

## **TI COMMENTS ON OECD CONSULTATION PAPER**

Transparency International appreciates the invitation to comment on OECD's January 2008 Consultation Paper. The Working Group's review of steps to be taken to strengthen implementation of the OECD anti-bribery instruments is very timely. The Consultation Paper provides an excellent and comprehensive survey. It presents a disturbing picture of inadequate enforcement and considerable deficiencies in how governments have implemented or interpreted the Convention. The lengthy list of "cross-cutting issues" (138 issues) raises an obvious challenge: the need to prioritise the work.

This paper will first present the TI assessment of the effectiveness of the OECD Convention ten years after its adoption, and then go on to discuss the issues raised by the OECD Consultation Paper, dividing them by orders of priority.

### **I. TI assessment of the Convention: Success is not yet assured**

The adoption of the Convention at the end of 1997 was a landmark event in the fight against international corruption. Because most major multinational companies are based in OECD countries, the Convention is the best instrument for curbing the supply side of corruption.

The two most outstanding accomplishments of the past decade are the enactment of laws making foreign bribery a crime by most of the 37 parties, and the operation of a rigorous monitoring programme by the Working Group on Bribery. Monitoring reviews have been impressively thorough and the Working Group has had the courage to criticise even the most powerful governments.

TI's annual assessments of the status of enforcement have shown mixed results. Our 2007 report indicated substantial enforcement in 14 countries, including five of the eight largest exporters. However, there has been little or no enforcement by over half of the parties, including three of the largest exporters. In some countries the message is clear that foreign bribery is no longer acceptable, in others it is ambiguous or worse. The conflicting messages are illustrated by the prosecution of Siemens in Germany and the termination of the investigation of BAE Systems in the UK.

The present situation is unstable because the Convention is based on the collective commitment by all the parties to compete without foreign bribery. There is danger that existing support will unravel unless lagging governments comply without further delays. The assertion by the UK in the BAE case that national security considerations override the commitment to prohibit foreign bribery sets a dangerous precedent that other governments could use, unless there is prompt action to close this loophole.

The ultimate objective of the Convention is to change corporate culture and stimulate effective anticorruption compliance programmes. Based on TI's extensive relations with the business community, we do not believe that a sea-change in corporate behaviour has taken place. A

considerable number of large multinationals have taken action, but progress is uneven and incomplete. A higher and more consistent level of enforcement will be needed to change corporate culture.

In the light of the foregoing considerations, TI believes that OECD's most urgent need is to step up the efforts necessary to ensure that the Convention will be successful, as will be discussed in greater detail in the next section, key steps include:

- Continuation of a rigorous and adequately funded monitoring programme until there is active enforcement by all parties.
- Political action to ensure that lagging governments enforce the prohibition against foreign bribery.
- Foreclosing the use of national security considerations as a justification for not prosecuting foreign bribery.

Success of the Convention will have great benefits by laying the basis for a bribe-free level playing field for international trade. Failure of the Convention will destroy the credibility of the industrialised world in promoting anticorruption programmes in the developing world and in important countries such as China, India and Russia. It will undermine multilateral anticorruption initiatives by the G-8, the World Bank, and the UN, including the UN Convention against Corruption.

### ***Proposed priorities***

The order of priorities proposed in the following sections reflects two factors: the importance of the issue to combating foreign bribery, and the likelihood that progress can be made by OECD; we assume that the time is not right for actions requiring amendment of the Convention.

- Section II covers the highest priority issues on which the success or failure of the Convention depends.
- Section III covers high priority issues that would strengthen and improve the coverage of the Convention.
- Section IV covers two issues of longer-term importance on which action can be deferred.
- Section V covers cooperation with other organisations.
- Section VI suggests additional Working Group programmes.

To maintain continuing support for the Convention, tangible progress must be demonstrated in the next 2-3 years. It is better to succeed with a limited agenda than to fail with an over-ambitious agenda.

## **II. Highest priority programmes**

### ***(1) Continue strong monitoring programme to ensure enforcement***

Because there is still only limited enforcement of the Convention's prohibition against foreign bribery, it is essential that the Working Group continue with a strong monitoring programme. Without continued monitoring to ensure that lagging governments meet their commitments, support for the Convention will unravel. Governments that now prosecute foreign bribery will be reluctant to continue enforcement if their competitors persist in winning orders through bribery.

