) regarding progress in implementing the DAC Recommendation, and will make the responses available to the Working Group in early 2008.

121. This Consultation Paper already looks at two issues directly related to Official Development Assistance (ODA) funded procurement. First, in Part II on "Proposals on the Criminalisation of the Bribery of Foreign Public Officials" it looks at debarment from ODA-funded procurement as an additional sanction upon conviction of the bribery of a foreign public official.[61] Then under Part III it first looks at the obligation of ODA authorities to report suspicions of foreign bribery to the competent authorities,[62] with the discussion here focusing on the detection of the bribery of foreign public officials by ODA authorities.

122. Some forms of ODA involve contracting with companies, organisations or individuals that perform international business transactions, with the result that there is a risk that the funds obtained through such contracting might be used in corrupt foreign transactions. The main risk area is through bilateral aid-funded procurement, and it is for this reason that this is the area addressed in the 1997 Revised Recommendation.[63] When assistance is administered bilaterally, funds are either provided by an ODA agency or embassy to a co-operation partner,[64] such as a foreign country or a NGO (local or international), under a project agreement between the ODA agency delivering the aid and the partner, or the ODA agency contracts directly with a consultant, usually an individual or company which is often from the ODA agency's country. Where assistance is administered through a co-operation partner, the partner normally hires a consultant to carry out the services. Both forms of bilateral assistance create opportunities for foreign bribery, not only on the part of the company or individual who contracts directly with the ODA agency or co-operation partner, but on the part of successive layers of agents and subcontractors. ODA agencies must therefore be prepared to detect and prevent foreign bribery committed by its first level of contractors as well as successive layers in the contracting process.

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61 See under II. 3.2. "Additional Civil or Administrative Sanctions".

62 See under III. 2.1. "Officials from agencies with contractual relationships with business: ODA and Official Credit Support Agencies".

63 On the other hand, multilateral assistance involves the provision of funds to multilateral organisations, such as international and regional development banks. These funds can be contributed through various means, including Trust Fund Financing, parallel or co-financing or to replenish soft loan windows. Multilateral assistance is sometimes "tied", meaning that the recipient organisation is obligated to hire a consultant from the donor country to carry out the services.

64 Since ODA funds can be provided by an ODA agency or embassy, the term "ODA agency" denotes either body in this Paper.

123. In light of these risk factors, ODA agencies are increasingly taking measures to detect and prevent foreign bribery when they contract with consultants or NGOs. These include the following: (a) selecting the consultants or NGOs through a full and open competition whenever possible; (b) requiring "anti-corruption provisions" in contracts with subcontractors; (c) checking the publicly available debarment lists of international financial institutions and national governments; (d) exercising enhanced due diligence where there are suspicions of foreign bribery; and (e) monitoring the selection of subcontractors and agents, and payments and disbursements made to them.

124. Where the co-operation partner is a foreign country or NGO, which in turn will put the project out for tender, there is a growing trend for ODA agencies to take steps to ensure that the foreign public procurement process is reliable and transparent, and that it is designed to prevent and detect corrupt transactions. In the contracting stage, such steps include the following[65]: (a) requiring that foreign public procurement employees make personal asset declarations and that they are given regular anti-corruption training and awareness; (b) ensuring that the public procurement process is subject to adequate oversight and internal and external controls such as audits; and (c) monitoring critical stages of the foreign procurement process. In the execution phase, such steps include the following: (a) ensuring that the contracts contain effective "anti-corruption provisions" and that similar provisions are required in contracts with sub-contractors; and (b) taking into consideration the "Benchmarking System" for developing countries' procurement systems, developed by the joint OECD/DAC–World Bank Round Table Initiative on Strengthening Procurement Capacities in Developing Countries.

7. Foreign Bribery in Relation to Official Export Credit Support

125. The 1997 Revised Recommendation does not expressly refer to foreign bribery in relation to official export credit support. However, the Working Group has monitored the role of official export credit support agencies in detecting and preventing the bribery of foreign public officials by virtue of the broad mandate in Paragraph I of the 1997 Revised Recommendation, which recommends that "Member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions".

126. In addition, the OECD Export Credit Group (ECG) has been active in this area, first through its 2000 Action Statement on Bribery and Officially Supported Export Credits, which it monitored regularly through a survey, and currently through the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits. The 2006 Recommendation was developed by the ECG based on its experience in implementing the 2000 Action Statement, and feedback from the Working Group on Bribery on its analysis in the Phase 2 examinations of the detection, prevention and sanctioning of the bribery of foreign public officials through systems for official export credit support.

