This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.
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EXECUTIVE SUMMARY

The Phase 3 report on South Africa by the OECD Working Group on Bribery evaluates and makes recommendations on South Africa’s implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country-specific (vertical) issues arising from changes in South Africa’s legislative and institutional framework, as well as progress made since South Africa’s Phase 2 evaluation. The report also focuses on key Group-wide (horizontal) issues, particularly enforcement.

The Working Group is seriously concerned with the lack of foreign bribery enforcement actions in South Africa. Despite South Africa’s economic links to a number of countries with corruption risks, only ten foreign bribery allegations have surfaced since it became a party to the Convention in 2007. These allegations have not resulted in a single prosecution and the four on-going investigations are far from reaching the prosecutorial stage. South African authorities did not proactively investigate or seek the cooperation of foreign authorities in any of the four on-going investigations or the other allegations. The lack of enforcement of corporate liability for foreign bribery is especially troubling in an economic environment where there has been a major growth in corporate activity, and where state-owned enterprises operating in sensitive sectors are allegedly involved in foreign bribery cases. The Working Group thus recommends that South Africa significantly increase its efforts to detect, investigate and prosecute foreign bribery. Accordingly, South African authorities should make full use of the broad range of investigative measures available and gather evidence, access financial information, and seek the assistance of foreign authorities where appropriate. South African authorities should also respond to MLA without unnecessary delays.

While the root cause of South Africa’s lack of enforcement is unclear, the Working Group is concerned that political and economic considerations may be influencing the investigation and prosecution of foreign bribery. Against a background, where most of its foreign bribery allegations involve major South African companies, South Africa should take steps to ensure that factors prohibited under Article 5 of the Convention do not influence the investigation and prosecution of foreign bribery cases. The Working Group further recommends that South Africa increase the financial resources available to prosecutors and ensure enhanced cooperation and coordination between the police and prosecutors from the outset of foreign bribery investigations, including through the newly established integrated approach to combating complex commercial crimes and the Anti-Corruption Task Team.

The report identifies additional areas for improvement. The low number of foreign bribery allegations raises concerns on the levels of awareness, reporting and detection in both the public and private sectors. In an environment where the public perception is that there are very serious reprisals against whistleblowers, South Africa needs to urgently take concrete and meaningful steps to ensure that those who report suspected acts of foreign bribery are in practice afforded the protections guaranteed by the law, including those in the auditing profession. South Africa should also ensure that steps are taken to raise awareness of these protections; Effective enforcement also goes hand in hand with effective, proportionate and dissuasive sanctions; in this regard, South Africa should ensure that the penalties applied in practice to legal persons meet the standards of the Convention. South Africa should also review its debarment process to ensure the systematic inclusion in the Register of Tender Defaulters of all natural and legal persons convicted of foreign bribery. The Working Group further recommends that South Africa promptly proceed with the adoption of the Extradition Bill to ensure that it can provide extradition for foreign bribery, regardless of where the foreign bribery has been committed.

The report also notes positive developments. Panellists across all sectors are of the unanimous view that South Africa’s foreign bribery offence does not raise particular issues, in line with the country’s
generally robust regulatory framework, including a broad and flexible corporate liability regime. As in Phase 2, the Working Group also finds that the Prevention of Organised Crime Act (POCA) allows for the broad use of freezing orders and confiscation measures, although, in the absence of enforcement of the foreign bribery offence, this should continue to be monitored. The Working Group is encouraged by the expected legislative amendments to address some deficiencies in South Africa’s anti-money laundering regime regarding preventive measures. It also welcomes the improvements made for publicly-listed and state-owned enterprises to strengthen internal controls, ethics and compliance measures for the purpose of preventing and detecting foreign bribery, including through the establishment of social and ethics committees.

The report and its recommendations reflect findings of experts from Hungary and the United States, and were adopted by the Working Group on 13 March 2014. It is based on legislation and other materials provided by South Africa and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its four-day on-site visit to Pretoria and Johannesburg on 9-12 July 2013, during which the team met representatives of South Africa’s public and private sectors, media and civil society. The Working Group requested that South Africa provide a written self-assessment report in six months (i.e., by October 2014) on progress made in (i) pro-actively investigating and prosecuting foreign bribery; and (ii) ensuring that investigations and prosecution are not influenced by political and economic considerations, including on implementation of recommendations 1, 4a, 4e, 6, 12c and 12d. It also invited South Africa to submit a written follow-up report on its implementation of all recommendations and on all follow-up issues within two years (i.e., by March 2016).

South Africa was further invited to provide detailed information in writing on its foreign bribery-related enforcement actions when it submits these two reports. The Working Group will take appropriate measures throughout this process, including the possibility of a Phase 3bis evaluation, should South Africa have failed to take steps to address its recommendations.
A. INTRODUCTION

1. The On-Site Visit

1. On 9-12 July 2013, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Pretoria and Johannesburg as part of the Phase 3 evaluation of South Africa’s implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention); the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation); and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation). The report was scheduled to be evaluated by the Working Group in December 2013 but was postponed to March 2014 following the national period of mourning for the passing of President Mandela.

2. The evaluation team was composed of lead examiners from Hungary and the United States of America as well as members of the OECD Secretariat. Before the on-site visit, South Africa responded to the Phase 3 Questionnaire and supplementary questions, and provided relevant legislation and documents. However, the responses provided were incomplete in some areas. The evaluation team also referred to publicly available information. During the on-site visit, the evaluation team met representatives of the South African public and private sectors, civil society, and media. The evaluation team expresses its appreciation to South Africa for its efforts in the evaluation process, and to all participants for their openness during the on-site visit discussions. The evaluation team notes however, that it was unable to meet with representatives from the Department of International Relations and Cooperation, legal academics, and members of the South African judiciary (see Annex 3 for a list of participants). During and following the on-site visit, South Africa made efforts to provide additional information; however, a number of the follow-up materials requested were provided late, while the evaluation team was in the final stages of drafting the report.

2. Summary of the Monitoring Steps Leading to Phase 3

3. The Working Group previously evaluated South Africa in Phase 1 (June 2008), Phase 2 (June 2010) and the Phase 2 written follow-up report (September 2012). As of September 2012, South Africa had fully implemented 13 out of 28 Phase 2 recommendations, while 2 were no longer relevant (see Annex 1). The outstanding recommendations cover issues such as the detection, investigation and prosecution of foreign bribery, safeguards from improper influence of political and economic considerations, whistleblower protection, accounting and auditing, money laundering, internal controls, ethics and compliance measures and extradition.

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1 Hungary was represented by: Ms. Viktoria Soós, Counsellor, Ministry of Public Administration and Justice, Department of Criminal Law Codification; and Ms. Tímea Borok, Legal Advisor, Ministry of National Economy, Division of Corporate Taxation, Department of Income and Turnover Taxes. The United States of America was represented by Mr. Matthew S. Queler, Assistant Chief – Foreign Corrupt Practices Act Unit, Fraud Section/Criminal Division, U.S. Department of Justice; Mr. Charles Cain, Deputy Chief – Foreign Corrupt Practices Act Unit, U.S. Securities and Exchange Commission; and Mr. Mark Bocchetti, Senior Anti-Corruption Adviser, Office of Monetary Affairs, U.S. Department of State, who did not participate in the on-site visit. The OECD Secretariat was represented by Ms. Sandrine Hannedouche-Leric, Co-ordinator of the Phase 3 Evaluation of South Africa and Senior Legal Analyst; Ms. Melissa Khemani, Legal Expert; and Mr. Joydeep Sengupta, Anti-Corruption Analyst, all from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.
3. Outline of the Report

4. This report is structured as follows. Part B examines South Africa’s efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to both Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results, and weaknesses identified in previous evaluations. Part C sets out the Working Group’s recommendations and issues for follow-up.

4. Economic Background

5. South Africa is a medium-sized economy and Africa’s largest economy. In 2012, it ranked 23rd in terms of GDP and 25th in terms of exports of goods and services among the 40 Working Group members. South Africa’s abundant mineral resources and mining companies account for a significant proportion of global production and reserves. It is one of the world’s largest producers and exporters of gold, platinum and chromium. While South Africa’s major trading partners are China, the United States, Japan, Germany, the United Kingdom and Saudi Arabia, other African countries are becoming increasingly important. For example, its regional trade accounts for 41 per cent of the Southern African Development Community’s (SADC) total.

6. South Africa is a major recipient of foreign direct investment (FDI) and also a growing source of outbound investment, especially in Africa. With an outward FDI stock of USD 72.28 billion (EUR 54.1 billion) in 2012, South Africa is ranked 24th among the WGB members. In 2011, South Africa was the fifth largest holder of outward FDI stock in Africa. The main investment destinations are Mauritius (as a conduit for investment in third countries), Nigeria, Mozambique and Zimbabwe. Angola, Africa’s third largest economy and considered by the Working Group to be high-risk for foreign bribery is also a “priority market for South African exports.” FDI is mostly concentrated in natural resources, industries (ranging from cellular communications, infrastructure development and energy to mining activities), health-care products and the wholesale sector. While most FDI involves large enterprises, South African SMEs also play a notable role in FDI flows, mainly in Africa. South Africa has a number of state-owned enterprises operating in high risk sectors, including defence, energy, oil and gas, telecommunications and infrastructure. Such companies have also been active in investing in energy, telecommunications and

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2 2012 UNCTAD Statistics, South Africa, nominal and real GDP; export flows.
4 See: “Outlook for direct investment in Africa”, African Economic Outlook, OECD.
5 See: UNCTAD, World Investment Report 2013, p.33
6 Exchange rates used throughout this report are as of 16 September 2013, unless the figure refers to information from South Africa’s Phase 2 report or South Africa’s Phase 2 written follow-up report.
7 See UNCTAD World Investment Report 2013, statistics, outward FDI.
8 Portugal Phase 3 report, at para. 7.
9 “South Africa’s President Visits Angola to Bolster Ties”, Voice of America, January 16, 2013.
10 See FDI by African countries, Overseas Development Institute, London, 2004, p.23
11 See UNCTAD Case study on outward foreign investment by South African enterprises, 2005.
infrastructure projects both in and outside of Africa. Some of these companies are also involved in foreign bribery cases (see section 5.b. below for further details).

5. Bribery of Foreign Public Officials

(a) South Africa’s exposure and approach to corruption, including foreign bribery

7. Corruption remains a serious problem in South Africa. The country has experienced a number of high profile domestic corruption scandals, and corruption allegations have been linked to the highest levels of government. In presenting her annual report to Parliament in October 2013, South Africa’s Public Protector stated that corruption in South Africa had reached “crisis proportions”. Corruption in public procurement tenders has been a particularly serious problem; in 2011, the head of South Africa’s Special Investigating Unit (SIU) reported to Parliament that between ZAR 25 to 30 billion (EUR 1.9 to 2.5 billion as of 16 September 2013) – approximately 20% of the government’s annual procurement budget – was lost to “corruption, incompetence and negligence”. A number of cases unveiled contracts being awarded on the basis of bribery, personal connections, or officials holding simultaneous business interests.

South Africa’s corruption problems were openly acknowledged by President Zuma in his 2013 State of the Nation Address, in which he also highlighted efforts to increase law enforcement resources to fight corruption offences. South African authorities also point to a number of government speeches and strategies as illustrative of the political will to combat corruption. However, some still question the government’s will to fight corruption; the latest report of the African Union’s African Peer Review Mechanism (APRM), for example, which flags corruption as a major concern, asserts that the government has not done enough to tackle the problem.

8. A cross-section of non-governmental panellists at the on-site visit viewed South Africa’s ability to investigate, prosecute, convict and punish those who engage in corruption as somewhere between limited and almost completely non-existent. South Africa disagrees, citing that at present, the Anti-Corruption Task Team (ACTT) has 140 high profile domestic corruption investigations and has achieved 42 convictions to date.

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13 UNCTAD Case study on outward foreign investment by South African enterprises, 2005.
15 South Africa Phase 2 report, at. para. 23.
16 “Madonsela Warns SA Corruption at Crisis Levels”, eNCA.com, 15 October 2013. Reference to corruption in South Africa as a “national crisis” was also recently made by a prominent academic, Professor Paulus Zulu, in his book A Nation in Crisis: An Appeal for Morality. See: “Our President should be above reproach, Mangosuthu Buthelezi”, Politicsweb.co.za, 27 October 2013.
17 See, for example: Corruption Watch, Economic Impact of Corruption and “Dodgy Procurement Costs R25bn Every Year”, MoneyWeb, 5 April 2013.
18 Corruption in public procurement tenders in South Africa has been referred to as “tenderpreneurship”. See, for example, “The South African Version of Entrepreneurship”, News24, 12 November 2012.
19 State of the Nation Address by President Jacob Zuma, 14 February 2013.
20 For example, speech given by Minister of Justice and Constitutional Development on 30 January 2012 on the launch of Corruption Watch; and South Africa’s National Development Vision for 2030.
21 The APRM is a voluntary peer review monitoring mechanism for African Union member countries. See: “SA corruption a major concern; African Peer Review”, Business Live, 28 June 2011.
9. Reasons underpinning weak enforcement efforts of domestic corruption would also apply to foreign bribery. Lack of independence and susceptibility to political interference, as well as a need for better coordination and specialised expertise were repeatedly cited during the on-site visit as the perceived reasons for law enforcement inaction. Additionally, a lack of protection for whistleblowers or, at least, the perception in the private sector of a lack of such protection, was also cited on multiple occasions as a reason for under-reporting of foreign bribery allegations to law enforcement. Risks that political or economic considerations are affecting law enforcement efforts – an issue which attracted significant attention in South Africa’s Phase 2 report – remains a serious concern to the evaluation team.

(b) Cases involving the bribery of foreign public officials

10. South Africa has not prosecuted any foreign bribery cases. Since South Africa became a Party to the Convention in 2007, only six allegations of South African individuals and/or companies bribing foreign public officials have surfaced publicly. At the time this Report was in the process of being finalised, South Africa indicated that an additional four foreign bribery allegations had given rise to preliminary investigations, all of which were subsequently closed, reportedly because there was no prospect for successful prosecution. The evaluation team was disappointed that South Africa raised these additional allegations at such a late stage and to not have had the opportunity to assess in more depth during the on-site visit the allegations and the reasons for closing the investigations. In general, the number of foreign bribery allegations appears low, given South Africa’s economic links to a number of countries with corruption risks (see section 4 above for further details). Five allegations are currently subject to on-going investigations. One investigation has been closed. The case names have been anonymised at the request of the South African authorities.

i. On-going foreign bribery investigations

Case #1 – Sale of Farming Equipment Case: Foreign public officials of an African country allegedly received bribes for their involvement in the procurement of farm equipment and aircraft. The bribes were allegedly paid by an off-shore company with a Danish bank account to the South African branch of a Portuguese bank. South Africa opened a preliminary investigation in April 2011 and states that the investigation is currently on-going but that initial investigation into the relevant business transactions did not uncover a direct or indirect link of payments to foreign public officials. However, information obtained from an incoming MLA request by another OECD State Party revealed that a South African national may be implicated in foreign bribery through the use of an intermediary. In 2009, Portugal requested MLA from South Africa, seeking assistance relating to witness statements from four South African citizens, requests for commercial documents, criminal records and bank records. South Africa stated that it has obtained the commercial documents, criminal records, bank statements and witness statements from 3 of the 4 witnesses. The fourth witness has since emigrated; South Africa has not requested MLA from the country to which he or she emigrated. South Africa further states that it is liaising with Portuguese authorities on an informal basis. However, no formal outgoing MLA requests have been made. South Africa states that it will await the outcome of the case underway in Portugal to determine if any evidence could result in possible foreign bribery charges against South African nationals. The week prior to its evaluation in the Working Group, South Africa indicated that its investigators are making arrangements to obtain the bank statements of the South African national, as well as interview the intermediary in the African country concerned.

Case #2 – Telecoms Case: A South African telecommunications company was accused by a competitor of allegedly paying bribes to foreign and domestic public officials to win a license to operate in the foreign country. A senior government official in the foreign country allegedly received USD 400 000 (EUR 299 000) to exclude the competitor from the market. USD 200 000 (EUR 148 500) was also allegedly paid to a South African public official to influence the foreign country’s position and reputation.
at a certain international agency – allegedly a condition for securing the contract. In 2012, South African authorities announced they had opened an investigation into the allegations. According to South Africa, the investigation is at a preliminary investigation stage and investigators have interviewed legal representatives of the company concerned. The company had appointed an independent judge to investigate the allegations and found no wrongdoing. South Africa has made inquiries via Interpol to track a key witness whistleblower who recently left the country. The week prior to its evaluation in the Working Group, South Africa reported that the competitor company has since lodged papers in the South Gauteng High Court, summoning the telecoms company for alleged improper conduct in obtaining the contract to provide cellular services in the foreign country concerned. South Africa states that the DPCI is studying the contents of the documents from the litigation in order to establish if any information therein could aid the investigation.

