



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

SOUTH AFRICA: PHASE 2

**REPORT ON THE APPLICATION OF THE CONVENTION ON
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS
AND THE 2009 RECOMMENDATION FOR FURTHER
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS**

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 17 June 2010.

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· EXECUTIVE SUMMARY

· The Phase 2 Report on South Africa by the OECD Working Group on Bribery evaluates and makes recommendations on South Africa's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. While the current measures to fight corruption within South Africa are well publicised and reported, further efforts are necessary to raise awareness of the foreign bribery offence within both the public and private sector, as highlighted in this Report.

· As of the time of this report, there are no prosecutions for foreign bribery in South Africa, a matter that the Working Group believes could be addressed if South Africa adopted a more proactive approach to the investigation and prosecution of this type of crime. In this regard, the Working Group recommended that South Africa develop specialised investigators and prosecutors to more effectively investigate and prosecute foreign bribery, and ensure adequate training and resources, as well as enhance coordination between the police and prosecutors with respect to these cases. South Africa should also strengthen safeguards to ensure that prosecutorial decisions cannot be affected by those considerations set out in Article 5 of the Convention.

· With regard to liability of legal persons, the Working Group noted that, in spite of the long standing existence of corporate liability legislation, convictions or prosecutions of companies for intentional economic offences appear to be rare. The Group recommended the attention of prosecutors and investigators be drawn to the importance of effectively enforcing liability of legal persons for acts of foreign bribery. The Group also indicated that it would follow-up on South Africa's ability in practice to prosecute companies for foreign bribery acts committed by intermediaries abroad, including related legal persons such as their subsidiaries. With respect to sanctions, the Working Group recommended that South Africa raise awareness among prosecutors and judges of the full range of penalties applicable to legal persons for foreign bribery irrespective of the level of the Court, including debarment sanctions available under the Prevention and Combating of Corrupt Activities Act (PRECCA).

· The Working Group also highlighted positive aspects of South Africa's work to fight foreign bribery. The legislative framework for combating bribery and related offences is of a generally high standard. Provisions under the PRECCA appear to cover all elements of the foreign bribery offence under the Anti-Bribery Convention. In addition, the Working Group considers that section 34 of the PRECCA, which imposes a reporting obligation of suspected acts of foreign bribery on a broad category of persons, could be a useful tool in uncovering foreign bribery instances. Similarly, the legislative framework and authorities' ongoing efforts and close cooperation with regulators to fine tune the

anti-money laundering reporting system provide a good foundation to detect foreign bribery-related money laundering.

The report and the recommendations therein, which reflect findings of experts from Slovenia and the United States, were adopted by the OECD Working Group. Within one year of the Group's approval of the report, South Africa will make an oral follow-up report on its implementation of the recommendations, and will submit a written report within two years. The report is based on the laws, regulations and other materials supplied by South Africa, and information obtained by the evaluation team during its five-day on-site visit to Pretoria and Johannesburg in February 2010, during which the team met with representatives of the South African public administration, the private sector, civil society and the media.

· INTRODUCTION

This Phase 2 report evaluates South Africa's enforcement of its legislation implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention),¹ assesses its application in the field, and monitors South Africa's compliance with the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the Recommendation).² It reflects the South African authorities' written responses to the general and supplementary Phase 2 questionnaires, interviews with experts during the on-site visit in South Africa in February 2010, and review of relevant legislation and independent analyses conducted by the lead examiners and the Secretariat.

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The Convention and related instruments can be accessed [here](#).

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The Phase 1 Report on South Africa was adopted by the Working Group on Bribery on 20 June 2008. The purpose of the Phase 1 examination is to assess whether a Party's laws comply with the legal standards set by the Convention. The issues raised by the Group in Phase 1 were followed up in the context of the Phase 2 examination.

1. On-site visit

The Phase 2 on-site visit to South Africa was undertaken by an evaluation team from the OECD Working Group on Bribery in International Business Transactions (the Working Group) from 15 to 19 February 2010 in Pretoria and Johannesburg.

The evaluation team was composed of lead examiners from Slovenia³ and the United States,⁴ and representatives of the OECD Secretariat.⁵ During the on-site visit, meetings were held with officials from the South African government and representatives from civil society, business associations, companies, the legal profession, the judiciary, and Parliament.⁶ The examining team appreciated the high level of co-operation received from the South African authorities at all stages of the Phase 2 process, including the detailed responses to the written questionnaires; the provision of legislation and other pertinent documentation; and the organisation and coordination of the on-site visit, which ran very smoothly. Finally, the examination team is grateful to all participants met during the on-site visit for their co-operation and openness during the course of discussions.

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Slovenia was represented by: Mr. Gorazd ŠALAMON, Deputy Head for Conflict of Interest, Commission for the Prevention of Corruption; and Ms. Antonija SETNIČAR MUBI, Senior Advisor, Division for Tax Audit and International Information Exchange, International Information Exchange Department, Ministry of Finance.

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The United States was represented by: Mr. Charles E. DUROSS, Assistant Chief, Fraud Section, Criminal Division, Department of Justice; Mr. John KELLEY, International Financial Economist, Office of Monetary Affairs, Department of State; Ms. Cheryl SCARBORO, Chief, Foreign Corrupt Practices Unit, Division of Enforcement, Securities and Exchange Commission; and Ms. Kathryn NICKERSON, Senior Counsel, Office of the Chief Counsel for International Commerce, US Department of Commerce.

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The OECD Secretariat was represented by: Ms. France CHAIN, Co-ordinator of the Phase 2 Evaluation of South Africa, Senior Legal Analyst, Anti-Corruption Division; Ms. Sandrine HANNEDOUCHE-LERIC, Senior Legal Analyst, Anti-Corruption Division; and Ms. Melissa KHEMANI, Legal Analyst, Anti-Corruption Division.

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See the list of institutions encountered in Annex 1 to this report.

· 2. General observations

· a. *Economic background and international economic relations*

· The South African economy is among the largest and most prosperous on the African continent. The democratically elected government that came to power in South Africa in 1994 inherited an economy wracked by long years of internal conflict and external sanctions. Against that backdrop, economic performance since 1994 has been impressive. In particular, the successive governments during that period have shown considerable prudence, refraining from resorting to economic populism in an effort to boost short-term growth. As a result, public finances were stabilised, inflation was brought down, foreign capital was attracted in growing amounts, and economic growth, after lagging for a time, improved.⁷ Since 2004, South Africa's economic growth has accelerated significantly, with a GDP growth rate averaging over 5 per cent annually through 2007, dropping to 3.1 per cent in 2008, and expected to weaken further to 1.1 per cent in 2009. Economic activity was adversely affected by severe energy shortages, slowing domestic consumption and the worsening world recession. South Africa's GDP is anticipated to rebound by 3.5 per cent in 2010, however, thanks to the stimulus expected from the soccer World Cup.⁸

· With over 50 per cent of the world's proven gold reserves, and as the largest producer and exporter of important precious metals such as platinum and chromium, South Africa relies to a great extent on its abundant natural resources, with the mining industry and its large privately owned firms currently accounting for roughly 18 per cent of the country's GDP. The construction sector is currently booming due to infrastructure projects under way in transport and electricity, and projects related to the hosting of the soccer 2010 World Cup: construction grew by 14 per cent in 2008, after a 17.1 per cent growth in 2007, and is expected to remain dynamic in the coming years. Tertiary industries account for almost 65 per cent of GDP led by financial services, and wholesale and retail trade. Following a growth rate of 5.4 per cent in 2007, the tertiary sector grew by only 1.5 per cent in the first three quarters of 2008, with weak performances in the leading sectors as well as in insurance, real estate and business services.⁹ Agriculture accounts for the remainder 3.2 per cent of GDP.

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OECD Economic Surveys: South Africa, Volume 2008/15 – July 2008, p. 9.

8

See the African Economic Outlook on South Africa at www.africaneconomicoutlook.org/en/countries/southern-africa/south-africa/#/overview.

9

Ibid.

. In the area of international trade, South Africa now enjoys robust trading relationships throughout the world. Key exports include the aforementioned commodities such as gold, chromium, platinum and palladium. In contrast with much of the rest of the agriculture-dependent African continent, South Africa also boasts a well developed manufacturing industry whose output accounts for over 50 per cent of the country's exports.¹⁰ South Africa's primary trading partners currently include the United States, the European Community, and China. The principle destination of South Africa's exports is Japan (11.1 per cent), the US (11.1 per cent), Germany (8 per cent), the UK (6.8 per cent), China (6 per cent), and the Netherlands (5.2 per cent). As to imports, these principally originate from Germany (11.2 per cent), China (11 per cent), the US (7.8 per cent), Saudi Arabia (6.2 per cent), and Japan (5.5 per cent).¹¹ More recently, a significant and growing share of transactions has been taking place with other sub-Saharan countries, a trend commensurate with ongoing efforts at regional economic integration, and the diversification of trading partners amongst less developed African nations.¹²

1b. Political and legal systems

. After a long period of apartheid, the country became a fully multiracial democracy with the adoption of an interim Constitution in December 1993 and the April 1994 general election. The Constituent Assembly (Parliament) approved a revised version of South Africa's Constitution which came into force in February 1997. The Constitution provides for a strong central government headed by a President (currently Mr. Jacob Zuma, elected in 2009) elected for a maximum of two five-year terms as chief of state and head of government. The bicameral Parliament consists of a 400-member National Assembly, elected by proportional representation, and a 90-seat National Council of Provinces, elected by the nine provincial legislatures. Legislators of both houses serve five-year terms.

. The Constitution of 1996 is the supreme law of South Africa and it vests the various government bodies with their respective scopes of power and jurisdiction. The national Parliament retains exclusive legislative primacy over the provincial legislatures in all but a few areas of minor concern. In many cases, however, provincial governments are delegated authority and may exercise concurrent competence. In the end, any such

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WTO Country Profile: South Africa.

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CIA World Factbook: South Africa (Gini Index of Wealth Distribution).

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South African Development Community: SADC Free Trade Area Brochure.

legislative initiatives may be overturned by Parliament when they conflict with national law, thus limiting the federal character of the South African government structure.¹³

The legal system of South Africa is a hybrid of legal traditions from English common law and Roman-Dutch civil law, with an infusion of indigenous African customary law. Notwithstanding these historical roots, in matters of judicial procedure the common law tradition dominates, and there is firm adherence to the principle of *stare decisis*. Not only are decisions of higher courts binding on those below, but the Constitution also explicitly recognizes a certain measure of judicial activism in granting judges the “inherent power...to develop the common law.”¹⁴

South African courts enjoy a high level of constitutionally protected judicial independence. Judges are appointed by the President upon the recommendations of a peer-based Judicial Service Commission, and once appointed benefit from security of tenure and remuneration.¹⁵ The South African Constitution identifies four primary courts vested with the ultimate judicial authority of the state: the Constitutional Court, the Supreme Court of Appeals, the High Courts and the Magistrates’ Courts.¹⁶ The 11 member Constitutional Court sits at the top of the hierarchical judicial structure and may pass final binding judgments on all cases of constitutional importance; it also possesses the jurisdiction to decide which cases fall under this classification. The Supreme Court of Appeals is the court of last instance in all other matters.¹⁷

One level down in the structure sit 13 High Courts corresponding to South Africa’s pre-constitutional regional divisions. These have first instance jurisdiction over high-profile civil and criminal matters and appellate jurisdiction over judgments of lower courts. Decisions of the High Courts may be appealed to the Supreme Court of Appeals or to the Constitutional Court if the subject matter is of an appropriate constitutional character.

13

The Constitution of the Republic of South Africa 1996 at s. 146.

14

The Constitution of the Republic of South Africa 1996 at s. 173.

15

Ibid. at ss. 174, 176.

16

The Constitution of the Republic of South Africa 1996 at s. 166.

17

Ibid. at s. 167-168.

The Magistrates' Courts rest at the bottom of the structure and deal with the majority of cases. These lower courts can be formally divided into two distinct types. District Magistrates' Courts are found in most South African towns and cities and have the jurisdiction necessary to hear low-value civil cases and low-severity criminal cases. Regional Magistrates' Courts are found in major population centres in order to serve a larger geographic area, and they exercise jurisdiction over a wider array of criminal provisions with a correspondingly increased sentencing discretion.

In the context of the Anti-Bribery Convention, the Regional Magistrates' Courts or the High Courts would be the venue of choice for criminal corruption charges, as explained by the South African authorities already at the time of Phase 1. This is important to ensure that adequate fines can be imposed, especially on legal persons, as the lower Magistrate's Courts may only impose very limited sanctions (see section B.4.a. on criminal sanctions). It was further indicated that the National Director for Public Prosecutions is considering a proposal in terms of which all foreign bribery cases would have to be prosecuted in the High Courts.

In addition, since 1999, Specialised Commercial Crime Courts (SCCCs) have been set up in six major cities in South Africa.¹⁸ These courts do not have specific legislation defining their scope of operation and functioning. The SCCCs operate at Regional Court level, and can be understood primarily as institutionalised and dedicated court time reserved for the hearing of commercial crime. These cases are brought exclusively by a dedicated group of prosecutors – the Specialised Commercial Crime Unit (SCCU) of the National Prosecuting Authority (NPA) –, who select or identify cases investigated by the Commercial Crime Branch of the South African Police Service (SAPS). The boundaries of the cases that can be brought before these courts is unclear, but, in practice, they usually include fraud cases except for relatively small, straightforward frauds, apparently committed by a single individual, as well as some more serious forms of theft (e.g. embezzlement). According to explanations provided during the on-site visit, certain serious corruption offences could be prosecuted by the SCCU, and brought before the SCCCs. The most serious cases of fraud and corruption were previously investigated and prosecuted by the Directorate for Special Operations (DSO, also known as “the Scorpions”), a joint investigative and prosecutorial body operating under the NPA, and thereby falling outside the competence of the SCCCs. The DSO has now been disbanded and replaced by the Directorate for Priority Crime Investigation (DPCI, also known as “the Hawks”), placed within the SAPS. Following the on-site visit, South Africa further clarified that the functions of the SAPS's Commercial Crime Branch have been transferred to the DPCI, and that foreign bribery cases would be handled exclusively by the Commercial Crime Branch. Foreign bribery cases could therefore be prosecuted by the SCCU within the NPA, and tried before the SCCCs. (See

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For an in-depth description and analysis of the SCCC system, see [Antony Altbeker, *Justice through Specialisation: The Case of the Specialised Commercial Crime Court*](#).

further discussion on the issue of specialisation of law enforcement authorities and the courts under sections B.1.a. and B.4.a. respectively.)

lc. Implementation of the Convention and Recommendation

South Africa is one of seven non-OECD member countries that are a Party to the Convention.¹⁹ It deposited its instrument of ratification on 19 June 2007. However, since 2004 and the entry into force of the Prevention and Combating of Corrupt Activities Act 2004 (Act No. 12 of 2004), South Africa has outlawed the bribery of foreign public officials.

Section 231(2) of the Constitution of the Republic of South Africa 1996, provides that an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces unless it is an agreement referred to in subsection 3.²⁰ The South African Parliament approved the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in August 2006. South African authorities indicated that the Constitution enjoins the courts to make reference to international law in the administration of justice, especially in high profile and other relevant cases.

Section 233 of the South African Constitution further provides that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” In certain areas, where the foreign bribery offence in the Prevention and Combating of Corrupt Activities Act 2004 (the PRECCA) does not clearly implement a standard in the OECD Convention, the South African authorities explain that this section would supplement it. However, it should be noted that, at this stage, there is no jurisprudence supporting the broadening of unclear elements in a criminal offence to meet the standards under an international convention, in particular given the general legal principle of “legal certainty” which ensures that any lack of clarity in a criminal offence should be resolved in favour of the accused.

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The other non-OECD members which are Party to the Anti-Bribery Convention as of the time of this report are: Argentina, Brazil, Bulgaria, Estonia, Israel and Slovenia.

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Subsection 3 refers to international agreements that do not require ratification or accession. Article 14 of the Anti-Bribery Convention provides that the “Convention is subject to acceptance, approval or ratification by the Signatories, in accordance with their respective laws”. South Africa indicated that, consequently, the Convention needed to be approved by the South African Parliament.

. 3. Overview of corruption trends and recent measures

. a. *Corruption overview*

. South Africa has experienced a number of high profile corruption scandals within public sector agencies, provinces and, more recently, serious allegations that have been linked to the highest levels of government. These have produced considerable publicity, debate, and political upheaval, and resulted in particular in highly publicised judicial decisions in the case of *S. v. Shaik and Others*. As a result, the awareness of domestic corruption in South Africa is generally high. South Africa has undertaken major reforms in the law and in terms of awareness raising to address the issue of corruption. The adoption of the PRECCA in 2004, which significantly improved the definition of bribery offences in the South African law, as well as several State-led anti-corruption initiatives aim to tackle this scourge.

. Issues of domestic corruption also serve to undermine the standing and reputation of South African businesses abroad. As one reflection of this, in Transparency International's 2006 Bribe Payers Index, which surveys global business executives to determine how likely a firm from a given country is to bribe abroad, South Africa scored a 5.61 on the index (out of a perfectly "clean"10). However, only two years later, in 2008, South Africa scored a 7.5, which represents a marked improvement over the 2006 score. This is likely a reflection of South Africa's efforts to bolster their stance against corruption, with accession to the Anti-Bribery Convention being an important part of that strategy.

Ib. Cases involving the bribery of foreign public officials

. South Africa, at the time of the on-site visit, had not recorded any convictions for the offence of bribery of foreign public officials in the context of international business transactions. The South African authorities informed the evaluation team, at the time of the on-site visit, that there were four cases, potentially involving foreign bribery, which were under preliminary investigation. These were initiated by the Directorate of Priority Crime Investigation of the South African Police Service, following referrals by the National Prosecuting Authority. As of the time of this report, no prosecutions were underway.

. 4. Outline of the Report

. This Report is structured in four parts. The Introduction provides background information on the South African economic, legal, and political systems. Part A examines prevention, detection and awareness of foreign bribery in South Africa. Part B develops issues related to the investigation, prosecution and sanctioning of foreign bribery and related offences. Part C sets out the recommendations of the Working Group to South Africa, and identifies issues for follow-up.

A. PREVENTION, DETECTION AND AWARENESS OF FOREIGN BRIBERY

1. General efforts to raise awareness

Section III of the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions²¹ recommends that each Member country “take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine the following areas: i) awareness-raising initiatives in the public and private sector for the purpose of detecting foreign bribery...”

South African public officials participating in the on-site visit all appeared broadly aware of the Convention and the criminalisation of foreign bribery under the Prevention and Combating of Corrupt Activities Act (PRECCA). However, while the South African government has undertaken a range of measures to raise awareness of domestic corruption and the government’s various anti-corruption initiatives, government-led initiatives *specifically focusing on foreign bribery* have been very limited in comparison with such efforts. South Africa indicated in the responses to the Phase 2 Questionnaire that the bribery of foreign public officials is addressed as part of an “integrated approach” to fighting corruption, rather than under a separate programme. The concern raised by the lead examiners in this regard is that very little has been done by the South African government to specifically raise awareness in the public and private sector for the prevention and detection of foreign bribery – as opposed to domestic corruption.

1a. Government initiatives

The Department of Public Service and Administration (DPSA) is the government body responsible for the coordination of South Africa’s anti-corruption strategy. The Public Service Anti-Corruption Strategy (‘Strategy’) was adopted in 2002 and emphasises an integrated, cross-sectoral approach to combating corruption. The Strategy focuses on the following nine topics:

- 1Review and consolidation of the legislative framework
- 2Increased institutional capacity
- 3Improved access to report wrong-doing and protection of whistleblowers and witnesses
- 4Prohibition of corrupt individuals and businesses
- 5Improved management policies and practices
- 6Managing professional ethics

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Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Section III, adopted by Council on 26 November 2009.

7Partnerships with stakeholders

8Social analysis, research and policy

9Awareness, training and education

. A public service training programme focusing on the provisions of the PRECCA was rolled out to national, provincial and local government in 2006, and in 2008, a follow-up programme was designed to be rolled out over a period of five years to all spheres of government. Training programmes focusing on the investigation of corruption and the conducting of financial investigations have also been conducted within the South African Police Service (SAPS) (see also B.1.a.i. Law Enforcement Authorities). A circular on the Convention and South Africa's participation in the OECD Working Group on Bribery in International Business Transactions was also issued by the National Director of Public Prosecutions to all prosecutors, chief prosecutors and directors of public prosecutions. Section 5.5 of the Circular encourages every Director of Public Prosecutions to develop training and awareness programmes on the Convention within his or her area of jurisdiction. Subsequent to the on-site visit, South African authorities indicated that in May 2010, they introduced training programmes specifically on foreign bribery to over 200 members of the prosecution authority.

. While South Africa has organised consultations with business, labour and NGOs in anti-corruption activities, the focus of such consultations on raising awareness of the Convention and the foreign bribery offence has been very narrow. A National Anti-Corruption Forum (NACF) was established in 2001 to bring together the public sector, private sector and civil society to share strategies in the fight against corruption. The NACF's Anti-Corruption Programme was adopted in 2008 and is aimed at, *inter alia*: advocating rights, obligations, sanctions and protection under anti-corruption legislation and ensuring its full implementation; promoting ethical practices through awareness and training programmes; providing platforms for national, provincial and local engagement on anti-corruption issues and implementation of cross-sectoral anti-corruption programmes. In conjunction with the NACF, the South African government annually convenes National Anti-Corruption Summits. The Convention was discussed during the 3rd Summit, which was held in 2008. A number of anti-corruption awareness and communications campaigns directed to the public at large have also been developed through the NACF, notably through the use of radio, and the printing and distribution of brochures, posters, pamphlets and guidelines on the anti-corruption legislation. The lead examiners were provided with copies of such documents during the on-site visit; the NACF's "Understanding the PRECCA" booklet takes note of the foreign bribery offence and provides a user-friendly illustration of the act of foreign bribery.

. South Africa has taken steps to raise awareness of foreign bribery in the private sector. The DPSA has partnered with Business Unity South Africa (BUSA), a South African business organisation, to develop a three-year programme to increase private sector capacity to prevent and combat corruption, including the bribery of foreign public officials (for further details, see b.ii. below on Business Organisations). The government has also engaged with the Institute for Internal Auditors of South Africa whereby the auditing obligations under the Convention were presented during the 7th Institute of Internal Auditors of South Africa and Association of Certified Fraud Examiners Fraud Conference. Despite such joint initiatives by the South African public sector and private

sector organisations, representatives of South African companies stated, during the on-site visit, that while they were aware of the government's general anti-corruption campaigns, they were not aware of any government initiatives specifically aimed at raising awareness of foreign bribery within the private sector.

. During the on-site visit, the DPSA expressly acknowledged that government initiatives to raise awareness of foreign bribery require strengthening. The DPSA further confirmed during the on-site visit that internal discussions are currently underway as to how to specifically address foreign bribery, and outlined future plans to combat foreign bribery, including: the development of guidelines on the application of the Convention at the national level; specific training in the public sector and private sector, including SME's; education and awareness raising campaigns and partnerships with civil society and the private sector. The progress and implementation of such plans should be followed-up upon; for example, pursuant to Section X.C. of the 2009 Recommendation, South Africa could encourage companies to take into account the new *Good Practice Guidance*, among other publicly available information.

Ib. Private sector initiatives

li. Corporations

. Six large South African companies attended the on-site visit, which included state-owned enterprises and companies with investments and exposure abroad. While BUSA, whose membership includes SME associations, was present during the on-site visit, no SMEs independently attended the panel discussions.

. All of the companies present during the panel with the private sector expressed good knowledge and awareness of the foreign bribery offence under the PRECCA, the Convention, and the US Foreign Corrupt Practices Act (FCPA). However, this level of awareness may not be reflective of the wider situation in South Africa, as panellists from civil society indicated that South Africa lacks strong voices from the private sector on issues related to the combating of foreign bribery and that more needs to be done to educate the South African corporate sector on foreign bribery. The lead examiners also heard from panellists that the level of awareness among SMEs of the foreign bribery offence or the Convention is likely to be low.

. The King Report on Corporate Governance, a document created by the Institute of Directors of South Africa, lays out a comprehensive set of principle-based guidelines to which South African companies may choose to adhere. The recently released King III Report (King III) deals with all aspects of corporate governance, and specifically covers issues of fraud and corruption insofar as it requires that there be robust internal auditing processes that mandate the reporting of any kind of irregularities. King III also addresses the question of "stakeholder relationships," whereby companies and their directors are encouraged to actively pursue positive and sustainable relationships with all levels of stakeholders, including with government. Bribery and corruption are explicitly mentioned under section 50.3, which calls for a policy to be developed to address the role of the

company as a stakeholder in government, “ensuring that its directors, officers and employees do not participate in any activity that may corrupt any civil servant or corruptly undermine any government function.”²²

. During the on-site visit, the companies presented to the lead examiners an overview of their codes of conduct and related internal ethics policies, all of which include express prohibitions of foreign bribery or caution against acts of bribery and corruption and stress the importance of setting the tone at the top of the company. A number of the companies also provide anti-corruption training programmes for employees or are planning to establish such programmes. The panellists explained that all of their companies conduct business through the use of intermediaries, and highlighted the due diligence mechanisms in place when conducting business through agents and when engaging with third parties. A number of the companies that participated in this panel are also members of international anti-corruption and transparency initiatives, including the World Economic Forum’s Partnership Against Corruption Initiative (PACI), the UN Global Compact, and the Extractive Industries Transparency Initiative (EITI).

. All of the participating companies in the on-site visit also have in place confidential, whistleblower reporting mechanisms, including hotlines, a number of which are monitored by independent, third parties (for example, external auditors). However, the effectiveness of ensuring whistleblower protection in practice was raised by some of the panellists as an issue of concern. Encouraging employees to report violations of codes of conduct may be undermined in the absence of effective whistleblower protection (see section 2.b. below on Whistleblower Protection).

. As noted above, and further discussed below, none of the South African companies present during the on-site visit expressed knowledge of any government initiatives to raise awareness of foreign bribery in the private sector, nor of any foreign bribery prosecutions in South Africa. They also indicated that they have had no experience interacting with South African embassies abroad as a means of seeking assistance when faced with direct or indirect solicitations of bribery by foreign public officials. Some indicated that they did not know of domestic or foreign government personnel to contact in the event of a bribe solicitation or report. In this regard, it was emphasised that the provision of such assistance and advice by South African foreign diplomatic representations, especially as a means of assisting South African companies when confronted with solicitation requests, would be very useful.