127. The Phase 2 examinations routinely look at the following three major issues regarding the prevention and detection of foreign bribery by official export credit support agencies: (a) deterrence measures including anti-bribery undertakings and declarations; (b) reporting of foreign bribery by official export credit support authorities to the law enforcement authorities; and (c) denial, suspension and termination of contracting opportunities as additional sanctions upon conviction for

65 For more information on detecting and preventing corruption in public procurement, see: "Handbook: Curbing Corruption in Public Procurement" (Transparency International, 12/4/2006).

foreign bribery. The last two issues are dealt with elsewhere in this Consultation Paper, and the first issue is the subject of the discussion here.[66]

128. The 2006 Recommendation establishes effective standards for preventing foreign bribery and ensuring enhanced due diligence in appropriate circumstances. These standards could be usefully adopted by Parties to the OECD Anti-Bribery Convention that are not members of the OECD. With respect to deterrence measures,[67] the 2006 Recommendation recommends that Members adopt several important measures, which can be broadly categorised as follows: : a) preventive measures such as awareness-raising and the provision of undertakings/declarations; (b) enhanced due diligence measures triggered by certain red-flags such as a previous conviction for foreign bribery; and (c) suspension of applications, and refusal and termination of export credit contracts in specific circumstances.

129. The 2006 Recommendation recommends that approval of an application be suspended during a period of enhanced due diligence if there is "credible evidence" that bribery was involved in the award or execution of the export contract, and that the application be refused if enhanced due diligence "concludes" that bribery was involved in the transaction. It also recommends appropriate action such as denial of payment, indemnification or refund of payments if after approval of the application bribery is "proven".

130. It is not yet known how "credible evidence", which means "evidence of a quality which, after critical analysis, a court would find to be reasonable and sufficient grounds upon which to base a decision on the issue if no contrary evidence were submitted", will be interpreted, and thus at this stage it is unclear whether it might result in a threshold that is so high that there is a risk of approving contracts where there is a suspicion or even belief, based on reasonable evidence, that foreign bribery has occurred.

8. Co-operation with Non-Parties to the Convention

131. Part II of this Consultation Paper already discusses one major issue that involves the role of non-Parties to the Convention – challenges in obtaining mutual legal assistance from them (as well as Parties) and how Parties can co-operate with non-Parties to find ways to overcome any legal and procedural obstacles to providing effective mutual legal assistance. Since Part III of the Consultation Paper focuses more on the prevention and detection of the bribery of foreign public officials, and in particular how the 1997 Revised Recommendation addresses these issues, the discussion here centres on how co-operation with non-Parties can be enhanced in ways not related to the direct implementation of the Convention, but still with the overall purpose of combating the bribery of foreign public officials.

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66 The reporting issue is dealt with under III. 2.1. "Officials from agencies with contractual relationships with business: ODA and Official Credit Support Agencies", and the sanctioning upon conviction issue is dealt with under II. 3.2. "Additional Civil or Administrative Sanctions".

67 Note that the 2006 OECD Recommendation does not deal specifically with the denial, suspension or termination of official export credit support contracting opportunities as an additional sanction upon conviction for foreign bribery. However, Paragraph 1(d) and 1(f) of the Recommendation recommend that exporters and applicants disclose whether they or any one acting on their behalf are charged with foreign bribery or were convicted (or administratively dealt with) within five years. Paragraph 1(g) recommends that, where an exporter or applicant has been convicted of foreign bribery within five years, the official export credit agency verify whether appropriate internal preventive measures have been taken, maintained and documented.H[68] See: "Anti-Corruption Policies in Asia and the Pacific" (ADB/OECD. Manila. 2006).

132. Since the purpose of the Convention is to target the supply-side of the bribery of foreign public officials, and culpability for the offence of bribing a foreign public official depends solely on the intent of the briber (*i.e.* regardless of the mental state of the foreign public official, including whether he or she solicited the bribe), the role of foreign public officials in bribery transactions is not dealt with under the Convention. However, obviously, foreign public officials play an active role in the vast majority of foreign bribery transactions – *i.e.* by either soliciting the bribe, or at least by accepting the offer, promise or gift of the briber. Furthermore, the business and legal environment of some countries might not effectively discourage corrupt acts on the part of their public officials, and in countries plagued with systemic corruption, it might even indirectly encourage such acts. This is particularly detrimental to the concept of a "level playing field" for Parties whose companies' markets are mainly located in countries at high risk for corruption. Indeed, solicitation, including by officials from non-Parties, has been on the agenda of civil society and the private sector for some time now, and in 1999 an *ad hoc* group composed of Working Group delegates met with the Group's permanent civil society and private sector interlocutors to discuss how to address the issue.