The principal focus of the monitoring programme should be to ensure that:

- Active enforcement programmes get underway in the countries where there has been little or no enforcement. Priority should be given to the largest exporters, including Japan, UK and Canada.
- Governments correct the deficiencies identified in prior reviews.

Country visits must continue to be a major monitoring tool because they are the only reliable method for assessing the adequacy of enforcement. However, reviews can be narrower in scope and cover fewer countries than the Phase 2 reviews. New parties to the Convention should of course go through the same Phase 1 and 2 reviews as the existing parties.

## **(2) *Political actions to ensure enforcement by lagging governments***

In countries with the political will to combat corruption, monitoring reviews have greatly contributed to effective implementation and enforcement of the Convention. That implementation and enforcement is still inadequate in many signatory states, notwithstanding rigorous reviews, suggests that the requisite political is lacking, and that additional actions are needed at a higher political level is needed.

Under existing Working Group procedures countries are required to report back on actions taken to correct deficiencies identified in monitoring reports after one year and again after two years. The Working Group has also conducted follow-up visits, (so-called Phase 2bis reviews) where it has not been satisfied with the response. TI believes that enough time has elapsed and sufficient experience is available to raise the follow-up process to a higher political level.

Watch list. As a first step, the Working Group should establish and publish a watch list of countries where enforcement is lagging. This should reflect failures to bring prosecutions and to correct deficiencies identified in monitoring reviews. The decision to list the country, and the reasons for doing so, should be communicated by a letter from the Chair of the Working Group to the Justice Minister.

High-level mission. A high-level OECD mission should meet with each laggard government at the Justice Minister (or equivalent) level. OECD should be represented by the Secretary-General, the Chair of the Working Group, and senior representatives from at least two peer countries.

Suspension from Working Group. If the high-level visit fails to result in an appropriate and timely response, the government's participation in the Working Group should be suspended until corrective action has been taken.

Peer pressure. The success of OECD in other fields is widely credited to the effective use of peer pressure. Because the failure of the Convention would damage OECD's reputation, peer pressure to ensure increased enforcement is appropriate and in OECD's interest. Peer pressure is particularly important where non-enforcement is caused by lack of political will or by political desires to gain export orders even by illicit means. TI calls on the governments that actively enforce the prohibition on foreign bribery, including France, Germany, and the US, to press the laggards, particularly the UK, Japan, and Canada, to meet their commitments under the Convention. If private pressure does not succeed, public pressure must be used.

G8 report. We note that resolutions adopted at the last four G8 meetings called for enforcement of the OECD Convention. OECD should submit a report to the 2008 G8 meeting on enforcement by G8 countries.

### **3. *Foreclose use of national security exception***

The assertion by the UK that national security considerations justified its termination of the investigation of bribery allegations involving BAE Systems and members of the Saudi government poses a dangerous threat to the credibility of the Convention. High-level government officials are commonly involved in awarding large contracts in such fields as defence, energy and infrastructure projects. If threats by such officials to stop cooperation on national security programmes become an acceptable reason for terminating bribery investigations, a huge loophole would be opened which many governments could readily use. We welcome that the decision-making process in the BAE case has been challenged in the UK courts.

The use of national security considerations as a reason for not prosecuting foreign bribery must be foreclosed by stating explicitly that the Convention provides no national security exception, and that no such exception can be implied. This can be done without amending the Convention by publishing a Commentary on the meaning of Article 5. Such action would be fully consistent with accepted principles of international law. As pointed out by Professor Susan Rose-Ackerman of Yale Law School, national security exceptions are not to be implied under international law that is the reason why many treaties provide explicit national security exceptions. Rose-Ackerman also points out that the broad language of Article Five leaves no room for an implied national security exception. (New York University Journal of International Law and Politics, Volume 40, Winter 2008.)

## **III High priority programmes**

### **1. *Overcome obstacles to enforcement***

- *Centralise foreign bribery enforcement*

A critical obstacle to increased enforcement is that foreign bribery cases require specialised resources, such as forensic accountants, anti-money laundering experts, and lawyers familiar with mutual-legal assistance procedures. In most countries, such resources can only be provided by organizing a centralised office for foreign bribery cases, and not leaving the responsibility to local prosecutors with limited staffs.