Case # 3 – Oil Case: A South African state-owned enterprise allegedly paid USD 20 million (EUR 14.9 million) in bribes to officials of a state-owned enterprise of another African country in connection with an oil field contract. Senior executives in the South African state-owned enterprise were allegedly involved in the bribe payments. In April 2013, South Africa opened an investigation into the South African state-owned enterprise and its holding company. An affidavit from a whistleblower has been obtained, as well as company documents. No MLA has been requested from the foreign country of the state-owned enterprise whose officials allegedly received the bribes.

Case # 4 – Military Contract Case: A South African state-owned defence company allegedly paid a total of USD 35 million (EUR 26 million)22 in bribes through a UK-based intermediary to secure an arms contract with a South Asian country. The bribes were allegedly paid in 1999, 2002 and 2005. The foreign government cancelled the contract upon discovery of the alleged payments, and blacklisted the company in 2005 from bidding on defence contracts. South Africa opened an investigation in 2005. However, the investigation was suspended in 2006 pending the outcome of a commercial arbitration over a contractual dispute between the company and the foreign country. The foreign country has made two MLA requests to South Africa, which remain outstanding. In 2009, South Africa informed the foreign country that it would withhold MLA until the pending civil arbitration was concluded. In November 2010, the investigation was re-opened in South Africa. No additional information has been provided on what investigative steps or inquiries have been taken, although South Africa states that investigators have been “instructed to finalise this investigation”. In October 2012, South Africa publicly assured the foreign country that it would respond to the MLA requests, but has not done so to date. An application by the state-owned enterprise to a court in the foreign country to have criminal proceedings against it quashed appears to be still pending. South Africa indicated that it would provide the requested information to the foreign country upon (i) conclusion of arbitration proceedings, and; (ii) receipt of detailed information about the criminal proceedings in the foreign country, and identification of persons against whom criminal conduct is investigated. South Africa now states that it has not received this information to date and asserts that the initial request from the foreign country did not meet the requirements under their MLA laws (see also discussion on International Cooperation in section 9). South Africa has made no outgoing MLA requests to the foreign country. In September 2013, the foreign country announced that it closed its passive bribery investigation because no evidence was found which could substantiate the allegations of corruption.23 The week prior to its evaluation in the Working Group, South Africa reported that the case docket has been handed to a senior prosecutor within the NPA to provide direction on the investigation.

22 “CBI Director to Make Presentation in South Africa in Rifle Purchase Case”, The Hindu, 22 September 2012.

23 See: “CBI closes Denel case after 8 years of probe”, ZeeNews, 30 September 2013.
Terminated foreign bribery investigations

Case # 5 – Mining Case: Bribes were allegedly paid by an individual to obtain mining exploration licenses in an African country. Upon further investigation, South African authorities established that the suspect was not a South African national. Territorial jurisdiction could not be established. According to South Africa, the suspect was also allegedly acting independently, and not on behalf of a South African company. The investigation was therefore terminated.

Case # 6 – Middle East Business Interests Case: At the time of the on-site visit, information provided by South Africa was that a South African national was suspected of acting as an intermediary for a billionaire European businessman allegedly seeking to pay USD 4.5 million (EUR 3.6 million) in bribes to the sons of a former Prime Minister of a Middle Eastern country. The bribes were allegedly given to induce the Prime Minister to make favourable decisions in the billionaire’s business interests in the region. The South African national allegedly deposited USD 1.5 million (EUR 1.1 million) into a bank account of a member of the Prime Minister’s family. Upon further questioning, the South African national claimed the deposit was a loan. South African authorities accepted the potentially pretextual assertions that it was a loan and that it was repaid with interest. During the on-site visit, the South African authorities indicated that no inquiries or steps were taken to independently verify this information, or that the amount was in fact paid back. South African authorities later clarified that the investigation on this issue has not been terminated. South Africa had made no MLA requests to seek further information, although they stated they are communicating with authorities in the foreign country on an informal basis. In January 2013, the foreign country closed its investigation into the alleged passive bribery. South Africa cites the closing of the passive bribery investigation by the foreign authorities as a reason for putting on hold its own investigation because it depended on information and evidence from the foreign country before it could make a formal MLA request. South Africa stated that it would place the matter before the public prosecutor for a decision on how to proceed. Two days prior to South Africa’s evaluation by the Working Group, it indicated that a prosecutor first looked at the file in October 2013, two years after the investigation was opened. A specialised prosecutor reviewed the file a week before the Working Group’s review and concluded that South Africa does not, in fact, have jurisdiction over this case because the alleged acts occurred in 2001, before the entry into force of the PRECCA. The majority of the South African delegation was of the opinion that South Africa did not have jurisdiction over this case. South Africa also provided new information indicating that no South African natural or legal persons were involved in this case.

Commentary

The lead examiners have significant concerns regarding the lack of foreign bribery enforcement actions in South Africa and the seemingly passive approach to and lack of significant investigative efforts in existing foreign bribery investigations. Only ten foreign bribery allegations have surfaced since South Africa became a party to the Convention in 2007, although the evaluation team was only able to assess six of these allegations. These allegations have not resulted in a single prosecution. The South African authorities have not been sufficiently proactive - neither in generating new investigations nor in investigating existing ones. As described by South African authorities, all four on-going investigations are far from reaching the prosecutorial stage, and South Africa has not made any foreign bribery-related outgoing MLA requests. While the root cause of this lack of enforcement is unclear, the lead examiners are concerned that political and economic considerations may be influencing the investigation and prosecution of foreign bribery.
B. IMPLEMENTATION AND APPLICATION BY SOUTH AFRICA OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

11. This part of the report considers the approach of South Africa in respect of key Group-wide (horizontal) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to country-specific (vertical) issues arising from progress made by South Africa on weaknesses identified in Phase 2, or from changes in the domestic legislation or institutional framework of South Africa. With regard to weaknesses identified in Phase 2, the Phase 2 recommendations and issues for follow-up are set out as Annex 1 to this report.

1. The Foreign Bribery Offence

12. No legislative changes, other than the increase in monetary sanctions, have affected South Africa’s bribery provisions since Phase 1 and Phase 2. The basic foreign bribery offence is set forth in section 5 of the Prevention and Combating of Corrupt Activities Act, 2004 (‘PRECCA’), which closely tracks the terms of the Convention. While section 5(1) sets out the offence, section 5(2) provides a definition of the “act” of the foreign public official covered under the offence.

13. In Phase 1 and 2, the examiners found the South African foreign bribery statute to be clear, comprehensive and on the whole well understood by key constituencies. However, they recommended that, as case law develops, the Working Group follow up issues identified in the following two areas: (i) the intent requirement and (ii) whether section 5(2) might restrict the foreign bribery offence to acts performed only in the state of the foreign public official receiving the bribe. These two issues were thus noted by the WGB as requiring further monitoring (follow up issues 13b and 13c).

(a) The intent requirement

14. The South African foreign bribery offence does not specifically refer to an element of intent. However, since Phase 1, South Africa has consistently stated 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.

i. Knowledge of unlawfulness

15. South Africa refers to the C.R. Snyman textbook to further clarify that the intent requirement covers both the intent of accepting the gratification and the intent of acting in a certain manner in return for the gratification. In a recent Supreme Court of Appeal decision (Selebi v. S., hereinafter Selebi), a judge

25 South Africa Phase 1 report provides a detailed overview of the elements of the foreign bribery offence at www.oecd.org/dataoecd/51/30/40883135.pdf.
26 More specifically, section 5(2) states that: “to act” includes “the using of such foreign public official’s or such others persons’ position to influence any acts or decisions of the foreign state or public international organisation concerned; or obtaining or retaining a contract, business or an advantage in the conduct of business of that foreign state or public international organisation.
27 South African Court of Appeal, Selebi v. S [2012] 1 All SA 332 – In this decision, the accused, a former National Commissioner of the South African Police Service, was found guilty of the domestic passive bribery offence under section 4(1)(a) of the PRECCA (See reply to suppl. Question 15, page 27).
28 Mthyane DP, at para. 9.
also quoted C.R. Snyman who stresses that there is “a rebuttable presumption of *mens rea*, including knowledge of unlawfulness” and that “in the absence of evidence to the contrary which raises reasonable doubt, it is sufficient evidence that the person charged accepted such gratification ‘in order to act’ in a manner envisaged in section 4 of the [PRECCA].” During and after the on-site visit, prosecutors confirmed that the same approach would apply to foreign bribery given the similarity of language in both section 4 (domestic bribery offences) and section 5 (foreign bribery offence) of the PRECCA. Prosecutors also stressed that *bona fide* does not equal blind ignorance and confirmed the consideration in *Selebi* that *dolus eventualis* is also sufficient to establish the offence. It would in particular apply to a person who refuses to exercise due diligence. The scope of the criteria of knowledge of unlawfulness was also discussed in the context of the defence of ignorance of the law.

### ii. Defence of ignorance of the law

16. In Phase 2, the Working Group decided to follow-up as case law develops the issue of intent, to ensure that ignorance of the foreign bribery offence cannot be relied on as a defence in a foreign bribery case (follow-up issue 13b).

17. The concept of ignorance of the law as a defence was adjudicated by the Appellate Division (now the Supreme Court of Appeal) in 1977 in the *S. v. De Blom* case, where the court held 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.” The Phase 2 report noted that in the South African context - where awareness of the offence was considered low - it is possible that small and medium-sized enterprises (SMEs) in particular may not be aware that bribery of a foreign public official constitutes an offence under South African law. Prosecutors met during the on-site restated the unanimous view already expressed in Phase 2 that ignorance of the foreign bribery law may not be relied on to escape responsibility in a foreign bribery case. Persons operating in an international business environment, even 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. Furthermore, the uniform view of the law enforcement panellists was that such a defence would not be accepted by courts due to the inherent dishonesty implied in any act of bribery, an act that is so well known that it would be “ridiculous” to rely on such a defence.

**Commentary**

*Given the lack of case law, the lead examiners reiterate Phase 2 follow-up issue 13b and recommend that the Working Group continue to follow-up as case law develops 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.*

### iii. Quid pro quo

18. The *Selebi* decision\(^{29}\) also sets out that the prosecution needs to prove that “*the payments were received [...] and the quid pro quo was afforded*”. Would this be a requirement in foreign bribery cases, a range of situations provided under Article 1 of the Convention would not be covered in practice, including the offer to pay a bribe. However on-site discussions alleviated the examiners concerns in this regard. Not only does section 5 of the PRECCA expressly cover the offer but the investigators and prosecutors also referred to the long-standing legal tradition regarding the criminalisation and sanction of the offer in

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\(^{29}\) See para. 39.
domestic corruption offences. Panellists also confirmed that demonstrating that “the quid pro quo was afforded” is not a requirement under section 5 of the PRECCA, and referred to the Shaik decision in this regard. Therefore, the offence may still be established in situations where, for instance, a foreign public official has not provided the quid pro quo or the company bribes in order to obtain a loss-making contract when seeking to enter a major new market. Prosecutors further specified that in both domestic and foreign bribery, the bribe giver is guilty of corruption regardless of the intent of the public official.

(b) Impact of the specifications regarding the term “to act”

19. Section 5(2) of the PRECCA provides additional specifications regarding the terms “to act”. The Phase 1 and 2 reports 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]. This raised concerns that 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.

20. In Phase 2, South Africa held the view that section 5(2), by using the term “includes”, only provides additional specifications. Nonetheless, the Working Group decided to follow-up as case law develops 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 (follow-up issue 13c) South African authorities state that no court decision has clarified the issue since Phase 2.

Commentary

The lead examiners note that panellists across all sectors are of the unanimous view that the foreign bribery offence does not raise particular issues, in line with the country’s generally robust regulatory framework.

The discussions on-site also largely alleviated the examiners concerns with regard to the knowledge of unlawfulness and the quid pro quo. The lead examiners in particular noted the clarifications brought by case law in domestic corruption leading cases.

However, in respect of the term “to act”, in the absence of case law on foreign bribery, the lead examiners reiterate Phase 2 follow-up issue 13c, and recommend that the Working Group continue to monitor 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.

30 After the on-site visit, South Africa further pointed to Hunt text book, South African Criminal Law and Procedure, Vol. 2, at page 215, which refers to case law ranging from 1930 to 1958 in support of the statement that “The crime of bribery is complete when X makes his offer to Y.”

31 South African Court of Appeal, S v Shaik and Others 2007 (1) SACR 247; Constitutional Court, S v Shaik and Others 2008 (2) SACR 165.

32 See footnote 24 above.

33 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.”
2. Responsibility of Legal Persons

(a) Standard of corporate liability and level of authority of natural person required

i. Legal basis for corporate criminal liability

21. No legislative changes have affected the standard of corporate liability in South Africa since Phase 2. As a general rule, section 2 of the Interpretation Act 1957 provides that South African law applies to natural and legal persons alike. This implies that section 5(1) of the PRECCA, which covers the offence of bribery of foreign public officials, applies to both natural and legal persons. However, this text is not directly applicable to legal persons and the main basis for holding a company criminally liable is section 332(1) of the Criminal Procedure Act, 1977 (‘CPA’) that provides for the prosecution of “corporations and members of associations”.

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

22. The criminal liability of a legal person depends on a culpable act by a representative of the legal person. To prosecute a corporate body under South African law, it must be proved that a director or servant has committed an offence in the performance of his or her official company duties. Given that mens rea is a requirement for the foreign bribery offence, the criminal intent, once demonstrated, will be attributed to the company.

23. During the on-site visit, the South African authorities reiterated their Phase 2 position that a prosecution or conviction of a natural person is not necessary to proceed against the legal person. No authority has been provided to support this proposition and South Africa still refers to the Shaik decision, although in Phase 2, the Working Group concluded that it was not fully convincing in this regard. Nonetheless, all Phase 3 panellists questioned during the on-site visit confirmed the lack of such a requirement. Similarly, an academic analysis of the corporate liability regime in South Africa expresses the view that the prosecutor can decide whether to prosecute only the director or servant of a company or only the company or both.

24. The South African authorities further affirm that the actual identity of the specific director or servant does not even have to be established because section 332 of the CPA only requires that proof be established that “an act” was committed by a director or servant. In support of this view, the South African authorities rely on the S v Pelser case (‘Pelser’). However, the Phase 2 report noted that it is not clear whether this decision had been applied to an intentional offence. After the on-site visit, South Africa pointed to three other cases to demonstrate that there is no need for a natural person to be convicted or sometimes even identified. However, these were not fully convincing because the companies convicted

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35 See South Africa Phase 2 report, at para. 202. In Shaiik, South Africa emphasised that the companies Kobifin Ltd and Kobitech Ltd were convicted on the money laundering charges without Shaik being personally convicted on these charges. However, Shaik was personally convicted for the predicate offence of corruption (i.e. on the main count). In the same case, South Africa further explained that the Company Thint (Pty) Ltd was convicted despite the absence of its Director, Alain Thetard, who had fled to France. In fact, the State withdrew all the charges against Alain Thetard on the first day of the trial because of an undertaking given in exchange for information that Thetard had provided to the prosecution.
37 S v Pelser, 1966 (3) SA 626 (N).
38 The three cases were held in Western Cape Specialised Commercial Crime Court (SCCC): S v. Bachelors 25 CC, S v. Pato and S v. Jacques Hau –Ptv) Ltd.
were owned by a sole person (obviously identified even if not held personally liable) (in two cases) or because the offence was a regulatory offence for which no intent is required (in a third case). Notwithstanding the uncertainty with regard to the identification of the natural person, South Africa’s approach to the liability of legal persons appears to be in line with Annex 1 B) of the 2009 Recommendation, which “only” requires that legal persons may be held liable even where the natural perpetrator is not prosecuted or convicted.