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See the [King III Report on Corporate Governance](#), Institute of Directors South Africa, September 2009.

. ii. Business organisations

South African business associations have undertaken anti-corruption initiatives that in part raise awareness of foreign bribery in the private sector. Business Unity South Africa (BUSA) has established a Business Anti-Corruption Working Group that regularly meets to identify and conduct various anti-corruption projects in the private sector. BUSA also hosts an annual Anti-Corruption Business Forum, the first of which was held in October 2009, in collaboration with the South African government. A South African Charter on Ethical Business Practice has also been published by BUSA, which highlights principles of responsibility, integrity, respect and fairness. While BUSA itself is comprised of South African business associations, it was confirmed during the on-site visit that most South African companies are the end-recipients of BUSA's work.

A 2006 study jointly commissioned by BUSA's Business Against Crime South Africa and Germany's international development agency, GTZ, focused on corruption in South Africa's private sector. This study identified the need to increase anti-corruption awareness in the SME sector, and resulted in BUSA's subsequent publications on "An Anti-Corruption Guide for South African SMEs" and "An Anti-Corruption Information Guide for Foreign Investors to South Africa and Local South African Companies," which make reference to the foreign bribery offence and the Convention. In this regard, a cross-section of panellists during the on-site visit highlighted the challenge of raising awareness of foreign bribery within the SME sector, and the need to provide related anti-corruption training. As the resources available to SMEs are limited, it was also noted that this sector may find it difficult to resist bribery.

As mentioned above, the DPSA is collaborating with BUSA to develop a three-year programme to increase private sector capacity to prevent and combat corruption, including the bribery of foreign public officials. South Africa indicates in the responses to the Phase 2 Questionnaire that the purpose of this collaboration is to establish and implement anti-corruption training and communication programmes in the private sector, with specific focus on the financial sector, banking sector, financial planning, auditing and SMEs. The progress of this collaboration should be followed-up upon.

Commentary:

While the lead examiners welcome the various anti-corruption initiatives the South African government has undertaken, they remain seriously concerned about the lack of awareness-raising and training initiatives specifically focusing on the foreign bribery offence and the Convention. The lead examiners strongly encourage South Africa to develop and implement on-going awareness-raising and training programmes for both the public and private sectors, focusing on:

- (a) public officials, particularly those working in South African embassies/representations with South African companies operating abroad. These officials should be made fully aware of the provisions of the foreign bribery offence under South African law, including its extraterritorial application, so as to be able to detect and report instances of foreign bribery they may come across in the course of their work and provide assistance to South African companies;
- (b) providing specific government points of contact, both domestic and abroad, in the event of a solicitation request or for the purpose of reporting a bribe, and;
- (c) the private sector, particularly major South African corporations and SMEs active abroad, and as appropriate in cooperation with relevant business associations.

The lead examiners welcome the initiatives being undertaken within the private sector, particularly by the business associations, to raise awareness of foreign bribery. The lead examiners encourage the continuation

of such activities, particularly those focusing on major corporations and SMEs active in high risk sectors or geographic regions.

- 2. General sources for detecting and reporting foreign bribery

- a. Reporting crimes

There are a number of mechanisms available to South African citizens to report criminal offences, including foreign bribery. Reports concerning foreign bribery offences can be made directly to law enforcement authorities. The National Anti-Corruption Hotline (NACH), which is administered by the Public Service Commission (PSC), also provides a mechanism for members of the public to anonymously report acts of corruption by Government departments, agencies and public entities. In addition to a toll free hotline, reports can also be made by sms text message, freepost and freefax, in the eleven official languages of South Africa. During the on-site visit, the PSC highlighted the case management system of the NACH that tracks feedback and responses to reports. There is also a follow-up mechanism in place, and the PSC has the power to subpoena government departments that do not provide follow-up information on the reports. However, this mechanism is not intended for foreign bribery reports, but South African officials stated during the on-site visit that they would forward any such reports to the appropriate authorities. In South Africa's answers to the Phase 2 Questionnaire and Supplementary Questionnaire, which were confirmed during the on-site visit, it was noted that since the inception of the NACH in September 2004 up to March 2008, a total of 4,202 cases of alleged corruption were referred to national and provincial departments, as well as public bodies and entities. The most common type of allegation received were those concerning domestic fraud and bribery, of which there were a total of 781 cases reported during this period. South Africa states that the successful investigation of cases, through disciplinary procedures, resulted in the recovery of ZAR 86 million (EUR 8.6 million; USD 11.2 million).²³

The general public can also report any crime to the "Crime Stop" hotline (or via e-mail) of the SAPS. South Africa indicated that corruption-related reports made via this hotline would be referred to the DPCI or the Detective Services. At the time of the review, no allegations of foreign bribery were reported through the NACH or the "Crime Stop" hotline.

It should also be noted that under section 34 of the PRECCA, certain members of both the public and private sector have a duty to report corrupt transactions to the SAPS. As discussed in further detail in section B.3.a. of this Report, the duty applies to certain persons holding a position of authority; those failing to comply are guilty of an offence.

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As of 1 March 2010, 1 ZAR = 0.13 USD = 0.10 EUR.

Ib. Whistleblower protection

The Protected Disclosures Act 2000 (Act No. 26 of 2000) (PDA or 'Act') provides protection for both public and private sector whistleblowers. The Act sets out procedures by which public and private sector employees may disclose information concerning unlawful or irregular conduct by an employer or an employee of that employer. The Act prohibits an employer from subjecting an employee to "occupational detriment" on account of having made a protected disclosure.

The PDA defines "disclosure" as including "any information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show... that a criminal offence has been committed, is being committed or is likely to be committed."²⁴ The definition also includes information that shows or tends to show that such conduct "has been, is being or is likely to be deliberately concealed."²⁵ The disclosure of information concerning the act of foreign bribery - being a criminal offence - would therefore be covered by the PDA. The Act protects whistleblowers from being subjected to "occupational detriment" which includes, *inter alia*, any disciplinary action; dismissal, suspension, demotion, harassment or intimidation; being transferred against his or her will; being refused a transfer or promotion or being threatened with any of such actions.²⁶ The Act defines "employee" as any person "who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer."²⁷ However, independent contractors are expressly excluded from the definition of "employee."

The companies that participated in the on-site visit have all implemented specific measures to encourage whistleblowing, including through the establishment of internal hotlines, many of which are monitored by third parties. As these companies are all large South African companies, measures to encourage whistleblowing within South African SMEs could not be explored during the on-site visit. Civil society has also been active in promoting whistleblowing and the establishment of whistleblower protection

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Protected Disclosures Act (Act No. 26 of 2000), section 1.(i).

25

Ibid., section 1.(i)(g).

26

Ibid., section 1.(vi).

27

Ibid., section 1.(iii).

mechanisms. A representative from civil society during the on-site visit explained how work has been undertaken in conjunction with the National Anti-Corruption Forum (NACF) to raise awareness of whistleblower protection through the dissemination of awareness-raising materials, including the provision of policy packs to businesses on implementation of the PDA. In this regard, it was stated that approximately 25 per cent of businesses listed on the Johannesburg Stock Exchange have whistleblower policies in place. As noted above, improving access to report wrong-doing and protect whistleblowers is a feature of the Public Service Anti-Corruption Strategy. Accordingly, a number of government departments have also implemented measures for whistleblowing and are prepared to direct employees to internal helplines. However, the Parliamentarian representative during the on-site visit acknowledged that the public campaign to raise awareness and promote the use of the PDA could be improved upon.

A cross-section of representatives during the on-site visit also expressed concern over the effectiveness of the PDA in practice. In particular, representatives from the private sector noted that protection afforded under the PDA does not extend to auditors, as they would be considered independent contractors and thereby fall outside the definition of "employee." This concern was echoed during the panel with business associations. Representatives from civil society also noted that the remedies provided under the PDA are limited, and that in practice, the experience faced by whistleblowers has generally been difficult in terms of re-employment and access to legal representation. Following the on-site visit, South African officials also provided the lead examiners with case examples on the victimisation of whistleblowers.

The extension of the PDA to cover independent contractors has been the subject of investigation by the South African Law Reform Commission, which produced a report that recommends the strengthening of the PDA.²⁸ A civil society representative also indicated during the on-site visit that there is a proposed amendment to the Companies Act 2008 (due to enter into force in July 2010) that would increase protection for private sector whistleblowers and apply to a wider range of persons who are not employees. Following the on-site visit, South Africa further explained that section 159(4) of the Act on protection of whistleblowers was inserted after consultation with the Portfolio Committee for Trade and Industry, the Civil Society Organisation, and the South African Law Reform Commission.

Commentary:

The lead examiners commend South Africa for having adopted whistleblower protection legislation. However, the lead examiners are concerned about the effectiveness of such legislation in practice, and encourage South Africa to increase its awareness-raising activities within the public and private sector to encourage reporting and ensure the implementation of adequate means of protection. The lead examiners also recommend that South Africa consider enhancing the scope of whistleblower protection to include a wider range of persons, such as independent contractors and auditors.

The Law Commission Report is not publicly available, and was brought to the attention of the lead examiners by a representative from civil society during the on-site visit.

· 3. Detecting and reporting by the public sector

· a. General reporting procedures

The Public Service Regulations 2001 impose a duty on every employee in the public service, in the course of his or her official duties, to report to the appropriate authorities, fraud, corruption, nepotism, maladministration and any other act which constitutes an offence, or which is prejudicial to the public interest.²⁹ This duty to report applies to all permanent, temporary and contracted employees in the public service. Public service employees must report such conduct hierarchically to their supervisors or may report the matter directly to the Public Protector.³⁰ The duty to report under the Public Service Regulations does not apply to employees of state-owned enterprises. During the on-site visit, the Public Service Commission confirmed that those who fail to comply with this duty would be charged with misconduct.

In addition, section 34 of the PRECCA places a duty on certain persons to report corrupt transactions to the SAPS. Any person who fails to comply with this duty is guilty of an offence. This duty to report, which applies to certain employees within both the public and private sector, is a commendable feature of South Africa's anti-corruption laws. The duty applies to any person who holds a position of authority, including those who have been appointed in an acting or temporary capacity. Section 34(4) broadly defines persons holding a position of authority as including:

- the Director-General or head (or equivalent officer) of a national or provincial department;
- a municipal manager; any public officer in the Senior Management Service of a public body;
- any head, rector or principal of a tertiary institution;
- the manager, secretary or a director of a company as defined in the Companies Act 1973, including members of a close corporation as defined in the Close Corporations Act 1984;
- the executive manager of any bank or financial institution;
- any partner in a partnership;
- any person who has been appointed as chief executive officer or an equivalent officer of any agency, authority, board, commission, committee, corporation, council, department, entity, financial institution, foundation, fund, institute, service, or any other

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See section 4.4.10, Explanatory Manual of the Code of Conduct for the Public Service (issued by the Public Service Commission of South Africa).

30

Ibid., section 4.3.4.

institution or organisation, whether established by legislation, contract or any other legal means;

· any other person who is responsible for the overall management and control of the business of an employer.

· Accordingly, the duty to report under the PRECCA would also apply to state-owned enterprises and export credit agencies, such as the Export Credit Insurance Corporation of South Africa (ECIC). As noted above, this duty would also apply to certain persons in the private sector; however, some of the companies present during the on-site visit mentioned that they were not aware of this reporting mechanism.

· At the time of the review, South African authorities were not aware of any reports made under these provisions concerning suspicions of foreign bribe payments by a South African national or that South African officials have been promised, offered or given a bribe by foreign nationals or companies. During the on-site visit, the Public Service Commission acknowledged that more could be done to promote reporting within the public sector.

Commentary:

The lead examiners welcome South Africa's adoption of a broad duty to report corruption offences, particularly under the PRECCA, which commendably applies to certain persons within both the public and private sectors. The lead examiners recommend that South Africa issue regular reminders to such persons concerning their obligation to report suspicions of foreign bribery that they may uncover in the course of their work, and provide means to encourage and facilitate such reporting.

Ib. Foreign diplomatic representations

· Foreign diplomatic representations play an important role in raising awareness of the foreign bribery offence when companies seek advice when considering investing or exporting abroad. Foreign diplomatic representations can also be an important source of support for companies facing bribe solicitations by foreign public officials, as set out under Annex I, Section A of the new 2009 Recommendation.

· South Africa indicated in its responses to the Phase 2 Questionnaire that its authorities have not implemented any measures to provide assistance to companies facing direct or indirect solicitation of bribery by foreign public officials. This was confirmed during the on-site visit by officials from the Department of International Relations and Co-operation (DIRCO) who stated that there is no formal framework in place to provide assistance to South African companies facing bribe solicitations abroad. Following the on-site visit, South African authorities further explained that South African diplomatic missions abroad do interact regularly with South African businesses in order to encourage good governance and ensure that their practices in foreign countries are in line with international conventions. They further stated that South African companies may report to the South African diplomatic missions on any bribery situation with which they might be faced and that they are in the process of developing a Code of Good Business Practice applicable to all South African businesses operating abroad. However, the South African companies participating in the panel discussions with the private sector during the on-site visit did not appear to be aware of initiatives by South African embassies. They indicated that they have no experience interacting with South African

embassies abroad in this regard, and felt that the provision of such assistance and advice by South African foreign diplomatic representations would be very useful.

DIRCO officials further confirmed during the on-site visit that there is no established practice of reporting foreign bribery or suspicions of foreign bribery to relevant authorities by personnel of South African diplomatic representations. It should be noted, however, that foreign diplomatic representation staff, as public officials, are bound by the general duty to report corruption offences under the Public Service Regulations 2001. Certain public officials are also bound by the duty to report corrupt transactions under section 34 of the PRECCA. Where reporting is concerned, South Africa further referred to the Fraud Prevention Strategy and Policy, a Policy developed by DIRCO to provide guidance on corruption and fraud issues to its officials in South Africa and abroad. However, the Policy focuses only on alleged irregularities involving officials and employees or entities involved with DIRCO, or consultants, suppliers, and other providers of goods or services to DIRCO. Acts of bribery committed by South African companies, and which DIRCO personnel may become aware of is not addressed in DIRCO's Fraud Prevention Strategy and Policy.

Commentary:

Given the important role that foreign diplomatic representations could play in both advising South African companies and detecting foreign bribery, the lead examiners are very concerned about the lack of awareness and training for personnel in foreign diplomatic representations on the foreign bribery offence. The lead examiners therefore encourage South Africa to:

- (a) raise awareness of the foreign bribery offence among diplomatic personnel, for example through instruction cables, newsletters, seminars or training sessions, and in particular for those posted in sensitive geographic regions;
- (b) ensure that foreign diplomatic representations establish and maintain contacts with South African businesses operating overseas, and (i) disseminate information on the corruption risks in the country of operation and the legal consequences of foreign bribery under South African law, and; (ii) encourage South African businesses and individuals to report suspected instances of foreign bribery to appropriate authorities, and;
- (c) establish procedures and distribute such directions in writing to be followed by diplomatic representation personnel for reporting suspicions or indications of foreign bribery that they uncover in the course of performing their duties to the relevant law enforcement authorities.

1c. Officially supported export credits

The Export Credit Insurance Corporation of South Africa (ECIC) is South Africa's export credit agency. It is an independent company, with the South African Government as sole shareholder. It provides primarily medium and long-term export credit and investment insurance. Primary countries of exposure include Mozambique, Iran, the Democratic Republic of the Congo, Turkey and Zambia.³¹ ECIC currently operates a programme in the amount of ZAR 30 billion (EUR 3 billion; USD 3.9 billion), with 61 per cent of ECIC's exposure in Africa, and 46 per cent in mining construction projects. ECIC personnel are not public officials.

South Africa is not a member of the OECD Working Party on Export Credit and Credit Guarantees (ECG),³² and, consequently, has not had to report within that Group on its compliance with the Recommendation on Bribery and Officially Supported Export Credits, including measures to disseminate information on the foreign bribery offence, and to detect and sanction applicants involved in foreign bribery. As of the time of this review, no formal steps had been taken by South Africa to adhere to the new 2006 OECD Council Recommendation on Bribery and Officially Supported Credits, as provided in Article 3 of this Recommendation, which invites "Parties to the Anti-Bribery Convention which are not OECD members to adhere to this Recommendation."³³

.i. Awareness raising efforts

ECIC has undertaken awareness raising of its staff on the general issue of corruption essentially through its "Tip-Offs" Communication Activities. These have largely focused on issues relating to internal corruption and transparency, although foreign bribery has been tangentially addressed, notably through an August 2007 induction programme on fraud prevention and detection.

As concerns applicants, ECIC includes an anti-corruption clause under which the insured party is required to provide a covenant to refrain from engaging in corrupt

31

See the ECIC Website, Department of Trade and Industry:
www.thedti.gov.za/parliamentary/ECICStartplan.pdf.

32

South Africa has however attended several meetings of the ECG as an ad hoc observer to.

33

See the [2006 OECD Council Recommendation on Bribery and Officially Supported Credits](#).

practices. The definition of corrupt practices provided in ECIC's Insurance Policy and Exporter Undertaking Agreement corresponds to the general definition provided under the PRECCA. While this definition is legally broad enough to cover bribery of foreign public officials, awareness raising on the existence of a foreign bribery offence and its legal consequences may be deserve greater attention on ECIC's part, in particular given the exports context in which ECIC and its clients operate.

. ii. Detection and duty to report foreign bribery

Since ECIC officials are not public servants, reporting obligations under the Public Service Regulations (2001) do not apply to them. However, section 34 of the PRECCA would impose an obligation on “persons of authority” within ECIC to report suspected bribery offences (including foreign bribery) to police officials (see section (a) above on general reporting procedures). In addition, ECIC staff is subject to money laundering reporting obligations under the Financial Intelligence Centre Act of 2001.

ECIC has drawn the attention of its staff to its reporting obligations through its Code of Ethics and Business Conduct, as well as through its Fraud Prevention and Detection Plan. Tip-Offs Anonymous, an outsourced, confidential whistleblowing hotline service, allows ECIC staff as well as applicants and external parties in general to report suspected instances of fraud or corruption. As is the case for its awareness raising and training activities, ECIC's approach is very holistic, targeting reporting of corruption globally, without addressing specifically the issue of foreign bribery. As already outlined above, given that ECIC staff is the one most likely, among South African public agencies, to come across suspected acts of foreign bribery by South African companies exporting abroad, its attention should be further drawn to the specificities of foreign bribery and the requirement to report such suspected instances.

Commentary:

The lead examiners welcome the initiatives by ECIC to raise awareness of its staff and applicants on corruption issues. However, they note that the focus is on corruption generally, and are concerned that foreign bribery specifically may not be adequately relayed. Given the important role that ECIC plays in interacting with South African companies exporting abroad, both in terms of awareness raising as well as reporting of suspicions of foreign bribery, the lead examiners recommend that South Africa:

- (a) adhere to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits, as invited to in Article 3 of the Export Credit Recommendation;
- (b) raise awareness of the foreign bribery offence among ECIC staff and among applicants requesting export credit support;
- (c) ensure that employees of ECIC are provided adequate training on due diligence procedures to detect foreign bribery, and are fully aware of their obligation to report foreign bribery instances they may come across in the course of their work; and
- (d) consider inserting express references to the foreign bribery offence and its legal consequences under South African law in ECIC's contracts.

Id. Official development assistance

South Africa is a net recipient of international official development assistance (ODA), although, as pointed out by the South African authorities, it is in no way reliant on this source of income. Despite its status as a foreign aid recipient, South Africa does

occasionally distribute development aid of its own to other countries. The South African government targets its development aid essentially to its African neighbours, with the bulk (about 70 per cent) focused on South African Development Community (SADC) member states. South Africa's development assistance focuses on general improvements in governance, and on local priorities such as conflict prevention, resolution, and remediation.

The African Renaissance and International Cooperation Fund (“the Fund”) was established by the African Renaissance and International Cooperation Fund Act 2000, under the control of South Africa’s Department of International Relations and Cooperation (DIRCO). Between 2006 and 2009, an amount of ZAR 353 040 million was approved to fund projects, exclusively in Africa (USD 45 895 million; EUR 35 304 million).³⁴ Generally, the assistance provided is not formally tied, though most development projects are reliant on South African skilled labour and technology.³⁵

Depending on whether personnel employed by the Fund are public servants, they may be subject to the general reporting obligations under the Public Service Regulations (2001). In addition, section 34 of the PRECCA would impose an obligation on “persons of authority” within the Fund to report suspected bribery offences (including foreign bribery) to police officials (see section (a) above on general reporting procedures).

Because it was not possible to meet with representatives of the Fund during the on-site visit, information relating to the functioning of the fund was provided by South Africa following the on-site visit. Based on available information, it does not appear that systematic awareness raising on foreign bribery issues has taken place within the Fund itself, nor has any reminder been sent out to staff regarding their obligation to report suspected foreign bribery instances uncovered in the course of their work. It is equally unclear whether anticorruption clauses exist in ODA-funded contracts administered by the Fund.

Commentary:

The lead examiners recommend that South Africa promptly undertake awareness raising activities, both internally within the African Renaissance and International Cooperation Fund, and with regard to potential contractors, to inform and prevent occurrences of foreign bribery in its ODA funded contracts.

In addition to including anti-corruption clauses in its ODA-funded contracts, the lead examiners recommend that South Africa put in place effective means for detecting instances of foreign bribery by contractors, establish procedures to be followed by employees of the Fund for reporting credible information about foreign bribery offences that they may uncover in the course of performing their duties, and encourage and facilitate such reporting.

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See the Annual Reports of the for [2006-2007](#), [2007-2008](#), and [2008-2009](#).

35

See the Report by the International Development Research Centre of Canada: www.idrc.ca/uploads/user-S/12441470591Executive_Summaries.pdf.

4. The Tax Administration

a. The non tax-deductibility of bribes

With respect to the non-tax deductibility of bribes, the Income Tax Act 1962 was amended in 2006 to include a new section 23(o), which provides that no deductions shall in any case be made in respect of any expenditure incurred—

- (i) where the payment of that expenditure or the agreement or offer to make that payment constitutes an activity contemplated in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); or
 - (ii) which constitutes a fine charged or penalty imposed as a result of an unlawful activity carried out in the Republic.”
- [emphasis added]

Chapter 2 of the PRECCA deals with offences in respect of corrupt activities, including the foreign bribery offence (section 5) and refers to the giving of a “gratification”. Gratification is broadly defined under the PRECCA, and includes bribes in the form of services or other intangible benefits. Thus, South Africa's tax law explicitly denies the deduction of bribes paid to foreign public officials in the context of international business transactions, as required under the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions.³⁶ In terms of claiming a deduction, section 82 of the Income Tax Act provides that the burden of proof that any amount is subject to deduction is upon the person claiming the deduction.

ib. Awareness, detection and reporting by tax authorities

li. Awareness and detection

The South African Revenue Service (SARS) provides yearly training to tax auditors on tax updates. Specific training was provided on introduction of the new section 23(o). Representatives of the SARS interviewed during the on-site visit specified that attention had been drawn specifically to the issue of foreign bribe payments. Indeed, these panellists were all well aware of the non-tax deductibility of bribe payments, and of its introduction in South African tax law in 2006.

On the other hand, South Africa has not taken any specific measures to draw the attention of the private sector to the non tax-deductibility of bribes. Representatives of

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The 2009 OECD Council Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions can be accessed at www.oecd.org/dataoecd/18/15/43188874.pdf.

the SARS indicated that an Explanatory Memorandum on the Revenues Law Amendment Bill 2005, which introduced the non tax-deductibility of bribes, was made public at the time of passing of the legislation. More generally, the information around legislation and other related matters are accessible on the various governmental website including the National Treasury, SARS, Government Communications and Information Systems, and are also published in the government gazette. In addition, all tax updates are also published on the website. SARS representatives indicated that the issue may also have been picked up by the accounting profession. Representatives of the accounting profession interviewed during the on-site visit did not, however, report on any such initiative. Nonetheless, representatives of large corporations interviewed during the on-site visit, as well as those of auditing firms and the accounting profession, appeared very well aware that bribe payments to foreign public officials were not tax deductible. As concerns small and medium size enterprises, given the perceived low level of awareness of the foreign bribery offence (see section (1) above on awareness), specific action from the SARS may be necessary to alert these companies to the fact that foreign bribery is illegal, and that such payments are therefore not tax-deductible.

In the context of the yearly tax training, audit training was also provided to auditors on identifying irregular or suspicious amounts that could amount to a bribe. As of the time of this report the OECD Bribery Awareness Handbook for Tax Examiners had not been circulated, although officials from the SARS indicated they were amenable to doing so. In order to detect suspicious payments, the SARS relies on computer tools to draw into the books and records of companies, as well as risk engines. The SARS's Large Business Centre Unit is in charge of auditing large South African companies (with turnover above ZAR 250 million), and has a specific division dealing specifically with international business transactions. In addition, the SARS's Business Intelligence Unit receives relevant suspicious activity reports transmitted by the Financial Intelligence Centre, South Africa's financial intelligence unit in charge of handling money laundering reports.

ii. Sharing of information with South African law enforcement authorities

Section 4 of the Income Tax Act 1962 contains general rules on the preservation of secrecy. However, the secrecy provisions under section 4(1B) may be overridden by an order of court or by a judge in chambers on application by the Commissioner. The type of information which may be disclosed is limited to information which may reveal evidence of an offence or where such information may be relevant to the investigation or prosecution of such an offence, and such offence is a serious offence in respect of which a court may impose a sentence of imprisonment exceeding five years (i.e. including foreign bribery offences).³⁷

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Under section 4(1B), the secrecy provisions contained in section 4 are not absolute and may be overridden by an order of court or by a judge in chambers on application by the Commissioner to disclose such information which may reveal evidence:

. In addition, section 34 of the PRECCA sets on persons of authority (including those in government departments) a duty to report to the SAPS suspected bribery offences (see section (a) above on general reporting procedures). Tax officials interviewed at the on-site visit indicated that, if the amount concerned was over ZAR 100 000, they would be able to report the matter directly to the police, but if the amount were lesser, they would have to rely on a court order, as provided under section 4(1B) of the Income Tax Act. This interpretation of the PRECCA reporting requirement by tax authorities is stricter than the actual obligation, which requires reporting of any PRECCA corruption offence (or suspected offence). In any event, representatives of the SARS were not aware of any reporting relating to a PRECCA offence in practice.

