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Dear Mr. Johnston,

We enclose an ECA-Watch briefing paper, "Experience and Practice of Combating Bribery in Officially Supported Export Credits: the evidence so far from the OECD Working Group on Bribery Phase 2 reviews". The paper details comments made so far about Export Credit Agency practice on combating bribery and looks at the recommendations made by the OECD Working Group on Bribery and Phase 2 peer review examiners for improving ECA practice with regard to combating bribery.

We are directing this paper to your office since we are concerned at the potential for policy incoherence being created within the OECD's anti-bribery work being carried out by two OECD Directorates. The OECD's Export Credit Secretariat (ECG) is in the process of facilitating the negotiation of an enhanced Action Statement on Bribery and Officially Supported Export Credits. We are concerned that the excellent work being done by the Working Group on Bribery in its Phase 2 reviews, and particularly the comments and recommendations made by the Working Group and Phase 2 peer review examiners, are not adequately reflected in the proposals under discussion for an enhanced Action Statement on export credits and bribery.

We believe, on the basis of the enclosed analysis, that it is essential that the comments and recommendations made by the OECD Working Group on Bribery and Phase 2 peer review examiners about ECA practice on combating bribery be fully taken on board in the current discussions at the OECD ECG about enhancing the Action Statement on Combating Bribery in Officially Supported Export Credits and reflected in any final Action Statement.

As you are aware, the 2005 G8 Gleneagles summit committed itself to "strengthening anti-bribery requirements for those applying for export credits and credit guarantees." It is disappointing that some G8 countries appear to be blocking any significant progress towards an enhanced Action Statement, as highlighted in a recent Financial Times article based on internal OECD documents.

We note that some countries have argued that revisions to the OECD Working Group on Export Credits and Export Credit Guarantees' Action Statement on Combating Bribery in Officially Supported Export Credits should not be made unless experience suggests that these revisions are absolutely necessary. We believe that the enclosed

paper shows that on the basis of experience so far, significant improvements to the Action Statement on Combating Bribery in Officially Supported Export Credits are essential in order to improve Export Credit Agency practice in combating bribery across the board.

The paper shows that while some ECAs are beginning to implement measures proposed in the OECD ECG's 2003 "Best Practices to Deter and Combat Bribery in Officially Supported Export Credits", others are falling behind on implementation of even the current Action Statement. A new and enhanced Action Statement is needed urgently to create a level playing field that reflects best rather than worst practice.

In the context of the continuing discussions at the ECG as to how to enhance and revise the Action Statement, we draw your attention to the following issues that are supported by the attached briefing paper:

1. Whether there should be a requirement on ECAs to report suspicions of bribery to law enforcement authorities.

Some countries have suggested that there should be no automatic obligation on ECAs in the Action Statement to report suspicions or 'credible evidence' of bribery to law enforcement authorities. The Working Group on Bribery Phase 2 reviews have almost universally emphasised the key role that ECAs could and should be playing in detecting bribery and reporting it to the relevant authorities. In numerous reviews, the Working Group on Bribery has specifically recommended that countries establish proper reporting procedures that enable ECAs to report suspicions and "credible evidence" to the police.

We believe that if the ECG does not include an explicit requirement on ECAs to report suspicions of bribery to the law enforcement authorities in a revised Action Statement, it will be a direct contradiction of the Working Group on Bribery's repeated recommendations for ECAs to do so.

2. Whether Small and Medium Sized Enterprises (SMEs) should be included in requirements to be made of ECA clients.

There has been some suggestion that SMEs should be excluded from the requirements of any future Action Statement. Phase 2 reviews have found almost universally that SMEs have very poor awareness of the risks of foreign bribery despite being at high risk of paying bribes. The Working Group on Bribery has recommended that a considerable number of countries do more to raise awareness with SMEs, including promoting corporate compliance programmes.

We believe it would be a major step backward for raising awareness of bribery if SMEs were to be excluded from the requirements in any revised Action Statement and in clear contradiction of the Working Group on Bribery's recommendations for improved awareness-raising for SMEs.

3. Whether ECAs could do more to raise awareness of bribery offences with their clients.

Most ECAs are now implementing the requirements under the current Action Statement to make clients aware of their legal obligations under national implementing legislation and the OECD Anti-Bribery Convention. Several of the Phase 2 reviews have clearly recommended however, that ECAs should and could be doing more to raise private sector awareness of foreign bribery.

We believe that it would be appropriate for the OECD ECG to include in an enhanced Action Statement an additional and more explicit 'appropriate measure' to deter

bribery that would reflect these Working Group on Bribery recommendations. Such a measure should consist of requiring ECAs to undertake proactive steps to raise awareness of the risks of bribery with their clients, including circulating guidelines that reflect international best practice (such as the OECD Guidelines for Multinational Enterprises, the International Chambers of Commerce Rules on Combating Extortion and Bribery, Transparency International's Business Principles, and the TRACE standard for employing agents and intermediaries), providing information bulletins, and organising seminars.

4. Whether ECAs have sufficient procedures in place to detect whether bribery may be occurring on projects they support, to train ECA staff to detect bribery, and to deny cover where evidence of bribery is detected.

A significant number of the Phase 2 reviews have found that ECAs have inadequate procedures in place for detecting bribery or that ECA staff have not been provided with training or guidelines as to how to detect bribery. In some Phase 2 reviews, examiners have commented negatively on the failure of ECAs to have procedures in place for checking for previous convictions for corruption by applicant companies. Another area of serious concern is whether ECAs will refuse cover to a company where indications that bribery may have occurred are detected. The Phase 2 reviews suggest that while some countries state they are prepared to withhold cover where there may be evidence of bribery, this is on a highly discretionary basis, and it is not clear that this is being done consistently by ECAs. Given that liability falls to the public purse for most officially supported Export Credit Agencies, the precautionary principle should apply where evidence of bribery is detected prior to support being given for a project, and support should not be provided.