25. Annex 1 B) a) further requires that the level of authority of the perpetrator be flexible. The Phase 2 report noted that this is the case under section 332(10) of the CPA which allows for the labelling of persons as “directors” even where such persons are not officially registered as such in terms of the Companies Act, 2008. Furthermore, the term “servant” in section 332 covers any person if he or she is regularly employed whether by contract or otherwise. Supporting case law provided by South Africa includes the 1992 decision by the Appellate Division in Ex Parte Minister van Justisie v Suid-Afrikaanse Uitsaikorporasie (SABC), where the Court held that the actions and intentions of “directors, servants and other persons” may be ascribed to a legal person.

iii. Types of acts likely to trigger the liability of the legal person

26. The types of acts likely to trigger the liability of legal persons are also broadly defined under South African law. As in Phase 2, 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 refers to “instructions” or “permission” given by a director or servant), or an omission (section 332, paragraph (b) of the CPA deals with the omission of any act “with or without a particular intent”). According to prosecutors, omission under section 332(b) of the CPA would also cover a failure to supervise a lower level person.

(b) Issues identified in Phase 2: Liability of parent companies, criteria of the interests of the company and liability of state-owned and state-controlled enterprises

27. In spite of the prima facie broad scope of the regime of liability of legal persons in South Africa, the Working Group decided in Phase 2 to follow up, as case law develops, on 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 enterprises (issue for follow-up 13f). The absence of case law involving bribery of foreign public officials obviously narrowed the possibilities for monitoring these issues. Nonetheless, during the on-site visit, the lead examiners briefly discussed these with the South African prosecutors.

28. With respect to the liability of parent companies for the acts of bribery committed by intermediaries including their subsidiaries, the prosecutors reiterated that the leading case (although it concerned passive bribery) remains the Shaik case, which was examined in detail in Phase 2.\(^{39}\) They went, however, a step further than in Phase 2 by stating that if a parent is reckless as to the consequences of its subsidiary’s act, it should be sufficient to establish its liability. The subsidiary could be considered as a servant of the parent company to the extent that the parent obtains a benefit even if indirect and non-monetary. These theories however remain untested.

\(^{39}\) South Africa Phase 2 report, at para. 198.
The same arguments advanced in Phase 2 were again raised regarding the other two follow-up issues. The application of corporate liability to state-owned and state-controlled enterprises in particular retained the evaluation team’s attention in the South African context where such companies operate in sensitive sectors. The prosecutors re-asserted that there is no legal ground to treat these companies any differently with regard to corporate liability. They stressed that this is illustrated by the fact that there are on-going investigations against state-owned enterprises, including in the Military Contract Case and the Oil Case (discussed under Part A.5). However, the examiners note that these investigations remain in preliminary stages. These issues will therefore need to continue to be monitored as case law develops.

(c) **Lack of prosecution of legal persons**

i. **Lack of prosecution, lack of priority and lack of statistical tools**

As indicated above, in almost 10 years since the entry into force of South Africa’s foreign bribery legislation in 2004, no natural or legal persons have been convicted for foreign bribery. During the on-site visit, the South African authorities stated that legal persons are often prosecuted for intentional economic crimes. However, both during and after the on-site visit, the lead examiners requested statistics on convictions for such crimes for legal persons. South Africa was unable to provide this information. Prior to finalising this report, the NPA confirmed that they do record convictions of companies under PRECCA but no convictions have thus far been obtained. The only domestic bribery case cited by South Africa remains, as in Phase 2, the Shaik case, where the companies involved were all convicted of corruption. However, the companies were not charged under the PRECCA because the unlawful acts took place before its enactment.

Statistics on conviction rates provided under the National Prosecuting Authority (NPA) Annual Performance Plan for 2013/14 make no reference to legal persons. Legal persons are similarly absent from the 2012/2013 Performance Overview report for the Specialised Commercial Crimes Unit (SCCU) – the unit in charge of prosecuting serious economic crimes, including foreign bribery, within the NPA. Similarly, the Prosecution Policy Directives still 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 (see also discussion under section 5). Against this backdrop, it appears that South Africa’s regime of corporate liability for intentional economic offences – while broad and flexible in theory and in force since at least 1977 – is given little priority and remains hardly enforced in practice.

ii. **Towards a possible reform of the current regime of liability enforcement?**

The ease at which acts of a natural person can in theory trigger the liability of a legal person seems to be confirmed by academic analyses which describe South African legislation as instituting a regime of vicarious liability. Nonetheless, in view of its limited enforcement, academics also discuss the possible need for a revision of the regime, noting that it has been argued that “in South Africa, the theory behind corporate responsibility and the translation of this theory into a realistic form of corporate responsibility is in desperate need of review.” Many stress the proliferation of severe corporate criminality as an adverse consequence of the vast corporate activity and development, and the crucial need for adequate measures for the liability of corporate offenders. However, consideration of a possible change of corporate regime was not confirmed during the on-site.

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Commentary

The lead examiners find the lack of enforcement of corporate liability for foreign bribery of particular concern. This is especially troubling in an economic environment where there has been a major growth in corporate activity, including in areas recognised as having high risk of foreign bribery (see also section A.4), and where state-owned enterprises operating in sensitive sectors are allegedly involved in foreign bribery cases. The lead examiners further note, however, that the lack of enforcement is not due to any restrictions with South Africa’s corporate liability regime itself, which appears broad and flexible. The reasons for the lack of enforcement are not transparent, but lack of proactivity is clearly a significant factor.

The lead examiners therefore recommend that South Africa take steps to (i) ensure that the prosecutors make a full use of the broad range of possibilities available under section 332 of the CPA to effectively enforce liability of legal persons for act of foreign bribery; and (ii) encourage the NPA to include such enforcement within their quantified targeted objectives and monitored conviction rate.

They also recommend that the Working Group continue to monitor Phase 2 follow-up issue 13f, as case law develops, which includes: 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, such as 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 enterprises.

3. Sanctions

(a) Sanctions for natural and legal persons

i. Level of sanctions for both natural and legal persons

33. As in Phase 2, criminal penalties for foreign bribery are either imprisonment or a fine or both. The level of sanctions for both natural and legal persons depends on the court with jurisdiction over the offence. In the absence of enforcement of the foreign bribery offence, the evaluation team was unable to assess how sanctions would apply to either natural or legal persons in practice. This sub-section therefore briefly recalls available penalties and focuses on recent changes.

34. With regard to imprisonment, there has been no change since Phase 2. Penalties remain as follows: up to 18 years at the Regional Court Level; and up to life imprisonment at the High Court Level (section 26(1)(a) PRECCA). A minimum term of imprisonment for certain specified offences including foreign bribery must be imposed by either a Regional Court or a High Court where the offence involves, inter alia: (i) amounts of more than ZAR 500 000 (EUR 36 510 as of 16 September 2013), or (ii) amounts of more than ZAR 100 000 (EUR 7 301 as of 16 September 2013), if the offence was committed by a person, group, syndicate or enterprise towards a common purpose or conspiracy. In such circumstances, a minimum of 15 years imprisonment must be imposed for first time offenders although this sanction can be waived if “substantial and compelling circumstances exist which justify imposition of a lesser sentence.”

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42 Section 51, Criminal Law Amendment Act, 1997.
43 Section 51(2)(a) and 51(3), Schedule 2, Part II of the Criminal Law Amendment Act 1997 (Act No. 105 of 1997).
With regards to monetary sanctions, the level of fines provided in the law is the same for both natural and legal persons. As with imprisonment, the level depends on the court with jurisdiction over the offence. At the Regional Court level, since 1 February 2013, a Regional Court may impose a fine of up to ZAR 720 000 (EUR 52 574 as of 16 September 2013), doubling the amount from Phase 2 (ZAR 360 000; EUR 26 288 as of 16 September 2013). The High Court’s unlimited jurisdiction over fines remains unchanged since Phase 2. No minimum fines are provided under South African criminal law.

ii. Uncertainty with regard to the level of sanctions applied in practice to legal persons

In Phase 2, the Working Group found that the level of fines then available was low, especially where legal persons are concerned. The report noted that this concern was somewhat alleviated by the then-recent amendment to the Criminal Law Amendment Act 1997, which allows foreign bribery cases to be tried by a High Court, or a Regional Court acting with the same jurisdiction as the High Court. During Phase 2, this was understood to mean that Regional Courts could also impose unlimited fines. Questions remained, however, as to the fines which will be imposed in practice, as well as the concern already expressed 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) of PRECCA (see sub-section 4b) appeared uncertain, especially in the absence of sentencing guidelines and practice. The Working Group therefore recommended that, regarding legal persons, South Africa take steps to ensure that the penalties applied in practice are sufficiently effective, proportionate and dissuasive (Phase 2 recommendation 10b). In Phase 3 following the on-site visit, South Africa takes the position that it is only with respect to imprisonment that the Regional Courts may act with the same jurisdiction as the High Court, pursuant to section 51 of the Criminal Law Amendment Act, which does not deal with fines. Consequently, the maximum fine which may be imposed on a legal person despite the recent increase (i.e., EUR 52 574) is not sufficiently effective, proportionate and dissuasive.

In South Africa’s Phase 2 written follow-up, the Working Group had welcomed the introduction of draft legislative amendments to increase fines which can be imposed by a Regional Court for corruption offences for both natural and legal persons under section 26(1)(a) PRECCA. Recommendation 10b was hence considered partially implemented. However, it is notable that proposed fines at the time of the Phase 2 written follow-up were significantly higher and hence dissuasive for legal persons – up to ZAR 50 million (EUR 3.69 million as of 16 September 2013) – than the increase that eventually entered into force in February 2013. The concern expressed in Phase 2 thus remains that, where Regional Courts have jurisdiction over legal persons, the level of maximum fines available are still too low to be deterrent, in particular for large companies.

This concern could have been alleviated by clarifications regarding which courts have jurisdiction over foreign bribery offences. However discussions in this regard have not helped to clarify this matter. The Phase 2 report noted that pursuant to the Prosecution Policy Directives, all contraventions to the PRECCA must be prosecuted in the Regional Court. However, South Africa indicated that foreign bribery may be either tried by a High Court or a Regional Court. Additionally, discussions during Phase 2 revealed that foreign bribery cases could also be tried by the Specialised Commercial Crimes Courts (SCCCs), which are specialised Regional Courts, primarily dedicated to hearing of commercial crimes prosecuted by the Specialised Commercial Crimes Unit (SCCU). In South Africa’s Phase 2 written follow-up report, the Working Group noted that it appeared that it had always been intended that SCCCs would,

45 South Africa Phase 2 Report, para. 219,
46 See South Africa Phase 2 Report, para. 19.
47 See Phase 2 written follow-up report, summary and conclusion at para. 12.
in practice, hear foreign bribery cases. South Africa indicates that there are continuing developments in this area; the NPA is in the process of finalising policy directives, which require that both natural persons and corporate entities be tried in the High Court for foreign bribery offences so as not to qualify for the lower Regional Court fines.

39. However, during Phase 3, the South African authorities stated that foreign bribery cases would not always be heard by the SCCCs due to several reasons (further detailed under section 5 of this report) and that the High Court may be preferred in a number of circumstances. The situation thus returns to where it was in Phase 2. Acknowledging this difficulty, and given that it is now clear that Regional Courts cannot impose unlimited fines, South Africa has stated that the National Director for Public Prosecutions (NDPP) is considering directives to instruct the Directors of Public Prosecutions to charge legal persons for the offence of foreign bribery in the High Court, especially in circumstances which warrant a fine in excess of that allowed by the Regional Court. While the lead examiners are encouraged by this proposal, given the confusion that continues with regard to this issue, recommendation 10b remains of particular relevance.

Commentary

The lead examiners are significantly concerned that, where Regional Courts have jurisdiction over foreign bribery offences, the level of maximum fines applied in practice may still be too low and not sufficiently dissuasive, in particular with regard to legal persons. Therefore, they reiterate Phase 2 recommendation 10b, and urge South Africa to take steps to ensure that, regarding legal persons, the penalties applied in practice are sufficiently effective, proportionate and dissuasive.

iii. Administrative and civil sanctions

40. Companies convicted of foreign bribery may be debarred in South Africa from receiving public contracts. As discussed in section 11 of this report, section 28 of the PRECCA provides that Courts may order inclusion of conviction information of a natural or legal person in the Register for Tender Defaulters (Register) where the foreign bribery offence also constitutes an offence under either 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 PRECCA (section 28, PRECCA). Debarment is not automatic upon conviction but requires a judge to make an order. Absent entries in the Register, at the time of Phase 2, the Working Group recommended (recommendation 12d) that South Africa draw 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. In its Phase 2 written follow-up, the Working Group considered this recommendation to be satisfactorily implemented as South Africa had issued a circular and provided training to prosecutors and judges regarding section 28 of PRECCA.

41. However, since Phase 2, only 2 natural persons have been included on the Register, due to “corruption relating to contracts” in domestic corruption cases. Corruption Watch, a South African anti-corruption NGO, contends that the extremely low number of entries in the Register can be explained by both the low level of enforcement of corruption-related offences as well as the possibility that prosecutors and courts may not be fully aware of the Register and its operation.48 Critics also point out that the process set out under section 28 is not followed through systematically in practice, resulting in under-use of this provision.49 The lead examiners therefore find the need to re-iterate the Phase 2 recommendation 12d that

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48 Corruption Watch, Understanding Treasury’s Tender Blacklist, 1 October, 2013.

South Africa continue to draw attention of prosecutors and judges to section 28 of the PRECCA. The lead examiners also recommend that South Africa consider reviewing its debarment process with a view to ensure the inclusion of all natural and legal persons convicted of foreign bribery.

42. As discussed in section 11 on Public Advantages, the National Treasury also maintains an online Database of Restricted Suppliers, which sets out the names of legal and natural persons found to be “fraudulent, corrupt or improper”, based on negative reports made by government officers regarding a supplier. 50 As of August 9, 2013, 623 legal and natural persons appeared on the Database, but none of them have been identified as possibly linked to foreign bribery. It remains unclear as to what processes are in place to ensure the Database is systematically updated to include all convictions of domestic and foreign bribery.

Commentary

The inclusion of only two persons in the Register of Tender Defaulters raises concerns. The lead examiners hence re-iterate Phase 2 recommendation 12d that South Africa continue to draw attention of prosecutors and judges to section 28 of the PRECCA, with a view to ensure the possible endorsement of natural and legal persons convicted of foreign bribery on the Register of Tender Defaulters and possible termination (subject to applicable court orders) of their on-going relations with the South African National Treasury. The lead examiners also recommend that South Africa consider reviewing its debarment process to ensure the systematic inclusion in the Register of Tender Defaulters of all natural and legal persons convicted of foreign bribery. They further recommend that the Working Group follow-up on the use of the Database of Restricted Suppliers to ensure that it is being used to include all those convicted of domestic and foreign bribery.

(b) Sanctions in practice

43. No sanctions have been imposed against natural or legal persons for foreign bribery. As discussed above, the main concern raised in Phase 2 with regard to sanctions was the application in practice of sanctions available to legal persons for which a Regional Court may act with the same jurisdiction as the High Court. In the absence of enforcement of the foreign bribery offence, the evaluation team sought information regarding the level of sanctions imposed for domestic bribery and other intentional economic offences. However, South Africa was unable to provide this information. While sanctions imposed in some individual SCCU cases are available, they do not provide a comprehensive picture of the level of sanctions imposed in such cases. 51 South Africa indicated that statistical tools had been developed to track sanctions for foreign bribery, thus enabling the Working Group to consider recommendations 11 and 12a as satisfactorily implemented. However, the inability to provide statistics for domestic bribery and other intentional economic offences raises questions on the effectiveness of the new system. During the on-site visit, the South African authorities stated that legal persons were often prosecuted for intentional economic crimes (see also discussion under section 2). However, without detailed statistics, the lead examiners were unable to properly assess the sanctions regime in practice.

50 Treasury Regulation 16A 9.1(c).

51 See Performance Overview Report for the NPA Programme, SCCU Quarter 4 - 2012/13, Vote 24, Justice and Constitutional Development at pp.5-8.
44. After the on-site visit, South Africa stated it could only point to 3 cases where large fines were imposed on legal persons for intentional economic crimes: *S v. Shaik*, *Golden Arrow Bus Services*, and *Hout Bay Fishing*. Sanctions in the *Shaik* case were already discussed in the Phase 2 report. In *Shaik*, the highest penalty imposed on a legal person was a sentence totalling ZAR 2 025 000 (EUR 202 500 based on contemporaneous value of the exchange rate) for three counts of corruption and fraud. In Phase 2, this fine was not deemed by the Working Group as effective, proportionate and dissuasive, although it noted that this was significantly supplemented by confiscation. In *Golden Arrow*, a 2003 case which predates *Shaik* and involved fraud offences, the Regional Court fined a legal person ZAR 5.59 million (EUR 415 000 based on contemporaneous value of the exchange rate), plus an additional fine of ZAR 6 million (EUR 445 400 as of 16 September 2013). The legal person also agreed to pay ZAR 45.46 million (EUR 3.37 million as of 16 September 2013) to the relevant government department, based on a plea agreement. Here again, the lead examiners have significant doubts that the fine is effective, proportionate and dissuasive, although South Africa emphasises the additional amount paid under a plea bargain. In the *Hout Bay* case, although a natural person was convicted and sanctioned for corruption, the legal person was *only* sanctioned for the regulatory fishing offences.