. Finally, section 71 of the Prevention of Organised Crime Act (POCA) provides for the possibility of overriding statutory secrecy imposed on the SARS, without the necessity of a court order.³⁸ South Africa explained that, consequently, if information from the SARS were sought with the purpose of confiscating or restraining property under the POCA in relation to criminal acts of foreign bribery, the evidence could also be used in the prosecution of the foreign bribery offence. Section 73 of POCA also allows for sharing of information with SARS, for offences committed in terms of POCA and offences listed in Schedule 1 of POCA, which include the foreign bribery legislation.

. For all other investigations, section 205 of the Criminal Procedure Act 1977 could be relied on. Under the CPA provision, a judge may, upon request of a prosecutor, require the attendance before him/her of any person likely to provide material or relevant information in relation to any alleged offence. South Africa explains that there is no impediment to relying on this general provision to access tax information. South African police and prosecutors interviewed during the on-site visit further reported that they did not generally encounter any difficulty in procuring tax information from the SARS in the course of criminal investigations.

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- that an offence, other than an offence in terms of the Income Tax Act or any other Act administered by the Commissioner or any offence in respect of which the Commissioner is a complainant has or may be committed
 - or where such information may be relevant to the investigation or prosecution of such offence, and such offence is a serious offence in respect of which a court may impose a sentence of imprisonment exceeding five years; or
 - of an imminent and serious public safety or environmental risk and where the public interest in the disclosure of the information outweighs any potential harm to the taxpayer concerned should such information be disclosed.

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Other Acts that provide for the possibility of overriding the South African Revenue Service's statutory secrecy are the Drugs and Drug Trafficking Act 1992 and the Financial Intelligence Centre Act 2001.

. iii. International exchange of information

. As regards exchange of information with tax authorities at the international level, the South African Revenue Service may only exchange information with a foreign tax authority if there is an exchange of information article in the tax treaty with the foreign country. South Africa indicates that, although there may be deviations in some of the treaties, it generally follows the wording of the exchange of information article of the Model Tax Convention on Income and on Capital of the OECD.

Commentary:

With regard to awareness raising and training within the SARS, the lead examiners recommend that South Africa remind the SARS of their obligation to report any suspected foreign bribery offence, regardless of the amount involved, to the SAPS, and encourage and facilitate such reporting. In addition, South Africa may want to consider circulating the Bribery Awareness Handbook for Tax Examiners, with a view to drawing the attention of tax examiners to the importance and the means of detecting foreign bribery through tax audits.

With regard to awareness raising in the private sector, the lead examiners recommend that South Africa take measures to alert South African companies, in particular small and medium size enterprises, to the fact that bribery of foreign public officials is illegal, and to the non tax-deductibility of such bribes.

. 5. Detection through accounting and auditing

. a. Awareness-raising efforts

. At the time of the on-site visit, the principal bodies that regulate the accounting and auditing professions in South Africa – namely, the Independent Regulatory Board for Auditors (IRBA), the South African Institute of Chartered Accountants (SAICA) and the Companies and Intellectual Property Registration Office (CIPRO), within the Department of Trade and Industry (DTI) ³⁹– had not produced any training materials, newsletters or other documents that specifically address foreign bribery, nor did they provide such information on their websites. The accounting and auditing profession has not engaged in any specific awareness-raising with regard to foreign bribery and the role of the accountants and auditors in the fight against this crime. However,, representatives of the auditing profession indicated that auditors had to sign affidavits certifying that they were aware of the legislation on anti money laundering at the time of its enactment; no such step has been taken thus far with regard to the bribery offence (domestic or foreign).

. Representatives of the accounting and auditing profession met on-site nevertheless expressed knowledge and awareness of the foreign bribery offence under

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A new Companies and Intellectual Property Commission (the Commission) was created by the Companies Act 2008 (Section 185) but was not yet in existence as of the time of this report. “The Commission must promote the reliability of [financial statements](#) by, among other things—a) monitoring patterns of compliance with, and contraventions of, [financial reporting standards](#); and b) making recommendations to the [Council](#) for amendments to [financial reporting standards](#), to secure better reliability and compliance.” (Section 187 of the Companies Act 2008)

the PRECCA. Representatives of the IRBA explained that their Institute, in cooperation with the SAICA, closely follow any new laws within the accounting and auditing domain, and that they keep their members aware of any such developments. They indicated that training, including “compliance sessions”, will be organised this year on new fundamental pieces of legislation (in particular on the new Companies Act 2008 described below, and which entry into force is expected on 1 July 2010), and that it could include specific modules on foreign bribery. This should be followed up.

1b. Accounting and auditing standards

The Convention and 2009 Recommendation both emphasise the importance of systems of accounting in the fight against foreign bribery. In particular, Article 8 of the Convention requires that within the framework of its laws regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, creating statements and records for the purpose of bribing foreign public officials or of hiding such bribery. In South Africa, the Companies Act 1973 contains provisions relating to the keeping of accounts. In 2006, recognizing the need for reform (as notably stressed by the World Bank in its 2003 assessment of “accounting and auditing practices in South Africa”⁴⁰), the South African authorities undertook a review of the Companies Law. The first stage of this reform was completed with the adoption of the Corporate Laws Amendment Act (the CLAA) that came into effect on 14 December 2007 and notably introduced more detailed provisions on account keeping. This Act also established the Financial Reporting Standards Council (the Council), charged with establishing financial reporting standards.⁴¹ Panellists indicated that, at the time of the on-site visit, this Council was not yet in existence and that the new Companies Act provides for its creation that, according to South Africa, should take place in July 2010.

The Securities Services Act 2004 includes additional regulations for companies listed on the South African Stock Exchange. A new Companies Act, No. 71 of 2008 (Companies Act 2008), was signed into law by the President on 9 April 2009 and is expected to enter into force on 1 July 2010. This law, which is aimed at overhauling the

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In its assessment the World Bank noted that the “lack of legal backing for accounting standards gives rise to problems. The existing mechanisms for enforcing compliance with accounting and auditing standards seem to be weak. Opportunities exist for undetected accounting manipulation and financial statements misrepresentation and departures from established accounting and auditing requirements”.

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See section 53 of the CLAA, which introduces a new Chapter XVB on Financial Reporting Standards in the Companies Act 1973, and notably new section 440P establishing the new Financial Reporting Standards Council.

current Companies Act 1973, notably addresses some legal framework deficiencies highlighted in a 2007 report from the United Nations Conference on Trade and Development (UNCTAD).

. According to South Africa, section 284 of the Companies Act, 2008 requires all companies to maintain accounting records to ensure fair representation of their state of affairs and business. This includes requirements that the company keep records showing assets and liabilities of the company; a register of fixed assets; records containing entries from day to day in sufficient details; records of goods sold or purchased; and statements of the annual stocktaking.⁴² In addition, public interest and widely-held companies⁴³ are expected to comply with the more stringent financial reporting standards⁴⁴: the SA GAAP issued by the Council in accordance with the International Financial Reporting Standards (IFRS) of the International Accounting Standards Board (IASB).⁴⁵ These companies notably have the obligation to produce consolidated accounts covering their subsidiaries.

. State owned enterprises that are registered as companies in terms of the 1973 Act and those that will be registered in terms of the 2008 Act will have to abide with stringent provisions of the Acts regarding corporate and financial governance. Moreover, the Public Finance Management Act (PFMA) 1999 sets out requirements regarding accounting norms for national and provincial government institutions and the entities under their control, including a number of state-owned or state-controlled companies. An Accounting Standards Board (ASB) has been established under Chapter XI of the PFMA, 1999, which sets accounting standards for the public sector, based on the International Public Sector Accounting Standards (IPSAS) issued by the International Federation of Accountants (IFAC). State-owned companies are also expected to comply with the IFRS, as underlined by auditors met during the on-site visit, and in the case of conflict with any requirements in terms of the PFMA, the latter prevails. Panellists indicated, in particular, that state-owned companies are not subject to the requirement to issue financial statements disclosing their material contingent liabilities. However,

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Section 284(1) of the Companies Act 1973.

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A company is regarded as a widely held company if its articles provide for an unrestricted transfer of its shares to the public.

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Section 285A(1) *ibid*, as introduced by section 36 of the CLAA.

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Section 440S *ibid*, as introduced by section 53 of the CLAA.

following the on-site visit, South Africa indicated that State owned Companies are required by the PFMA⁴⁶ to prepare financial statements according to GAAP or GRAP⁴⁷, underlining that these standards require disclosure of contingent liabilities.

Limited interest companies must comply with the accounting standards developed by the Council for limited interest companies, in consultation with representatives of such companies.⁴⁸ Smaller, non-listed companies are subject to a simplified, self-contained set of accounting principles: the “IFRS for Small and Medium-sized Entities” issued by the IASB in July 2009. A widely-held company that has not issued securities to the public and/or does not hold assets in a fiduciary capacity for a broad group of outsiders as one of its primary business, may apply the IFRS for SMEs. Alternatively, the company may choose to apply full South African Statements of GAAP or IFRS. As was confirmed by representatives of the regulatory bodies and professionals met during the on-site visit, the applicable standards do not permit off the book transactions or keeping off the book accounts, and prescribe requirements for disclosure of material contingent liabilities. In this regard, the lead examiners noted that the representatives of the profession hold the view that the new accounting standards are in line with existing international accounting standards.

At the time of the on-site visit, the SAICA was on the verge of releasing a new accounting standards framework for micro-enterprises, called the South African Generally Accepted Accounting Principles for non Public Entities (South African GAAP for NPEs) that is intended to simplify the accounting framework in the form of IFRS for SMEs that is too cumbersome for the smaller entities. This was presented in the press by a senior executive of SAICA as a highly innovative document identified by the International Federation of Accountants for its potential use in developing economies.

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PFMA, Section 55(2)(b)(ii): “The annual report and financial statements (...) must (...) (b) include particulars of (i) any material losses through criminal conduct and any irregular expenditure and fruitless and wasteful expenditure that occurred during the financial year; (ii) any criminal or disciplinary steps taken as consequence of such losses or irregular expenditure or fruitless and wasteful expenditure.”

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Generally Recognised Accounting Practice means an accounting practice complying in material respects with standards issued by the Accounting Standards Board (ASB).

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See section 285A(2) of the Companies Act 1973, as introduced by section 36 of the CLAA, and section 440S of the Companies Act 1973, as introduced by section 53 of the CLAA.

Given the role that micro-enterprises can play as intermediaries in the context of foreign bribery and the potential of dissemination of these new standards in the region, the lead examiners are of the view that their compliance with the requirements of the Convention and the 2009 Recommendation should be followed up.

1c. Internal controls, corporate codes of conduct and audit committees

. The 2009 Recommendation asks Working Group Members to encourage the development and adoption of adequate internal company controls and standards of conduct in companies (notably through the implementation of its Annex II “Good practice guidance on internal controls, ethics and compliance”). An effective internal controls system can enhance the quality of financial reporting and assist to minimise financial, operational and compliance risks. As such, they have a potential for enhancing firms’ capacity to internally detect and prevent fraud that can be related to foreign bribery. The 2009 Recommendation also asks Working Group Members to encourage the creation by companies of monitoring bodies independent of management, such as audit committees of boards of directors or of supervisory boards. In this regard, a firm’s bribery prevention strategy can potentially benefit from the presence of a focused and capable corporate monitoring body.

. The views of corporations and members of the accounting and auditing professions present at the on-site visit indicated that an increased number of South African companies (mostly large corporations) are adopting corporate codes of conduct. As discussed above under section B.1.b., the codes of conduct and related internal ethics policies presented by the panellists include express prohibitions of foreign bribery or caution against acts of bribery and corruption. However, they also indicated that the awareness efforts undertaken by these large companies may not be reflective of the wider situation in South Africa and in particular among SMEs.

. The panellists also explained that all of their companies conduct business through the use of intermediaries, and indicated that they have put in place due diligence mechanisms to ensure compliance with their internal controls and ethics policies by agents and other sub-contractors.

. The Companies Act 1973, as amended by the CLAA provides that “in every financial year in which a company is a widely held company, its board of directors shall appoint an audit committee for the following financial year” (section 269A(1)). The Companies Act 2008, which is expected to enter into force in July 2010, clarifies that the obligation to elect an audit committee applies to “a public company, state-owned enterprise or other company that has voluntarily determined to have an audit committee.” Provisions as to the independence of such committees are also included in the Act. Under Chapter 3, “Enhanced Accountability and Transparency”, the Act also provides for a number of internal control requirements that are mandatory for “Public companies and SOC’s Ltd” and can be followed on a voluntary basis by private companies. The Lead examiners are not aware of any more detailed provision that require non-state-owned enterprises to maintain a system of internal controls, not even for a publicly listed company.

. With regard to state-owned enterprises, in terms of the Public Finance Management Act 1999, entities in the public sector are required to set up internal audit, audit committees and other internal control measures. South Africa indicates⁴⁹ that sections 38(1)(a)(i) and 51(1)(a)(i) of the PFMA require accounting authorities of public entities to establish and maintain effective, efficient and transparent systems of financial and risk management and internal control notably to deter and detect fraudulent transactions. In terms of treasury regulation 27.1.10 (b), the audit committee must report on the effectiveness of internal controls in the annual report of the institution. Sections 38 and 51 of the Act also require accounting officers and accounting authorities to establish systems of internal audit under the control and direction of an audit committee. The PFMA also requires every public entity, including state-owned enterprises, to have internal audit under the supervision of the audit committee to assist the entity to, among others things, ensure that there exist effective and efficient systems of control that comply with the PFMA. The National Treasury developed an Internal Audit Framework and Risk Management Frameworks to provide a standard a set of guidelines for internal auditing and risk management in the public sector. South Africa underlines that these Frameworks were developed taking into account international best practices related to internal audit, and that risk management and intense training interventions on the Frameworks are being rolled out to internal audit and risk management officials in the public sector.

Id. External Auditing

. The 2009 Recommendation contains a series of recommendations concerning accounting requirements, independent external audit and internal company controls, the implementation of which are important to the overall effectiveness of the fight against bribery in international business.

.i. Auditing requirements

. Under section 286 of the Companies Act 1973, directors of all companies must present annual financial statements that fairly present the state of affairs of the company and its business. Section 286(2)(d) provides that such statements must include an auditor's report. Section 300 sets out the auditor's duties concerning annual financial statements. They include, under subsections (a) examining the annual financial statements; (b) satisfying himself that proper accounting records are kept; (f) obtaining all necessary information for the purpose of carrying out his duties; (g) satisfying himself that the company's financial statements are in accordance with its accounting records; (i) carrying out any other tests in respect of accounting records and auditing procedures as deemed necessary to satisfy himself that the financial statements fairly present the financial position of the company, or of the company and its subsidiaries; and generally

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See response to the general questionnaire, paragraph 160.

(l) complying with any other applicable requirements under the Auditing Profession Act 2005 (APA). However, following the on-site visit South Africa confirmed that these duties do not include a requirement for the auditor to test or report on internal controls. In South Africa, there is no requirement to report on internal controls, as is the case, for example in the United States in terms of the Sarbanes Oxley Act. South Africa adopted the International Standards on Auditing (ISA) issued by the International Auditing and Assurance Standard Board (IAASB) of the International Federation of Accountants (IFAC) on 1 January 2005. In terms of the ISA, the Auditor does not report on internal controls. Further audit requirements are provided in the relevant legislation governing a particular industry and are compulsory for all companies, listed and unlisted. The Close Corporations Act provides another vehicle through which an entity may trade (close corporation). These corporations are not subject to an external audit but must have an accounting officer (who may or may not be a Chartered Accountant) to issue an accounting officer's report which, *inter alia*, confirms that the financial statements are in agreement with the accounting records.

Representatives of the audit profession met during the on-site visit drew the attention of the lead examiners to a third type of review of companies' financial statements. They pointed to proposed new regulations that should implement the Companies Act, 2008 that are currently in the regulatory pipeline (Companies Regulations 2010, draft for public comment, 18 December 2009). These new regulations are likely to eliminate the need for statutory audit for non-public interest entities. It appears that less stringent rules would apply to these reviews (as opposed to audit applied under auditing standards) and that the qualifications of those entitled to carry out a review would also be less stringent than those of qualified auditors under current South African company law. According to representatives of the audit profession, this may undermine the quality of the assessment of internal controls made by external auditing, depending on the type and proportion of non-public interest enterprises which will be allowed to engage someone to do a review, as opposed to an audit. On the contrary, South Africa underlined that the introduction of these reviews will not compromise financial accountability or corporate governance and that the standards applicable to reviews will even improve financial accountability compared to what was the situation prior to this reform. As of the time of this report, a consultation process was still underway in order to determine the size threshold or criteria to be provided in the Companies Regulations.

In terms of the PFMA 1999, entities in the public sector are required to set up internal audit, audit committees and other internal control measures. These entities are subject to an external audit by the Auditor-General of South Africa. The Auditor-General has adopted the entire suite of auditing pronouncements issued by the International Auditing and Assurance Standards Board (IAASB) of the International Federation of Accountants (IFAC) for conducting audits. Each auditing standard includes a specific public sector perspective. These standards provide for consideration of fraud in the audit of financial statements (ISA 240) and reporting requirements on fraud and management integrity (ISA 260). The mandate of the Auditor-General includes reporting on significant non-compliance of legislation and any other aspects that come to his/her attention and which are considered to be in the public interest. These reports are subject to a quality

management process, carried out annually by the Public Accountants' and Auditors' Board, and are tabled in the relevant legislature (national, provincial or local) for political and public scrutiny. As of 30 April 2010, the percentage of registered companies (public, private and non-profit companies) audited by the Auditor General amounted to 0.03% (79 out of 249 996 Companies). As indicated above, only public companies are subject to an external audit by the Auditor General.

. ii. Independence

. With regard to independence, section 286, as amended by the CLAA in 2006, specifies that auditors must be appointed and be rotated after a certain period, e.g. after 5 years in the case of public interest companies. South Africa also refers to the APA that regulates the conduct of auditors in relation to the auditing of companies; for example, "which services are auditable by the auditor and which ones the same auditor cannot give an advice." The Code of Professional Conduct, published by the IRBA provides that "a practitioner should be free and be seen to be free from any influence, interest or relationship, whether direct or indirect, which might be regarded, whatever its actual effect, as incompatible with integrity, objectivity and independence" (article 6). The Code further lists a number of relatively detailed situations "which, because of the actual or apparent lack of independence, would give a reasonable observer grounds for doubting the practitioners' independence" (article 7). These standards and guidelines are seen as effective by the practitioners met during the on-site visit.

le. The duty to report foreign bribery

. While auditors are subject to certain reporting obligations under the South African anti money laundering legislation⁵⁰, they do not have specific obligations to report suspected acts of (domestic or foreign) bribery. Auditors met during the on-site visit referred to the International Standards of Auditing (ISA): ISA 240 on the auditor's responsibilities relating to fraud, and ISA 250 on the auditor's responsibilities relating to laws and regulations. They indicated using these standards to determine the red flags used to detect possible irregularities. However, these Standards do not require any reporting by auditors to regulatory and enforcement authorities unless required under domestic law.

. Notwithstanding the absence of specific obligations to report suspected acts of bribery in the South African legislation, auditors must report "reportable irregularities" to the Independent Regulatory Board for Auditors (IRBA), as provided under section 45 of the APA. In terms of section 1 of the Act, a "reportable irregularity" is "an unlawful act or omission committed by a person responsible for the management of the audited company, which (a) has caused or is likely to cause material financial loss to the entity or

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See section 29 of the Financial Intelligence Centre Act 2001.

to partners or shareholders; or (b) is fraudulent or amounts to theft; or (c) represents a material breach of any fiduciary duty.” According to the auditors met during the on-site visit, a foreign bribe payment would likely fall under item (b) of this definition of a “reportable irregularity.” Panellists specified that the amount of the irregularity would not need to be material in monetary terms and that it would be irrelevant to consider whether the irregularity has contributed to financial gain through, for instance, obtaining a public procurement contract.

During the on-site visit, representatives of the auditing profession explained that after sending a written report to the IRBA, the auditors then have 3 days to notify the members of the management board of the audited entity and 30 days to discuss the report with them, and then send another report to the IRBA to indicate whether the irregularity “is continuing.” The IRBA must as soon as possible after receipt of this second report notify any appropriate regulator in writing of the details of the reportable irregularity.⁵¹ Panellists also indicated that since April 2006, approximately 550 irregularities have been reported to the IRBA, most of which had taken place in medium size enterprises and five out of 10 complying before IRBA reports to the appropriate regulator, i.e. the revenue authorities or to the SAPS. After the on-site visit South Africa specified that a large percentage of irregularities are forwarded to the DTI as the irregularities are mostly committed at companies that are under the DTI’s jurisdiction. They further explained that this is the reason why the IRBA is uncomfortable with the removal of the audit requirements (as discussed above) for certain companies, as “it is only auditors who can report these irregularities”. However, panel members were not aware of examples of prosecutions of offences such as fraud, embezzlement or theft that were initiated by a report by an auditor of a suspicious transaction to the company management, a corporate monitoring body or the competent authorities.

In terms of section 52 of the APA, auditors are subject to a fine⁵² or imprisonment up to ten years, or both, if they fail to comply with their reporting obligations under section 45. However, panellists emphasised that the auditors do not benefit from any protection from legal action for making such reports. It was confirmed by representatives of the auditing profession and the regulatory bodies present at the on-site visit that it is rather the IRBA that has the responsibility of furthering reports to the appropriate

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Appropriate regulators are defined in the Auditing profession Act as “any national government department, registrar, regulator, agency, authority, centre, board or similar institution established, appointed, required or tasked to ensure compliance with any legislation, regulation or licence, rule, directive, notice or similar instrument issued in terms of or in compliance with any legislation or regulation, as appears to the regulatory Board to be appropriate in relation to the entity”.

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The amount of the fine is calculated in terms of the Administration of Justice Act. A fine up to ZAR 10 million can be imposed.

regulator. The lead examiners welcome the efforts made by the South African regulators to put in place such a reporting system. However, they are of the view that the 30 days delay between the first and second reports, and therefore before the IRBA “must notify any appropriate regulator.” does not seem appropriate in the case of reporting offences such as bribery that may require prompt action to preserve evidences. They are also concerned by the lack of protection of auditors against legal action.

Commentary

The lead examiners welcome the efforts undertaken by South Africa since 2003 to reform its Companies Act and align accounting standards applicable in South Africa with existing international accounting standards. However, the lead examiners recommend to follow up on the implementation of the new provisions of the Companies Act 2008, after its entry into force in July 2010.

They also recommend that South Africa:

- a) considers any appropriate increased role for business organisations and professional associations in the promotion of internal control development for small and medium size enterprises, in the event that the new regulations to implement the Companies Act 2008 eliminate the need for statutory audit for non-public interest entities.
- b) encourage South African companies to (i) further develop and adopt adequate internal controls, ethics and compliance programmes or measures, for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance in Annex II of the 2009 Recommendation; and (ii) make statements in their annual reports, or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those that contribute to preventing and detecting bribery [2009 Recommendation, Section X.C., and Annex II];
- c) consider extending (i) to additional companies, including all publicly traded companies, existing requirements to establish and maintain systems of internal controls; and (ii) to non-publicly traded companies, where appropriate, the requirement to establish corporate monitoring bodies, such as audit committees [2009 Recommendation, Section X.C.]; and
- d) in consultation with relevant professional associations: (i) take steps to encourage the detection and reporting of suspected bribery of foreign public officials by accountants and internal and external auditors, in particular through guidelines and training for these professionals and through raising the awareness of the management and supervisory boards of the companies about these issues; and (ii) ensure that auditors reporting suspected acts of foreign bribery to the law enforcement or regulatory authorities, reasonably and in good faith, are protected from legal action.

6. Detection through anti-money laundering systems

An effective system designed to detect and deter money laundering may uncover underlying predicate offences such as foreign bribery. In South Africa, money laundering is criminalised pursuant to the Prevention of Organised Crime Act 1998 (POCA) (see section B.6. below concerning the money laundering offence and its enforcement, which finds South Africa in compliance with Article 7 of the Anti-Bribery Convention). In addition, the Financial Intelligence Centre Act 2001 (FICA) established the Financial Intelligence Centre (the Centre), as South Africa's Financial Intelligence Unit under the Ministry of Finance.

South Africa is a member of the Financial Action Task Force (FATF) and of the Eastern and Southern Africa Anti-Money Laundering Group. In February 2009, the FATF adopted its *Mutual Evaluation Report on Anti-Money Laundering and the Financing of Terrorism in South Africa*. South Africa's anti-money laundering system is extensively described therein.⁵³

la. Suspicious transactions reporting

The obligation to report suspicious and unusual transactions to the Centre is established in section 29 of the FICA, and is extremely broad. Pursuant thereto “a person who carries on a business or is in charge of or manages a business or who is employed by a business” is required to report to the Centre the grounds for the knowledge or suspicion that a transaction involves the proceeds of “unlawful activities”, as well as prescribed particulars concerning the transaction or transactions in question. Section 29(3) includes a prohibition in respect of tipping off.

South Africa's suspicious transaction reporting regime is also broad in terms of situational bases on which to report. Section 29(1) of the FICA provides for the reporting to the Centre of information that the business has received or is about to receive the proceeds of unlawful activities; of a transaction or series of transactions to which the business is a party and which facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities, or has no apparent business or lawful purpose; or that the business has been used or is about to be used in any way for money laundering purposes. Section 29 does not provide for a monetary threshold as a condition to file a suspicious transaction report (STR); therefore, STRs need to be filed regardless of the amount involved. The Centre's 2008-2009 Annual Report indicates that approximately 23 000 STRs were received between 2008 and 2009, 81 per cent of which emanated from the banking sector.⁵⁴

“Accountable institutions” are subject to additional obligations. Under Schedule 1 to the FICA, such bodies include various financial institutions, as well as attorneys, and persons providing investment advice or investment brokering services, including public accountants where they carry on such a business. Section 21 requires accountable institutions to identify clients. They are also required to keep records of business relationships and transactions, and provide information about clients and persons acting on behalf of clients to the Financial Intelligence Centre.⁵⁵ Pursuant to section 28 of the

See the FATF 2009 [Mutual Evaluation Report on Anti-Money Laundering and the Financing of Terrorism in South Africa](#).