TI's 2007 Progress Report on Enforcement indicated that fifteen countries had established centralised offices for foreign bribery enforcement, an important step forward. In some countries responsibility for criminal law enforcement is based at the provincial, not the national level, and centralizing foreign bribery enforcement may not be possible. There, steps should be taken to coordinate and provide specialised assistance to local prosecutors.

- *Increase cooperation among prosecutors*

A productive meeting of prosecutors from signatory states with members of the OECD Working Group on Bribery was held in Rome in November 2007. Such meetings should be held on a regular basis, at least annually, because prosecutors are a crucial resource and can provide essential frontline information on what needs to be done to overcome obstacles to enforcement.

Sharing experience among prosecutors on how mutual legal assistance procedures can be improved is particularly important. Because cooperation from prosecutors in developing countries will also be needed, we urge the Working Group to explore with UNODC how best to promote such cooperation.

- *Improve complaint procedures*

Publicly-known and readily-accessible procedures for reporting foreign-bribery allegations are essential. TI's 2007 Progress Report on Enforcement indicates that thirteen signatory states still do not have satisfactory procedures. They should be established without further delays. In addition, as noted in the Consultation Paper, government officials who detect corruption should be required to report to enforcement agencies. This should apply to officials in a wide range of activities including embassy staffs, procurement officials, export financing, and tax auditors.

- *Protect whistleblowers*

Because bribery is always conducted in secrecy, prosecution is usually impossible unless someone in the know is willing to blow the whistle. Protection against retaliation is necessary to encourage whistleblowers to step forward. TI's 2007 Progress Report on Enforcement indicates that 19 signatory states lack satisfactory whistleblower protection.

## **2. Coverage of foreign subsidiaries**

There is widespread concern that the Convention's prohibition against foreign bribery is often evaded when bribes are paid by foreign subsidiaries of parent companies based in OECD countries. That concern was amplified by the large number of such subsidiaries that are included in the Volcker Report's list of companies that paid kickbacks under the UN's Oil-for-Food programme.

TI recommends that signatory governments require their companies to adopt anti-bribery compliance programmes that cover their controlled subsidiaries. Such an approach is consistent with current thinking on corporate governance. Most corporate compliance programmes apply to the whole enterprise, including subsidiaries. It would not raise problems regarding extraterritorial application and could be done by a Commentary, without amending the Convention.

As noted in the Consultation Paper, foreign bribes can be paid through a wide variety of agents and other intermediaries, besides foreign subsidiaries. Because the laws passed by almost half of the parties do not expressly cover bribing through an intermediary, it would be useful to issue a Commentary on Article 1, paragraph 1, which makes clear that the "directly or through intermediaries" language must be broadly interpreted to covers all forms of agents and other intermediaries. There should be no room for uncertainty on this critical issue.

The need for governments to promote corporate compliance programmes is important, beyond the issue of foreign subsidiaries and intermediaries. TI's Bribe Payers Index, as well as a survey conducted by Control Risks, indicates that many companies are still unaware that foreign bribery is a crime and that in many countries corporate compliance remains inadequate.

## **3. Bribery of political parties and party officials**

In 2000 TI submitted recommendations to the Working Group to strengthen the coverage of bribery of political parties and party officials. (Referred to on p.10 of the Consultation Paper.) For the reasons explained in our submission, the prohibition against bribery of foreign public

officials may not apply when a payment is made to a political party or party official, who influences a public official in awarding business. This is a serious loophole that can be closed by a Commentary to the Convention, without amending the Convention.

#### **4. *Corporate criminal liability***

The flexibility provided by Commentary 20, allowing parties not to apply criminal liability to corporations, is out of step with the past decade's developments in corporate law and practice. There is increasing recognition that to deal with complex crimes such as foreign bribery, corporations should be held liable not only for affirmative derelictions but for lack of supervision or control. Only a minority of parties still have not provided for corporate criminal liability; however this includes several major exporters. There are numerous advantages to recognizing corporate criminal liability and it makes little sense to conduct "functional equivalence" analyses to determine whether failure to provide for corporate criminal liability should still be tolerated.

#### **5. *Facilitation payments***

The exemption of facilitation payments from the Convention's prohibition of foreign bribery should be eliminated. The other anticorruption conventions, adopted after the OECD Convention, do not exempt facilitation payments. Moreover, a substantial number of OECD states prohibit facilitation payments.