45. During the on-site visit, a number of panellists from the private sector, business associations and civil society, expressed the view that the lack of enforcement and effective sanctions imposed creates a serious disincentive for South African companies and individuals to comply with the law. They further stated that many South African companies are more deterred by concerns of possible prosecution under the US Foreign Corrupt Practices Act (FCPA) and UK Bribery Act than the PRECCA.

46. In the *Selebi* and *Shaik* domestic corruption cases, while the convicted natural persons (respectively Jackie Selebi and Schabir Shaik) received mandatory prison sentences of 15 years, they both have been released on medical parole after serving only a fraction of their sentences. Selebi was released on medical parole in July 2012, after serving only 7 months and 16 days, while Shaik was released in March 2009, after serving 2 years, 3 months and 8 days. The lead examiners are unable to assess the frequency of releases on parole without detailed statistics on sentences imposed and the actual time served by natural persons convicted of domestic bribery and possibly other intentional economic crimes. However, the lead examiners note that the actual enforcement of severe prison sentences by the Department of Correctional Services appears to raise concerns within South Africa’s civil society; as noted by an anti-corruption NGO “people convicted of corruption will often have strong political connections that they can use to have their punishment lessened”. The possible abuse of parole (including medical parole) and pardons were cited as examples of such improper influence.

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52 *S v Shaik* [2005] 3 All SA 211 (D); see also *S v Shaik and others* 2007 (1) SACR 142 (D) and *S v Shaik* 2007 (1) SA 240 (SCA).

53 Wynberg Regional Court, *The State Versus Golden Arrow Bus Services (Pty) Ltd and Others*, Case Number SHB 105/03.


55 See South Africa Phase 2 report, at para. 220.

56 The natural person was sanctioned to ZAR 2 million (EUR 148 262 as of 16 September 2013) or imprisonment of 5 years and a further 5 years imprisonment suspended under certain conditions.

Commentary

The lead examiners were unable to assess the effectiveness of South Africa’s sanctions regime for foreign bribery or corruption cases more generally. They are further concerned that the few reported sanctions imposed on legal persons for intentional economic crimes are low. The lead examiners also note the concerns expressed by civil society about the actual execution of prison sentences imposed on natural persons convicted of corruption offences. They recommend that the Working Group monitor whether natural persons convicted of foreign bribery offenses serve their sentences and, if not, the circumstances surrounding any reductions.

The lead examiners therefore recommend that South Africa continue to maintain statistics on convictions of natural and legal persons for foreign bribery. They also recommend that South Africa maintain statistics on convictions of natural and legal persons for other intentional economic crimes, including levels of fines, actual time served by natural persons under prison sentences, and an indication of the Court which imposed the sanction.

4. Confiscation of the Bribe and the Proceeds of Bribery

47. The Criminal Procedure Act (CPA) and the Prevention of Organised Crime Act (POCA) set forth the rules of confiscation of the bribe and proceeds of bribery, which remain unchanged since Phase 2. The Asset Forfeiture Unit (AFU) within the NPA is responsible for freezing and confiscation of assets. 58

(a) Conviction and civil based confiscation regimes

48. In South Africa, two forms of asset forfeiture are used at the discretion of the prosecutor – the first (Chapter 5, POCA) is conviction-based, where a final conviction is necessary prior to forfeiture, while the second is a civil (Chapter 6, POCA) non-conviction based process, allowing assets to be frozen and forfeited without conviction. Either the criminal or the civil form of forfeiture may be used in a given case, but if problems are anticipated in a prosecution, the civil form is selected, given the lower civil standard of proof. In non-conviction based forfeiture, the prosecutor must demonstrate that the property is either the instrumentality of the offence, or that the property is the proceeds of crime, thereby establishing a link between the crime and the asset.

(b) Confiscation of the bribe and the proceeds of bribery

49. Section 20 of the CPA provides for seizure of the bribe payment (if it is an exhibit or an instrumentality of the specific crime under investigation) if the bribe is still in the hands of the briber or at least on South African territory. Courts may also declare seized assets forfeited upon conviction (section 35, CPA), although a conviction is not necessary in civil-based proceedings. Even where the bribe can no longer be seized however, section 26(3) of the PRECCA allows for a court to impose a fine of up to “five times the value of the gratification involved in the offence”. 59 South Africa was unable to provide any examples where such a fine has been imposed.

50. As noted in Phase 2, the POCA also provides for confiscation of “proceeds of unlawful activities”. Section 1 of the POCA specifies that “unlawful activities” include proceeds of foreign bribery. Confiscation can also extend to proceeds of any criminal activity which the Court finds to be sufficiently related to those offences. A court may inquire into “any benefit,” relating to the offence, thus including not

58 South Africa Phase 1 report, pp. 61-70; Phase 2 report p. 229.
59 Section 26(3), PRECCA.
only the bribe itself, but even assets representing the bribe, profits from an illicit contract in a bank account, or value of an illicit contract that has not been paid. South African authorities also stated that a parent company could face confiscation of any “benefits” (such as profits, contracts, etc.) it derived from acts of foreign bribery committed by its subsidiary, but no cases illustrating this principle were available.

(c) Confiscation in practice

51. In Phase 2, the lead examiners were satisfied that confiscation provisions of the POCA appeared to work well. The South Africa Phase 2 report also noted⁵¹ that POCA legislation was effectively used in the domestic corruption case of S v. Shaik and Others in 2007, resulting in a confiscation of ZAR 34 million (EUR 3.4 million based on contemporaneous value of the exchange rate), and the case remained a leading authority on confiscation in Phase 3. Nonetheless, the Working Group recommended (Phase 2 recommendation 12c) that South Africa continue to make full use of confiscation provisions available under 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 are not too high in practice. At the time of South Africa Phase 2 written follow-up report, the Working Group noted that POCA had been “relied on and litigated successfully in several cases” and considered recommendation 12c to be satisfactorily implemented. However, given the absence of actual foreign bribery cases, the Working Group decided to attentively follow up on this issue in Phase 3.

52. No seizure or confiscation has been ordered with respect to a foreign bribery offence to date. However, with regard to other offences, since 2010, 172 conviction-based and 741 non-conviction based freezing orders were obtained. In addition, 290 conviction-based final orders and 564 non-conviction based final orders were obtained. Economic crimes were the largest proportion of conviction-based freezing and final orders, while economic crimes as well as drug-related offences formed the largest proportion of non-conviction based freezing and final forfeiture orders.

53. A positive development has been that the AFU has increased focus on high value and complex cases by reducing the overall number of cases being completed. However, while the AFU completed an average of approximately 300 forfeiture matters per year between 2011 and 2013, it remained below its target relating to freezing orders in serious corruption matters. A review of the AFU’s Annual Performance Plan for 2012-13 reveals further concerns about reduced resources at the AFU, which could weaken confiscation efforts in foreign bribery cases. In 2012-2013, the AFU’s overall budget declined by 11%, which included a 16% decline in the employee budget. The AFU has also identified key weaknesses in “dealing with more complex cases” and “a lack of inflow of suitably qualified” staff members, a situation which could be further exacerbated by the significant decline in the AFU’s employee budget. Following the on-site visit, the Head of the AFU stated that while this decline in the employee budget had a significant impact on its ability to perform, recent actions have been taken to restore the former employee budget.

Commentary

As in Phase 2, 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. However, in the absence of enforcement of the foreign bribery offence, the lead examiners recommend that the Working Group continue to monitor this issue and encourage South Africa to make full use of the provisions available under the POCA to freeze and confiscate the bribe and proceeds of foreign bribery, and ensure that the

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⁵⁰ Sections 18 and 19, POCA.
⁵¹ See Phase 2 report, at para. 235.
evidentiary threshold necessary to apply for freezing and confiscation orders under the POCA is not too high in practice.

They further note the Asset Forfeiture Unit’s (AFU) own assessment of its weaknesses in dealing with complex cases, as well as the diminished resources of the AFU, including a reduced employee budget. They were encouraged, however, by efforts to restore the employee budget at the time of drafting of this report. They recommend that the Working Group follow up as to whether South Africa ensures adequate resources are available to the AFU, including ensuring adequately qualified staff, so that it remains effective and capable of handling high-value complex cases, including foreign bribery cases.

5. Investigation and Prosecution of the Foreign Bribery Offence

(a) Principles of investigation and prosecution, resources and cooperation

i. Enforcement agencies

54. The Directorate for Priority Crime Investigation (DPCI, also known as the “Hawks”) within the South African Police Service (SAPS) is responsible for the investigation of serious commercial crime and serious corruption, including foreign bribery. The prosecution of complex commercial crime cases under the PRECCA, including foreign bribery, is the responsibility of the Specialised Commercial Crimes Unit (SCCU) within the National Prosecuting Authority of South Africa (NPA). South Africa has also established Specialised Commercial Crime Courts (SCCCs), which are Regional Courts, with expertise in complex commercial crimes, including foreign bribery.

ii. Specialisation, coordination and cooperation

55. At the time of South Africa’s Phase 2 in 2010, its law enforcement authorities had recently been re-structured following the disbandment of the Directorate for Special Operations (DSO also known as the “Scorpions”), and the establishment of the DPCI within the SAPS through an amendment to the SAPS Act 1995. The DSO was established in 2000 and had been responsible for both the investigation and prosecution of organised crime and corruption, including offences listed under Chapter 2 of the PRECCA. The effect of the recent institutional re-arrangement is further discussed below under subsection 5(d) on Independence. Under the new structure, prosecutors are no longer placed within the DPCI, as was formerly the case within the now disbanded DSO. However, the National Director for Public Prosecutions (NDPP) must ensure that a dedicated component of prosecutors is available to assist and cooperate with members of the DPCI in conducting its investigations, and may be requested by the Head of the DPCI to appoint a Director of Public Prosecutions to perform the investigative powers referred to in sections 28 and 29 of the NPA Act. The investigation and prosecution process of the SCCU is driven through a combined prosecutor and investigator approach. Prosecutors technically become involved the moment a case has formally been opened under the case docket system. At the commencement of a formal investigation, the investigating officer and the prosecutor are supposed to interact to plan the investigation. However, it remains unclear at what stage of an investigation of foreign bribery a prosecutor would, in practice, start to be closely involved with the DPCI, and some panellists noted that the SAPS resists early involvement by prosecutors (a view which was rejected by the SAPS).

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62 Section 17B of the amended South African Police Service Act 1995 (SAPS Act)
63 Established under Section 179 of the Constitution and further regulated under the National Prosecuting Authority Act 1998 (NPA Act)
64 See: South Africa Phase 2 report at paras. 113 and 118 for further details.

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The need for a more coordinated approach can be illustrated by the developments in the Middle East Business Interests Case. In this case, an investigation was ongoing in South Africa for 2 years without coordination between prosecutors and the police. In its June 2012 Phase 2 written follow-up, South Africa indicated that a more coordinated approach in prosecutions has been facilitated by (i) the development of a five year Strategic Plan for the NPA; (ii) the role devoted to the SCCU; and (iii) the creation of the Anti-Corruption Task Team (ACTT) to fast track the investigation and prosecutions of cases of corruption. During the on-site visit, the evaluation team explored this approach to gain a better understanding of how cooperation works in practice.

Improved integration of the SCCU, SAPS Commercial Branches, and the Special Commercial Crime Courts (SCCCs)

SCCCs were created in 1999 to improve specialisation in combating complex commercial crimes. The SCCU prosecutors prosecute complex commercial crime cases investigated by the Commercial Branch of the DPCI in dedicated courts i.e. mostly in the Regional Courts, and in theory with respect to foreign bribery, in the SCCCs. In practice, prosecutors stress that the SCCU cases mostly emanate from the Commercial Branch of the SAPS with whom they usually share premises where the Regional Courts (including SCCCs) are also located. All of the on-going foreign bribery cases except for one are being investigated by the Commercial Branch. The other case is being investigated by the Organised Crime Branch. As an illustration of this improved coordinated approach in prosecutions, South Africa emphasised that a five-year Strategic Plan for the NPA has been developed based on a combined strategy between the SCCU and the DPCI to intensify the efforts against corruption. This improved integration is perceived by academia, as well as by a cross-section of non-governmental panellists, as an important innovation to increase the effectiveness and efficiency of law enforcement.

Role of Anti-Corruption Task Team (ACTT)

In its June 2012 Phase 2 written follow-up, South Africa indicated that a more coordinated approach in prosecutions has been facilitated by the creation of the Anti-Corruption Task Team (ACTT), an inter-departmental body managed by an executive committee comprised of members of nine separate government departments, including the National Head of the DPCI and the NDPP. The objective of the ACTT is to fast track the investigation and prosecutions of priority corruption cases. These cases include foreign bribery cases.

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66. South Africa has 9 regions; SCCCs have been established in Pretoria, Johannesburg, Port Elizabeth, Durban, Cape Town, and Bloemfontein.

67. DPCI, SIU, NPA, SCCU, AFU, FIC, SARS, the National Treasury and the DPSA.
corruption cases involving specific amounts (i.e. at least ZAR 5 million; EUR 382 000 as of 16 September 2013) and corruption cases including foreign bribery. At present, the ACTT has 140 high profile investigations and has achieved 42 convictions to date. Regarding foreign bribery, the DPCI states that the ACTT is involved in 1 out of the 5 cases currently under investigation (the Oil Case). The ACTT is not a permanent agency; it is a framework in the context of which different bodies may meet and cooperate on certain cases. While the evaluation team was unable to obtain a clear or detailed view of the role and value of the ACTT during lengthy discussions about the subject during the onsite, South Africa has subsequently provided additional clarification concerning its structure and operation. As described by South Africa, the ACTT Operational Committee must evaluate and prioritise DPCI investigations with a value of ZAR 5 million (EUR 365 017 as of 16 September 2013) and over, and will then oversee those investigations. As part of the ACTT process, these investigations have dedicated prosecutors appointed from the beginning to the end of the investigation. South Africa is of the view that the ACTT is a conscious and measured operational approach to address serious corruption including foreign bribery.

- Cooperation in practice

Despite such institutional arrangements that have been put in place to facilitate cooperation, concerns still remain as to how effectively it is functioning in practice. During the on-site visit, a representative of a South African company stressed that “we have it all: we have the legislation, we have the Hawks [DPCI], we have the SCCU, now we have the ACTT. But where is the enforcement and who are the people to enforce the legislation?” Certain prosecutors expressed the view that the SCCU is not involved early enough and that there is insufficient co-ordination and cooperation with the SAPS, though they also expressed the belief that coordination is improving. As discussed in further detail below, there is also a lack of consensus amongst the police and prosecutors concerning the availability of certain critical investigative measures, including a mechanism to compel the production of relevant records and/or electronic data from natural and legal persons that are under investigation for foreign bribery violations.

iii. Training and resources of the police and prosecutors

In its Phase 2 written follow-up, the WGB welcomed measures taken by South Africa to increase resources allocated to fighting corruption and to provide training on detection and investigation of foreign bribery to investigators and prosecutors. The DPCI budget for 2013/2014 is ZAR 1 293 873 000 (EUR 94 457 074 as of 16 September 2013). The total number of employees is 2 784, of which 622 are employed in the Commercial Branch. It is unclear, however, how many of these employees are investigators. During the on-site visit, DPCI representatives stated that their resources were satisfactory. However, the NPA Annual Performance Plan for 2013/2014 sends an alarming message regarding the reductions in the NPA resources, which raises questions regarding measures South Africa previously reported were undertaken to increase law enforcement resources to fight corruption, including foreign bribery.

The DPCI indicated that it is able to obtain the resources and expertise it requires. Section 17F of the amended SAPS Act expressly provides for a multi-disciplinary approach to be undertaken by the DPCI. Accordingly, the DPCI may 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. Accountability of the DPCI to the Police is further discussed under section 5(d) on Independence.