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See the Financial Intelligence Centre's [2008-2009 Annual Report](#) at page 32.

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Sections 22 and 27 of the FICA.

FICA, accountable institutions and reporting institutions⁵⁶ must report cash transactions above the prescribed limit to the Centre.

The FATF identified certain gaps in South Africa's system for monitoring transactions. In particular, the 2009 FATF Report points out that the FICA does not contain a provision which expressly requires financial institutions to pay special attention to transactions based on complexity, size or unusual patterns, or to give special attention to business relationships and transactions with persons from or in countries which do not or insufficiently apply the FATF Recommendations.

Failure to comply with any of the reporting obligations under the FICA carries a fine not exceeding ZAR 10 million (EUR 1 million; USD 1.3 million) or imprisonment for a period not exceeding 15 years. Sanctions in respect of breaches of the FICA have been applied only in one case (*S. v. Maddock*). Some administrative sanctions are available to regulators of the reporting institutions, such as the Registrar of Banks or the Financial Services Board, but they are not directly applicable for anti-money laundering violations, and can generally only be applied if those anti-money laundering deficiencies rise to the level of undesirable business practices, safety and soundness issues, or fit and proper criteria. Thus, the 2009 FATF Mutual Evaluation Report raised concerns that currently available sanctions for breach of money laundering reporting obligations were not sufficiently effective and proportionate nature. The Financial Intelligence Centre Amendment Act, adopted in 2009, and which the Centre anticipates will come into effect mid-2010, is expected to address these deficiencies.⁵⁷

1b. Resources, awareness, and training

According to the 2009 FATF Mutual Evaluation Report, the Centre is a well structured, funded, and staffed FIU that is functioning effectively. The Centre became a member of the Egmont Group of Financial Intelligence Units in 2003, and has access to a wide range of financial, administrative and law enforcement information to enhance its ability to analyse STRs.

In terms of internal training, all staff of the Centre is provided with an annual training budget to develop new skills or enhance existing ones. Staff attends courses, including through the Justice College. The foreign bribery issue is included in training, as part of a broader anti-corruption package.

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Under Schedule 3 to the FICA, reporting institutions are persons dealing in motor vehicles, as well as persons dealing in South African Rands.

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See the FATF Report at paragraphs 639-646.

The Centre has also stepped up efforts to better communicate with reporting institutions. In 2009, a Tactical Research and Typology Analysis Section was set up to undertake tactical research on topical issues in the public arena or prevailing crimes in the law enforcement areas of operation. Two typologies were highlighted on possible movements of proceeds of crime, and money laundering by abusing insurance products.⁵⁸ The issue of foreign bribery (or even corruption more broadly) as a predicate offence to money laundering has not been the subject of any specific communication to reporting institutions. In particular, representatives of the Centre pointed out that there were not enough corruption cases at this point in South Africa to extract a typology.

lc. Exchange of information

The Centre provides regular feedback to its reporting institutions. To this end, the Centre has established a liaison mechanism whereby the Compliance and Prevent and the Monitoring and Analysis Departments regularly meet with the major accountable institutions to share information and perspectives on money laundering matters. To respond to concerns expressed by the FATF, the Centre now includes in these meetings sanitised feedback on reports made to the Centre and subsequent actions, sanitised case studies with the purpose of identifying money laundering indicators and the modus operandi employed, as well as feedback on cases where the STRs added value to criminal investigations.⁵⁹

As concerns interaction with South African law enforcement authorities, during the 2008/2009 period, the Centre passed on 1221 analysed reports to law enforcement agencies, as well as other supervisory bodies, or foreign counterparts.⁶⁰ The Centre's contact point in the SAPS is the Commercial Crime Unit. Representatives of the Centre interviewed at the on-site visit reported that they also receive good feedback from the police in general. As noted above, and as also outlined below (see section B.6. on the money laundering offence), the number of investigations for money laundering offences remains however fairly low, with only 64 investigations into money laundering offences, and only 16 convictions.

Commentary:

The lead examiners recommend that South Africa ensure that the institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Financial Intelligence Centre

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See the Financial Intelligence Centre's 2008-2009 Annual Report at page 36.

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See *ibid* at page 36.

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See *ibid* at page 34.

itself, receive appropriate directives and training on the identification and reporting of information that could be linked to foreign bribery.

· B. INVESTIGATION, PROSECUTION AND SANCTIONING OF FOREIGN BRIBERY

· 1. Investigation and prosecution

· a. Law enforcement authorities: Structure and independence

· i. South African Police Service (SAPS)

The South African Police Service (SAPS) is the primary agency responsible for the investigation of crime, including the bribery of foreign public officials. South Africa's law enforcement was recently re-structured following the disbandment of the Directorate for Special Operations (DSO), and the establishment of the Directorate for Priority Crime Investigation (DPCI) within the SAPS. The DSO was established in 2000 and was responsible for both the investigation and prosecution of crime, and had shared competence over the offences listed under Chapter 2 of the PRECCA, including foreign bribery. However, the National Prosecuting Act 1998 (Act No. 32 of 1998) (NPA Act) was amended in 2008 to the effect that the DSO was disbanded. At the same time, an amendment was made to the South African Police Service Act 1995 (SAPS Act) to establish the DPCI. Accordingly, the investigative capacity once held by the DSO within the NPA now lies with the DPCI within the SAPS, and no prosecutors are placed within the DPCI. Section 17F(4) of the amended SAPS Act provides that the National Director must ensure that a dedicated component of prosecutors is available to assist and co-operate with members of the DPCI in conducting its investigations. South African authorities confirm that this has been undertaken and that dedicated prosecutors have been placed in all prosecutor offices.

A government Memorandum on the objectives for amending the SAPS Act sets out a number of reasons for the disbandment of the DSO and the establishment of the DPCI. In this regard, a formal Commission of Inquiry was undertaken that looked into issues such as the lack of coordination between the DSO and SAPS, the lack of oversight over the DSO, and operations conducted by the DSO outside of its mandate.⁶¹

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Memorandum on the Objects of the South African Police Service Amendment Bill 2008, para. 1.2.

The Memorandum also highlighted the need to address organised crime in a more comprehensive fashion.⁶² During the on-site visit, South African officials further explained that the establishment of the DPCI and the disbandment of the DSO also stemmed from the controversy that surrounded the DSO since its inception, whereby concerns were raised about the level of involvement by prosecutors into investigations, and the loss of objectivity of prosecutors leading investigations. A policy decision was therefore taken on the part of the government to transfer this investigative component of the NPA to the SAPS.

. The structure of the DPCI is comprised of:⁶³

- The Head of the Directorate, who is Deputy National Commissioner appointed by the
 - Minister of Police in concurrence with Cabinet;
- Persons appointed by the National Commissioner of Police on the recommendation of the
 - Head of the Directorate on the basis of the required level of experience, training, skills, competence or knowledge;
- Legal officers appointed to the new Directorate; and
- Officials from any Government department or institution, seconded to the new Directorate.

. Section 17B of the amended SAPS Act sets out the need to establish the DPCI “to prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption.” The DPCI’s function is to investigate national priority offences, which in the opinion of the Head of the Directorate need to be addressed by the DPCI, and any other offence or category of offences referred to it from time to time by the National Commissioner, subject to any policy guidelines issued by the Ministerial Committee.⁶⁴ The amendment to the SAPS Act also includes a new schedule of offences that fall under the competence of the DPCI, and expressly includes “any offence contemplated under Chapter 2 and section 34 of the Prevention and Combating of Corrupt Activities Act 2004.”⁶⁵ Following the on-site visit,

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Ibid., para. 1.4.

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SAPS Amendment Act (Act No. 57 of 2008), section 17C.

64

SAPS Amendment Act (Act No. 57 of 2008), section 17D.

65

Ibid., section 16(2).

South Africa clarified that the Ministerial Guidelines do not prioritise certain crimes over others. Some of the civil society and private sector panellists expressed the view that the investigation of corruption offences does not appear to be a priority in South Africa, and that focus tends to be placed on violent crimes. South Africa, authorities do not share this view. The SAPS considers the investigation of all crimes as serious. In respect of the matter at hand, specific divisions of the DPCI, the Commercial Crime and Organised Crime Units, have been set up to specifically investigate corruption cases. According to South Africa, this would also include foreign bribery cases. Furthermore, South African authorities point to the Strategic Plan of the NPA, which recognises “specialised prosecution” as a focus area. This newly created capacity aims to focus on crimes against women and children, environmental crimes, corruption in government, corruption of foreign public officials, specialised tax offences, and competition law.

. Section 17B of the amended SAPS Act requires *inter alia* that the DPCI has the necessary independence to perform its functions and that it is staffed through the transfer, appointment or secondment of personnel whose integrity is beyond reproach. The head of the DPCI reports to the National Commissioner of the National Police Service, who is appointed by the President. A Ministerial Committee, which is to include at least the Ministers of Safety and Security, Finance, Home Affairs, Intelligence and Justice, oversees the functioning of the DPCI.⁶⁶ Section 17K of the Act also provides for Parliamentary oversight over the DPCI and the committees. Members of the DPCI may complain to a retired Judge if such a member can provide evidence of any improper influence or interference whether of a political or other nature exerted upon him/her regarding the conducting of an investigation.⁶⁷ The retired Judge shall report the outcome of such investigation to the Minister, and report annually to Parliament on the performance of his or her functions.⁶⁸ South African law enforcement officials participating in the on-site visit stated that nothing has occurred in practice to raise concerns regarding the autonomy and independence of the DPCI, and that they have conducted a number of high profile investigations and arrests of political figures.

. Regarding training and resources, the DPCI is comprised of 2,079 staff members (excluding support staff). According to officials representing the DPCI during the on-site visit, any of these staff members could take up a foreign bribery investigation at any time. However, the lead examiners question this position in practice, given foreign bribery investigations demand a specialised skill set, and there is no specialised unit or

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Ibid., section 17I.

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Ibid., section 17L.

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Ibid., sections 17L (6) and 17L(9).

set of investigators within the DPCI specifically focusing on foreign bribery investigations. South Africa indicated in the responses to the Phase 2 Questionnaire that the current training programme for specialised units within the SAPS consist of class-based courses, the content of which is specific to their relevant mandates. While training programmes have been provided on the conducting of corruption investigations, including financial investigations and all the provisions under the PRECCA, including section 5, there has not been any training apart from this specifically focusing on the foreign bribery offence and the specificities of investigations into this type of offence. Subsequent to the on-site visit, South African authorities indicated that in May 2010, they introduced training programmes specifically on foreign bribery to over 200 members of the prosecution authority. The need for such specialised training and resources for the investigation of foreign bribery was raised by some of the panellists during the on-site visit. In particular, representatives from the private sector noted that the lack of police specialisation on this offence may be linked with the absence of reporting under section 34 of the PRECCA (see para. 47 of this Report for further details). South African authorities point out that, since the entry into force of section 34 of the PRECCA in July 2005, no reports on alleged foreign bribery have been made, and that, should any such report arise, it would be duly evaluated and forwarded for investigation if necessary.

. In the Phase 1 Report of South Africa, the Working Group expressed serious concern over the disbandment of the DSO, and that it would monitor the situation further to ensure that the effective enforcement of the foreign bribery offence is not affected by the rearrangement of law enforcement responsibilities. South African law enforcement officials informed the lead examiners during the on-site visit that the majority of former DSO special investigators (77 per cent) opted to transfer to the SAPS. South Africa also indicated in the responses to the Phase 2 Supplementary Questionnaire that all DSO investigations pending at the date of the disbandment of the DSO have been transferred to the DPCI, and that no investigations have been dropped as a result of the transfer. However, it should also be noted that the intake of new cases over this transition period dropped significantly. Given that it is still relatively early since the DPCI has become operational, and that South Africa has only very recently opened four preliminary investigations of cases of foreign bribery, the effect of this rearrangement of law enforcement on the investigation of foreign bribery is something that should continue to be closely monitored and followed-up upon. As discussed further in Section v. below, the lead examiners are concerned about the interaction between investigators and prosecutors and whether they will be effectively coordinating and working together from the beginning of a foreign bribery case. South African officials indicated they are satisfied that their respective functions and working relationships are effective.

. ii. *Inspector General for Intelligence*

. Under the Intelligence Control Act 1994 (Act No. 40 of 1994), the Inspector-General for the Intelligence Services may also receive and investigate complaints, including for the corruption offences under the PRECCA. It was confirmed during the on-site visit that complaints received by the Inspector-General would normally be referred directly to the SAPS. The President appoints the Inspector-General of Intelligence, who

is nominated by a Parliamentary Committee (Joint Standing Committee on Intelligence) and approved by the National Assembly by a resolution supported by at least two thirds of its members. The Inspector-General is accountable to the Parliamentary Committee for the overall functioning of his/her office, and reports on activities and performance of functions to the Committee at least once a year.

. iii. *National Prosecuting Authority*

. The National Prosecuting Authority of South Africa (NPA), established under Section 179 of the Constitution and further regulated under the National Prosecuting Authority Act 1998 (NPA Act), is the centralised prosecuting authority. Its functions and duties are to institute and conduct criminal proceedings on behalf of the State, and to carry out any necessary functions incidental to instituting such criminal proceedings.

. Section 179(4) of the South African Constitution provides that the prosecuting authority must exercise its function without “fear, favour or prejudice.” Section 32(1)(a) of the NPA Act further specifies that a member of the prosecution must serve “impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.” This obligation has been developed by case law, notably in *State v Yengeni*,⁶⁹ where the Court held that “the Constitution guarantees the professional independence of the National Director of Public Prosecutions and every member of its staff, with the obvious aim of ensuring their freedom from any interference in their functions from the powerful, the well-connected, the rich and the peddlers of political influence... The independence of the judiciary... depends on the independence of... the National Director of Public Prosecutions.”

. Section 179(1) of the Constitution provides that the NPA is headed by the National Director of Public Prosecutions (NDPP) who is appointed by the President, without formal consultation (like ministers, but unlike judges). The NPA Act provides that the NDPP be a “fit and proper person, with due regard to his or her experience, conscientiousness and integrity.”⁷⁰ The NDPP is responsible for determining, with the Minister of Justice, and after consultation with the Directors of Public Prosecution, the prosecution policy which must be observed in the prosecution process. Section 179 (5) (c-d) provides that “the NDPP may intervene in the prosecution process when policy directives are not complied with”, and also “may review a decision to prosecute or not to prosecute”. Section 179(6) of the Constitution grants to the Minister of Justice (a political cabinet post) “final responsibility over the prosecution authority”. The issue of safeguards

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State v Yengeni 2001 (1) SACR 405.

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National Prosecuting Authority Act, section 9(1)(b).

to prosecutorial independence is discussed further in section c.i. below on discretion to prosecute.

As in the SAPS, there is no dedicated team of prosecutors within the NPA specifically dealing with foreign bribery cases, and in addition to the need for specialisation within the SAPS, the need for such prosecutorial specialisation was also raised by a cross-section of panellists during the on-site visit. Some of the panellists referred to this lack of specialisation and training as being a contributory factor to the overall low conviction rate in South Africa, which private sector and civil society panellists estimate at being around 15 percent. Following the on-site visit, South African authorities indicated a very different figure and that the conviction rate for the court system in all District, Regional and High Courts amounted to 88.6 percent for the 2009/2010 financial year. South African authorities suggested that the 15 percent figure may have been calculated on the basis of all reported crimes. South Africa pointed out that there is a well established working relationship between the SAPS and the NPA, with investigating officers and prosecutors working as a team to investigate and prosecute cases. South Africa further specified, following the on-site visit, that, with regard to foreign bribery, the Commercial Crime Components of the various DPP offices in the NPA have the specific mandate of dealing with the “apex commercial crime cases”, which would generally include foreign bribery cases. The lead examiners underline the importance of specialisation within both organisations, as well as their ability to work together effectively in light of the establishment of the DPCI. The complexity of foreign bribery cases, the need for obtaining evidence from foreign counterparts and the need to work with foreign law enforcement, are some of the reasons why specialisation is important and required for effective foreign bribery investigations.

During the discussions of the on-site visit, mention was made of a Specialised Commercial Crime Unit (SCCU) within the NPA. Further research on the SCCU indicates that it is comprised of specialist prosecutors focusing on the prosecution of complex commercial crime cases emanating from the commercial branches of the SAPS, which appear to predominantly focus on white collar crime, including fraud, embezzlement, and statutory offences associated with the establishment and running of businesses.⁷¹ The mandate of the Commercial Crime Unit, which was provided to the evaluation team after the on-site visit, specifically indicates that complex cases under the PRECCA fall under the responsibility of this branch of the NPA. The investigation and prosecution process of the SCCU is driven through a combined prosecutor and investigator approach.⁷² These cases are prosecuted in designated Special Commercial Crime Courts (SCCC). The

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Antony Albeker, “The Specialised Commercial Crime Court” in Justice Through Specialisation? The Case of the Specialised Commercial Crime Court, Monograph No. 76, Institute of Security Studies, January 2003.

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See generally: www.info.gov.za/aboutgovt/justice/npa.htm#specialisedcomm

impact of the establishment of such a specialised unit and courts has been significant, with a conviction rate of 94 per cent.⁷³ It has also been noted that SCCCs save time, resources and build capacity. Cases are mainly obtained through the Commercial Branch of the SAPS, which, according to South Africa's responses to the Phase 2 Questionnaire and information provided during the on-site visit, now appears to be situated within the DPCI. Following the on-site visit, South African authorities indicated that the adjudication of cases relating to the bribery of foreign public officials will take place in the SCCC, but that there is also a proposal that all foreign bribery cases must be prosecuted in the High Courts. The NDPP is also considering a proposal whereby all foreign bribery cases would be prosecuted in the High Courts. (See also discussion of the SCCCs under paragraph 14 of the Introduction to this Report, and under section 4.a. below.)

With regard to training, the Justice College of South Africa provides training programmes for prosecutors that have included programmes on MLA, corruption, fraud, organised crime, and extradition. Specifically, the Justice College presented six, five-day workshops on corruption and fraud in 2009-2010 to approximately 240 prosecutors, dealing notably with section 5 of the PRECCA (the foreign bribery offence), also in conjunction with section 332 of the Criminal Procedure Act (on liability of legal persons). As addressed in section B.1.a. of this Report, the NDPP has also issued a circular on the Convention and South Africa's participation in the OECD Working Group on Bribery in International Business Transactions to all prosecutors, chief prosecutors and directors of public prosecutions. Section 5.5 of the Circular encourages every Director of Public Prosecutions to develop training and awareness programmes on the Convention within his or her area of jurisdiction. However, it was confirmed during the on-site visit that no specific training on the foreign bribery offence has followed from this Circular. The need for specialised training on the provisions of the foreign bribery offence is particularly important, not only because of the complexity of the crime, but to also ensure prosecutors are made aware of the specific exceptions under PRECCA to established legal rules and principles; for example, those pertaining to the exercise of jurisdiction. In May 2010, South Africa indicated that it had taken due note of this, and that discussions with the Justice College had already been initiated to address these aspects.

iv. The Judiciary

An overview of the South African judicial structure is provided in the Introduction of this Report. The judges participating in the discussions during the on-site visit were all aware of the foreign bribery offence under the PRECCA; however, no specific training on the foreign bribery offence under the PRECCA has been provided to the judiciary. The Justice College provides training to district and regional court magistrates and has provided training on corruption as a general offence under section 3 of the PRECCA to the judiciary of some regional courts. Training for the judiciary also takes place through

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See www.pmg.org.za/files/docs/080521sccu.ppt.

conferences and peer training among magistrates. The enactment of a Judicial Education Institute Bill⁷⁴ is currently being considered by Parliament, which is envisioned to provide a more comprehensive approach to judicial training and education.

· v. *Law enforcement coordination*

· Section 17F of the amended SAPS Act expressly provides for a multi-disciplinary approach to be undertaken by the DPCI. In this regard, the National Commissioner may request the secondment of personnel from any other Government department or institution whenever the Head of the DPCI makes such a request. The DPCI may also be assisted in the performance of its functions by personnel seconded by relevant government departments, including the South African Revenue Service, the Financial Intelligence Centre and the Department of Home Affairs. Section 17F also states that the NDPP must ensure that a dedicated component of prosecutors is available to assist and cooperate with members of the DPCI in conducting its investigations.

· The amended SAPS Act also provides for coordination between the DPCI and other law enforcement agencies at the Cabinet and departmental level. As outlined above, the President has designated a Ministerial Committee that oversees the running of the DPCI and the relevant government departments and institutions. The Act also provides for an Operational Committee consisting of the National Commissioner of Police, the Head of the DPCI, the NDPP, the Directors-General of Finance, Justice and Constitutional Development, Intelligence and Home Affairs, the Commissioner of the South African Revenue Services, the Head of the Financial Intelligence Centre, and such other persons the Operational Committee may require.⁷⁵ The purpose of the Operational Committee is to review, monitor and facilitate the support and assistance of the respective Government departments or institutions to the DPCI, as well as secondments to the Directorate.

· Subsequent to the on-site visit, South African authorities indicated that a Memorandum of Understanding (MOU) has been concluded between the DPCI and NPA, which sets out:

- The nature, scope and limits of the more particular functions which may properly be performed in the dedicated component of prosecutors assisting and cooperating with members of the DPCI in conducting its investigations;
- What practical arrangements will be made to facilitate the performance of these functions;

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See the [South African Judicial Education Institute Bill](#).

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SAPS Act, section 17J.

· Whether and in what circumstances prosecutors in this dedicated component are to make prosecution decisions and conduct prosecutions.

· This MOU is expected to result in a cross-pollination of training between the DPCI and the NPA.

· As revealed at the on-site visit, the lead examiners are concerned that there is a lack of coordination and oversight to ensure that the SAPS and the NPA are working together closely coordinating from the investigation to the prosecution stages of foreign bribery cases. As any foreign bribery investigations in South Africa are at a very preliminary stage, it remains to be seen how such coordination will unfold in practice between the SAPS, in charge of initiating investigations, and the NPA, where prosecutorial expertise lies. Officials interviewed during the on-site visit reported good cooperation between the police and prosecution authorities, and that police and prosecutors consult, and work closely together from the early stages of an investigation. The example of the close working relationship between the Commercial Branch within the SAPS and the Special Commercial Crimes Unit within the NPA was provided with regard to the investigation and prosecution of complex economic crimes. The SAPS further referred to the Operational Committee, established under section 17J of the SAPS Act, which notably comprises the SAPS, the NDPP, and the Department of Justice and Constitutional Development. This Committee's function, however, is not to coordinate the handling of cases, but to "review, monitor and facilitate the support and assistance of the respective Government departments or institutions to the DPCI." The lead examiners nevertheless remain concerned about the level of interaction between investigators and prosecutors and the need for oversight, and that the cooperation demonstrated between such personnel, such as it existed under the DSO, has not been lost with the re-structuring of law enforcement. This issue should continue to be monitored.

Commentary:

While the lead examiners take note of the recent restructuring of law enforcement in South Africa and the subsequent period of transition, they remain concerned that the existing resources dedicated to the investigation and prosecution of foreign bribery, including at the level of training, are insufficient for the adequate detection, investigation and prosecution of foreign bribery offences. Thus, they recommend that South Africa ensure that sufficient resources are made available, and that specialised training be provided to relevant law enforcement authorities for the effective detection, investigation and prosecution of foreign bribery.

The lead examiners consider that the existence of specialised investigative and prosecutorial personnel is critical to foreign bribery prosecutions, and they welcome the legislative framework in place to promote coordination among law enforcement authorities. However, given the complexity of foreign bribery, and the intricate corporate structures potentially involved, the lead examiners recommend that South Africa develop specialised investigators and prosecutors to deal with foreign bribery offences. South Africa should also ensure that the police and prosecutors are working together effectively. The lead examiners consider that this issue should continue to be monitored.

lb. The conduct of investigations

li Commencement of proceedings

During the on-site visit, the SAPS confirmed that a police investigation into a foreign bribery offence could be initiated (i) where the matter is formally reported to the SAPS as a criminal complaint, (ii) where the matter is reported under section 34 of the PRECCA, or (iii) on the basis of a report received by the Public Service Commission.⁷⁶ In the cases of (ii) and (iii), evidence would need to be obtained to open a criminal case docket. Cases can also be referred to the SAPS for investigation by the NPA.

In the Phase 1 analysis, it was also indicated that the SAPS may open an investigation on its own initiative on the basis, for example, of substantiated media reports.⁷⁷ Following the on-site visit, lead examiners were provided with further information on the designated office within the SAPS that monitors media reports regarding allegations of corruption. In this regard, the Counter Intelligence Desk and the Financial and Cyber Crime Intelligence Centre within the Crime Intelligence Division of the SAPS monitor media publications for information on allegations of crime, and gathers intelligence to substantiate the allegations. Once a criminal case or offence is detected, the matter will then be referred to the DPCI for further investigation. However, in practice thus far, media allegations of foreign bribery have not served as a basis for opening an investigation; the lead examiners are concerned that despite the existence of such publicly available allegations concerning the foreign bribery cases now under preliminary allegations, neither the SAPS nor the NPA took the initiative to look into these allegations at an earlier stage.

Reasonable suspicion is required for an investigation to be initiated. The SAPS can close an investigation only in consultation with prosecutors. South African authorities indicate that the law provides that if there is new evidence in relation to a case, it can still be brought before the courts. In relation to Article 6 of the Convention which requires that any statute of limitations with respect to bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution”, section 18 of the CPA states that the right to institute a prosecution for corruption lapses after the expiration

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As discussed in section B.2.a. of this Report, the Public Service Commission manages the National Anti-Corruption Hotline, to which the general public may also report suspected corruption, including foreign bribery offences.