There are three reasons why attitudes about facilitation payments have changed since the Convention was adopted in 1996. First, it is now widely recognised that facilitation payments are a major problem in many developing countries and place a heavy burden on their poorest citizens. Second, facilitation payments are often part of widespread extortion schemes organised from the top down, and not isolated acts by low-level officials. Third, corporate compliance experts have learned that it is difficult to draw a line between facilitation payments and other bribes. This thinking is reflected in guides to compliance, including TI's Business Principles for Countering Bribery, the International Chamber of Commerce's Rules of Conduct to Combat Extortion and Bribery, and the World Economic Forum's Principles for Countering Bribery.

For these reasons, it would be desirable for OECD to eliminate the exemption for facilitation payments. Because the OECD exemption is provided in a Commentary to the Convention, it can be changed by revising the Commentary without amending the Convention.

The exemption is provided in Commentary 9 which states that facilitation payments "do not constitute payments made 'to obtain or retain business or other improper advantage' within the meaning of paragraph 1 and, accordingly, are also not an offence." This justification overlooks that "other improper advantages" can include the granting of permits, licenses or customs clearances, which are often secured by means of facilitation payments. John Raven, a noted authority on customs regulation, has observed that the OECD's exemption of facilitation payments has serious adverse effects on customs. (Raven, *Compliance with Customs Regulations*, Chapter 11, *Fighting Corruption: A Corporate Practices Manual*, ICC Publishing, 2003)

#### **6. *Jurisdictional limitations***

There has been substantial progress in the past decade in extending nationality jurisdiction, and Canada appears to be the only holdout. It is time to end the flexibility provided by Commentary 26 for not extending nationality jurisdiction to foreign bribery. Permitting nationals

to pay foreign bribes, as long as they do so outside the country, tolerates an easy and indefensible loophole.

## **7. *Statutes of limitations***

The Consultation Paper comments on the wide-ranging practices on statutes of limitations. Article 6 is very general, providing only that statutes of limitations “allow an adequate period of time” for investigation and prosecution, and there is no Commentary providing guidance. There are at least two considerations why the Working Group should issue a Commentary on this important issue. First, bribes are always paid in secret and money laundering and other cover-up schemes are widely practiced. Second, bribery investigations are very time consuming because the cover-ups must be unravelled and mutual legal assistance from other countries will be needed. For these reasons, statutes of limitations should not begin to run from the time the offence was committed, but from the time it was discovered. Even with a trigger date based on discovery, a long statutory period should be provided.

## **8. *Outreach to other major exporting states***

Accession to the Convention by other major exporting states would promote the Convention’s objective to curb the supply-side of international corruption. The accession by South Africa is a welcome development, as would be accession by China, India and Russia. Accession by such countries should be conditioned on their agreement to submit to the same monitoring reviews as the existing parties to the Convention. This is critically important. It would be a strategic error to weaken the monitoring programme in order to broaden the coverage of the Convention.

# **IV Longer-term issues**

## **1. *Private-to-private bribery***

The International Chamber of Commerce has proposed that the Working Group undertake a study of private-to-private bribery. There are important reasons for undertaking such a study. Privatization of many governmental functions has blurred the line between the public sector and the private sector. In a global economy, private-to-private bribery transcends national borders and is considered to be widespread. Moreover, in many countries the private sector is larger than the public sector.

Coverage of private sector bribery would represent a major extension of the scope of the OECD Convention and the workload of the Working Group. For that reason, OECD action going beyond the proposed study should be deferred until after the prohibition against public sector bribery has been successfully implemented and enforced. The study should take into account that private sector bribery is covered by other anticorruption conventions, and consider what the appropriate role for OECD should be.

## **2. *Concurrent jurisdiction and multiple prosecutions***

Bribery involving the same briber payer and the same recipient may give rise to prosecutions in multiple jurisdictions. Article 4.3 of the Convention provides that when more than one Party has jurisdiction, the Parties shall consult to determine the most appropriate jurisdiction for prosecution. It leaves open what happens when agreement cannot be reached. This may be the result of differences in applicable laws, in enforcement policies, or in political considerations.