In contrast, the NPA Annual Performance Plan for 2013/2014 describes a completely different situation with regard to the resources available to prosecute corruption. The Plan, in addressing the NPA’s performance target to “reduce corruption”, states that “there is a real concern that the baseline reductions will translate into a decline in performance despite efforts to improve efficiencies”. The Plan further stresses that “the organisation anticipates that the impact of the constraints will result in the NPA being
unable to fulfil its Constitutional mandate at all newly established courts as there is no funds available for additional staff that will be required to be recruited.” The NPA also anticipates that “its staff will become overburdened and that this will “translate into reduced performance”. The Performance Overview Report for the NPA also stresses that a reason for the limited number of prosecutions instituted for corruption is that in many of the corruption cases, forensic accountants are involved and it takes a considerable time to appoint the accountants and obtain their reports. At the onsite, lawyers also expressed the view that the NPA is underfunded and has difficulties retaining talent.

64. Regarding training, a relatively sustained effort has been undertaken by South Africa to provide training to investigators and prosecutors on the investigation and prosecution of corruption, including foreign bribery offences. More specifically, in 2013, 22 investigators and prosecutors of the DPCI/NPA were trained on the investigation of the foreign bribery offence. Between 2012 and 2013, 300 members of the DPCI were trained on PRECCA offences, including foreign bribery and related use of international cooperation and subpoenas. During the same period, approximately 58 prosecutors were also trained on the foreign bribery offence. Two other trainings were provided to prosecutors regarding the prosecution of PRECCA corruption offences, financial investigations, asset recovery, MLA and extradition. Despite the extensive training provided, there remain public perceptions that expertise is still lacking. During the on-site visit, a cross-section of private sector and civil society panellists uniformly held the view that the Hawks and the NPA do not have adequate expertise to prosecute sophisticated white collar crime. To gain credibility, it is imperative that the training now materialises into enforcement action.

Commentary

The lead examiners are encouraged by the efforts made by South Africa since Phase 2 to reinforce coordination and cooperation between the police and the prosecution authorities in complex commercial crimes, including foreign bribery cases. However, the lead examiners are concerned that the Anti-Corruption Task Team (ACTT) adds yet another layer of complexity in an enforcement system in which the roles and responsibilities of the various organisations are already muddied and which were not clarified in the different phases of evaluation of South Africa or during the Phase 3 on-site visit.

In addition, the lead examiners are particularly concerned that, in the absence of adequate resources provided to prosecutors to achieve their stated objectives, the improved coordination and cooperation measures recently put in place will in practice produce limited results. This is especially concerning in a context where, as highlighted throughout this report, there have been no foreign bribery prosecutions to date in South Africa and where a cross-section of non-governmental panellists seriously questioned the capacity of law enforcement to tackle complex economic crime. This also reinforces serious concerns with regard to the political will to ensure effective investigation and prosecution of corruption, including foreign bribery.

The lead examiners therefore strongly encourage South Africa to increase the financial resources available to the specialist prosecutors in charge of fighting corruption to ensure the effectiveness of the investigation and prosecution of foreign bribery cases, including, through (i) the recruitment of the additional human resources needed; and (ii) ensuring that there is sufficient specialised expertise for foreign bribery cases including more permanently integrated forensic accountants in the Specialised Commercial Crime Unit (SCCU).

They also encourage South Africa to make full use of the newly established integrated approach to investigating complex commercial crimes – i.e. the coordination and cooperation between the SAPS and the NPA – at the outset of foreign bribery cases. They further
recommend that the Working Group follow up, as case law develops, the effectiveness and efficiency of this newly established strategy, including the ACTT.

(b) Investigation tools

i. Special investigative tools

65. In Phase 2, the Working Group recommended that South Africa make full use of the broad range of investigative measures available to investigative authorities, including special investigative techniques and access to financial information, in order to effectively investigate suspicions of foreign bribery (recommendation 7d). In its Phase 2 written follow-up, the WGB found this recommendation partially implemented. The Working Group was encouraged by the law enforcement authorities’ reliance on such tools in domestic bribery cases, but noted that they have yet to be used in a foreign bribery investigation.

66. In Phase 3, South African authorities stressed that in addition to the above-mentioned investigative measures, a dedicated capacity exists within the Priority Crime Management Centre (PCMC) of the DPCI to gather and analyse information and intelligence relating to allegations of bribery of foreign public officials. In addition to the PCMC, the DPCI is also supported by the Crime Intelligence Division for the supply of intelligence in this regard, which is a duty under the SAPS Act. It is unclear whether the DPCI has used any of these investigative techniques in the 5 foreign bribery cases currently under investigation.

ii. Issuing of subpoenas

67. Section 205 of the Criminal Procedure Act 51, 1977 (CPA) allows a judge or a magistrate to “require the attendance before a judge, for examination by a public prosecutor, of any person who is likely to give material or relevant information as to any alleged offence, whether or not it is known by whom the offence was committed.” A person who refuses to appear or fails to give the required information can be sentenced to imprisonment if the magistrate or the judge is of the opinion that revealing such information is necessary for the administration of justice or the maintenance of law and order. However a person summoned in terms of section 205 is not obliged to testify or to answer any particular question or to produce any evidence if the person has a “just excuse” for refusing to do so (section 189(1) of the CPA).

68. Accordingly, subpoenas are useful to obtain the evidence needed to open a formal investigation, which could also include information from companies’ books and records (see also section 5(c) below on opening investigations). However, the DPCI representatives met on-site indicated that they cannot issue a subpoena unless a formal case has been opened on the basis of a complaint contained in an affidavit or a report made under oath. Prosecutors met on-site were of a different opinion and stressed that issuing subpoenas to persons under even preliminary investigation is useful and should be used more broadly. Some were of the opinion that one reason why subpoenas are rarely requested by investigators at an early stage is because they require the involvement of a prosecutor. Other panellists expressed the view that before a company becomes the focus of an investigation, a subpoena cannot be issued to that company based on unsubstantiated allegations (whether via media reports or whistleblower). However, those same panellists were of the view that once the allegations are substantiated, and the company becomes the focus of an investigation, then it cannot be compelled to produce evidence that may incriminate it. This paradox leaves law enforcement effectively unable to subpoena companies for their documents, such as company e-mails and electronic accounting data, evidence which typically is crucial to bringing successful cases. During the on-site visit, some panellists were of the view that there is a continuing reluctance to involve prosecutors in early stages of an investigation (see discussion above under section 5(a)ii.).

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68 The Phase 2 report discusses these techniques into details under para 138-142.
advanced was that investigators were not fully aware of the extent to which section 205 of the CPA can be used in an investigation.

iii. **Access to classified information**

69. The Protection of State Information Bill, currently under discussion in the South African Parliament, is primarily aimed at classifying and de-classifying state information and creating a legal framework to address espionage and other related criminal offences (see also discussion under section 10). Discussions with prosecutors and DPCI representatives clarified that classification rules and procedures under the Bill may not create obstacles to the investigation and prosecution of foreign bribery cases by limiting access to classified information by law enforcement authorities. The current Bill contains some safeguard provisions and also requires a request for classified information to be granted if the information reveals “a substantial contravention of, or failure to comply with the law.” DPCI investigators state that they can access classified information for official purposes without having to undergo a declassification process. However, access to classified documents related to the widely-publicised Arms Deal Case was initially refused to the Commission of Inquiry into Allegations of Fraud, Corruption, Impropriety or Irregularity in the Strategic Defence Package (“Seriti Commission”; see also discussion under sub-section 5(d) on Independence).70 The Members of the Commission, despite being charged with such a high level inquiry, apparently did not have the requisite security clearances to examine the documents. In October 2013, they were able to access the documents once they had been declassified. Delays in accessing such information can pose a risk that key information is destroyed.

**Commentary**

The lead examiners urge South Africa to make full use of the broad range of investigative measures available, including special investigative techniques and access to financial information, in order to effectively investigate suspicions of foreign bribery (thus reiterating Phase 2 recommendation 7d).

They also encourage the DPCI to (i) make full use of the legal tools available to gather evidence, including, as appropriate, the issuing of subpoenas to natural and legal persons; and (ii) continue to include the availability and use of subpoenas as an investigative tool in foreign bribery training programmes.

Given the divergent views expressed during the onsite regarding the permissible use and utility of the various investigative tools available to law enforcement, particularly at the stage where allegations are unsubstantiated, the lead examiners recommend that South Africa clarify which investigative tools are available at each stage of an investigation, and under what standards or circumstances, in order to enhance their ability to proactively investigate allegations of foreign bribery.

Finally, the lead examiners recommend that the Working Group follow up the ability of bodies charged with investigating corruption allegations, including commissions of inquiry, to access classified information without unnecessary delay.

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69 For example, sections 14.2(b) and 45.

70 See: A potential breach of national security could sink the arms deal commission of inquiry before it even begins, The Times, 6 August 2013.
(c) **Opening and terminating foreign bribery investigations, and issues concerning proactivity**

70. In Phase 2, the Working Group recommended that South Africa take 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 (recommendation 7c). In its Phase 2 written follow-up, the WGB found that South Africa had only partially implemented this recommendation. The Working Group welcomed the institutional measures put in place by South Africa to monitor and evaluate the performance of law enforcement agencies, but considered that, given the absence of foreign bribery cases opened to date, questions remain regarding proactivity.

71. South Africa has not prosecuted a single case of foreign bribery. There are currently 5 on-going foreign bribery investigations. Progress made in a number of these investigations appears to be limited. Given the size of the South African economy, and the countries and sectors in which its companies are operating, serious questions remain about the level of proactivity by South Africa’s law enforcement authorities, and the political will to robustly enforce this offence.

i. **Leads and sources of information**

72. A police investigation into a foreign bribery offence can be initiated where the matter (or related criminal matter) is formally reported to the SAPS as a criminal complaint. Reporting channels include section 34 of the PRECCA, the Public Protector, the SIU and the Public Service Commission. However, all of these reports must ultimately be transmitted to the SAPS. Cases can also be referred to the SAPS for investigation by the NPA. Reporting is further discussed under section 10 of this Report.

73. According to the DPCI, investigations may be opened on the basis of whistleblower reports. However, South Africa states that charges can only be laid if the allegations are corroborated by the whistleblower in a sworn statement. This appears to suggest that anonymous whistleblower allegations cannot progress an investigation. Political parties, foreign states or entity can also request an investigation. However, investigations can only be opened on the basis of substantiated information provided under oath (see also discussion above under sub-section b.ii).

74. The DPCI further states that they may also open an investigation on their own initiative, including on the basis of substantiated media reports. As mentioned above, there is a designated office within the SAPS that monitors media reports regarding allegations of corruption. Once a criminal case or offence is detected, the matter will then be referred to the DPCI for further investigation.

75. In practice, however, South Africa has not been proactive in investigating foreign bribery allegations that have been widely publicised in the media, or from the Working Group, which obtains information from international press reports. In Phase 2, the Working Group was concerned that despite the existence of publicly available allegations concerning the foreign bribery cases under preliminary investigation at the time, neither the SAPS nor the NPA had taken the initiative to look into these allegations at an earlier stage. It is only after unexplained and varying delays that South Africa started investigations on the basis of these allegations in 4 cases out of the 6 that have been investigated at the time of this Phase 3 report: the *Sale of Farming Equipment Case*, the *Middle East Business Interests Case*, the *Military Contract Case* and the now terminated *Mining Case*. In practice, foreign bribery allegations

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71 The Public Service Commission manages the National Anti-Corruption Hotline, to which the general public may also report suspected corruption, including foreign bribery offences.
have surfaced from other sources in two other cases – the Telecoms Case and the Oil Case, which were reported under section 34 of the PRECCA.

ii. Initiation and conduct of investigations

76. Reasonable suspicion is required for a formal investigation to be opened. However, a preliminary investigation under section 28(13) of the NPA Act, can be initiated on the basis of a “mere suspicion”. This was addressed in a Constitutional Court judgment in the Hyundai case. The Court stated that the purpose of a preliminary investigation in this regard is “to assist the Investigating Director to cross the threshold from a mere suspicion that a specified offence has been committed to a reasonable suspicion”, which is required for a formal investigation. Despite this, the DPCI stated that a “mere suspicion” (e.g. a press article) is not sufficient for them “to act” or open a formal investigation, although they can make informal inquiries. The evaluation team is seriously concerned by this situation, which in the view of the DPCI, prevents them from taking investigative steps to transition from mere suspicion to reasonable suspicion.

77. With regard to the 5 on-going foreign bribery investigations, there are also serious concerns that law enforcement authorities are not proactively taking investigative steps or seeking international cooperation, and are rather relying on a cursory investigation or deferring to foreign authorities too readily. In the Middle East Business Interests Case, for example, the South African national claimed that the alleged bribe given was in fact a loan. In response to the lead examiners’ questions regarding further steps taken to verify the truthfulness of this statement, the DPCI representatives indicated that they made no inquiries to independently verify this information. They also cited the closing of the passive bribery investigation by the foreign authorities as a reason for putting on hold its own investigation. In the Sale of Farming Equipment Case, the South African authorities indicated that they are deferring to foreign authorities to conduct the investigation on the passive side. In the Military Contract Case, South Africa also questionably put on hold its investigation pending the outcome of a civil proceeding in the foreign country. The South African authorities demonstrate a complete lack of proactivity in conducting their investigations, including not seeking co-operation and MLA from foreign countries for those few investigations that are open. At the time of the Phase 3 on-site visit, South African law enforcement authorities stated that no outgoing MLA requests had been made in any of the five on-going foreign bribery investigations (see section 9 for further discussion). Ultimately, the evaluation team is seriously concerned that reported allegations are not being turned into formal investigations, prosecutions and convictions.

iii. Prosecutorial Discretion

78. The NPA Act vests the NPA with the discretion to institute or discontinue proceedings. The Prosecution Policy Directives issued by the NDPP to all prosecutors also 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.” Factors to be taken into account when considering the public interest are further discussed below. Once “enrolled”, a case may only be withdrawn on “compelling grounds”. This includes where the evidence available is such that there is no longer a reasonable prospect of a successful prosecution. The right to institute a prosecution for corruption lapses after the expiration period of 20 years from the time when the offence was committed (section 18 of the

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72 Constitutional Court of South Africa, The Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (PTY)LTD and others, case CCT 1/00
73 Section 20 of the NPA Act.
74 Section 32 (1) (b) of the NPA Act.
CPA), which was deemed by the Working Group as affording sufficient time for foreign bribery cases to be investigated and prosecuted.

79. Prosecutors also have the possibility to enter into plea bargaining with an accused in a criminal trial (section 105A of the Criminal Procedure Act), including for foreign bribery.\(^75\) 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. A guilty plea triggers the debarment of the company from public contracts. South Africa was unable to provide statistics on the number of plea bargains reached for corruption offences. The Working Group should therefore continue to follow up the use of plea bargaining in foreign bribery cases.\(^76\)

**Commentary**

*The lead examiners are seriously concerned that South Africa is still not proactively investigating allegations of foreign bribery including those appearing in widely publicised media reports, and reports obtained from the Working Group.*

They therefore recommend that South Africa increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations.

(d) Independence

80. This sub-section addresses a number of inter-related issues concerning the independence of South African law enforcement authorities and their ability to investigate and prosecute foreign bribery cases, without political interference or consideration of factors prohibited by Article 5 of the Convention. In addition to the numerous recommendations\(^77\) made by the Working Group to South Africa in Phase 2 on this issue, this sub-section addresses recent developments regarding the re-structuring of law enforcement authorities and its effect on independence. Reference is also made throughout this section to a number of high profile, well-publicized corruption cases which raise a number of concerns, including with regard to Article 5 of the Convention; independence of the NPA, and; decisions to discontinue prosecutions.

i. Article 5 considerations

81. Article 5 and Commentary 27 of the Convention require Parties to ensure that foreign bribery investigations and prosecutions are not subject to improper influence by considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal persons involved. In Phase 2, the Working Group was concerned that such considerations may be taken into account in foreign bribery law enforcement actions in South Africa because of a provision in the Prosecution Policy which requires prosecutors to consider “the economic impact of the offence on the community” as a factor in determining the public interest to prosecute. The Phase 2 report also refers to a 2009 decision taken by the National Director of Public Prosecutions (NDPP) to drop all charges against a very high level public official in relation to alleged corruption in a multi-billion dollar arms deal (‘Arms

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\(^75\) See Phase 2 report, para. 153 *at al.*

\(^76\) At the time of South Phase 2 written follow-up, the Working Group had deemed implemented its recommendation 7 (g) that South Africa 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.