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South Africa: Phase 1, Review of Implementation of the Convention and 1997 Revised Recommendation, approved by the OECD Working Group on Bribery in International Business Transactions on 20 June, 2008.

period of 20 years from the time when the offence was committed.⁷⁸ In the responses to the Phase 2 Questionnaire, South Africa also made reference to the Constitutionally-guaranteed right to be tried within a reasonable time.⁷⁹ South African officials elaborated on this during the on-site visit and explained that the determination of “reasonable time” will be based on the concept of “reasonableness” and take into account the nature, facts and circumstances of the case.

Cases involving the bribery of foreign public officials

At the time of the on-site visit, South African officials confirmed that four cases of bribery of foreign public officials have been opened and are under preliminary investigation. Two cases were opened in December 2009, and the other two cases were opened in February 2010. However, media reports disclosing details of bribery of foreign public officials by South African companies, including those now under preliminary investigation, surfaced in at least mid-2008. In this regard, the lead examiners noted that these preliminary investigations were opened within the three months preceding the on-site visit. This raises concern over the lack of proactive efforts by South African authorities in the investigation of foreign bribery, particularly given the aggravating factors connected with these cases; the South African companies now under preliminary investigation operate in sensitive sectors and industries, and the allegations of foreign bribery in each case took place in high risk geographic locations. As of the time of this report, no formal criminal charges had been formulated.

The lead examiners were informed of the preliminary steps taken in the conduct of the preliminary investigations by the South African law enforcement authorities, which also raise concern in terms of proactivity. In a number of cases, no investigative measures have been taken beyond requesting information from INTERPOL, nor have measures been taken to further investigate matters while waiting for a response from INTERPOL. In one particularly high profile case alleging foreign bribery by a South African state-owned company operating in India, South African authorities informed the lead examiners that a preliminary investigation had not been opened because of a pending civil proceeding. However, it was confirmed during the on-site visit that the general rule in South Africa is that a criminal investigation cannot be interrupted by civil proceedings. Furthermore, an incoming MLA request from the Indian authorities received on this particular case, and which could have provided useful information for the South African investigation, did not trigger further enquiries into the acts of this company.

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Certain types of offences, as listed under section 18(a) to (g) of the CPA, and including treason, genocide, as well as other very serious crimes, have a longer statute of limitations.

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Constitution of South Africa, Section 25(3).

The lead examiners are seriously concerned by this lack of progress and proactivity in investigating foreign bribery allegations. Furthermore, the delay in commencing any form of investigation could well be detrimental to the prospect of a successful investigation and prosecution, since it provides the companies in question with the opportunity to destroy evidence. Such delays also limit the opportunity to gather evidence by covert means during a period of continuing offending.

Commentary:

Despite recent steps taken by South African law enforcement authorities concerning allegations of foreign bribery by South African companies, the lead examiners remain seriously concerned by the lack of progress in this regard, given the publicly available information about allegations of bribery by South African companies, and recommend that South Africa take all necessary measures to ensure that foreign bribery allegations are promptly and proactively detected, investigated and prosecuted as appropriate.

The lead examiners also recommend that South Africa monitor and evaluate on an on-going basis the performance of law enforcement authorities with regard to foreign bribery allegations, and in particular, decisions made on whether to open or close an investigation, and that this should be followed-up by the Working Group.

ii. Investigative techniques

General and special investigative techniques

General search and seizure powers are contained in the Criminal Procedure Act 1977 (Act No. 51 of 1977) (CPA) which are provided by means of a warrant issued by a judicial officer,⁸⁰ and under section 13 South African Police Service Act 1995 (Act No. 68 of 1995) (SAPS Act). Chapter 2 of the CPA provides for the application and granting of search warrants, seizure, forfeiture and disposal of property connected with any offence. Section 20 covers the seizure of any article which is “concerned or on reasonable grounds is believed to be concerned in the commission or suspected commission of an offence in the Republic of elsewhere; which may afford evidence of the commission or suspected commission of an offence, whether within the Republic of elsewhere; or which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.”⁸¹ As noted in the Phase 1 analysis of South Africa, this provision can also be relied upon to seize the bribe payment in situations where the bribe is still in the hands of the briber or, at least, on South African territory. The CPA also provides for exceptions where a search and seizure may take place without a warrant.⁸²

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Criminal Procedure Act (Act No. 51 of 1977), Chapter 2, sections 20, 21.

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Ibid., Chapter 2, section 20(a), (b), (c).

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Ibid., Chapter 2, section 22.

South Africa states in the responses to the Phase 2 Questionnaire that the state has the same powers for investigating an offence in relation to a legal person as it does in relation to a natural person.

Special investigative techniques are also available under the CPA, the Regulation of Interception of Communications and Provision of Communication-Related Information Act 2002 (Act No. 70 of 2002) (RICA), and the National Strategic Intelligence Act 1994 (Act no. 29 of 1994) (NSIA). Special investigative techniques can be used in any criminal investigation, including for foreign bribery, where conventional investigative techniques would not deliver successful results. Investigators may utilise such techniques as controlled deliveries, undercover operations and electronic surveillance, depending on the circumstances of the crime and the activities of the perpetrators. More specifically, section 252(a) of the CPA makes provision for the conducting of sting and undercover operations; RICA makes provision for the interception of certain communications, the monitoring of certain signals and radio frequency spectrums, and the provision of certain communication-related information, and; the NSIA regulates, *inter alia*, the gathering of crime intelligence by overt and covert means. South African law enforcement officials confirmed during the on-site visit that they have the requisite logistical capacity to employ such special investigative techniques.

One of the panellists during the on-site visit noted that South Africa has some of the most advanced special investigative techniques, but that implementation, awareness and training on the proper application of these techniques has been poor. In this regard, it was noted that the improper use of such techniques has given rise to constitutional challenges. As the provisions within the RICA allow for infringements of the constitutionally protected right to privacy⁸³, a balancing test must be applied to determine that the limitation of this right is reasonable and justifiable in an open and democratic society.⁸⁴

Bank secrecy

South Africa indicated in the responses to the Phase 2 Questionnaire that the search and seizure provisions under section 20 of the CPA cover information that is subject to confidentiality arrangements, such as transaction records, customer identification information, account files, business correspondence and any other records

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Constitution of South Africa, Section 36.

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Factors that must be taken into account include: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and the purpose; and (e) consideration of less restrictive means to achieve the purpose.

pertaining to a customer which a financial institution may hold. South African law enforcement officials confirmed during the on-site visit that they do not have difficulty accessing banking and related financial information in the conduct of an investigation.

Witness protection

Witness protection is provided under the Witness Protection Act 1998 (Act No. 112 of 1998) (WPA). The WPA does not place a restriction on the type of offences that may justify witness protection, and could therefore protect witnesses in the context of foreign bribery proceedings. Section 7 of the WPA provides that a witness “who has reason to believe that his or her safety or the safety of any related person is or may be threatened by any person or group or class of persons, whether known to him or her or not, by reason of his or her being a witness” may make an application for protection to law enforcement officials or other designated bodies under the Act.⁸⁵ The WPA also makes provision for, *inter alia*, the establishment of a designated Office for the Protection of Witnesses; the functions, powers and duties of the Director for Witness Protection; the temporary protection of witnesses pending placement under protection; the placement of witnesses and related persons under protection; services related to the protection of witnesses and related persons, and; witness services at courts.

Commentary:

The lead examiners welcome the broad range of investigative measures available to investigative authorities in the context of foreign bribery investigations. They urge the law enforcement authorities to make full use of these techniques to effectively investigate suspicions of foreign bribery. In order to do this, they recommend that South Africa ensure that all relevant personnel are fully aware of and continue to receive adequate training on these important techniques.

lc. Principles of prosecution

li. Prosecutorial discretion to initiate, conduct or discontinue proceedings exercised under the control and direction of the National Director

The NPA Act vests the prosecuting authority with the discretion to make any decision regarding the criminal process, including decisions whether or not to institute, or to discontinue proceedings.⁸⁶ Various provisions in the South African Constitution and in the NPA Act are aimed at guaranteeing the independent exercise of prosecutorial discretion⁸⁷. The Act grants the power to institute, carry out and discontinue criminal

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Witness Protection Act (Act No. 112 of 1998), section 7.

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Section 20 of the NPA Act.

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proceedings to any Deputy National Director and any Director “subject to the control and directions of the National Director” and any prosecutor “to the extent that he has been authorised thereto in writing by the National Director.” The prosecutors met on-site explained that, in practice, such decisions are taken by the Directors of public prosecution and the prosecutors, although the National Director is entitled to review it.

. The Prosecution Policy Directives⁸⁸, issued by the National Director⁸⁹ to all prosecutors, also provide some direction, and prescribe that “*once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.*” [Emphasis added]. Factors to be taken into account when considering the public interest are further discussed below. According to the prosecutors met on-site, these Directives implement the Prosecutorial Policy approved by Parliament which sets out the general policy orientations.

. Once enrolled, a case may only be withdrawn on “*compelling grounds*”, as specified in the Prosecution Policy Directives. South Africa compares these “*compelling grounds*” to the “*substantial and compelling circumstances*” referred to in several South African Acts. The Courts have considered in their decisions that “*substantial and compelling circumstances*” would be constituted if, for instance, the evidence available is such that there is no longer a reasonable prospect of a successful prosecution.⁹⁰ Accountability for decisions to open or not open prosecutions, and the termination of cases, is provided in the NPA Act.⁹¹ Specific offences also exist in relation to any actual or attempted interference with this independence⁹².

See for instance, Section 179(4) of the Constitution and section 32(1)(a) of the NPA Act.

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The current version was issued in 1997. Revised Policy Directives are under consideration according to Prosecutors and Representatives from the Ministry of Justice.

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Pursuant to section 21(1) of the NPA Act.

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For further details on relevant case law, see the Responses at 5.1.18.

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Section 32 (1) (b) of the NPA Act.

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Section 41 (1) of the NPA Act.

Prosecutors also have the possibility to enter into plea bargaining with an accused in a criminal trial, as indicated in South Africa's responses to the general questionnaire,⁹³ and further discussed in subsection below.

ii. Considerations such as national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved

Article 5 of the Convention requires that "the investigation and prosecution of the bribery of a foreign public official [...] 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."

South Africa's legislation does not foresee the possibility of an investigation or prosecution being influenced by factors relating to the national economic interest, the potential effect upon relations with another state or the identity of the natural or legal person involved. However, with regard to prosecutions, South Africa explains that public interest is an essential factor to be taken into account by prosecutors in their decisions whether or not to prosecute, as provided in the Prosecution Policy Directives. In this respect, the Directives specify that, "*when considering whether or not it will be in the public interest to prosecute, prosecutors must consider all relevant factors, including "the nature and seriousness of the offence", and, notably, "the economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public"* [emphasis added].⁹⁴ This factor is one among several, and the Directives also state that "*the relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.*" In Phase 1, South Africa pointed out that the reference to "*the economic impact of the offence*" should be read in context as one of the factors relevant when considering "*the nature and seriousness of the offence*", and that this factor of economic impact would only be considered as an aggravating factor, where corruption has a detrimental effect on the economy of the country.

As noted in Phase 1, while this may be true in the context of a domestic bribery offence, which would clearly undermine the economy of South Africa, it is quite possible that a foreign bribery investigation could have a negative economic impact in South Africa, where the economic situation of an important South African company could be at risk. This reference to "*the economic impact of the offence on the community*" raised serious concern in Phase 1 that the prosecution of a foreign bribery offence in South Africa could be influenced by considerations of national economic interest, contrary to

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See reply to question 5.1 in the general questionnaire.

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See the Responses at 5.2.2.

prescriptions under Article 5 of the Convention.⁹⁵In Phase 1, South Africa indicated to the WGB its intention to carry out the necessary clarifications.⁹⁶ A Circular (attached to South Africa's responses to the Phase 2 supplementary questionnaire), which was approved by the Acting National Director prior to the on-site visit, specifies that "The Director of Public Prosecutions concerned or a Deputy Director of Public Prosecutions (...) may not take the economic impact of the offence on the community into account, unless such economic impact may constitute an aggravating circumstance." The lead examiners believe that the Circular is an important first step, and welcome the information provided by the NPA representatives during the on-site visit that a review of the Prosecution Policy Directives has been undertaken, which will notably clarify that the economic impact of the offence shall not be taken into account by prosecutors in their decision to initiate (or not) a prosecution. The lead examiners believe that this clarification needs to be done without delay, as the current Circular does not carry the same legal weight as the Prosecution Policy Directives. As of the time of this report, the NPA indicated that the reference to the economic impact had been deleted from the draft revised Prosecution Policy Directive and that they were in the process of obtaining the Minister's approval.

As expressed by the Working Group on Bribery in previous evaluations of countries Party to the Anti-Bribery Convention, extraneous political and economic factors can affect foreign bribery cases if a prosecutor is not sufficiently protected from external pressure and influence. It is important to note that the evaluation team was not presented at the on-site visit with information of undue political interference in the handling of foreign bribery cases in South Africa. The South African Constitution explicitly provides that "national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice." Under section 179(1) of the Constitution the "National Director of Public Prosecutions (NDPP), [...] is the head of the prosecuting authority, and is appointed by the President"⁹⁷, without any requirement for formal consultation (i.e. like ministers, and unlike judges, for instance). Section 9 of the NPA Act specifies the qualifications for appointment of the NDPP.⁹⁸ The President also has power to remove

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Article 5 of the Convention states that:

Investigation and prosecution of the bribery of a foreign public official [...] 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.

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See paragraph 171 of the Phase 1 Report of South Africa.

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Section 179(1) of the Constitution.

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the NDPP with approval from Parliament.⁹⁹ Furthermore, the Minister of Justice “must exercise final responsibility over the prosecuting authority.”^{100 101} With regard to the nomination and dismissal of the NDPP, the evaluation team noted that civil society and the media had raised concerns in 2007 regarding the dismissal of the then NDPP by the former President, reportedly due to “an irretrievable break down in the working relationship between the Minister of Justice and Constitutional Development and the NDPP.”¹⁰² The Ginwala Commission,¹⁰³ which was charged with assessing the NDPP’s fitness to hold office, found that the NDPP was “a fit and proper person”. Nevertheless, this dismissal was confirmed by the President, as well as Parliament, on the ground that insufficient regard had been paid by the NDPP to national security matters. The NDPP challenged this decision before the courts, and ultimately reached an out-of-court settlement. The evaluation team further noted that the nomination of the current NDPP¹⁰⁴

Section 9 of the NPA Act provides that :

- (1) Any person to be appointed as National Director, Deputy National Director or Director must
- (a) possess legal qualifications that would entitle him or her to practise in all courts in the Republic; and
 - (b) be a fit and proper person, with due regard to his or her experience, conscientiousness and integrity, to be entrusted with the responsibilities of the office concerned.
- (2) Any person to be appointed as the National Director must be a South African citizen.

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Section 12(6) of the NPA Act.

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Section 179(6) of the Constitution.

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See also *State v. Yengeni* referred to in paragraph 116 of this Report.

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See for instance, [BBC News, 28 September 2007](#), [Politicsweb, 8 October 2007](#), and [Mail & Guardian, 8 December 2008](#).

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Frene Ginwala, a former speaker of the National Assembly, was appointed on 28 September 2007 to head the inquiry into the NDPP’s suspension under section 12(6) of the NPA Act.

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attracted serious criticism in the media and by civil society and the opposition, including alleged interference in the previous NPA law enforcement decision-making.¹⁰⁵ This matter is being challenged before the courts.

Under the Constitution, the NDPP “may review a decision to prosecute or not to prosecute”,¹⁰⁶ which allows the NDPP to revisit such a decision. There is no requirement in the law to publicly disclose the reasons for such a decision. Nevertheless, it seems to be common practice for the NDPP to issue press statements, at least in high profile cases. For example, in 2009, the NDPP decided to drop all charges against a very high level public official, as well as a co-accused arms company, in relation to a well-publicised, multi-billion dollar arms deal. In a public statement, the NDPP explained that the case was dropped because of an abuse of process in the prosecution, which violated the accused’s constitutional guarantees.¹⁰⁷ A March 2010 NDPP decision to abandon a preservation order in the context of an investigation concerning the same multi-billion dollar arms deal was also accompanied by a press statement from the NDPP (see also section 4.b. below on confiscation).¹⁰⁸ Under the Promotion of Administrative Justice Act, there is no possibility for judicial review of such decisions,¹⁰⁹ although, as stated by the Constitutional Court in 2007 in *Masethla vs President of South Africa*, appeals on the legality are possible (“the power to dismiss may not be exercised in bad faith, arbitrarily

The nomination of the current NDPP was announced on 25 November 2009.

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See for instance the [November 2009 Press statement from the Centre for Constitutional Rights \(F W DE Clerk Foundation\)](#), [Mail & Guardian, 26 November 2009](#), [The Times, 29 November 2009](#), [News 24](#).

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Section 179(5) of the Constitution.

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See the [Statement of the NDPP](#) of 6 April 2009.

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See the [Statement of the NDPP](#) of 19 March 2010.

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The Promotion of Administrative Justice Act regulates the review of the Government’s administrative action by the courts. Section 1 defines the Government’s “administrative action” subject to review by the courts. Section 1(ff) excludes from this definition, any “decision to institute or continue a prosecution”.

or irrationally”).¹¹⁰ The South African authorities also informed the evaluation team that the NDPP is subject to the Prosecution Policy Directives, which set out considerations to be taken into account in the prosecution process, including in the exercise of the NDPP’s power to review prosecutorial decisions. Therefore, if the Directives are clarified to ensure that Article 5 considerations are not to be taken into account, the NDPP will be bound by these. The evaluation team noted that the above-mentioned decisions to discontinue prosecutions in relation to prominent domestic bribery cases raised questions from civil society and the media, both nationally and abroad, about possible political influence over prosecutorial decisions. These concerns are addressed in the two Statements by the NDPP, which indicate that, in respect of the 2009 decision, abuse of process was the reason for terminating the prosecution, and that, with respect to the 2010 decision, there was insufficient evidence of criminal conduct. The NDPP further stated that “this decision does not mean that the NPA will not consider information on this matter again. The decision only affects the issue of the preservation order.”¹¹¹ South Africa further confirmed that this investigation is still ongoing. The evaluation team notes that, as of the time of this report, no South African public official has been prosecuted in this widely reported arms deal case.

The lead examiners noted that academia, civil society and the media have raised questions regarding the independent exercise of prosecutorial powers.¹¹² When discussing issues of prosecutorial independence in respect of the above mentioned instances, one prosecutor interviewed during the on-site visit suggested that a solution may be to put in place a collective decision making process, in lieu and place of the role currently played by the NDPP. Other prosecutors repeatedly stressed that they were not subject to political influence, and that they were appropriately independent. South African representatives after the on-site visit reiterated their firm belief that their system has adequate checks and balances to ensure prosecutorial independence.

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The Constitutional Court held in *Masethla vs President of South Africa* (CCT 01/2007) at paragraph 23:

“[23] However, it observed, this did not mean that the President’s decision is beyond the reach of judicial review on any basis. The decision of the President to dismiss must conform to the principle of legality. Therefore, the power to dismiss may not be exercised in bad faith, arbitrarily or irrationally.”

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See the [Statement of the NDPP](#) of 19 March 2010, last paragraph.

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See for instance Horn, N., “[The Independence of the Prosecutorial Authority of South Africa and Namibia: A Comparative Study](#)”, Nico Horn (Dean, Faculty of Law, University of Namibia), Windhoek, MacMillan Namibia, 2008.

. iii. *Out-of-court settlement of cases*

South Africa provides for a procedure for a plea-bargaining under section 105A of the Criminal Procedure Act. This provision states that “a prosecutor authorized thereto in writing by the National Director of Public prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement (...).” The prosecution and defence can reach a settlement through which the defendant pleads guilty to a certain offence, normally accompanied by a mutual agreement on the corresponding sentence. A plea-bargain must be approved by the court and be affirmed as a judgment. During the on-site visit, prosecutors indicated that while many of these plea arrangements are rejected by the Courts every day -- because the sentence reached is deemed too light or not in the interest of justice by the judges -- some are also accepted. Once rejected, it cannot be re-submitted, and the sentence may either be altered by the parties to such sentence as the presiding officer deem fit or the proceedings must resume their normal course of action. On the other hand, lawyers, prosecutors and judges explained that there is a significant opportunity for them to review such settlements in chambers before they are formally submitted and that with more training and expertise such settlements may be more successfully used to effectively resolve cases without having to go to trial.

Section 105A (11) (b) (iv) of the CPA provides that the NDPP must ensure that comprehensive records and statistics are kept of these agreements and that these should be submitted to Parliament at least once a year. According to South Africa, no cases have been reported where this procedure was applied to foreign or domestic bribery cases under the PRECCA. However evidently an example of plea bargaining was provided by South Africa in relation to the *Shaik case*¹¹³ where the State withdrew all the charges against the French Director of a Company on the basis of an undertaking given in exchange for information provided to the prosecution. There is no distinction between plea bargaining and witness cooperation in the South African legal system where the State chooses to follow the same formal process with a cooperating accused who decides to plead guilty¹¹⁴. Another plea bargaining agreement was reached in 2003

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S v Shaik and Others 2007(1) SACR 142 D.

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South Africa explains that Plea bargaining is a formal process the requirements of which are found in section 105A. The State may also follow this formal process with a cooperating accused should he decide to plead guilty - therefore, in this sense, there is no difference. Should the informal process (the cooperating accused pleads guilty, pleads for leniency based on his cooperation and confirmed by the prosecutor) be followed there is no guarantee that the judge/magistrate will impose the sentence proposed by the prosecutor. Where the prosecutor withdraws the charges against the cooperating accused and uses him as a so-called section 204 witness, he will not be prosecuted if the court discharges him from prosecution because he has testified frankly and honestly.

between the Prosecution and a former Chief Whip in the Parliament on charges of corruption in connection with a controversial public procurement scandal involving a multi-billion dollar arms deal, which was largely reported in the press.¹¹⁵ After the on-site visit, the South African Authorities provided statistics on the plea bargains reached in 2009 in respect to corruption cases. These statistics show that the NPA entered into such agreements in ten corruption cases for sentences comprising between 6 months to 5 years imprisonment¹¹⁶ and ZAR 2000 to 20 000 in fines. The South African authorities do not keep statistics as to the number of convictions reached by courts for corruption cases that would allow to put these figures into perspective but they stressed that authorization to enter into plea agreements have been limited.

In its responses to the Phase 2 Questionnaire, South Africa indicates that the National Director envisages issuing new Prosecution Policy Directives relating to plea bargaining and provides for the most important features of the directives.¹¹⁷ It notably clarifies that “the established principle, in terms of which a prosecutor has discretion to decide whether or not to consider accepting a plea of guilty on the main charge, alternative charge or competent verdict, still applies” and that the specific authorisation from the National Director or the relevant Director is required to proceed.” Information provided after the on-site visit shows that the amended Policy Directives further clarify that only a Director of Public Prosecution may authorize a plea agreement in respect of foreign bribery cases. As of the time of this report, a final draft had been submitted to the NDPP for consideration.

The Director / Special Director / Deputy Director of Public Prosecutions may authorise a plea and sentence agreement where there is a deviation from any prescribed minimum sentence. South Africa did not provide information in this regard in the above-mentioned statistics. The lead examiners are of the view that this will need to be followed-up.

Commentary:

The lead examiners welcome South Africa’s announcement that the Prosecution Policy Directives for prosecutors are in the process of being clarified, and encourage South Africa to proceed promptly with these

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See for instance [BBC News World Edition](#), 13 February 2003.

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South Africa indicates that in 33% of all plea agreements, the sentences involved direct imprisonment and a further 9 % involved correctional supervision.

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Phase 2 question 6.4

modifications to ensure that all Article 5 considerations are respected in foreign bribery cases.

The prosecutorial independence is afforded an explicit constitutional guarantee, which has been confirmed by case law. However, the lead examiners have noted that the NDPP, who is nominated by the head of the executive without any requirement for formal consultation, has the power to review the decision to prosecute or not to prosecute in all cases. The lead examiners believe that South Africa should consider strengthening safeguards to ensure that the exercise of investigative and prosecutorial powers, in particular, for the foreign bribery offence, is not to 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, as prohibited under Article 5 of the Anti-Bribery Convention, including with regard to decisions made by the NDPP and other prosecutors of the NPA.

The lead examiners also recommend that South Africa:

- (a) Take all necessary measures to ensure that foreign bribery allegations are proactively and promptly detected, investigated and prosecuted as appropriate;
- (b) Monitor and evaluate on an on-going basis the performance of law enforcement authorities, including the SAP, the NPA, and other relevant agencies, with regard to foreign bribery allegations, and in particular with regard to decisions not to open or to discontinue investigations and, as appropriate prosecution; and
- (c) Ensure (i) that when plea bargaining is used, it is an effective mechanism for the enforcement of the foreign bribery offence; and (ii) that prosecutors receive adequate training and resources to improve its effectiveness.

Id. Jurisdiction

li. Territorial jurisdiction for offences committed by persons that are not South African nationals or residents

Article 4(1) of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.” Commentary 25 to the Convention clarifies that “the territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required.”

In South Africa, section 35(2) of the PRECCA provides for territorial jurisdiction but only for offences committed by persons who are not South African nationals or residents. Section 35(2) provides that “any act alleged to constitute an offence under this Act and which is committed outside of the Republic shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to also have been committed in the Republic if that (a) act affects or is intended to affect a public body, a business or any other person in the Republic (b) person is found to be in South Africa; and (c) person is for one or other reason not extradited by South Africa or if there is no application to extradite that person.” Acts constituting an offence under the

PRECCA that are perpetrated by a citizen or a resident in South Africa are covered by nationality jurisdiction under section 35 (1) of the PRECCA, as discussed below.

IPrinciples governing the application of territorial jurisdiction

Neither the PRECCA nor the CPA contain provisions relating to the application of territorial jurisdiction [emphasis added]. However, during the on-site visit, panellists referred to a Constitutional Court decision *S v Basson* (hereinafter *Basson*¹¹⁸) as the leading case to interpret jurisdiction issues. After the onsite visit, NPA representatives further provided a written analysis [herein under the NPA's note] which emphasised the same principle set out in *Basson*, that “[South African] Courts have declined to exercise jurisdiction over persons who commit crimes in other countries” and that there are only a few “very specific exceptions” to this general rule. Trans-national crime is one of these exceptions as notably reflected in section 35(2) of the PRECCA.