133. Given that the United Nations Convention against Corruption (UNCAC) addresses both the active and passive sides of the bribery of foreign public officials, one approach that could help to address passive bribery by foreign public officials would be for all Parties and non-Parties to the Convention (especially non-Parties in which major international business transactions take place) to sign, ratify and implement the UNCAC as well as regional anti-corruption conventions such as those of the Council of Europe, the European Union and the Organisation for American States. This would significantly help to provide an effective international legal framework for criminalising the passive bribery of foreign public officials and would therefore help to reduce solicitation.

134. Accession to the OECD Anti-Bribery Convention by non-Parties that are major emerging economic players (*i.e.* countries that are major exporters and investors and involved in providing official development assistance) might also be a way to enhance the role of non-Parties in the fight against foreign bribery. Although this issue is outside the ambit of this Consultation Paper, the Working Group notes that this is an option that is currently under discussion. In addition, potential accession candidates may be involved in the Working Group's outreach activities, in part because of the risk of foreign bribery by OECD companies engaging in trade and investments in those countries.

135. However, the Working Group believes that there is also further scope for addressing the fight against the bribery of foreign public officials by non-Parties under the 1997 Revised Recommendation, by building on initiatives already taken by it for co-operating with non-Parties in strengthening their legal and institutional capacities for combating corruption and the bribery of foreign public officials. These regional initiatives support and assist non-Parties with, for instance, judicial reform and improving their law enforcement capabilities, including through international judicial co-operation involving mutual legal assistance and extradition.

136. Two major OECD initiatives in this respect include the Asia Development Bank/OECD Anti-Corruption Initiative for Asia-Pacific, and the Anti-Corruption Network for Eastern Europe and Central Asia. The ADB/OECD Anti-Corruption Initiative for Asia Pacific recently completed and published a thematic review on mutual legal assistance, extradition, and the recovery of proceeds of corruption in the 27 members of the Initiative. In 2006 the Initiative published a review of the main developments and reforms to the legal and institutional frameworks of its members for fighting corruption. [68] The Anti-Corruption Network for Eastern Europe and Central Asia, which includes more than 20 countries from the region, conducts country reviews and monitoring of the legal and

68 See: "Anti-Corruption Policies in Asia and the Pacific" (ADB/OECD. Manila. 2006).

institutional frameworks for fighting corruption in its member countries, which are published as country reports.[69] The Anti-Corruption Network has also prepared for publication a "glossary" of the core legal requirements under the OECD Convention, as well as the United Nations Convention against Corruption (UNCAC) and the Council of Europe's Criminal Law Convention on Corruption. [70] The main purpose of this "glossary" is to assist the "Istanbul Action Plan Countries" (Armenia, Azerbaijan, Georgia, Kazakhstan, the Kyrgyz Republic, the Russian Federation, Tajikistan and Ukraine) implement country recommendations on anti-corruption legislation.

137. Paragraph XI of the 1997 Revised Recommendation on "Co-operation with Non-Members" encourages non-Member countries to adhere to the Recommendation and participate in any follow-up or implementation mechanism, while paragraph XII instructs the Committee on International Investment and Multinational Enterprises (now the Investment Committee) through the Working Group on Bribery to promote wider participation of non-Members in the Recommendation. By encouraging non-Members to adhere to the 1997 Revised Recommendation, the general language of these paragraphs recognises that they have a role to play in combating the active bribery of foreign public officials.

138. By effectively combating domestic corruption, non-Members will improve the overall business environment and reduce the risk of bribery of their officials by foreign companies and individuals. By assisting and supporting non-Members in strengthening their legislative and institutional frameworks for this purpose, the Working Group reinforces its previous and current initiatives, and provides the ambit for increased targeted efforts through various means, including a forum for regular consultations (including meetings between the law enforcement authorities of Member and non-Member countries), policy dialogue, and co-operation with other international organisations as well as regional organisations involved in fighting corruption.

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69 The Anti-Corruption Network country reports are published on the ACN website (www.oecd.org/corruption/acn).

70 The "Glossary" ("Corruption: A Glossary of International Criminal Standards") is scheduled for publication in early 2008.