We believe that, in light of the Phase 2 findings, it would be appropriate for the OECD ECG to include in the enhanced Action Statement an additional and more explicit 'appropriate measure' requiring ECAs to develop due diligence procedures for detecting whether bribery may have occurred on any project, and to provide regular training and guidelines for their staff in how to conduct due diligence. We also believe that the enhanced Action Statement should have a further specific 'appropriate measure' that requires ECAs to adopt a precautionary approach where there is credible evidence of bribery, and to refuse support until the evidence has been investigated by the appropriate authorities.

5. Whether ECAs should require details of agents' commissions on transactions they are to support.

While few Phase 2 reviews have looked in detail at agents' commissions, one review observed that "verification of agents' commissions could potentially uncover attempts to pay bribes to foreign public officials through intermediaries" (Australia). In another review, the Working Group on Bribery particularly recommended that the ECA "require a client to disclose sufficient information, such as details on agents' commissions, which would enable [the ECA] to verify whether the client has engaged in foreign bribery". (Slovak Republic). It would be wholly inadequate if this information were required solely on medium and long-term transactions over a certain value in high-risk countries, and solely on public sector contracts. A significant number of recent foreign bribery cases investigated or prosecuted by Member States have involved bribes paid to officials in countries deemed relatively 'low-risk'. Furthermore, bribery is no less of a risk on lower value contracts than it is on higher-value contracts; nor on shorter term transactions than longer term ones; nor is it less of a risk in the private sector than in the public sector. If ECAs are serious about avoiding any form of involvement in

bribery, and any potential complicity on their part in bribery, due diligence with regard to agents should be conducted on all transactions.

We believe that the recognition by the Working Group on Bribery of the importance of ECAs verifying agents' commissions as a means to prevent bribery must be reflected in any revised Action Statement produced by the ECG. We believe that ECA procedures for detecting bribery will remain wholly inadequate if a requirement on ECA clients to provide the identity of the agent and the amount and purpose of the commissions and fees on EACH transaction is not included in the revised Action Statement.

6. Whether ECAs should adopt administrative sanctions for companies convicted of bribery offences.

Exclusion or disqualification from export credits has been raised regularly in the Working Group on Bribery's Phase 2 reviews. It is a matter of serious concern that despite the specific recommendation in the Commentary on Article 3 of the OECD Anti-Bribery Convention and in the Revised Recommendations for persons to be excluded from 'public advantages' when convicted of foreign bribery, no ECA does so on an automatic, non-discretionary basis. It is worth noting that the OECD Convention and Recommendations only appear to envisage the use of administrative sanctions where there is a conviction of corruption. This is already a higher threshold than that used by the World Bank, where a company or individual may be excluded from tendering for further projects where there is "reasonably sufficient" evidence of corruption. Some OECD member countries themselves have administrative debarment procedures in place at a national level which are based on sufficient evidence, rather than on a conviction for corruption. The failure of ECAs to adopt this measure in any meaningful way is reflected in the fact that in half of all the Phase 2 reviews that mention ECAs, either the lead examiners or the Working Group on Bribery has recommended that the ECA revisit its policy on dealing with companies convicted of foreign bribery, with a view to introducing exclusion as an administrative sanction.

We believe that any revised Action Statement must reflect the recommendations of the Working Group on Bribery and include a requirement on ECAs to have a proper system for excluding from export credit support on a temporary or permanent basis companies convicted in any competent jurisdiction of bribery.

7. What conditions should apply to administrative sanctions in the form of exclusion from export credits.

We note that the current proposals under discussion for an enhanced Action Statement appear to suggest that ECAs should develop procedures for denying companies support only where the company concerned has not taken appropriate internal corrective measures. We believe that this is open to interpretation and to the danger of discretionary and inconsistent application by ECAs, unless there are guidelines, which ECAs agree to adhere to and which clearly outline what constitutes appropriate corrective measures. It would be totally insufficient if a convicted company were to be able to evade sanction on the basis of merely putting in place a code of conduct. Numerous recent cases have shown that the presence of a code of conduct is by no means sufficient to prevent bribery re-occurring. Furthermore, we note that the Phase 2 reviews have shown that while some countries recognise convictions from a competent foreign jurisdiction, other countries only recognise convictions from their own jurisdiction. We also note that some countries appear to be arguing that applicants should only be required to disclose convictions over a very limited time span and not with respect to all subsidiaries over which they have effective control.

We believe that detailed and clear guidelines must be included in any enhanced Action Statement as to what internal corrective measures companies convicted of bribery are obliged to have taken in order to be eligible for export credit support. The Action Statement should require ECAs to ensure that such measures have been taken as a precondition for support, and the measures should include: submitting to an independent audit and having adopted an independently verified, independently monitored anti-bribery compliance and internal control system. Any repeat offence once these measures have been adopted should be grounds for a lengthy exclusion period. We also believe that any enhanced Action Statement should state clearly that disclosure of convictions from any competent jurisdiction at any time in the previous seven years must be required by ECAs of their clients.

We look forward to hearing from you about our concerns and we hope that the attached report will be of assistance in the March 2-3 and April ECG Plenary negotiations on an enhanced Action Statement on Bribery and Official Export Credits.

Yours sincerely,

Bob Thomson

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cc: Janet West, Export Credit Secretariat
Mark Pieth, Chair, Working Group on Bribery