As to the type of territorial link that would be necessary to enable South Africa to exercise its territorial jurisdiction, it was explained in Phase 1 that, where the only part of the bribery offence that took place in South Africa was a telephone call or e-mail regarding the payment of the bribe, such situations would be covered, as they would constitute an “offer to give any gratification...” However, during the on-site visit, panellists referred to the criteria set out in the Canadian Case *Libman v. the Queen*¹¹⁹ and on which the South African Constitutional Court agreed in *Basson*¹²⁰, i.e. that “a significant portion of the offence” has to take place on the territory and that a “real and substantial link” need to be established between the offence and this country. These requirements appear to imply a more extensive physical connection than indicated in Phase 1, which may restrict in practice the application of South African territorial jurisdiction.

In *Basson*, the Constitutional Court Decision¹²¹ set out another criterion for the application of territorial jurisdiction, which is the requirement for “harmful consequences within the territory of the State which imposes the punishment”¹²². Given that the

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Constitutional Court decision *S v Basson* 2005 (12) BCLR 1192 (CC) [226]

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Libman v the Queen [1985] 2 S.C.R. 178

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Constitutional Court decision *S v Basson* 2005 (12) BCLR 1192 (CC) [226]

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Constitutional Court decision *S v Basson* 2005 (12) BCLR 1192 (CC) [229]

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consequences of a bribe might be the obtaining of large contracts by South African companies, it is not clear whether the offence of foreign bribery would be considered as inducing “harmful consequences” within South Africa. This general criterion may have been transcribed to some extent into section 35 (2) (a) of the PRECCA with the requirement that the act “affects or is intended to affect a public body, a business or any person in the Republic.” However, during the on-site visit, panellists explained that this would cover either a prejudice or a benefit. The situation where the act of foreign bribery is committed entirely abroad, but the benefits returned to a person in South Africa, would therefore appear to be covered. In the absence of case law, this aspect of territorial jurisdiction will need to be followed up.

The lead examiners are of the view that section 35(2) of the PRECCA seems to afford the South African Courts fairly broad territorial jurisdiction over both natural and legal persons. However, the fact that territorial jurisdiction over acts committed abroad is a relatively recent exception¹²³ in the South African legal tradition coupled with the recurrent references to the *Basson* case¹²⁴ and its fairly restrictive criteria, arguably may raise questions on the interpretation and application in practice of section 35(2) of the PRECCA. The lead examiners suggest monitoring this issue as case law develops to ensure that such jurisdiction can be asserted in practice in foreign bribery cases.

Acts of preparation or complicity

Another important practical issue for territorial jurisdiction is its application to acts of preparation or complicity in an offence otherwise committed abroad. While South Africa has nationality jurisdiction, territorial jurisdiction over acts of complicity would still be important where a non-citizen or foreign company is instigating bribery from South Africa but is not otherwise involved in the commission of the offence. Territorial jurisdiction would therefore be important for instance (i) to prosecute the non-citizen accomplice; but also (ii) to avoid that South Africa be used by foreign companies or

The Constitutional Court indicated that “We agree with the comment by Lord Diplock in *Treacy v Director of Public Prosecutions*: 195 “[T]he rules of international comity...do not call for more than that each sovereign State should refrain from punishing persons for their conduct within the territory of another sovereign State where that conduct has had no harmful consequences within the territory of the State which imposes the punishment.”

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According to South Africa, a similar specific exception was also introduced in 2004 in their anti-terrorism legislation.

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Constitutional Court decision *S v Basson* 2005 (12) BCLR 1192 (CC)

citizens as a territory from where preparation or complicity in an act of bribery (itself committed in a third country) may be perpetrated with no risk of prosecution. South Africa explain that the person whose act or omission (in South Africa) constitutes an attempt (provided it is a consummate act as opposed to a preparatory act) or who conspires with others (in or outside SA) or incites another person or is an accessory to the commission of bribery of a foreign official could be convicted of attempt, conspiracy, incitement or as an accessory to the crime. While section 35 (1) does not seem to cover these types of acts on their own as it specifically targets acts that “occurred outside the Republic”, section 35(4) provides that “(W)here a person is charged with conspiracy or incitement to commit an offence or as an accessory after the offence, the offence is deemed to have been committed not only at the place where the act was committed, but also at every place where the conspirator, inciter or accessory acted or, in case of an omission, should have acted.” This appears to provide South Africa with a fairly broad jurisdiction (both territorial and nationality) over attempt, conspiracy or incitement -- although the preparatory acts per se are not covered.

. ii. *Nationality jurisdiction*

. Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official.” Section 35(1) of the PRECCA establishes the extra-territorial jurisdiction of South African courts for offences under the PRECCA, “regardless of whether or not the act constitutes an offence at the place of its commission [...] if the person to be charged (a) is a citizen of the Republic; (b) is ordinarily resident in the Republic;(c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;(d) is a company, incorporated or registered as such under any law, in the Republic; or (e) any body of persons, corporate or unincorporated, in the Republic.”

. Nationality jurisdiction applies to South African citizens as well as residents of South Africa. The Phase 1 analysis concluded that overall, the provisions in section 35(1) seem to afford the South African Courts fairly broad nationality jurisdiction over foreign bribery offences (as well as other domestic bribery offences). No formal preconditions that might constitute an impediment to effective prosecution were mentioned by panellists for the exercise of nationality jurisdiction. In particular, while dual criminality is listed as a precondition in *Basson*¹²⁵ it is expressly excluded in section 35(1) of the PRECCA. From a general standpoint, concerns raised above about the fact that jurisdiction over acts committed abroad is a relatively recent exception in the South African legal tradition coupled with the recurrent references to the *Basson* case¹²⁶ and its

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Constitutional Court decision *S v Basson* 2005 (12) BCLR 1192 (CC) [237]

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fairly restrictive criteria (in particular as regards the dual criminality requirement) may also be relevant to nationality jurisdiction to a certain extent and may arguably raise questions on the interpretation and application in practice of section 35(1) of the PRECCA. This will need to be followed up as practice develops.

. iii. Legal persons and jurisdiction

. As regards territorial jurisdiction, given the lack of practice, the South African authorities and panellists met on-site were not in a position to establish under which circumstances territorial jurisdiction would apply to foreign legal persons that commit foreign bribery in their or in third territories. (see discussion in subsection above).

. As regards nationality jurisdiction, Section 35(1) of the PRECCA provides an express statutory basis to assume that nationality jurisdiction will apply to legal persons. Prosecutors seemed rather confident that they would be able to apply nationality jurisdiction to legal persons although no supporting example was available at the time of the onsite visit. For this purpose the company needs to be “incorporated or registered as such under any law, in the Republic.”

. Nationality jurisdiction is particularly relevant to the acts of foreign subsidiaries and whether the South African authorities could take action against a parent company in South Africa where one of its foreign subsidiaries bribed a foreign public official for the direct or indirect benefit of a South African company. However, the extent to which South Africa may exercise nationality jurisdiction over a parent company in South Africa for the acts of bribery committed by an intermediary abroad, such as a subsidiary acting on its behalf, will need to be determined as case law develops. The substantive law on legal persons determines whose actions matter for purposes of jurisdiction and is further discussed below in the subsection on the liability of legal persons (See section 3. A. i.).

. iv. Consultation procedures

. Article 4.3 of the Convention requires that when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution. It was noted in Phase 1 that South Africa does not currently have specific procedures in relation to the foreign bribery offence for the purpose of consulting with other Parties to the Convention, where South Africa and another country Party may have concurrent jurisdiction over a foreign bribery offence. It was confirmed during the onsite visit that South Africa would deal with the issue of co-operation on an ad hoc basis.

v. Review of basis of jurisdiction

As indicated in Phase 1, given that the legislation on nationality jurisdiction only came into force in 2004, South Africa considers it needs more time, as well as the development of case law, to fully evaluate whether the current basis for jurisdiction is effective in the fight against foreign bribery in practice.

Commentary:

The lead examiners recommend that:

(a) given that jurisdiction over acts committed abroad is a recent exception in the South African legal tradition, South Africa take steps to ensure that law enforcement authorities and the judiciary are aware of the full range of jurisdiction possible under section 35 of the PRECCA, in particular as regards legal persons;

(b) the Working Group follow up as case law develops on the application of territorial and nationality jurisdiction concerning offences committed in whole or in part abroad, to ensure that the South African authorities can take action against legal persons for bribery of foreign public officials, whether the bribery is committed directly or through intermediaries (including related legal persons such as foreign subsidiaries).

le. Statute of limitations

Article 6 of the OECD Anti-Bribery Convention requires that statutes of limitations applicable to the foreign bribery offence shall allow for an adequate period of time for the investigation and prosecution of this offence.

Section 18 of the Criminal Procedure Act (CPA) provides that the right to institute a prosecution for any offence lapses after the expiration of a period of 20 years from the time when the offence was committed. While there are no limits set by the law on the duration of investigations or prosecutions, the South African authorities pointed out that the courts would protect the accused's right to have a trial "begin and conclude without unreasonable delay", as enshrined in section 35(3) of the South African Constitution. South African prosecutors further explained that courts have not set specific investigation times, but rather that the particular circumstances of each case would be taken into account. In particular, where certain offences, such as foreign bribery, are involved, which may, for instance, require reliance on mutual legal assistance, this would be a factor considered by the courts.

lf. Mutual legal assistance and extradition

Articles 9 and 10 of the Anti-Bribery Convention address the issues of mutual legal assistance and extradition, two key processes in the context of foreign bribery investigations and prosecutions.

li. Mutual legal assistance

Article 9 of the Convention requires countries to provide prompt and effective legal assistance to other Parties to the Convention for the purpose of foreign bribery investigations and proceedings.

South Africa indicates that it provides mutual legal assistance (MLA) in criminal matters on the basis of bilateral or multilateral treaties. In addition, the International Cooperation in Criminal Matters Act (ICCMA) provides a basis for providing mutual legal assistance, including with countries with which South Africa does not have a treaty. The Director General in the Department of Justice and Constitutional Development serves as South Africa's Central Authority for all matters pertaining to MLA and extradition.

In terms of section 7 relating to incoming requests, the Director-General shall satisfy himself that (i) proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; (ii) there are reasonable grounds for believing that an offence has been committed in the requesting State, or the evidence is necessary to determine whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State,¹²⁷ after which the request will be submitted to the Minister of Justice for approval.¹²⁸ The ICCMA does not include provisions regulating the discretionary power of the Minister when considering an MLA request. Under the ICCMA, dual criminality is not a pre-requisite for the rendering of MLA.

The Act does not regulate the coercive and non-coercive measures which may or may not be undertaken in response to an MLA request, but this is supplemented by other domestic legislation relating to criminal investigations. South Africa indicates that bank secrecy is never a ground for refusing MLA, neither in the ICCMA, nor in treaties with other countries. However, section 9(2) of the ICCMA allows witnesses to claim a privilege where the person would be entitled to such a privilege under the law of the requesting State. The question was therefore raised as to whether, where the requesting state allows bank secrecy, a defendant may claim a similar privilege in respect of an MLA request to access banking information. South Africa indicated that section 205(1) of the CPA as well as section 15 of the Regulations of Interception of Communications and Provision of Communication-Related Information Act could also be relied on to access this type of information to respond to an MLA request. Furthermore, South Africa could not recall any instance where MLA was refused in relation to the provision of banking information.

Section 16 of the ICCMA provides that the Minister may also refuse assistance in the execution of a foreign pecuniary sentence, if the person against whom the sentence was imposed would not have been extradited under South Africa's extradition legislation, had a request for that person's extradition been made. This could create a loophole in foreign bribery cases, given the current state of South Africa's extradition law, which requires that the offence for which extradition is sought has been committed in the

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Section 7(2) of the ICCMA.

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Section 7(3) *ibid.*

requesting state, although this issue should be adequately addressed once South Africa enacts the Extradition Bill 2009 (see section ii. on extradition below).

. Prosecutors interviewed during the on-site visit indicated that, in their experience, once a request has been passed on from the Central Authority to law enforcement for execution, they have never refused to execute it, nor been confronted with a refusal by the courts to execute it. Any decision not to execute an incoming MLA request has been, to date, taken by the Central Authority.

. South Africa indicated in its Phase 2 responses that it had received two incoming requests to date, from two different countries, concerning a suspected foreign bribery offence. Neither of these requests had elicited a positive response from South Africa as of the time of this report. South Africa indicated that, in these specific cases, this was due to insufficient information being provided by the requesting state, but that South Africa's policy is to ensure that requests are dealt with promptly. Concerning the first request, the Central Authority indicated that sufficient information had not been provided, and that supplementary information from the requesting country was still pending. Concerning the other incoming request, South Africa explained that it could not respond at this time as a commercial arbitration was underway in the requesting country, but that the matter was receiving national executive attention. The evaluation team was not satisfied by explanations provided by the Central Authority that similar issues were being considered in the arbitration process and in the request, and expressed concerns that a private arbitration process would impact the rendering of mutual legal assistance in a criminal investigation. Subsequent to the on-site visit, South Africa informed the evaluation team that, in May 2010, the Central Authority acceded to the MLA request by India.

. Concerning outgoing requests, South Africa indicated that no MLA had yet been requested in the context of a foreign bribery investigation in South Africa. The South African authorities explained that none of the four matters currently under preliminary investigation and involving suspected foreign bribery had triggered an MLA request to date. Representatives of the Police further indicated that, with regard to two of these preliminary investigations, requests for information had been sent to INTERPOL (see section b. above on ongoing investigations).

. ii. Extradition

. Article 10 of the Convention notably requires Parties to make foreign bribery an extraditable offence.

. The Extradition Act 1962 regulates extradition in South Africa. Extradition is possible for a foreign bribery offence, whether the offender is or not a South African national. Pursuant to this Act, South Africa has the authority to extradite persons accused or convicted of an "extraditable offence" with or without an extradition agreement, subject to certain criteria. Under section 1 of the Act, extraditable offences are those punishable by a deprivation of liberty of six months or more, and thus include the foreign bribery offence (which is punishable by up to five years imprisonment at the

lowest court level). A new Extradition Bill 2009 will raise the imprisonment threshold for extraditable offences to twelve months. This would not impact foreign bribery as an extraditable offence. The Bill is expected to be submitted to Parliament in 2011, with possible entry into force during the second half of 2011. South African authorities however indicated that there was a slight possibility that the Bill could be introduced before Parliament in 2010.

Sections 4 to 12 of the Extradition Act set out the different steps for processing extradition requests. Under these provisions, once a magistrate receives notification from the Minister of Justice concerning an extradition request, a warrant for the arrest of the person shall be issued, and an enquiry shall be held as soon as possible with a view to the surrender of the person to the requesting State. Where the magistrate finds that there is sufficient evidence to warrant a prosecution for the offence in the requesting State, the magistrate shall issue an order committing such person to prison to await the decision of the Minister of Justice regarding his/her surrender. The Minister may refuse extradition on different grounds, including where proceedings against the person are pending or where the person is serving or about to serve a prison sentence in South Africa, where he/she is concerned that the extradition request is not being made in good faith, or that the person may be prosecuted, punished or prejudiced by reason of his or her gender, race, religion, nationality or political opinion.¹²⁹

The Phase 1 Report on South Africa's implementation of the Convention identified a loophole in South Africa's extradition legislation. Under section 3 of the Extradition Act, there is always a requirement that the offence for which extradition is requested has been "committed within the jurisdiction" of the foreign State requesting extradition. Consequently, South Africa would not be able under the current system to provide extradition for a foreign bribery offence where the requesting country is exercising nationality jurisdiction (i.e. the offence took place outside the requesting country's territory), which may often be the case for foreign bribery offences.¹³⁰ The Extradition Bill 2009 would remedy this situation; the proposed section 5 provides that "a person may be extradited to an extradition partner or unlisted foreign state irrespective whether the offence concerned occurred within the jurisdiction of the extradition partner or unlisted foreign state." However, the currently planned scheduling for adoption of this Bill means that it may not enter into force until mid-2011.¹³¹

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Section 11 of the Extradition Act 1962.

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See the Phase 1 Report on Review of Implementation of the Convention and
1997 Revised Recommendation at paragraphs 145-154
(www.oecd.org/dataoecd/51/30/40883135.pdf).

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South Africa has indicated the following schedule for adoption of the Extradition Bill:

. In terms of practical experience, South Africa explains that it has not received to date any request for extradition in relation to a foreign bribery offence, nor has South Africa requested extradition in such a matter.

Commentary:

Overall, the lead examiners were appreciative of the positive approach of the South African authorities to the provision of MLA to requesting states. Nevertheless, the lead examiners have serious concerns about delays in providing MLA with regard to certain foreign bribery allegations, and recommend that South Africa take all appropriate measures to ensure the provision of MLA in foreign bribery cases without undue delay.

As concerns outgoing MLA requests, the lead examiners are concerned that the South African authorities are not effectively and pro-actively using MLA as an evidence gathering tool to obtain and assess evidence of potential corruption activities involving South African citizens and legal persons abroad. It is the view of the lead examiners that law enforcement and prosecution authorities should be encouraged, through renewed efforts to raise awareness and, where necessary, training of police and prosecutors, to be more proactive in their use of MLA requests and in responding to credible allegations.

Finally, as regards extradition, the lead examiners recommend that South Africa promptly proceed with the adoption of its Extradition Bill with a view to ensuring it can provide extradition for foreign bribery, regardless of where the foreign bribery offence has been committed.

. 2. The foreign bribery offence

. a. Background

. At the core of the Anti-Bribery Convention is Article 1 which defines the offence of bribery of foreign public officials in international business transactions. Commentaries 3 to 19 on the Convention provide further indications on the foreign bribery offence.

. The Phase 1 Report on South Africa's Implementation of the Convention and 1997 Revised Recommendation provides a detailed overview of the elements of the foreign bribery offence under South Africa's Prevention and Combating of Corrupt Activities Act (PRECCA).¹³² Specifically, section 5 of the PRECCA covers the offence of bribery of foreign public officials:

Section 5. Offences in respect of corrupt activities relating to foreign public officials

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- Bill to be submitted to the Minister for guidance: June 2010
 - Bill to be published in the Government Gazette for public comments: September 2010
 - Bill to be submitted to Minister with Cabinet Memorandum: December 2010
 - Bill to be submitted to Cabinet: February 2011.

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See the Phase 1 Report on Review of Implementation of the Convention and 1997 Revised Recommendation at www.oecd.org/dataoecd/51/30/40883135.pdf.

- (1) *Any person who, directly or indirectly gives or agrees or offers to give any gratification to a foreign public official, whether for the benefit of that foreign public official or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner—*
- (a) *that amounts to the—*
 - (i) *illegal, dishonest, unauthorised, incomplete, or biased; or*
 - (ii) *misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*
 - (b) *that amounts to—*
 - (i) *the abuse of a position of authority;*
 - (ii) *a breach of trust; or*
 - (iii) *the violation of a legal duty or a set of rules;*
 - (c) *designed to achieve an unjustified result; or*
 - (d) *that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to foreign public officials.*
- (2) *Without derogating from the generality of section 2(4), “to act” in subsection (1) includes—*
- (a) *the using of such foreign public official’s or such others person’s position to influence any acts or decisions of the foreign state or public international organisation concerned; or*
 - (b) *obtaining or retaining a contract, business or an advantage in the conduct of business of that foreign state or public international organisation.*

The present section of this Phase 2 report only reviews elements of the offence identified in the Phase 1 Report as requiring further evaluation.

Ib. Elements of the offence

I(i) Intentionally

The issue of intent was the element of the South African foreign bribery offence which raised the most concern at the time of Phase 1, and was specifically identified in the Evaluation by the Working Group as requiring follow-up in Phase 2.¹³³ The lead examiners welcomed reassurances provided by the different panellists during the on-site visit.

. The South African foreign bribery offence does not specifically refer to an element of intent. Consequently, the general nature of intent under South African needs to be examined. Responses provided in Phase 1 by South Africa indicated that “South African law requires that the perpetrator not only acted intentionally, but also with the knowledge that what he or she is doing is illegal.”¹³⁴ The concept of ignorance of the law as a defence was consecrated by the Appellate Division in 1977 in the *S. v. De Blom* case, where the court held that “it must be accepted that the cliché that 'every person is presumed to know the law' has no ground for its existence and that the view that 'ignorance of the law is no excuse' is not legally applicable in the light of the present day concept of *mens rea* in our law.” In the South African context (see section A.1. above on awareness), it is possible that small and medium size companies in particular may not be aware that bribery of a foreign public official constitutes an offence under South African law, and/or that this offence can be prosecuted before the South African courts even where the bribery took place entirely abroad, given the exceptional character of the extra-territorial jurisdiction applicable to the foreign bribery offence (see section 1.d.ii. above on nationality jurisdiction).

. Consequently, during the on-site visit, the evaluation team discussed extensively with representatives of the Department of Justice, prosecutors, judges, businesses, academics and private counsel whether ignorance of the foreign bribery law might be relied on to escape responsibility in a foreign bribery case. While prosecutors acknowledged that an accused might try to raise that defence, they unanimously and strongly believed it would not be viable before the courts. Judges also confirmed that they would consider this a very weak defence, in all cases, and that, in bribery cases in particular, it would not be accepted due to the inherent dishonesty implied in any act of bribery. At most, they considered it might have an impact on the sanction handed down. All panellists were unanimous in considering that such a defence would be very unlikely to succeed in the context of a foreign bribery trial, since persons operating in an international business environment, be it at the level of a small company, would be expected to acquaint themselves with all the rules governing international business in South Africa, including as regards foreign bribery.

. (ii) *In order to obtain or retain business or other improper advantage in the conduct of international business*

. Section 5(2) of the PRECCA provides additional specifications regarding the terms “*to act*”. The Phase 1 Report questioned why the specifications in section 5(2) were felt to be necessary at all, and whether this section might restrict the acts performed by the foreign public official to acts performed by “the foreign state or public international organisation concerned”, or in respect of the business of “that foreign state or public international organisation” [emphasis added].¹³⁵ This raised concerned that

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See *ibid* at paragraph 9.

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situations envisaged under Commentary 19 of the Anti-Bribery Convention would not be covered where, for instance bribes might be paid to a foreign public official for him/her to influence the decision making process in another state or in a multilateral development bank.¹³⁶

South Africa reiterated the view that section 5(2), by using the term “includes”, only provides additional specifications, and would not be read as restricting application of section 2(4) of the PRECCA. Section 2(4), however, simply specifies that “a reference in this Act to any act, includes an omission.” South Africa also considers that Commentary 19 to the Anti-Bribery Convention could also be relied on in interpreting this.

Commentary:

Regarding the issue of intent, the lead examiners welcome reassurances provided by the different panellists during the on-site visit. They recommend that the Working Group monitor this issue as case law develops. Regarding the issue of section 5(2) and whether it might restrict the foreign bribery offence to acts performed only in the state of the foreign public official receiving the bribe, the lead examiners recommend that this be also followed-up as case law develops.

· 3. Liability of legal persons

· a. *The legal basis for liability of legal persons in South Africa*

Article 2 of the Convention requires each Party to “take such measures as may be necessary to establish liability of legal persons for the bribery of a foreign public official.”

· i. *Definition of legal persons*

· Legal persons covered by the CPA and the PRECCA

As a general rule, section 2 of the Interpretation Act 1957 provides that South African law is applicable to natural and legal persons alike¹³⁷. It implies that section 5(1)

See *ibid* at paragraphs 26-27.

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Commentary 19 states that “one case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office -- though acting outside his competence -- to make another official award a contract to that company.”

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Section 2 of the Interpretation Act 1957 provides that a reference in any Act to “person” includes (a) any divisional council, municipal council, village management

of the PRECCA which covers the offence of bribery of foreign public officials applies to both natural and legal persons. However, as underlined by the prosecutors met on-site, this text is not directly applicable to legal persons and the point of departure for holding a company criminally liable is more specifically section 332(1) of the Criminal Procedure Act, 1977 (“the CPA”) that provides for the prosecution of “corporations and members of associations”.¹³⁸ This raises the issue of whether the combination of the requirements in section 332(1) of the CPA and section 5(1) of the PRECCA provides an adequate basis for the effective prosecution of legal persons for foreign bribery offences.

Section 5(1) refers to acts committed by “any person” and, as specified in section 2(5) of the PRECCA, “any person includes a person in the private sector”. This appears to cover a broad range of legal persons in the private sector, including both South African and foreign legal persons. Moreover, South Africa explains that the word “includes” in section 2(5) of the PRECCA provides for the inclusion of persons other than “persons in the private sector”. In Phase 1, South Africa provided case law¹³⁹ in support of the assertion that state-owned and state-controlled enterprises can be held liable for statutory offences but this case does not, however, pertain to an offence under the PRECCA. No case law covering liability of state-owned or state-controlled companies – neither in respect of bribery offences nor in respect of other intentional offences – was provided as of the time of this review. The effective prosecution of state-owned or state-controlled companies for the offence of foreign bribery will need to be followed up as case law develops.

board, or like authority; (b) any company incorporated or registered as such under any law; (c) any body of persons corporate or unincorporated;”.

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Section 332(1) states that “For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and (b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.”

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In the *Ex parte Minister van Justisie v Suid-Afrikaanse Uitsaaikorporasie (SABC)* of 1992 SACR 618 (AD), the Appellate Division found the South African Broadcasting Corporation, a state-controlled enterprise, guilty of having negligently committed an offence.

Liability of parent companies for the acts of bribery committed by intermediaries including related legal persons

South African law does not address the liability of parent companies in general, nor does it specifically provide for the liability of parent companies for acts of bribery committed by intermediaries, including related legal persons such as their subsidiaries. -Section 5 of the PRECCA uses the terms “directly or indirectly” which have been interpreted by the Supreme Court of Appeal in *Shaik and Other v. S* [herein under *Shaik*] as encompassing “benefits obtained indirectly through another person or entity”¹⁴⁰. Thus, the situation where a foreign subsidiary is used by a parent company to bribe a foreign public official may be covered through this provision. While the *Shaik* case concerned the passive acceptance of benefits, South Africa pointed out that there is no indication in South African legislation to warrant a different interpretation in words contained in the active and passive bribery offence.