A study to determine what could be done to protect defendants from improper harassment should be undertaken. Two observations are pertinent: finding solutions that satisfy prosecutors with different interests is likely to be difficult; and at this stage in the history of the OECD Convention, lack of enforcement is a more pressing problem than multiple prosecutions.

## **V. Cooperation with other organisations**

### **1. *Avoiding duplicative monitoring***

In recent years concern has developed over duplicative monitoring reviews under different anticorruption conventions. Such concerns are heightened by the entry into force of the UN Convention against Corruption (UNCAC). OECD should play an active part in the development of cooperative arrangements among the different monitoring organisations. Such cooperation is desirable not only to avoid duplication, but because all monitoring programmes have serious resource constraints. Cooperation and coordinating would make all of them more effective.

As a first step, all convention monitoring organisations should exchange information obtained from prior reviews as well as plans and schedules for future reviews. As a second step, opportunities for closer cooperation should be explored. This could include joint reviews of issues of mutual interest and identification of areas of comparative advantage of particular organisations. One example would be OECD's unrivalled experience monitoring foreign bribery. Over time, UNCAC should be able to develop extensive expertise regarding asset recovery, mutual legal assistance and other issues requiring worldwide cooperation.

### **2. *Organisations with specialised expertise***

In determining issues to which the Working Group should give priority, account should be taken of the work of organisations with specialised expertise in areas relevant to the scope of the Convention. Examples include the Financial Action Task Force on money laundering; organisations establishing international accounting and auditing standards; the development of corporate anti-bribery compliance standards by ICC, TI and WEF-PACI; the OECD Export Credit Group; and the Development Assistance Committee (DAC) on corruption in donor-funded procurement.

The work of such organisations is important to the success of the Convention. The Working Group should cooperate closely with such organisations and utilise standards developed by them in OECD monitoring reviews.

## **VI Additional Working Group programmes**

### **1. *Publication of annual report on enforcement***

The Working Group should publish an annual report listing all foreign-bribery prosecutions, including convictions and other dispositions, as well as the number of investigations underway in all signatory states. The report should be updated to reflect the information reported at the tour-de-table conducted at each Working Group meeting. Keeping such information confidential is counter-productive. We recognise that some aspects of monitoring reviews may require confidentiality. However, we see no justification for not publicly disclosing the *names* of all foreign bribery prosecutions and the *number* of all foreign bribery investigations.

The proposal that OECD publish an annual report on enforcement was first made at a meeting of OECD prosecutors in October 2003. Because OECD was swamped by its monitoring workload, it was suggested that TI do the annual report. This decision should be re-examined.

Because the Working Group already collects the information, it would be far easier for OECD to publish the report.

## **2. *Increasing public awareness***

The Working Group's reports are entitled to high credibility because they present detailed assessments of national enforcement programmes. Putting the reports on the OECD website is important, but is not enough to secure public attention and promote increased enforcement. TI recommends that the Working Group take steps to secure a much higher level of public attention in the countries where reviews are conducted. Suggestions should be obtained from media representatives, civil society, the private sector and trade unions. Some actions have already been taken, including preparation of summaries of the conclusions of country reviews, but more is needed. In-country press conferences should be organised, if possible by OECD, if not by civil society, bar associations or other interested groups.

## **3. *Expansion of commentaries***

The "Official Commentaries" to the Convention are a useful and flexible tool and deserve expanded use. No new commentaries have been issued since the original 37 commentaries were published in 1997. Commentaries can be approved by the Working Group and do not require going back to legislatures as would be necessary for amendments to the Convention. They should be used clarify the meaning of Convention provisions.

A number of the issues discussed above can be dealt with through commentaries, including coverage of foreign subsidiaries and other intermediaries, bribery of foreign political parties and party officials, statutes of limitations and facilitation payments.

## **4. *Consultation process***

TI commends the practice of the Working Group to hold periodic consultations with civil society and private sector organisations. We hope ways can be found to make to such consultations more productive for the Working Group and for the participants. Formal meetings with the full Working Group should not be the only form of consultation. Smaller meetings on specific issues should be used to facilitate more informal dialogue.

TI appreciates this opportunity to provide written comments on the Consultation Paper. The Working Group's deliberations on its future plans are of such importance to the success of the Convention that an opportunity for discussions with civil society, the private sector and trade unions should be provided before these plans are finalised.

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5 March 2008