\(^77\) See Phase 2 recommendations 7e and 7f.
Deal Case’). While not a foreign bribery case, it did raise wider questions on independence and whether Article 5 considerations (i.e. the identities of the accused) were influencing prosecutorial decisions in South Africa (see also discussion under sub-section 5(d)iii. below).78

82. The Working Group made two Article 5-related recommendations to South Africa in Phase 2, namely, to (i) “promptly proceed with clarification of the Prosecution Policy to ensure that all Article 5 considerations are respected in foreign bribery cases” (recommendation 7e), and; (ii) “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, including decisions made by the NDPP and other prosecutors of the National Prosecution Authority” (recommendation 7f). In its Phase 2 written follow-up, the Working Group found both recommendations unimplemented.

83. In Phase 3, South Africa has taken steps towards the revision of the Prosecution Policy. An amendment to the Policy expressly clarifying that Article 5 considerations shall not influence prosecutorial decision-making in foreign bribery cases was approved by the NDPP in October 2011 and subsequently by the current Acting NDPP in May 2013.79 The Minister for Justice and Constitutional Development concurred with the amendment on 5 June. It will be included in the upcoming NPA annual report to Parliament, for information. Recommendation 7e has hence been implemented. The NPA also plans to include the amendment in its next Annual Report as a way to raise awareness. South Africa further states that a previously issued Circular that sets out to prosecutors the considerations prohibited under Article 5 remains applicable. South Africa continues to consider additional steps that can be taken to strengthen safeguards, and in the interim has provided training to both the investigators and prosecutors regarding the Circular. Accordingly, recommendation 7f is partially implemented.

84. The NDPP, in addition to all NPA prosecutors, are legally bound by the Prosecution Policy. The entry into force of such safeguards is welcomed although its impact remains to be seen in a context where some recent decisions of the NPA have attracted a significant amount of controversy, including the withdrawal of fraud charges against a politically-connected, former senior law enforcement official.80 The highly publicised case is among a number that have contributed to perceptions of political interference and that the identities of the accused are being considered in prosecutorial decision-making (see discussion under sub-section 5(d)iii. below).81

85. As in Phase 2, a cross-section of non-governmental panellists again spoke with concern on the perceived lack of independence and political interference in corruption cases. A number also expressed the view that certain enforcement actions have been delayed or uninitiated because of a desire not to jeopardize South African economic interests. Representatives from the media stated that despite significant, in-depth reporting on the Telecoms Case, which involves a major South African telecommunications company, it was their perception that there has been no apparent progress on the investigation. The DPCI disagrees with this point of view. As noted above under section A5, two of the

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78 South Africa Phase 2 report, at paras.148 and 151.
79 The amendment states: “The prosecution of offences in respect of corrupt activities relating to foreign public officials shall be subject to the abovementioned principles and considerations: Provided that the decision-making process 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.”
80 See, for example: “Is South Africa really complying with the anti-corruption protocols it has ratified?” Institute for Security Studies, 9 July 2013.
five foreign bribery allegations also involve major South African state-owned enterprises operating in highly lucrative industries. As mentioned throughout this report, the absence of proactive investigative measures, including the use of MLA, also raises questions on whether economic interests or political interference concerns may underpin the lack of action. For example, a number of private sector panellists noted the perception that law enforcement lacks the will to proactively investigate and prosecute corruption cases because, allegedly, they have learned through experience that if the subjects of their investigation have high-level connections, political influence will be used to shut the case down. While the evaluation team notes that a number of factors discussed in this report could explain enforcement delays or inaction in such cases, they cannot rule out the possibility of Article 5 considerations, especially in the continued absence of legally binding safeguards.

Commentary

The lead examiners welcome the implementation of Phase 2 recommendation 7e, and the adoption of the amendment to the Prosecution Policy to stress that all considerations prohibited by Article 5 of the Convention must be respected in foreign bribery cases. They recommend that South Africa raise awareness among prosecutors, including the NDPP, of the legally-binding nature of the Policy.

ii. Independence of the police

86. Concerns were raised in Phase 2 on the possible lack of independence of the DPCI. While this did not give rise to a specific recommendation, the Working Group decided to continue to follow-up, as case law develops, the effect of the institutional rearrangement of law enforcement authorities on the investigation and prosecution of foreign bribery cases (follow-up issue 13a). The Phase 2 report notes that section 17B of the amended SAPS Act requires inter alia that the DPCI has the necessary independence to perform its functions. The head of the DPCI reports to the National Commissioner of the National Police Service, who is appointed by the President. In Phase 2, South Africa stressed that a number of safeguards are in place to guarantee the independence of the police including a Ministerial Committee, Parliamentary oversight and the possibility for members of the DPCI to complain to a retired Judge in case of improper influence or interference.

The Glenister Case

87. On 17 March 2011, the South African Constitutional Court ruled in a majority judgement, Hugh Glenister v President of the Republic of South Africa & Others (hereafter Glenister), that the legislation used to disband the Scorpions in 2008 and set up the current DPCI was unconstitutional. In summary, the Court’s main findings were that: (i) the DPCI established after the disbanding of the Scorpions “does not meet the constitutional requirement of adequate independence” and is “insufficiently insulated from political influence in its structure and functioning”; and (ii) the state is constitutionally bound to “establish and maintain an independent body to combat corruption and organised crime”.

82 Section 17I of SAPS Amendment Act (Act No 57 of 2008)
83 Ibid., Section 17K
84 See Phase 3 report, para. 116
85 South African Constitutional Court, Glenister v The President, Case No. CCT 48/10. See also Constitutional Court of South Africa - Hugh Glenister v President of the Republic of South Africa & Others - Media summary
88. The Constitutional Court found that it was too easy for the government to interfere in the Hawks’ anti-corruption investigations precisely because the Unit is overseen by a Ministerial Committee (which the South African authorities presented in Phase 2 as a safeguard to guarantee independence), which includes the Ministers of Police, Finance, Home Affairs, Intelligence and Justice and may in addition include any other Minister designated by the President of South Africa. This, and the fact that police members can be dismissed almost at will by the Police Commissioner, might, in the view of the Court, prevent sensitive investigations. This was viewed by one of the judges as potentially disinclining members of the DPCI from reporting undue interference in investigations.

89. The debate that ensued in South Africa focused on a question that the Court explicitly decided not to determine: whether the elite anti-corruption unit belongs in the Police or the National Prosecuting Authority – in a context where the Scorpions had been disbanded because locating an investigative unit within the NPA, interfered with the separation of powers.

- The SAPS Amendment Act 2012

90. The first draft bill following the Glenister judgment was, according to an academic analysis, met with protest and was then substantially changed (after a public consultation process with lawyers and civil society groups).86 The South African Police Service Amendment Act, 2012 (Act 10 of 2012), came into operation on 14 September 2012 and is still in an implementation phase. South Africa stresses that the Act aligns the provisions relating to the DPCI with the Constitutional Court judgment in the Glenister case in order to ensure that the DPCI has the required structural and operational independence to fulfil its mandate without undue interference.

91. Under the new law, the DPCI still form part of SAPS, but it is now managed and directed by the National Head of the DPCI, instead of the National Commissioner of the SAPS, as was the case before.87 The National Head is appointed by the Minister of Police, in concurrence with Cabinet. Specific powers are afforded to the National Head under the Amended Act to manage and control all members of the Directorate. He/She shall not be removed from office except pursuant to certain circumstances.88 The DPCI’s expenses are covered by their own budget, although the National Commissioner of Police remains the Accounting Officer of the SAPS. The National Head must, however, be consulted on the estimate of revenue and expenditure of the DPCI. Should there be disagreement between the National Commissioner and the National Head on the estimate of the revenue and expenditure, the Minister of Police must mediate between the Parties. The National Head is in control of funds appropriated by Parliament to the DPCI. At the on-site visit, the evaluation team discussed the implications of the SAPS financial accountability to the Minister. It was not perceived by DPCI representatives as a limitation on their resources or infringement on their independence; even though it is the Minister and not Parliament who would mediate any disagreements that may arise on their budget.

92. Retained in the current Act is the possibility for members of the DPCI to report to a retired judge cases of improper influence or interference in investigations.89 The judge has broad investigative powers including the power to issue subpoenas. During the on-site visit, the evaluation team tried to assess the effectiveness and efficiency of this mechanism with panellists, who stressed that the power of the retired judge to report to Parliament should not be underestimated. After the on-site visit, South Africa indicated

86 See for instance: Can The Hawks be independent and subject to Political Control? Pierre de Vos, 28 May 2012
87 Section 17C(3) SAPS Amendment Act 2012.
88 These are listed under section 17DA(2), (3) and (4) of the SAPS Amendment Act 2012.
89 See Phase 3 report, para. 116
that for the period 15 May 2010 to 12 May 2011, the previous retired judge dealt with four complaints. No report was submitted to Parliament and no report is publicly available.

93. Whether the Act sufficiently addressed the issues concerning independence identified by the Constitutional Court was recently challenged in court by a non-governmental organisation, the Helen Suzman Foundation (HSF), in the case of Helen Suzman Foundation v The President of the Republic of South Africa and Others.90 The High Court was asked to assess whether certain provisions within the Act now provide the DPCI with an adequate degree of insulation from political interference which would threaten its independent functioning and operations. HSF challenged a number of aspects of the Act, including the extension and tenure of the Head of the DPCI; suspension and removal of the Head of the DPCI; financial control over the DPCI; and; jurisdiction of the DPCI by the Executive. On 13 December 2013, the Western Cape Division of the High Court agreed with a number of submissions made by HSF and declared sections 16, 17A, 17CA, 17D, 17DA and 17K(4)-(9), which address issues surrounding appointment, removal and financial control, inconsistent with the Constitution. The South African Parliament has been given 12 months to remedy the defect, and the matter is now expected to proceed to the Constitutional Court for confirmation.91 This decision is not binding until confirmed by the Constitutional Court.

Commentary

The lead examiners welcome the amendments introduced and safeguards retained in the SAPS Amendment Act 2012 to improve the independence of the DPCI. However, they note that although the National Head of the DPCI benefits from a guaranty that he should not be arbitrarily dismissed, he/she is still being appointed by the executive without consultation or consent of a body outside of the executive. The lead examiners believe that the Working Group should continue to follow up on the independence and effectiveness of the DPCI regarding the investigation of foreign bribery cases.

iii. Independence of the prosecuting authority

- Appointment of the NDPP by the President

94. 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,92 where the Court held that “the independence of the judiciary... depends on the independence of... the National Director of Public Prosecutions.” However, as the NDPP is appointed by the President without formal consultation or consent (like ministers, but unlike judges), concerns remain on the ability of the NDPP and in turn, the NPA, to operate without political interference. In Phase 2, the Working Group was concerned about the appointment process, especially as the NDPP may review a decision to prosecute or not to prosecute. Furthermore, section 179(6) of the Constitution grants to the Minister of Justice (a

90 Helen Suzman Foundation v President of the Republic of South Africa and Others; In Re: Glenister v President of South Africa and Others (23874/2012, 23933/2012) [2013] ZAWCHC 189 (13 December 2013)


92 State v Yengeni 2001 (1) SACR 405.
political cabinet post) “final responsibility over the prosecution authority”. South Africa states that this constitutional provision has been interpreted to mean that the Minister is “entitled to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority.”

95. The Phase 2 report noted that academia, civil society and the media raised numerous, compelling questions regarding the independent exercise of prosecutorial powers and, in particular, with regard to the nomination and dismissal of the then NDPP by the former President. The Supreme Court of Appeal set aside the President’s appointment of the NDPP in 2011. In its decision, the court rejected the Justice Minister’s argument that an NDPP is a “political appointee.” Until very recently, the NPA had been without an appointed NDPP; it has been operating under the authority of an Acting NDPP. On 31 August 2013, a new NDPP was appointed.

96. The political appointment by the President of the NDPP, as well as of the SCCU, has raised concerns regarding possible political interference in prosecutorial independence since Phase 2. The recent suspension of a prominent SCCU prosecutor has been widely reported in the media as one recent example. The prosecutor alleges she was suspended because she strongly objected to the withdrawal of fraud charges against the former head of Police Crime Intelligence, who was appointed by the President and is considered a strong political ally. The suspension was ordered by the then Acting NDPP on the recommendation by the Head of the SCCU, both of whom were appointed by the President and also widely considered to be his strong allies. The press highlights the case as “further denting the NPA’s credibility in the public’s eyes”.99

97. During the period of the same Acting NDPP, the NPA was alleged to have failed to comply with a 2012 Supreme Court of Appeal ruling to hand over certain documents regarding a controversial decision taken by a previously Acting NDPP to drop the prosecution against a public official at the highest level of government for fraud. This caused the Democratic Alliance (DA), an opposition political party, to return to court to challenge the continued refusal. The judge ultimately ordered the NPA to produce certain documentation in order to review the previously Acting NDPP’s decision to discontinue the case. This matter is currently under appeal.

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93 NDPP v Zuma 2009 ZASCA 1.
94 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.
95 See Phase 2 report, para 151
96 See also for instance: South Africa: Now Let Parliament Appoint the NDPP
98 The prominent SCCU prosecutor was later reinstated, but transferred to a different, less high-profile position. She contested this treatment, but did not succeed; on 2 July 2013, the Johannesburg Labour Court found in favour of the NPA. See: “Judgment reserved in Breytenbach case”, News24, July 2 2013.
99 See, for example: Is South Africa really complying with the anti-corruption protocols it has ratified?, ISS Africa, 9 July 2013.
100 See, for example: Zuma unlikely to win ‘spy tapes’ case on appeal, says expert, BD Live, August 19, 2013.
This was the second time since 2009 that an NDPP remained in office for months in an “acting” capacity. A constitutional law expert at the University of Cape Town commented on this issue, stating that the failure to promptly appoint a permanent NDPP “suggests that the constitutional obligation to ensure an impartial and independent NDPP may have taken a back seat to the President’s more urgent personal considerations.” The lack of security of tenure of an acting NDPP - as opposed to the ten years mandate of an NDPP - raises serious concerns as to the vulnerability to political pressures of a person whose removal as an acting NDPP is not subject to the protection afforded to a permanent NDPP under the NPA Act. The same legal expert stresses that "where a person is not appointed for a fixed term they may be perceived as [being unprotected] and would make decisions to secure the permanent job instead of making decisions without fear, favour or prejudice.” He further states that “the independence of the NPA was severely affected by a long-acting appointment.” Similarly a comment regarding the 2011 African Peer Review Mechanism report on South Africa advances that: “the report states that questionable appointments, politicisation of positions and other politically motivated actions to stall or undermine ongoing investigations has only gone to encourage graft, and lack of transparency, in the public sector.”

During the on-site visit, a large cross-section of panellists from civil society, the legal profession and the media emphasised that the situation and the level of trust in the system has deteriorated to an extent that whatever decision the Acting NDPP takes, there is suspicion that it is politically motivated. Another representative from the private sector indicated that there is a widely-held view that the independence of law enforcement has been compromised in South Africa. Another indicated that there is perception among citizens that political influence is applied in corruption cases, and that such cases, particularly those involving subjects with high-level political connections, are routinely “swept under the carpet”.

- Exercise by the NDPP of its power to review a decision to prosecute or not to prosecute

Under the Constitution, the NDPP “may review a decision to prosecute or not to prosecute” . 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.

Under the Promotion of Administrative Justice Act (PAJA), there is no possibility for judicial review of such decisions, 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 or irrationally”). In a recent decision (DA v. NDPP), the Supreme Court of Appeal ruled that a decision by the office of the National Director of Public Prosecutions to discontinue prosecution is subject to Constitutional review and that the Democratic Alliance, a registered political party, has locus standi to bring application to review. Similarly, in the case of Freedom Under Law v NDPP, the Court granted standing to an NGO to request judicial review of the discontinuation of a

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101 Pierre De Vos, Prosecuting authority: President Zuma’s conflict of interest, 30 May 2013.
102 See, for example: SA corruption a major concern: African Peer Review, Business Live, 28 June 2011.
103 Section 179(5) of the Constitution.
104 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”.
105 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.”
106 SA Supreme Court of Appeal, DA v. NDPP, Case no.: 288/11.
107 North Gauteng High Court, Freedom Under Law v NDPP, Case no. 26912/12.
prosecution of a police official. As mentioned above, following this decision, the NPA was ordered to hand over a number of documents regarding the 2009 decision by the then Acting NDPP to drop all charges against a very high level public official, as well as a co-accused arms company, in relation to corruption involved in a multi-billion dollar arms deal. The subsequent delays by the NPA in doing so have raised questions on its independence and susceptibility to political interference.\(^{108}\) The case was referred to extensively by the Working Group in South Africa’s Phase 2 report, in which it noted the questions raised at the time from international and national civil society and media on possible political interference over prosecutorial decisions.\(^{109}\) As of the time of the Phase 2 report, no South African public official had been prosecuted in this widely reported arms deal case. This remains true in Phase 3. During the Phase 3 on-site visit, panellists from civil society and journalists unanimously emphasised that the decision to drop the charges against a public official at the highest level of government has sent a wrong message to society.