However, as highlighted by the South African prosecutors, section 332 (1) of the CPA is the only point of departure in the law to hold a company criminally liable. Prosecutors point out that, under this article, if there is no evidence that an act abroad was committed “by or on instructions or with permission, express or implied, given by a director or servant of that corporate body”¹⁴¹ [emphasis added] then there can be no mention of criminal liability in South Africa. Consequently in the absence of an instruction or permission by the director or servant of the parent company, in South Africa, this parent company cannot be held liable for acts of bribery committed by its subsidiary abroad. Furthermore, prosecutors add that the issuing of an instruction by the South African parent company does not necessarily amount to instructions or permission given by a director or servant of the subsidiary as required under section 332 (1) of the CPA.¹⁴²

The lead examiners note that this is a horizontal issue potentially affecting many Parties to the Convention. Whether this could constitute an obstacle to the effective implementation of the liability of legal persons in foreign bribery cases will need to be followed-up as case law develops.

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Shaik and Others v S [2007] 2 All SA 150 (SCA). *This decision was confirmed by the Constitutional Court in 2008.*

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Section 332(1)(a) of the CPA

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See above potential difficulties to establish jurisdiction over legal persons in section B. 1. d.

. ii. *Relationship of liability between the legal person and a natural person*

. Annex I to the 2009 Recommendation for further combating foreign bribery provides under section B that “Member countries’ systems for the liability of legal persons [...] should not restrict the liability to cases where the natural person or persons who perpetrated the offence are prosecuted or convicted.” In the South African law, criminal liability of a legal person depends on a culpable act by a representative of the legal person. Section 332 of the CPA provides for the prosecution of corporate bodies, their directors and servants, and members of associations.

IPossibility to convict a legal person even where the individual responsible for the bribery has not been convicted

. As noted in Phase 1, to prosecute the corporate body under South African law, it must be proved that a director or servant has committed an offence. South Africa explains that this does not mean that a prosecution or conviction of a natural person is necessary to proceed against the legal person. In *Shaik*¹⁴³, South Africa stresses that the Companies Kobifin Ltd and Kobitech Ltd, were convicted on the money laundering charges without Shaik being personally convicted on these charges (although Shaik represented the Companies before the High Court, was either the sole or a majority shareholder and was convicted personally on the main count of corruption). South Africa explains that it is possible to successfully prosecute guilty corporations for bribery and other charges even when the guilty directors have fled or died. They provide as an example the conviction, from the same *Shaik* case, of the Company Thint (Pty) Ltd, despite the absence its Director, Alain Thetard, who had fled in France¹⁴⁴. All participants questioned on this issue during the on-site visit consistently stated that it is possible to convict a legal person even where the individual responsible for the bribery has not been convicted.

INeed to identify the individual responsible for the bribery

. Several representatives of the NPA met during the on-site visit infer from the *mens rea* requirement that, whereas it is possible to convict a legal person even where the individual responsible for the bribery has not been convicted, the individual

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Shaik and Others v S 2007(1) SACR 142 D.

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Although this case is not in itself fully convincing as the particularity here is that the State withdrew all the charges against Alain Thetard on the first day of the trial, in October 2004, because of an undertaking given in exchange for information that Thetard had provided to the prosecution.

responsible for the bribery needs to be identified -- although not necessarily named -- and *dolus* needs to be established (be it *dolus eventualis*). The requirement that an offence committed by a director or servant must be proved in order to prosecute the legal person was identified in Phase 1 as potentially raising certain difficulties with respect to prosecution and evidentiary issues.

In Phase 1, South Africa held the somewhat broader view that it is not the actual identity of the specific director or servant that needs to be established, and indicated that section 332 of the CPA only requires that proof be established that an act was committed by a director or servant [emphasis added]. Several panellists confirmed that in the case where a bribe transaction would be deterred, for instance by an external auditor, but no specific natural person would be identified (e.g. in the case of collective decision making or where a specific function, like a sales agent, was involved but no specific person can be named), it would still be possible to prosecute the legal person. This interpretation is not supported by all of the available case law. Panellists consistently referred to *Rex v. Josman*¹⁴⁵ [herein under *Josman*] and *Rex v. de Lange*¹⁴⁶ [herein under *de Lange*] in which the High Court held that the proof needs to be established that “the company committed the act through the named agent”[emphasis added]¹⁴⁷. However, after the on-site, South Africa provided an abstract of a case, *S v Pelsler*¹⁴⁸, [herein under *Pelsler*] where it was ruled that while charged employees could not be identified by the complainants (and were therefore found not guilty), “it does not necessarily preclude the employer from being convicted.”

Level of seniority of person whose action triggers the liability of the legal person

Annex I to the 2009 Recommendation for further combating foreign bribery provides under section B that the level of authority of the person whose conduct triggers

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Rex v. Josman, High Court, (1915, T.P.D. 295)

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Rex v. de Lange, High Court, (1949, T.P.D.)

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In *de Lange*, the High Court noted that in *Josman* “The crown failed to prove that the offence had been committed by the servant, but proved that it had been committed by some other servant” and it was therefore held that the employer could not be convicted.

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S v Pelsler 1966 (3) SA 626 (N)

the liability of the legal person should a) either be flexible and reflect the wide variety of decision-making systems in legal persons; or, b) if restricted to the highest level managerial authority, cover cases where such person directs or authorises a lower level person to bribe or fail to prevent such person from bribing, including through a failure of supervision or a failure to implement adequate internal controls, ethics and compliance programs and measures.

. Under section 332(10) of the CPA a “director” is defined as “any person who controls or governs that corporate body or is a member of a body or group of persons that controls or governs that corporate body, or, where there is no such body or group, who is a member of that corporate body.” South Africa explained in Phase 1 that the purpose of this provision is to allow for the labelling of persons as “directors”, even where such persons are not officially registered as such in terms of the Companies Act, 1973.¹⁴⁹ The term “*servant*” in section 332 is undefined, but South Africa contends that it would cover any person if he or she is regularly employed whether by contract or otherwise.¹⁵⁰ Supporting case law provided by South Africa includes the 1992 decision by the Appellate Division in *Ex parte Minister van Justisie v Suid-Afrikaanse Uitsaaikorporasie (SABC)*, where the Court held that the actions and intentions of “directors, servants and other persons” [emphasis added] may be ascribed to a legal person.

. In its responses to the Phase 2 general questionnaire, South Africa seems to narrow the above interpretation by specifying that “*servant or director*” include all levels of “management” which appears to cover still relatively senior persons but does not go as far as requiring that this individual be a “directing mind and will” of the company, as in some common law countries. However, prosecutors met during the on-site visit indicated that any act of an employee can trigger the liability of a legal person, be it a positive act (section 332, paragraph (a) of the CPA which refers to “instructions” or “permission” given by an director or servant) or an omission (section 332, paragraph (b) of the CPA which specifies “with or without a particular intent”), e.g. a failure of supervision. While this seems to be in the right direction and would appear to cover situations where a person in authority knowingly does not prevent an employee from committing the offence (wilful blindness), because of the lack of enforcement in practice, the lead examiners are of the view that this should be followed up upon as case law develops.

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Section 215 of the Companies Act, 1973 provides for the keeping of a register of directors and officers.

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See the Responses at 2.1.11.

Ib. Prosecution of legal persons in practice

li. Need for a natural person at the proceedings against the legal person

. South Africa indicates that, generally, proceedings against the legal person would be initiated and carried out simultaneously with the proceedings against the natural person. The judicial procedure thus reflects the need to identify the natural person discussed above.

. South Africa further explains that the corporate body is charged via a representative of the corporate body [emphasis added]. The prosecutor, as provided under section 332(2) of the CPA, has discretion in choosing which director or servant is to represent the corporate body even if this person is not involved in the offence. It was clarified during the on-site visit that a professional counsel cannot stand for a corporation in this representative capacity. In practice, it could be a very low level employee, although prosecutors will take into account such factors as whether the director or servant is also being charged in his/her personal capacity, or whether the director or servant lives close to the seat of the court.

. According to South Africa, “the cited person is speaking on behalf of the corporate body because it cannot speak for itself.” South Africa explains that the cited person is only the offender in a representative capacity, unless charged in a personal capacity, with the corporate body being the actual offender. Despite inconsistent information provided in the various replies on this issue, it was further clarified during the on-site visit that this requirement is purely procedural and that the cited person would not be convicted personally unless he/she is the perpetrator (he/she would not be given a criminal record as a result of these proceedings).

. ii. Standard of liability: offence to be committed in the exercise of powers or performance of duties or in furthering the interests of the legal person

. To trigger the liability of the legal person, the offence must have been committed either “in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body” [emphasis added] (section 332 (b) of the CPA). South Africa emphasised that these conditions are not cumulative and will be examined in the circumstances of the case. Consequently, even if a director or servant exceeds his/ her powers, liability of the legal person may still ensue, provided that the director or servant is acting in furthering or endeavouring to further the interests of the corporate body. The evaluation team queried whether “endeavouring to further the interests of that corporate body” could be interpreted as a requirement that the bribe to the foreign public official benefits the legal person that gave the bribe since such a standard would not cover cases where, for instance, a legal person bribes on behalf of a related legal person (including a subsidiary, holding company, or member of the same industrial structure). South Africa had indicated in Phase 1 that there is no systematic requirement that, in all cases, the

offence be carried out for the benefit of the legal person. Given the absence of case law to date, this issue may need to be further monitored by the Working Group.

. iii. Exercise of prosecutorial discretion and creation of additional criteria to the law

. The South African authorities have indicated that they are currently reviewing the Prosecution Policy Directives as discussed in the above subsection on Prosecution (see subsection c. above). The lead examiners welcome this effort however, they deem it essential that this document clarify that prosecutorial discretion does not result in the creation of additional criteria to the law which – like the “economic impact” in the current Prosecution Policy Directives – may be an impediment to the effective implementation of Article 2 of the Convention (see also section B.1.c.ii. on the principles of prosecution). They also believe that this document should contribute to raise awareness among the prosecution as to the importance of indicting both natural and legal persons involved in corruption issues, including foreign bribery offence bribery.

. iv. Limited number of prosecutions and convictions of legal persons for intentional criminal offences and still relatively undeveloped case law

. Despite the possibility of criminal liability of legal persons for intentional offences since 1977 under section 332 of the CPA¹⁵¹, convictions or prosecutions of corporations for intentional economic crime offences appear to be rare and the only domestic bribery case cited in Phase 2 was the *Shaik* case, where the offence was one of passive corruption. Even in Phase 1, South Africa did not point to any other case where a corporate body was convicted in South Africa for the domestic active bribery. Following the on-site visit, South Africa indicated that according to available sources, there are no reported cases, since the year 2000, specifically dealing with the application of section 332 of the CPA. Only 1 (maybe 2) convictions and 1 acquittal of legal persons in cases of economic crimes are reported for the years 1990 to 2000. According to South Africa, only a small number of cases would be reported in the law reports This would not necessarily reflect a low level of enforcement. However, no statistics were available to support the assertion and to show the level of enforcement. The lead examiners are concerned that despite the longstanding existence of the intentional criminal offence provided under section 332(1) of the CPA, it has not given rise to more known convictions of legal persons in South Africa.

. According to the South African authorities, there is no legal principle preventing the prosecution of state-owned or state-controlled companies for criminal offences on the basis of section 332 of the CPA. Nonetheless, the lead examiners note that their

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But case law shows that criminal liability of legal persons for intentional offences apparently pre-existed this Statute (See above mentioned Josman, de Lange and Pelsers cases respectively rendered in 1915, 1949 and 1966)

liability remains untested in the domain of economic crime (as already discussed above), which could be a concern especially in light of the sensitive sectors in which the largest companies operate.

. When asked on the reasons for the few prosecutions of corporations under section 332 of the CPA, the prosecutors expressed the view that this is not due to a lack of training on the criminal liability of legal persons for intentional offences under section 332 of the CPA (as this was addressed in several instances by the Justice College and notably in relation to section 5 of the PRECCA). The South African authorities rather hold the view that prosecutors only charge a corporation where it appears that the crime was committed “on behalf of or in the interest of the corporation”. South Africa further explain that prosecutors may prefer to charge natural persons where in a large number of cases the legal persons has been liquidated at the time of indictment and where the appropriate sentence is imprisonment -- which is viewed by South Africa as a greater deterrent to potential bribers.

. The lead examiners also note that the Prosecution Policy Directives currently in force do not include provisions on section 5 of the PRECCA nor on the use of section 332 of the CPA in conjunction with section 5 of the PRECCA. The Minister of Justice and Constitutional Development has not advised the NPA on this in any other fashion. However, the South African authorities hold the view that the prosecutors who prosecute under section 5 of the PRECCA are well aware of the application of section 332 of the CPA.

. The lack of prosecution and convictions of legal persons in South Africa must also be put into the broader perspective of the overall conviction rate by South African courts which according to private sector and civil society panellists is very low. (see also section 1 a) iii) above and section 4. below).

1c. Sanctions for legal persons

. The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. In South Africa, criminal penalties are identical for domestic and foreign bribery and for both natural and legal persons. As detailed below in section C, the level of fines relevant to corruption offences is provided under section 26(1)(a) of the PRECCA: The High Court has an unlimited jurisdiction, the Regional Court may impose a fine not exceeding ZAR 360 000 (EUR 36 000; USD 46 800), and the Magistrate’s Court may impose a fine not exceeding ZAR 100 000 (EUR 10 000; USD 13 000).

. As noted in Phase 1, the level of fines which can be imposed by a Regional Court or a Magistrate Court under section 26(1) may appear fairly low, especially where legal persons are concerned. This concern is somewhat alleviated by the recent amendment to the Criminal Law Amendment Act 1997, which allows foreign bribery cases to be systematically tried by a High Court, or a Regional Court acting with the same jurisdiction as the High Court. Questions remain, however, as to the fines which will be imposed in practice, and the concern expressed by the Working Group in Phase

1, that the Regional Courts may feel bound by the minimum amounts indicated in the PRECCA. Furthermore, the possibility of applying additional fines under section 26(3) appears uncertain, especially in the absence of sentencing guidelines¹⁵², as indicated in Phase 1 and confirmed by all practitioners during the on-site visit.

No sanctions of legal person have been handed down to date in a foreign bribery case. However, examples of sanctions in a recent case of corruption under the 1992 legislation (*S v Shaik and Others*)¹⁵³ are provided in South Africa's Responses to the Phase 2 questionnaire¹⁵⁴. In this case, the legal persons accused were convicted on various counts of corruption and fraud. The highest fine applied to one of the corporate entities was ZAR 1.4 million on one count plus ZAR 500 000 and ZAR 125 000 respectively on two other counts for a total of ZAR 2 025 000 (EUR 202 500; USD 263 250). Confiscation measures were also pronounced in the amount of ZAR 34 million (EUR 3.4 million, USD 4.4 million). The Court's reasoning and the sentences imposed were confirmed on appeal by the Supreme Court of Appeal and the Constitutional Court¹⁵⁵. The level of the highest sentence applied to one of the legal persons convicted in this case (that is presented by South Africa as a case of an exceptional magnitude) alone is not deemed by the lead examiners as amounting to an effective, proportional and dissuasive sanction against legal persons although this was significantly supplemented by confiscation in this case. During the on-site visit, an academic indicated that the level of sanctions provided in the law are, in his view, adequate but he affirmed that judges never apply the maximum fines provided in the law, notably because of a tendency to systematically retain mitigating circumstances. According to South Africa, no consideration has been given so far to drafting sentencing guidelines in this regard to complete or replace the current large body of case law to which South Africa pointed out in Phase 1 (also see footnote above).

As of the time of this report, no information was available as to the number of convictions and acquittals using section 332 of the CPA for intentional economic

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Despite a large body of case law that appears to provide guidelines on suitable sentences as indicated in Phase 1, paragraph 53.

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2007(1) SACR 142 D.

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See response to question 6.2.

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S v Shaik and Others 2007 (1) SACR 247 (SCA); *S v Shaik and Others* 2008 (2) SACR 165 (CC).

offences, the sanctions applied, and the underlying offences. South Africa indicated that the electronic data systems developed by the Department of Justice and the NPA to track the outcome of cases according to crimes/offences as well as the sentences do not provide information as to offences/sentences specifically applying to cases under section 332 of the CPA. South Africa specified that a request had been made to incorporate such tracking possibility into the electronic data systems. This should be followed up in phase 3 as it pertains to the foreign bribery offence.

The low level of convictions or prosecutions of corporations for intentional economic crime offences and the current lack of foreign bribery cases do not allow the lead examiners to further assess the level of fines imposed in practice in respect of legal persons. However, in view of the information available at the time of this report, this raises questions as to whether the penalties applied in practice are sufficiently effective proportionate and dissuasive with regard to legal persons. This concern is somewhat alleviated, however, by the issue linked to the practice of confiscation of the instruments and proceeds of bribery and similar offences discussed in section 4 below.

Commentary

The lead examiners consider that South Africa's legislation on liability of legal persons appears to allow for the investigation, prosecution and sanctioning of legal persons for foreign bribery. They are however concerned: i) that uncertainty remains as to the level of implementation of the intentional liability of legal persons for economic crime offences despite the long existence of the liability of legal persons in South African law and ii) that the South African authorities are not yet effectively and pro-actively investigating and enforcing the foreign bribery offence against legal persons.

Consequently, in view of the limited number of cases regarding bribery and/or other related economic crimes, the lead examiners recommend that South Africa take steps to ensure that:

- (a) police and prosecutors are adequately trained and made aware of the importance of effectively enforcing liability of legal persons for acts of foreign bribery, so that they will be better equipped and more proactive in investigating and prosecuting legal persons for foreign bribery offences, and in responding to credible allegations; and that
- (b) the penalties applied in practice are sufficiently effective, proportionate and dissuasive with regard to legal persons.

In addition, given that there is not yet a substantial body of case law for the lead examiners to draw conclusions from in this area, the lead examiners recommend that the Working Group monitor how the foreign bribery offence is applied in practice with respect to legal persons as case law develops, including as concerns:

- (a) the liability of parent companies for acts of bribery using intermediaries, including related legal persons such as subsidiaries abroad,
- (b) the implications of the requirement that the foreign bribery offence be committed "in furthering or endeavouring to further the interests of that corporate body", and
- (c) concerning state-owned or state-controlled companies.

4. Adjudication and sanction of the foreign bribery offence

Article 3 of the Anti-Bribery Convention provides for the imposition of effective, proportionate and dissuasive sanctions for foreign bribery offences. It also provides for confiscation of the bribe and proceeds of bribery of a foreign public official.

1a. Criminal sanctions

Criminal penalties are identical for domestic and foreign bribery under section 26(1)(a) of the PRECCA: up to 5 years or a fine at the Magistrate Court Level; up to 18 years or a fine at the Regional Court Level; and up to life imprisonment or a fine at High Court level. With regard to the level of fines, the High Court has an unlimited jurisdiction, the Regional Court may impose a fine not exceeding ZAR 360 000 (EUR 36 000; USD 46 800), and the Magistrate's Court may impose a fine not exceeding ZAR 100 000 (EUR 10 000; USD 13 000). Section 1(1)(b) of the Adjustment of Fines Act 1991 allows for imprisonment and fines to be imposed together.

Part 11, paragraph 1 of the Prosecution Policy Directives provides that all contraventions to the PRECCA must be prosecuted in the Regional Court.¹⁵⁶ In addition, recent amendments to the Criminal Law Amendment Act 1997 provide that the Regional Court has the same jurisdiction as the High Court in respect of certain serious offences, including corruption.

Furthermore, in respect of imprisonment sanctions, section 51 of the Criminal Law Amendment Act 1997, as amended in 2004, has increased the minimum sanctions applicable. For offences under Parts 1 to 4 of the PRECCA (i.e. including the foreign bribery offence), if the amount involved is above ZAR 500 000 (EUR 50 000; USD 65 000), or if the amount involved is above ZAR 100 000 and the offence was committed by a person "acting in the execution or furtherance of a common purpose or conspiracy",¹⁵⁷ a Regional Court or High Court to which such a matter has been referred must sentence the person to a minimum of 15 years imprisonment. According to South African authorities, the "amount involved" in a bribery case would be the amount of the gratification offered or given (and not the value of the advantage received). This minimum sanction can be waived if "substantial and compelling circumstances exist which justify the imposition of a lesser sentence."¹⁵⁸ This sentence was imposed in the 2007 case of *S v Shaik and Others*. As of the time of this report, no sanctions have been handed down in a foreign bribery case.

During the on-site visit, concerns were raised by a number of participants in the private sector and civil society panels over the low conviction rate in the South African

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See section 1.c. above on the legal nature of the Prosecution Policy Directives.

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Schedule 2, Part II of the Criminal Law Amendment Act 1997 (Act No. 105 of 1997).

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Section 51(2)(a) and 51(3) *ibid*.

justice system. Figures provided by panellists indicated a conviction rate between 6 and 15 per cent for all crimes reported. This seems to be in keeping with figures provided in the SAPS annual reports. Following the on-site visit, South African authorities indicated a very different figure and that the conviction rate for the court system in all District, Regional and High Courts amounted to 88.6 percent for the 2009/2010 financial year. South African authorities suggested that the 15 percent figure may have been calculated on the basis of all reported crimes. One public official from the National Treasury was quoted in several press articles as having stated before Parliament that “criminals know they have little chance of being caught. Should they be arrested, they know the chances are even less that they'll eventually appear in court. And, should they appear in court, the chances are even less that they'll be found guilty.”¹⁵⁹ With regard to enforcement of the foreign bribery offence specifically, representatives of large South African corporations present at the on-site visit indicated that, in their view, South African companies quoted on the NYSE appeared much more at risk of enforcement of the foreign bribery offence through the United States' Foreign Corrupt Practices Act than by South African law enforcement authorities through the PRECCA.

The conviction rate in the general South African criminal justice system should be examined in parallel with conviction rates in the Specialised Commercial Crime Courts (SCCC),¹⁶⁰ which achieve a conviction rate of over 90 per cent (see also section 1.a. above on specialisation in law enforcement authorities). The first SCCC opened in Pretoria in 1999, and six of these SCCCs currently exist in South Africa.¹⁶¹ Lawyers and academics interviewed during the on-site visit expressed the view that the reason for this higher conviction rate in the SCCCs is the greater specialisation and training available not only in the SCCCs themselves, but in the Specialised Commercial Crime Unit within the NPA, as well as within the Commercial Branch of the SAPS which exclusively work on the cases presented before SCCCs. This view is corroborated by research on the issue of specialised justice in South Africa and the SCCCs in particular, which highlights that “in terms of effectiveness and efficiency, the most important innovation of the SCCC was not that it heard only one type of case. Rather, it was the improved integration of the

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See, for instance [News 24 of 14 October 2009](#), and [IT Web business of 14 October 2009](#).

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See also discussion of the SCCCs in paragraph 14 of the Introduction of this Report, as well as discussion of the Specialised Commercial Crime Unit of the NPA in section B.1.a.iii. above.

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SCCCs have been established in Pretoria, Johannesburg, Port Elizabeth, Durban, Cape Town, and Bloemfontein.

work of the prosecutors and investigators whose cases came to these courts that made the difference.”¹⁶²

Ib. Confiscation

. As detailed in the Phase 1 report, the CPA and the Prevention of Organised Crime Act (POCA) lay down the rules regarding confiscation of the bribe and proceeds of bribery.¹⁶³ The Asset Forfeiture Unit (AFU) of the NPA is responsible for the freezing and confiscation of assets.

· (i) Confiscation of the bribe

. As concerns confiscation of the bribe, the CPA governs seizure and forfeiture of property connected with any offence. Section 20 could be relied on to seize the bribe payment, provided the bribe is still in the hands of the briber, or at least on South African territory. Section 35 provides for the possibility for the courts to declare the seized assets forfeited upon conviction. Where the bribe can no longer be seized, section 26(3) of the POCA allows for the imposition, upon conviction, of a fine equal to five times the value of the gratification involved.

· (ii) Confiscation of the proceeds of bribery

. The POCA also provides for the confiscation of “proceeds of unlawful activities”. Section 1 of the POCA specifies that “unlawful activities” include “any conduct which constitutes a crime”, therefore including proceeds derived from a foreign bribery offence. Confiscation extends not only to benefits derived from offences of which the defendant has been convicted, but also to proceeds of “any criminal activity which the Court finds to be sufficiently related to those offences.”¹⁶⁴

. Chapter 5 of the POCA provides for conviction based forfeiture and confiscation. Under section 18, confiscation is not mandatory but may be requested by the prosecutor where a defendant has been convicted of an offence. Any realisable property of the

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See [Antony Altbeker, Justice through Specialisation: The Case of the Specialised Commercial Crime Court.](#)

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See Phase 1 Report at paragraphs 61-70.

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Section 18(1) of the POCA.

accused, including legitimately obtained and untainted, may be subject to confiscation. Proceedings on application for a confiscation order are civil proceedings. Consequently, the rules of evidence applicable in civil proceedings (i.e. “balance of probabilities”) apply, and not the stricter rules of evidence applicable in criminal proceedings (i.e. “beyond reasonable doubt”).¹⁶⁵

Chapter 6 of the POCA provides for non-conviction based forfeiture. Under section 38, the High Court may make a preservation order in respect of proceeds and instrumentalities of crime. This property can eventually be forfeited to the State if the Court finds, on the balance of probabilities, that the property concerned constitutes the proceeds of unlawful activities.¹⁶⁶

· (iii) *Freezing of assets and confiscation in practice*

As noted above, there have been no foreign bribery cases to date, and no forfeiture or confiscation orders have therefore been pronounced in respect of a foreign bribery offence. Confiscation provisions in the POCA appear to function well, in view of the AFU statistics. The NPA indicated that, in all corruption cases over the 2008-2009 period, six restraint orders were obtained in the value of ZAR 220 million (EUR 22 million; USD 28.6 million), and three confiscation orders were executed to the value of ZAR 76 500 (EUR 7 650; USD 9 950). More recently, in March 2010, the AFU was ordered by the National Director for Public Prosecution, who heads the NPA, to abandon a preservation order in the amount of close to ZAR 5 million, due to insufficient evidence to prove criminality.¹⁶⁷ This does not raise concerns as regards the general functioning of the POCA per se, but could raise questions regarding the level of evidence necessary for the AFU to apply for freezing orders in practice. Questions raised by this case are discussed under section 1.c. above.

POCA legislation was notably relied on in the landmark domestic corruption case of *S v Shaik and Others* in 2007, which resulted in the confiscation of ZAR 34 million (EUR 3.4 million; USD 4.42 million), plus interest. The *Shaik* Supreme Court of Appeal and Constitutional Court judgments dealt with proceeds of crime which had passed through different hands, gross proceeds, and rearrangement of shares. South Africa indicated that the Constitutional Court judgement in the *Shaik* case is now the leading

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Section 13 *ibid.*

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Section 50(1) *ibid.*

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See the [official media statement from the NDPP](#).

authority on confiscation proceedings, especially since the application of the principles was found to be constitutional. The *Shaik* judgment is currently being applied in other Chapter 5 confiscation enquiries.

lc. Additional civil and administrative sanctions

l(i) Endorsement on the Register for Tender Defaulters

Where the foreign bribery offence also constitutes an offence under section 12 (offences in respect of corrupt activities relating to contracts) or section 13 (offences in respect of corrupt activities relating to the procuring and withdrawal of tenders) of the PRECCA, the Court may also issue an order to the effect that details of the conviction of the natural or legal person are endorsed on a Register for Tender Defaulters, as provided under section 28. The natural or legal person thus endorsed must make this endorsement known in any subsequent agreement or tender with the State. The Court may further order that this be accompanied by termination of any ongoing agreement with the National Treasury. The National Treasury is also responsible for determining the length of time, necessarily between five and ten years, during which the person or enterprise is barred from entering into any public contract.¹⁶⁸ However, as of the time of this report, there was no entry on the Register for Tender Defaulters. Representatives of the NPA interviewed at the on-site visit indicated that there may be an issue of awareness among prosecutors regarding the possibility of requesting such a sentence.

(ii) Public procurement

As noted above, natural and legal persons tendering for a public procurement contract are required to disclose any endorsement on the Register for Tender Defaulters, which is a publicly available document. However, as mentioned earlier, the Register remains empty to date, given that no cases which could elicit such an endorsement on the Register have been brought before the courts to date.

In addition to the Register, it was indicated by representatives of the National Treasury that a List of Restricted Suppliers also exists. This List is put together by the National Treasury where a company is found to be fraudulent in its activities, as well as when issues of “poor performance” by the company arise. A practice note prescribes to all government departments involved in public procurement to visit this list before awarding any public tenders. The List is not publicly available.

There are no specific rules on listing a company on the List of Restricted Suppliers. Representatives of the National Treasury considered that a conviction for domestic or foreign bribery would be sufficient to endorse a company on the List.

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Section 28(3)(a)(ii) and (iii) of the PRECCA.

However, this would require a systematic follow-up of cases in this area, which may be impractical to carry out in practice.

· (iii) *Due diligence and suspension of export credit support*

· Notwithstanding the fact that ECIC procedures do not specifically target foreign bribery (see section A.3.c. on *Officially supported export credits* above), controls are in place in ECIC processes to grant export credit support. In particular, during the due diligence process, the awarding of the underlying export contract is examined, and, under its Insurance Policy and Exporters Undertaking Agreement, ECIC has a right to access information regarding the transactions for which guarantees are provided.

· ECIC may also refuse or withdraw support where an applicant has been convicted of domestic or foreign bribery. ECIC further indicates that decisions by foreign courts regarding corruption situations involving applicants could also be taken into account through the normal due diligence process. In this respect, a specific intelligence information system is currently being tested. In practice, export credit support has not been refused or withdrawn to date due to an applicant being convicted of corruption.

Commentary:

Regarding criminal sanctions, the lead examiners are concerned about the possible low level of conviction rate which appears to plague the general criminal justice system in South Africa. In this regard, they note that there are discrepancies between the reported conviction rates for all crimes, and recommend that South Africa maintain statistics in respect of sanctions for the foreign bribery offence, to allow for an evaluation of the effectiveness of sanctions. The lead examiners also note that the integrated approach adopted in the context of the Specialised Commercial Crime Courts has yielded excellent results, and recommend that South Africa consider whether such an integrated approach may be appropriate to ensure the effective investigation, prosecution and sanctioning of foreign bribery cases.

As concerns confiscation, the lead examiners consider that the Prevention of Organised Crime Act (POCA) allows for the broad use of freezing orders and confiscation measures, whether conviction or non-conviction based. They encourage South Africa to continue to make full use of the confiscation provisions available under the POCA, and recommend that all necessary measures be taken to ensure that the level of evidence necessary to apply for freezing orders is not too high in practice, and that considerations prohibited under Article 5 of the Convention are not taken into account in respect of foreign bribery cases. With regard to additional sanctions, the lead examiners consider that the endorsement on the Register for Tender Defaulters provided for under the PRECCA could constitute a very dissuasive sanction for natural or legal persons engaging in foreign bribery. They therefore recommend that South Africa draw the attention of prosecutors and judges to the existence of section 28 of the PRECCA. Furthermore, they recommend that South Africa take steps to permit authorities in charge of administering public funds (such as public procurement, export credit, and official development aid agencies) to suspend from competition for public tenders or other public advantages natural and legal persons determined to have engaged in foreign bribery.

· **5. The false accounting offence**

· Bribe payments made to foreign public officials in the context of international business transactions can be detected through analysis of books and records violations by accountants and auditors as discussed in above section B. 5. In South Africa, section 284(4) of the Companies Act 1973 provides that failure to comply with accounting requirements under section 284 constitutes an offence by the company, and by the

director or officer.¹⁶⁹ Under section 441(d) of the Act, such an offence is punished with a fine and/or imprisonment for up to two years.

. Furthermore, section 287 of the Companies Act 1973 makes it an offence for any company to issue incomplete financial statements and circulars. The penalty for such an offence is imprisonment for up to three months and/or a fine. Section 287A of the Act as amended by Corporate Laws Amendment Act (CLAA) of 2006¹⁷⁰, relates to false and misleading reports. Under this provision, where a person is a party to the preparation, approval, publication, issue or supply of a report that is false or misleading, and knew or ought to have known that the report was false or misleading, that person is guilty of an offence. Such person will be liable for penalties in the form of a fine and/or imprisonment for up to two years.¹⁷¹

. Section 214 deals with falsification of company accounting records in a fraudulent manner. It is an offence to hinder proper administration of the Act and such offence is punishable by a fine or twelve (12) months imprisonment or both a fine and imprisonment.

. Any transgression of the Public Finance Management Act (PFMA) 1999, including omissions and falsification of books, records, accounts and financial statements, provides grounds for financial misconduct. Accounting officers of departments and accounting authorities of public entities must ensure that investigations into such misconduct are initiated within 30 days of discovery and that disciplinary proceedings are initiated. Where the financial misconduct is of a criminal nature, the institution must report these criminal charges to the executive authority (political head of the institution), the relevant treasury and the Auditor-General.

. If the Commission of Companies and Intellectual Property (CIPRO), within the Department of Trade and Industry (DTI), detects non-compliance with requirements under the Companies Act 1973, it may make adverse findings against the company concerned or its directors. If the DTI picks up fraudulent conduct or reckless conduct of business, the matter is referred to the National Prosecuting Authority for possible

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Under section 284(4)(b) of the Companies Act 1973, directors or officers who are able to prove that they had reasonable grounds to believe that a competent and reliable person was charged with the duty of overseeing compliance with section 284 requirements, may rely on this as a defence.

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Section 39 of the CLAA

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Section 441(d) of the Companies Act 1973.

prosecution. As confirmed by panellists during the on-site visit, the DTI has investigation powers only. The completion of its enforcement efforts depends on other agencies like the NPA, SAPS etc.

. While the provisions under the Companies Act, the CLAA [and the PFMA] seem to form an appropriate basis for punishing the prohibitions listed in article 8(1) of the Convention for the purpose of bribing foreign public officials or of hiding such bribery, panellists met during the on-site visit indicated that they were not aware of any criminal proceedings undertaken for omissions and falsifications of books, records, accounts and financial statements of companies despite the large number of reported misconduct.

Commentary:

The lead examiners recommend that South Africa ensure that false accounting offences are sanctioned in an effective, proportionate and dissuasive manner.

· 6. The money laundering offence

· a. The offence

Article 7 of the Anti-Bribery Convention provides that “each Party which has made bribery of its own public official a predicate offence for the purpose 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.”

Section 4 of the Prevention of Organised Crime Act (POCA) establishes the offence of money laundering under South African law:

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and—

- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or*
 - (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect—*
 - (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or*
 - (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere—*
 - (aa) to avoid prosecution; or*
 - (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,*
- shall be guilty of an offence.*

Since the South African money laundering offence covers proceeds from all unlawful activities, it applies in the same manner where the predicate offence is domestic bribery or foreign bribery. Under section 1 of POCA, unlawful activities include “any conduct which constitutes a crime [...] whether such conduct occurred in the Republic or elsewhere.” Consequently, the South African money laundering offence would be applicable “without regard to the place where the bribery occurred”, as prescribed by Article 7 of the Convention.

As outlined in the 2009 Financial Action Task Force's Mutual Evaluation Report on Anti-Money Laundering and the Financing of Terrorism in South Africa (“the FATF

Report”), section 4 of the POCA covers the laundering of one’s own proceeds of crime as well as laundering another’s proceeds.¹⁷²

lb. Sanctions

Penalties for money laundering are a fine not exceeding ZAR 100 million (EUR 10 million; USD 13 million), or imprisonment for a period not exceeding 30 years.¹⁷³ Criminal liability for money laundering extends to natural as well as legal persons.¹⁷⁴ In terms of recent examples, the *S. v. Maddock* case of 2008, involving about ZAR 421 million of proceeds (EUR 42. 1 million; USD 55.7 million), resulted in an eight-year prison sentence for a natural person for money laundering. In the 2006 *S. v. Shaik and Others* case, two legal persons were convicted of money laundering and sentenced to ZAR 500 000 each (EUR 50 000; USD 65 000).

The 2009 FATF Report found a low rate for money laundering investigations and convictions, with only 64 cases before the courts between April 2003 and March 2008, of which only 16 resulted in convictions.¹⁷⁵ The FATF further noted that “the lack of more comprehensive statistics makes it difficult to assess the effectiveness of the anti-money laundering regime.”¹⁷⁶

Commentary:

The lead examiners recommend that South Africa maintain statistics on the predicate offences for money laundering identified in money laundering investigations, prosecutions, convictions and sanctions, notably with a view to identifying foreign bribery offences as predicate offences to money laundering.

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See the FATF Report at paragraph 86 (www.fatf-gafi.org/dataoecd/60/15/42432085.pdf).

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Section 8 of the POCA.

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See discussions under Article 2 on legal persons which explain that a “person” under South African law includes a natural as well as legal person.

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See the FATF Report at paragraphs 107 et seq.

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See *ibid.* at paragraph 112.

. C. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

Based on its findings regarding South Africa's implementation of the Convention and the 2009 Recommendation, the Working Group: (1) makes the following recommendations to South Africa under Part 1; and (2) will follow up the issues in Part 2 when there is sufficient practice.

. 1. Recommendations

Recommendations for ensuring effective prevention and detection of foreign bribery

1With respect to prevention, awareness raising and training activities, the Working Group recommends that South Africa:

2Provide further training to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that can play an important role in preventing and detecting foreign bribery by South African companies active in foreign markets, including diplomatic personnel, tax inspectors, and trade promotion, export credit and development aid agencies [2009 Recommendation, Section III(i)]; and

3Take further action, as appropriate in cooperation with business organisations and other civil society stakeholders, to improve awareness among companies, in particular small and medium sized companies active in foreign markets, of the legislation regarding foreign bribery, and the non tax-deductibility of bribes, and to advise and assist companies in their efforts to prevent foreign bribery [2009 Recommendation, Section III(i)].

4With respect to the detection and reporting of suspected foreign bribery to the competent authorities, the Working Group recommends that South Africa:

5Regularly inform South African officials, particularly those in diplomatic representations, the tax administration, and in trade promotion, export credit development aid, and other agencies involved with South African companies operating abroad, and relevant private sector employees, of their obligations under the PRECCA to report instances of foreign bribery, and encourage and facilitate such reporting [2009 Recommendation, Sections III(iv) and IX]; and

6Take measures for enhancing and promoting its whistleblower protection mechanisms for public and private sector employees who report suspected acts of foreign bribery, in order to encourage them to report suspicions without fear of retaliation. [2009 Recommendation, Sections III(iv) and IX].

7With respect to officially supported export credits, the Working Group recommends that South Africa (i) ensure that applicants requesting export credit support are made expressly aware of the foreign bribery offence and its legal consequences; (ii) put in place due diligence procedures to verify that applicants are not engaging in acts of bribery; (iii) adhere to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits; and (iv) encourage the Export Credit Insurance Corporation of South Africa to take into consideration, in its decisions to grant export credit support, internal controls, ethics and compliance programmes or measures in place in applicant companies [2009 Recommendation, Sections IX(i) and (ii), X.C(vi), and XII].

8With respect to official development assistance (ODA), the Working Group recommends that South Africa (i) incorporate an anti-bribery declaration in its standard contract for ODA-funded projects; and (ii) encourage the African Renaissance and International Cooperation Fund to take into consideration, in its decisions to grant ODA funded contracts, internal controls, ethics and compliance programmes or measures in place in procuring companies [2009 Recommendation, Sections III(i), IX(i) and (ii), X.C(vi), and XI].

9Regarding accounting and auditing, the Working Group recommends that South Africa:

10Consider any appropriate increased role for business organisations and professional associations in the promotion of internal control development for small and medium size enterprises, in the event that the new regulations to implement the Companies Act 2008 eliminate the need for statutory audit for non-public interest entities [2009 Recommendation, Sections X.B. and C.];

11Encourage South African companies to (i) further develop and adopt adequate internal controls, ethics and compliance programmes or measures, for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance in Annex II of the 2009 Recommendation; and (ii) make statements in their annual reports, or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those that contribute to preventing and detecting bribery [2009 Recommendation, Section X.C., and Annex II];

12Consider extending (i) to additional companies, including all publicly traded companies, existing requirements to establish and maintain systems of internal controls; and (ii) to non-publicly traded companies, where appropriate, the requirement to establish corporate monitoring bodies, such as audit committees [2009 Recommendation, Section X.C.]; and

13In consultation with relevant professional associations: (i) encourage the detection and reporting of suspected bribery of foreign public officials by accountants and internal and external auditors, in particular through guidelines and training for these professionals and through raising the awareness of the management and supervisory boards of the companies

about these issues; and (ii) ensure that auditors making reports on suspected acts of foreign bribery to the law enforcement or regulatory authorities, reasonably and in good faith, are protected from legal action [2009 Recommendation, Section X.B. and Annex II].

14With regard to money laundering and foreign bribery, ensure that the institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Financial Intelligence Centre, receive appropriate directives and training on the identification and reporting of information that could be linked to foreign bribery [Convention, Article 7].

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1Regarding the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that South Africa:

2Ensure that sufficient resources are made available and that training is provided to relevant law enforcement authorities, including the South African Police Service, Directorate for Priority Crime Investigation, and the National Prosecuting Authority, for the effective detection, investigation and prosecution of foreign bribery offences [2009 Recommendation, Sections II., III(ii), V, and Annex I, Paragraph D];

3Develop specialised investigators and prosecutors' to more effectively investigate and prosecute foreign bribery cases, and consider establishing a mechanism for the purpose of facilitating the sharing of information and coordination of prosecutions of foreign bribery cases among law enforcement authorities [2009 Recommendation, Sections II., III(ii), V, and Annex I, Paragraph D];

4Take all necessary measures to ensure that foreign bribery allegations are promptly detected, investigated and prosecuted as appropriate, and to monitor and evaluate the performance of investigation and prosecution agencies with regard to foreign bribery allegations on an on-going basis, including in particular with regard to decisions not to open or to discontinue an investigation or prosecution [2009 Recommendation, Sections II., III(ii), V, and Annex I, Paragraph D];

5Make full use of the broad range of investigative measures available to South African investigative authorities, including special investigative techniques and access to financial information, in order to effectively investigate suspicions of foreign bribery [2009 Recommendation, Sections II, III(ii), V, and Annex I, Paragraph D];

6Promptly proceed with clarification of the Prosecution Policy to ensure that all Article 5 considerations are respected in foreign bribery cases [Convention, Article 5];

7 Consider strengthening safeguards to ensure that the exercise of investigative and prosecutorial powers, in particular for the foreign bribery offence, is not to be influenced by considerations prohibited under Article 5 of the Anti-Bribery Convention, including with regard to decisions made by the National Director of Public prosecutions and other prosecutors of the National Prosecution Authority; and [Convention, Article 5]; and

8 Ensure (i) that when plea bargaining is used, it is an effective mechanism for the enforcement of the foreign bribery offence; and (ii) that prosecutors receive adequate training and resources to improve its effectiveness [Convention, Article 5, and 2009 Recommendation, Sections II, III.(ii) and V].

9 With respect to jurisdiction over the foreign bribery offence, the Working Group recommends that, South Africa take steps to ensure that Law enforcement authorities and the judiciary are aware of the full range of jurisdiction introduced by sections 35 of the PRECCA, in particular as regards legal persons [Convention, Articles 2 and 4].

10 With respect to mutual legal assistance and extradition, the Working Group recommends that, South Africa:

11 Take all appropriate measures to ensure the provision of mutual legal assistance in foreign bribery cases without undue delay, and encourage law enforcement authorities to request mutual legal assistance to obtain and assess evidence available abroad of allegations of foreign bribery over which South Africa has jurisdiction [Convention, Article 9, and 2009 Recommendation, Sections III(ii) and XIII(iii)]; and

12 Promptly proceed with the adoption of its Extradition Bill, with a view to ensuring that South Africa can provide extradition for foreign bribery, regardless of where the foreign bribery has been committed [Convention, Article 10].

13 Regarding the liability of legal persons for foreign bribery, the Working Group recommends that South Africa take steps to ensure that:

14 Police and prosecutors are adequately trained and made aware of the importance of effectively enforcing liability of legal persons for acts of foreign bribery, so that they will be better equipped and more proactive in investigating and prosecuting legal persons for foreign bribery offences, and in responding to credible allegations [Convention, Article 2, and 2009 Recommendation, Sections II, III.(ii), V. and IX]; and that

15 The penalties applied in practice are sufficiently effective, proportionate and dissuasive [Convention, Article 2 and 3, and 2009 Recommendation, Sections II, III(ii) and V].

16 Regarding the related money laundering offence, the Working Group recommends that South Africa maintain statistics on the predicate offences for money laundering, with a view to identifying cases where foreign bribery is a predicate offence [Convention, Article 7].

17 Regarding sanctions for foreign bribery, the Working Group recommends that South Africa:

18 Maintain statistics in respect of sanctions for foreign bribery offences, to allow for an assessment of the effectiveness of sanctions in practice [Convention, Article 3];

19 Consider whether the integrated approach which exists in the context of the Specialised Commercial Crime Courts may be appropriate to ensure the effective investigation, prosecution and sanctioning of foreign bribery cases [Convention, Article 3, and 2009 Recommendation, Sections II, III(ii); and V];

20 Continue to make full use of the confiscation provisions available under the Prevention of Organised Crime Act (POCA) to freeze the bribe and proceeds of foreign bribery, and ensure that the evidentiary threshold necessary to apply for freezing orders under the POCA is not too high in practice [Convention, Article 3, and 2009 Recommendation, Sections II, III(ii); and V]; and

21 Draw the attention of prosecutors and judges to section 28 of the PRECCA, with a view to the possible endorsement of natural and legal persons convicted of foreign bribery offences on the Register for Tender Defaulters, and possible termination of their ongoing agreements with the South African National Treasury [Convention Article 3, and 2009 Recommendation, Section XI].

. 2. Follow-up by the Working Group

1 The Working Group will follow up the issues below as case law develops:

2 The effect of the institutional rearrangement of law enforcement authorities on the investigation and prosecution of foreign bribery cases;

3 The issue of intent, to ensure that ignorance of the foreign bribery legislation cannot be relied on as a defence in a foreign bribery case;

4 The application of section 5(2) of the PRECCA, to ensure that it does not restrict the foreign bribery offence to acts performed only in the state of the foreign public official receiving the bribe;

5 The performance of law enforcement authorities, including the SAPS, the NPA, and other relevant agencies, with regard to foreign bribery allegations, and in particular with regard to decisions not to open or to discontinue investigations and, as appropriate prosecutions; [Convention, Article 5, and 2009 Recommendation, Sections II, III.(ii) and V].

6 The application of territorial and nationality jurisdiction concerning offences committed in whole or in part abroad, to ensure that the South African authorities can take action against legal persons for bribery of foreign public officials, whether it is committed directly or through intermediaries (including related legal persons such as foreign subsidiaries) [Convention, Articles 2 and 3, and 2009 Recommendation, Sections II, III.(ii), V, and Annex I, Paragraphs B. and C.];

7 The application in practice of the foreign bribery offence with respect to legal persons, including as concerns (i) the liability of parent companies for acts of bribery by intermediaries, including related legal persons, including subsidiaries abroad, (ii) the

implications of the requirement that the foreign bribery offence be committed “in furthering or endeavouring to further the interests of that corporate body”, and (iii) the application of corporate liability to state owned and state controlled companies [Convention, Article 2, and 2009 Recommendation, Annex I, Paragraph C.]; and

8The implementation of the new provisions of the Companies Act 2008, after its entry into force in July 2010, in particular with regard to South Africa’s efforts to align accounting standards applicable in South Africa with existing international accounting standards [Convention, Article 8, 2009 Recommendation X].

· ANNEX 1 LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government Ministries and Bodies

- Companies and Intellectual Property Registration Office
- Department of International Relations and Cooperation
- Department of Justice and Constitutional Development (including the Justice College)
- Department of Public Enterprises
- Department of Public Service and Administration (including the Anti-Corruption Directorate)
- Department of Trade and Industry
- Financial Intelligence Centre of South Africa
- National Prosecuting Authority (including the Asset Forfeiture Unit; the Office of the Director of Public Prosecutions)
- National Treasury
- Office of the Auditor General
- Office of the Inspector General for Intelligence Services
- South African Police Service (including the Directorate for Priority Crime Investigation; the Witness Protection Unit)
- South African Public Service Commission
- South African Reserve Bank
- South African Revenue Service

Government-funded Bodies

- Armscor
- Export Credit Insurance Corporation of South Africa
- Gauteng Economic Development Agency
- Trade and Investment Kwazulu-Natal
- Trade and Investment Limpopo

Judiciary

- One High Court Judge
- One Retired Judge
- One Senior Magistrate
- One Regional Magistrate

Legislature

- One Member of Parliament

Private Sector

Private enterprises

- De Beers
- Denel
- Eskom
- Group Five
- Sasol

Business Associations

- Business Unity South Africa (BUSA)
- National African Federated Chamber of Commerce and Industry (NAFCOC)
- South African Chamber of Commerce and Industry (SACCI)

Legal Profession and Academics

- Two attorneys-at-law
- University of Pretoria
- University of Johannesburg
- UNISA

Accounting and Auditing Profession

- Accounting Standards Board
- Deloitte
- Ernst & Young
- Independent Regulatory Board for Auditors
- KPMG
- PWC
- South African Institute of Chartered Accountants

Financial Institutions

- Absa Bank
- Association of Savings and Investments of Southern Africa
- Banking Association of South Africa
- First National Bank
- Nedbank
- Office of the Ombud for Financial Service Providers
- South African Banking Risk Information Centre
- South African Insurance Association

Civil Society

- Ethics Institute of South Africa
- ECOSOC
- Institute of Security Studies
- Open Democracy Advisory Centre
- SANEF

· SANGOCO

· ANNEX 2 LIST OF ACRONYMS

AFUAsset Forfeiture Unit**APA**Auditing Profession Act**ASB**Accounting Standards Board**BUSAB**Business Unity South Africa**CIPRO**Companies and Intellectual Property Registration Office**CLAA**Corporate Laws Amendment Act**CPA**Criminal Procedure Act**DIRCO**Department of International Relations and Co-operation**DPC**Directorate for Priority Crime Investigations, also known as "the Hawks"**DPSA**Department of Public Service and Administration**DSO**Directorate for Special Operations, also known as "the Scorpions"**DTI**Department of Trade and Industry**ECGO**OECD Working Party on Export Credit and Credit Guarantees**ECIC**Export Credit Insurance Corporation of South Africa**EITI**Extractive Industries Transparency Initiative**FATF**Financial Action Task Force**FCPA**United States Foreign Corrupt Practices Act**FICA**Financial Intelligence Centre Act**GAAP**Generally Accepted Accounting Principles**GRAP**Generally Recognised Accounting Practice**IAASB**International Auditing and Assurance Standards Board**IASB**International Accounting Standards Board**ICCMA**International Co-operation in Criminal Matters Act**IFAC**International Federation of Accountants**IFRS**International Financial Reporting Standards**INTERPOL**International Criminal Police Organization**IPSAS**International Public Sector Accounting Standards**IRBA**Independent Regulatory Board for Auditors**ISA**International Standard on Auditing**MLA**Mutual legal assistance**MOU**Memorandum of Understanding**NACF**National Anti-Corruption Forum**NACH**National Anti-Corruption Hotline**NDPP**National Director of Public Prosecutions**NGOs**Non-governmental organisations**NPAN**National Prosecuting Authority**NSIA**National Strategic Intelligence Act**ODA**Official development assistance**OECD**Organisation for Economic Co-operation and Development**PACI**Partnering Against Corruption Initiative**PDAP**Protected Disclosures Act**PFMA**Public Finance Management Act**POCA**Prevention of Organised Crime Act**PRECCA**Prevention and Combating of Corrupt Activities Act**PSC**Public Service Commission**RICAR**Regulation and Interception of Communications and Provision of Communication-Related Information Act**SADC**South African Development Community**SAICA**South African Institute of Chartered Accountants**SAPSS**South African Police Service**SARSS**South African Revenue Service**SCCCs**Specialised Commercial Crime Courts**SCCU**Specialised Commercial Crime Unit**SMEs**Small and medium sized enterprises**STR**Suspicious Transaction Report**UNCTAD**United Nations Conference on Trade and Development**WGBO**OECD Working Group on Bribery in International Business Transactions**WPA**Witness Protection Act**ZAR**South African Rand