101. Since Phase 2, this case has given rise to further developments which have continued to attract media attention. Shortly after the release of the *Glenister* decision, which found that the DPCI (“the Hawks”) established after the disbanding of the “Scorpions” does not meet the independence requirement, Desmond Tutu wrote a letter to the President acknowledging the Court decision and asking for the establishment of an independent commission of inquiry into the arms deals. As he received no reply, he made this letter public.\(^{110}\) Shortly after, a prominent, former banker known for his opposition to the arms deal, asked the Constitutional Court to order the President to appoint an independent commission of inquiry into the arms deal contracts and allegations of corruption. Before the Constitutional Court rendered its decision in the matter, the President announced on 4 November 2011 the appointment of a “Commission of inquiry into allegations of fraud, corruption, impropriety or irregularity in the strategic defence package” (‘the SDPP’). This was perceived by some commentators as an attempt to pre-empt the Constitutional Court decision to appoint an independent Commission on the basis of its own terms of reference. The Commission, which began its works in 2011, was given a two year mandate to complete its inquiry. However, in March 2013, it was announced that public hearings would be postponed and that the Commission would not meet the two years deadline. Since its appointment, the Commission has been marred by controversy, including surrounding the President’s appointment of its Chairperson.\(^ {111}\) Two members of the Commission have since resigned, one stating that the Chairperson had a “second agenda”.\(^ {112}\) Concerns about the *modus operandi* and independence of this Commission, as well as the impact its work will have on the re-opening of the case, regularly arise in the press.\(^ {113}\) All are obviously linked to the perception that the Commission may take into account factors which, if taken into account in a foreign bribery case, would be in contravention of Article 5 of the Convention.

**Commentary**

The lead examiners remain very concerned by the strikingly low level of foreign bribery enforcement in South Africa. The lack of proactivity raises questions of whether considerations prohibited under Article 5 are influencing law enforcement decision making. This, coupled with the domestic context, where a number of obstacles have undermined the investigation and prosecution of high profile domestic corruption cases – often involving high

\(^{108}\) See, for example: *Zuma unlikely to win ‘spy tapes’ case on appeal, says expert*, BD Live, 19 August 2013.

\(^{109}\) See South Africa Phase 2 report, para 150.

\(^{110}\) See, for example: “*Tutu to Zuma: Do the right thing on Arms Deal*”, Cape Argus, 12 April 2011.

\(^{111}\) See, for example: “*Resignations Rock Arms Procurement Commission*”, SABC News, 1 August 2013.

\(^{112}\) “Another Arms Deal Resignation over ‘Second Agenda’”, Mail & Guardian, 2 August 2013.

\(^{113}\) *S. African Arms Deal Graft Inquiry Faces Credibility Test*
level public officials – continues to raise questions on whether law enforcement are able do their jobs independently and without interference. They further regret that since Phase 2, perceptions persist throughout South African society that the NPA’s credibility has been jeopardised because of political interference.

The lead examiners strongly recommend that South Africa take concrete steps to ensure that national economic interests and the identities of the natural or legal persons involved do not influence the investigation or prosecution of foreign bribery cases, including decisions made by the NDPP.

(e) Jurisdiction

102. Since Phase 2, there have been no legislative changes on territorial and nationality jurisdiction under section 35 of the PRECCA.

103. At the time of Phase 2, the WGB considered that section 35 of the PRECCA seemed to afford the South African Courts a reasonably broad territorial and nationality jurisdiction over both natural and legal persons. However given that jurisdiction over acts committed abroad is a recent development in the South African legal tradition, the Working Group recommended that “South Africa take steps to ensure that law enforcement authorities and the judiciary are aware of the full range of jurisdiction possible with section 35 of the PRECCA, in particular as regards legal persons” (recommendation 8). This recommendation was also based on a concern that a Constitutional Court decision in the leading case S v Basson provided relatively restrictive criteria, which if applied to foreign bribery cases may not meet the Working Group requirements. At the time of the Phase 2 Follow-up report, the Working Group considered that South Africa had only partially implemented this recommendation. While training sessions had been provided to prosecutors on the relevant provisions in the PRECCA, such training had not been extended to the judiciary. In Phase 3, the situation remains unchanged and none of the training sessions mentioned by South Africa has yet targeted the judiciary. The prosecutors met at the on-site referred to the potentially broader criteria set out in the case of R. v. Hape. This would include claiming jurisdiction “over a criminal act that commences or occurs outside the state if it is completed or if a constituent element takes place, within the state, thus connecting the event to the territory of the state through a sufficiently strong link”. In the absence of case law referring to this decision to date, the lead examiners are of the view that Phase 2 recommendation 8 should still stand.

104. In Phase 2, the WGB also decided to follow-up as case law develops 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 subsidiaries) (follow-up issue 13e). At the time of South Africa’s Phase 2 follow-up report, territorial and nationality jurisdiction were yet to be applied to foreign bribery offences including to legal persons and the Working Group decided to continue to follow this up in Phase 3. In Phase 3, the situation remains strictly the same.

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115 See Phase 2 Follow-up written report, p.3
116 Constitutional Court decision S v Basson 2005 (12) BCLR 1192 (CC).
118 See Phase 2 Follow-up written report, p.3
Commentary

The lead examiners note that, in the absence of enforcement of the foreign bribery offence there are no developments regarding the application of jurisdiction. They therefore recommend that South Africa ensure that future training provided to law enforcement authorities and the judiciary include the full range of possibilities available under section 35 of the PRECCA to establish jurisdiction, in particular as regards legal persons.

The lead examiners also recommend that the Working Group continue to follow up as case law develops 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), thus reiterating Phase 2 issue for follow up 13e.

6. Money Laundering

(a) Money laundering offence and enforcement

105. South Africa’s money laundering legislation is unchanged since Phase 2. Money laundering is criminalised in sections 4 to 6 of the POCA.\(^\text{119}\) Since South Africa has adopted an “all crimes” approach, the money laundering offences apply in the same manner whether the predicate offence is domestic or foreign bribery, or any other offence.\(^\text{120}\) The sanctions for money laundering are also unchanged since Phase 2, with a maximum fine of ZAR 100 million (EUR 7.3 million as of 16 September 2013) and imprisonment for a period not exceeding 30 years.

106. At the time of the Phase 2, there were no reported cases of money laundering predicated on foreign bribery, a situation which remains unchanged in Phase 3. More generally, regarding the enforcement of South Africa’s money laundering offence, an important concern remains the low number of investigations and prosecutions, as noted by the Financial Action Task Force (FATF) in 2009.\(^\text{121}\) Since Phase 2,\(^\text{122}\) and the money laundering offences sanctioned in the 2008 case of S. v. Maddock\(^\text{123}\) and the 2007 case of S. v. Shaik and Others,\(^\text{124}\) no enforcement action has been reported by South Africa. During the on-site visit, in an attempt to provide explanations regarding this situation, the DPCI stated that it could not determine whether there were any money laundering offences based on the analytical reports received from the Financial Intelligence Centre (FIC) since 2010. South Africa indicated that, at the time of drafting this report, no investigations of money laundering had been initiated on the basis of a FIC report. Since April 2012 through June 2013, the DPCI received 54 reports from the FIC, of which, according to the DPCI, “only one report had a potential for a money laundering investigation”. South African authorities


\(^\text{120}\) See South Africa Phase 2 report, paras. 250-251 and FATF MER paras. 5,72 and 92. An “all crimes” approach means that the predicate offence for money laundering covers all offences under South African law.

\(^\text{121}\) See e.g., FATF MER, paras. 10, 71, 107.

\(^\text{122}\) See South Africa Phase 2 report, para. 252

\(^\text{123}\) S v Maddock Incorporated and Another (0) [2008] ZACOMMC 1 (1 February 2008)
did not provide information as to whether this resulted in a money laundering investigation and/or prosecution.

107. In Phase 2, the Working Group noted the absence of statistics regarding enforcement of the money laundering offence – a gap noted by the FATF – and recommended 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 (recommendation 11). Based on information provided by South Africa, this recommendation was deemed implemented at the time of South Africa’s Phase 2 written follow-up. However, in Phase 3, South Africa still is unable to provide comprehensive statistics on the enforcement of the money laundering offence, including on (i) the number of enforcement actions per year since Phase 2, (ii) sanctions imposed on natural and legal persons, and (iii) the predicate offence. Partial figures on finalized money laundering cases provided at the last stage of the drafting of this report did not cover the whole country, and did not provide sufficient clarity on the sanctions imposed. South Africa’s inability to provide these statistics is all the more concerning because at the time of its Phase 2 written follow-up, South Africa reported that it had put in place a system to maintain such statistics as requested by the Working Group. It was based on that information that Phase 2 recommendation 11 had been considered fully implemented.125

**Commentary**

_In the absence of reported enforcement of the money laundering offence since Phase 2, the lead examiners are concerned that South Africa may not effectively prevent, detect and prosecute laundering of the proceeds of foreign bribery._

_The lead examiners are also deeply concerned by South Africa’s inability to provide comprehensive statistics on the enforcement of its money laundering offence and on the predicate offences for money laundering despite representing to the Working Group during its Phase 2 written follow-up that such statistics were being maintained._

_They therefore re-iterate Phase 2 recommendation 11 and urge South Africa to maintain statistics on the predicate offences for money laundering as well as statistics on enforcement of the money laundering offence to allow South Africa and the Working Group to assess the efficiency of South Africa’s money laundering regime in identifying foreign bribery offences as predicate offences to money laundering._

(b) **Anti-money laundering measures**

108. An effective system designed to detect and deter money laundering may uncover underlying predicate offences such as foreign bribery. In addition to the POCA, which criminalises money laundering, the Financial Intelligence Centre Act 2001 (FICA) sets out anti-money laundering requirements and reporting mechanisms, and establishes the Financial Intelligence Center (FIC) under the Ministry of Finance.

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

125 See _South Africa’s Follow-Up Report to Phase 2_ , p.30.
i. Awareness and training on foreign bribery as a predicate offence to money laundering

109. In Phase 2, the WGB recommended that South Africa ensure that the institutions required to report suspicious transactions, their supervisory authorities and as well as the FIC itself, receive appropriate directives and training on the identification and reporting of information that could be linked to foreign bribery (recommendation 6). At the time of South Africa’s written follow-up, in June 2012, the Working Group considered the recommendation partially implemented as only general information on STRs had been provided to reporting entities, but no awareness-raising or training specifically focusing on foreign bribery.

110. In Phase 3, given the lack of any foreign bribery detection through money laundering, the lead examiners remain similarly concerned by the lack of foreign-bribery specific training and guidelines. No further steps have been taken to raise awareness on foreign bribery as a predicate offence to money laundering to reporting entities, their supervisory authorities and FIC staff. There is no specific focus on the predicate offences, and the FIC only issues generalized guidance to reporting institutions on reporting requirements. No foreign bribery specific training is automatically provided to FIC staff monitoring and analysing reports. The FIC noted during the on-site visit that specialised training on foreign bribery legislation of other countries (e.g., the US Foreign Corrupt Practices Act) has been provided to analysts working on specific matters but only on an ad hoc basis. Furthermore, no typologies have been developed on foreign bribery.

ii. Preventive measures

111. At the time of the on-site visit, accountable institutions were not legally required to undertake enhanced due diligence for higher risk customers, including Politically Exposed Persons (PEPs). However, the FIC has issued guidance on the topic and sent a PEP questionnaire to reporting institutions based on the FATF standards. There is also currently no requirement on financial institutions subject to the FICA to identify beneficial owners (i.e. natural persons who ultimately control and own the customer).

112. During the on-site visit, South Africa announced that its money laundering regime is being reviewed in order to address gaps identified by the FATF, including lack of enhanced due diligence for PEPs, identification of beneficial owners and special attention for higher-risk countries. Legislative amendments to the FICA and subordinate regulations are expected to be introduced into the legislative process before March 2014 and the Act should come into force by the end of 2014. At the time of drafting of this report, the FIC was conducting internal consultations with various stakeholders regarding the proposed amendments to the FICA. The legislation would, inter alia, introduce new requirements for (i) enhanced due diligence and other monitoring requirements relating to PEPs and (ii) identification and due

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127 See South Africa’s Follow-Up Report to Phase 2, para. 7.

128 See FATF MER, para. 13: “there is no specific requirement that accountable institutions apply enhanced due diligence for higher risk categories of customers, business relationships or transactions, including politically exposed persons”.

129 See e.g., South Africa Phase 2 Report, para. 105. The FATF MER rated South Africa as partially compliant (PC) or non-compliant (NC) on 26 recommendations. FATF divides its recommendations into “core”, “key” and “other” categories. Among the core recommendations, two - R5 (customer due diligence) and R10 (record keeping) - were rated at PC. With regards to key recommendations, another two - R23 (regulation, supervision and monitoring) and SRIII (freezing and confiscation of terrorist assets) - were rated as PC. There were no recommendations rated NC among the core and key recommendations. Seven “other” recommendations were viewed as non-compliant, including R.6 (PEPs), R.33 (legal persons – beneficial owners) and R.21 (special attention for higher risk countries).
diligence of beneficial owners. No further details regarding proposed provisions relating to PEPs and beneficial ownership, or a copy of the draft legislation was provided to the evaluation team.

iii. Transaction reporting obligations

113. The South African anti-money laundering reporting regime remains unchanged since Phase 2. The Phase 2 report noted that the obligation to make suspicious transaction reports (STRs) is extremely broad, both in terms of businesses required to report, and as concerns the situational bases on which to report. “Accountable institutions” are subject to more stringent reporting obligations. Such institutions include various financial institutions, as well as attorneys and persons providing investment advice or investment brokering services, including public accountants where they provide such a service. During the on-site visit, FIC representatives stated that they currently do not receive feedback from the DPCI on the outcome of their reports (including any investigations), and they therefore do not provide feedback to reporting institutions.

114. During the on-site visit, the FIC indicated that it can independently request information from reporting institutions based on suspicious newspaper reports, even absent an STR. However, when suspicions arise from a source other than an STR, while the FIC may make additional inquiries to better understand the client relationship with a financial institution, it does not have the power to directly access financial records. Authorities at the on-site visit also indicated that if a new suspicion arises relating to a past transaction, an institution is required to retrospectively file an STR for the past transactions. Once a suspicion is formed, the reporting institution must file the information with the FIC within 15 days.

115. Based on STRs, and on its own research and enquiries, the FIC submits reports to the DPCI with an indication of possible money laundering, which is then assessed by the DPCI to determine whether there is sufficient ground to open an investigation. However, as discussed above, the DPCI indicated, during the on-site visit, that none of these reports have provided a sufficient basis to start an investigation in the 2010-2013 period. Only one possible money laundering case has been identified by the DPCI on the basis of an FIC report since 2010 and South Africa stated that it has resulted in an investigation.

Commentary

The lead examiners are concerned that South Africa’s anti-money laundering system does not effectively detect, prevent and prosecute laundering of the proceeds of foreign bribery.

While noting the expected legislative amendments to address some deficiencies in its regime regarding preventive measures, they reiterate Phase 2 recommendation 6 and urge South Africa to promptly ensure that 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.

They also recommend that South Africa consider issuing guidelines and typologies to reporting entities that specifically refer to foreign bribery as well as providing a better feedback

130 See South Africa Phase 2 Report, paras. 102-106.

131 See South Africa Phase 2 Report, paras. 102-103. As noted in the Phase 2 Report, para. 103, section 29 of the FICA provides the broad situational bases for reporting to the FIC, ranging from “information that the business has received or is about to receive the proceeds of unlawful activities” to “the business is about to be used in any way for money laundering purposes”.

132 Section 29, Financial Intelligence Centre Act.
by SAPS to the FIC and reporting institutions regarding STRs with a view to improving the quality of reporting. No money laundering or predicate offences appear to have been detected to date on the basis of the STRs from the reporting entities and the reports submitted by the Financial Intelligence Centre to the Directorate for Priority Crime Investigation. Further training is therefore necessary to improve detection and reporting of money laundering offences.

7. Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes

(a) Accounting requirements and the false accounting offence

116. The only body regulating the auditing profession is the Independent Regulatory Board for Auditors (IRBA). The IRBA is the statutory body controlling that part of the accounting profession involved with public accountancy in South Africa. As a regulator, IRBA accredits professional bodies in the accountancy profession. The South African Institute of Chartered Accountants (SAICA) is an IRBA-accredited body that serves the interests of the accounting profession. The Companies and Intellectual Properties Commission (CIPC) was established in 2011, after South Africa’s Phase 2 evaluation. It makes recommendations to the Financial Reporting Standards Council (Council) to improve financial reporting standards. Finally, the Accounting Standards Board (ASB) is a standards-setting body for entities in all spheres of government, including state-owned enterprises. 

i. Accounting standards

117. At the time of South Africa’s Phase 2 evaluation, a new Companies Act, 2008 (CA) had been adopted but had not entered into force. The Working Group decided in its written follow-up report to monitor the implementation of the new Act, including efforts to align South Africa’s accounting standards with existing international accounting standards (follow-up issues 13(g)). According to South Africa, the Act was, inter alia, designed to establish the Council which advises on the requirements of financial record-keeping and reporting by companies in line with the International Financial Reporting Standards (IFRS). South Africa adopted IFRS in 2005. Under section 28 of the CA, all companies are required to maintain “accurate and complete accounting records” consistent with the Act, and any other law with respect to preparation of financial statements. Two categories of companies exist under the Act – profit companies and non-profit companies. All financial statements must satisfy financial reporting standards which vary based on the type of company but, unless specifically provided, must be consistent with IFRS. The World Bank issued its South Africa report on the Observance of Standards and Codes (ROSC) on Auditing and Accounting. The report recommends the regulation of the accounting profession, and was made public in late 2013.

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133 The CIPC was established following the merger of the Companies and Intellectual Property Registration Office (CIPRO) and the Office of Companies and Intellectual Property Enforcement (OCIPE). See sections 187, 203 and 204, Companies Act, 2008.

134 Section 89 of the Public Finance Management Act.

135 These include: (i) personal liability companies; (ii) state-owned enterprises; (iii) public companies; and (iv) private companies.

136 Regulation 27, Companies Regulations, 2011.
118. For state-owned enterprises (SOEs) and government, accounting standards under the Public Finance Management Act (PFMA) take precedence over the CA. Under section 55 of the PFMA, and the Municipal Finance Management Act (MFMA), public entities must keep full and proper records of its financial affairs, and prepare annual financial statements in accordance with generally accepted accounting practice unless the ASB approves the application of generally recognised accounting practice for that entity. No information was provided as to whether the accounting standards for SOEs under the PFMA are less onerous than under the CA.

ii. False accounting offence

119. South Africa’s main false accounting offence is set out under section 214 of the CA, which prohibits the falsification of company accounting records. It is also an offence under the CA if a company, with the intention to deceive or mislead, fails to keep accurate or complete accounting records; keeps records other than in the applicable manner and form; or falsifies its accounting records or permits any person to do so. It is also an offence for “any person” to falsify a company’s accounting records. Financial misconduct, including accounting fraud, in state-owned enterprises is also criminalised under the PFMA. In Phase 2, the evaluation team was concerned that the level of sanctions imposed for false accounting may be too low to be effective, proportionate and dissuasive. At the time, the maximum penalty was a fine and/or imprisonment for up to two years. Since Phase 2, South Africa has increased the maximum penalty for false accounting to a fine and/or imprisonment of up to ten years. Since February 2013, the maximum fine for false accounting has increased to ZAR 400 000 (EUR 30 303 as of 16 September 2013) in the regional court. Accounting violations under the PFMA are subject to fines and/or imprisonment of up to five years. The maximum fine for accounting violations under the PFMA is ZAR 200 000 (EUR 15 240 as of 16 September 2013).

120. There have been no enforcement actions taken to date involving the concealment of foreign bribery. South Africa does not systematically maintain statistics on sanctions imposed for the false accounting offence. The lead examiners were therefore unable to fully assess whether false accounting offences are adequately investigated, prosecuted and sanctioned for both natural and legal persons. During the on-site visit, representatives from the accounting and auditing profession stated that obtaining criminal convictions for false accounting can take years, and cases stall due to insufficient expertise in investigating and prosecuting complex accounting fraud. Sanctions imposed in practice were also perceived as being disproportionately low.

**Commentary**

*Due to lack of information, the lead examiners were unable to fully assess South Africa’s enforcement of the false accounting offence, and recommend that it systematically maintain statistics on sanctions imposed on natural and legal persons for false accounting. As with regards to foreign bribery cases, the lead examiners are also concerned by the perceived delays in obtaining convictions in false accounting cases, whether due to the lack of reporting of allegations and potential leads to law enforcement, the lack of proactivity of law enforcement in investigating such matters once allegations and leads are received, or otherwise. The lead examiners recommend that South Africa ensure that (i) false accounting cases are vigorously investigated and effectively prosecuted where appropriate; and (ii) sanctions imposed in practice for false accounting offences are effective, proportionate and dissuasive.*

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138 Phase 2 report, Commentary following para. 247.
(b) **External auditing**

i. **Auditing standards and entities subject to external audits**

121. South Africa adopted the entire suite of IAASB Standards since 2005, known as the International Standards on Auditing (ISA), and include ISA 240 (consideration of fraud in the audit of financial statements) and ISA 250 (detection of material misstatements in financial statements due to non-compliance with relevant laws and regulations). The following types of entities must have their financial statements externally audited: (a) public companies; (b) state-owned enterprises; (c) any of the following: (i) any profit or non-profit company holding assets as a fiduciary for unrelated persons where aggregate asset value at any time during the financial year exceeds ZAR 5 million (EUR 381 000 as of 16 September 2013); (ii) certain non-profit companies with a specified government or international nexus; or (d) any other company whose “public interest score” is 350 or more; or at least 100, but less than 350, if its annual financial statements were compiled internally. As public interest scores are self-determined, unverified, and not yet reported in CIPC annual regulatory filings, a risk exists that some companies may avoid the external auditing requirement by intentionally or erroneously calculating a lower score. South Africa should close this potential loophole, including by ensuring that a company’s obligation to be externally audited can be independently verified, including by requiring the reporting and review of public-interest scores.

122. As prescribed by the Public Audit Act, 2004, SOEs are audited by the Auditor General of South Africa (AGSA), or if the AGSA opts not to perform the audit, by private audit firms contracted by the SOEs. The audits are performed in accordance with the AGSA audit standards, which include the SIA’s standards and the International Standards of Supreme Audit Institutions. Between 2010-2013, an average of 92 state-owned enterprises (representing slightly over 50% of all SOEs) were annually audited directly by the AGSA, while an average of 84 state-owned enterprises (representing slightly less than 50% of all SOEs) were audited by private audit firms. The SOE involved in foreign bribery allegations in the Military Contract Case is not audited by the AGSA, while the SOE in the Oil Case is annually audited by the AGSA.

**Commentary**

*The lead examiners recommend that South Africa take steps to close any loopholes that may allow entities to escape the requirement to be subject to external audit under the Companies Act, 2008, or any other applicable legislation. This could be achieved, for example, through mandatory reporting to the CIPC or through an independent review of a company’s public-interest score.*

ii. **Detection of foreign bribery through external auditing**

123. ISA 240 requires external auditors to identify risks of material misstatements due to fraud and assess the company’s responses to these risks. While auditors at the on-site visit confirmed that this would include foreign bribery, red-flag indicators specific to foreign bribery do not appear to be systematically considered in external audits. ISA 250 governs the detection of material misstatements in financial statements due to non-compliance with laws and regulations which might have a material effect on

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139 A “public interest score,” is calculated by each company based on criteria set forth in legislation and related regulations, and takes into consideration factors such as the average number of employees, amount of third-party liabilities, turnover, etc. Regulation 26(2), Companies Regulations, 2011 and Companies Act, 2008.

140 Regulation 28, Companies Regulation 2011.
financial statements. Auditors at the on-site visit confirmed that ISA 250 is understood to include consideration of irregularities relating to non-compliance with PRECCA. They also stated that if an auditor uncovered credible evidence of foreign bribery, it would meet the materiality thresholds under ISA 240 and ISA 250, regardless of the size of the bribe.

124. Although auditors at the on-site visit appeared knowledgeable about foreign bribery related risks and fraud audits, the absence of any detection or, at least, reporting of foreign bribery cases by auditors to date raises concerns regarding South African auditors’ ability to effectively detect foreign bribery through external audits in practice. South Africa has only made limited efforts to provide training, guidelines or general awareness-raising measures on the detection of foreign bribery by auditors. This mainly included peripheral mention of foreign bribery in various events focusing on other economic offences, such as money laundering or anti-trust violations.

Commentary

The lead examiners note that no foreign bribery cases to date have been detected or, at least, reported by auditors. Given the critical role the profession can play in the detection of foreign bribery, the lead examiners recommend that South Africa take appropriate steps to raise awareness specifically on the foreign bribery offence among auditors, including within the AGSA. They also recommend that South Africa ensure that the profession benefits from regular training, including specific methods for detecting foreign bribery, in order to facilitate their more active role in detecting foreign bribery.

iii. Reporting foreign bribery by external auditors

125. In Phase 2, the Working Group recommended that South Africa inter alia encourage the detection and reporting of suspected foreign bribery by auditors, including through guidelines, training, and awareness-raising measures (recommendation 5d). In its Phase 2 written follow-up, the Working Group found this recommendation only partially implemented because awareness-raising measures undertaken did not address the reporting regime specifically on foreign bribery.141 South Africa has taken limited steps to address this recommendation. IRBA has conducted 200 inspections which raised awareness about the PRECCA reporting obligations among auditors; however, as auditors are not considered persons in “positions of authority” under section 34 of the PRECCA, the application of this reporting mechanism would not apply to most auditors.

126. South Africa has taken limited steps to raise awareness of the general reporting regime for auditors. Under section 45 of the Auditing Profession Act (APA), auditors must report “reportable irregularities” to IRBA. This includes the reporting of foreign bribery. IRBA issued the Reportable Irregularity Guide in 2006, and states that compliance thereto is tested during routine inspections of auditors. Although IRBA takes the position that foreign bribery meets the definition of a “reportable irregularity”, the offence is not specifically addressed. The procedures for notifying the management board of the audited company, discussing the report with them, and sending a follow-up report to IRBA remain unchanged from Phase 2.142 While IRBA must then promptly notify the reportable irregularity to an “appropriate authority”, which includes the SAPS, it has not reported any actual or suspected foreign bribery-related irregularities to date. As mentioned above, once the management board of the audited company has been notified by the auditor of the irregularity, there is an obligation on persons in “positions of authority” within the company to report to law enforcement authorities pursuant to section 34 of PRECCA (see also discussion under section 10). Between 2011 and 2013 fiscal year, IRBA received an

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141 South Africa Phase 2 written follow-up report, at para. 7.
142 For further details, see South Africa Phase 2 report, paras. 96 – 99.
average of 777 reportable irregularities annually. According to IRBA, the number of reportable irregularities received during 2011-2013 which could possibly relate to foreign bribery, were: “defrauding a foreign national: 15; tender and fraud corruption: 7; fraud and corruption: 12; suspicious transaction/money laundering reports: 5.” However, none of these reports resulted in an investigation or prosecution for foreign bribery.

iv. Reporting foreign bribery in state-owned enterprises

127. The reporting of suspicions of foreign bribery in state-owned enterprises (SOEs) by auditors is a concern, especially as SOEs have been implicated in foreign bribery allegations (Military Contract Case and the Oil Case). Two reporting scenarios exist for SOEs. In the first case, an auditor within AGSA who audits the state-owned company would first report the foreign bribery suspicions to the management board of the company. If a thorough investigation or upwards reporting is not taken by the state-owned company, then AGSA can escalate the matter to the responsible Minister, and if necessary, to Parliament, SAPS or the Public Protector. No statistics are available as to how often such escalation has actually taken place in recent years. In the second case, where the audit is performed by a private audit firm, the auditor will follow the same escalation process, and would also report to the AGSA and IRBA (pursuant to section 45 of APA). Surprisingly, AGSA officials at the on-site visit were unaware of the foreign bribery allegations involving South African SOEs. In the Military Contract Case for instance, South African authorities did not officially learn about the company’s blacklisting in the foreign country for alleged bribery until several years later. This is particularly troubling in view of the significant media attention both allegations have attracted, and raises questions on the effectiveness of such audits as a means of detecting and reporting foreign bribery.

v. Lack of protection for external auditors

128. In Phase 2, the Working Group was concerned that auditors are not afforded protection for making reports under section 45 of the APA or otherwise. As mentioned above, protection afforded under section 34 of the PRECCA would also not apply to auditors, who are not considered persons “in positions of authority.” The Working Group therefore recommended 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 (recommendation 5d(ii)). In its Phase 2 written follow-up report, the Working Group found that South Africa had not addressed this part of the recommendation. In Phase 3, South Africa has still not taken steps to address this issue. The evaluation team remains very concerned by this continued lack of protection, which significantly undermines detection. During the on-site visit, IRBA representatives recalled incidents of auditors receiving threats of legal action or bodily harm for seeking to report illegal conduct. Subsequent to the on-site visit, IRBA representatives reiterated their serious concerns about the risks of retaliation on auditors. It is therefore critical that South Africa promptly address this recommendation to ensure auditors making reports receive adequate protection from legal or other forms of retaliatory action. IRBA has tabled proposals to strengthen the APA in this regard.

Commentary

The lead examiners strongly reiterate Phase 2 recommendation 5d(i) and that South Africa take further steps to encourage the reporting of foreign bribery, including through awareness-raising, guidelines and training measures, within the auditing profession and the AGSA.

143 South Africa has stated that the statutory basis for the AGSA’s obligation to escalate matters comes from the Public Audit Act, International Standards of Audit, and the AGSA audit manual.
The lead examiners also remain particularly concerned about the lack of protection for auditors who report reasonably and in good faith suspicions of foreign bribery. They therefore strongly reiterate Phase 2 recommendation 5d(ii) and recommend that South Africa urgently take concrete and meaningful steps to ensure that auditors making such reports are protected from legal action or other retaliatory action, as set forth in the 2009 Recommendation.

(c) Corporate compliance, internal controls and ethics programmes

129. In Phase 2, the Working Group recommended that South Africa encourage companies to (i) further develop and adopt adequate internal controls, ethics and compliance measures for preventing and detecting foreign bribery, taking into account the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance in Annex II of the 2009 Recommendation; and (ii) publicly disclose their internal controls, ethics and compliance programme measures, including those that contribute to preventing and detecting bribery (recommendation 5(b)). In its Phase 2 written follow-up report, the Working Group found this recommendation only partially implemented because more efforts were needed to specifically address foreign bribery and target SMEs.

130. While steps have been taken to address these issues, the extent to which this was based on government action remains unclear. For example, the Good Practice Guidance has been posted on Business Unity South Africa’s (BUSA) website. BUSA has also developed a detailed anti-corruption guide for SMEs, which includes reference to foreign bribery and compliance measures. However, it appears that this was done independently by the business association and not on the basis of collaboration with the government. Discussions during the on-site visit highlighted that more efforts need to be made in this regard by South Africa. A cross-section of private sector panellists stated that anti-corruption compliance measures are common for multinationals and listed entities, but are less common for SMEs. Research undertaken on 28 major South African companies further illustrates that while most have publicly-available policies on corruption, very few make specific reference to foreign bribery.

131. Phase 2 recommendation 5c required South Africa to (i) consider extending to additional companies, including all publicly traded companies, existing requirements to establish and maintain systems of internal controls; and (ii) consider extending, to non-publicly traded companies, where appropriate, the requirement to establish corporate monitoring bodies, such as audit committees. While this recommendation was found unimplemented in its written follow-up report, South Africa has since taken steps to address some of these issues. Under Regulation 43 of the Companies Regulations, boards of all publicly listed entities, all state-owned entities and entities with a certain “public interest score” are now required to have a social and ethics committee. The committee is responsible for monitoring, inter alia, the company’s standing with regard to the purposes of the Anti-Bribery Convention and recommendations, including the Good Practice Guidance, and; ensuring the company remains a good corporate citizen by, among other things, reducing corruption. Lawyers at the on-site visit noted, however, that companies have limited awareness and understanding of this requirement. With regard to the establishment of audit committees in non-publicly traded companies, section 94 of CA requires private companies “which have elected to do so and are not otherwise exempt” to elect an audit committee. The King III Report on Corporate Governance also obliges companies to establish audit committees; however, the principles contained therein are technically non-mandatory and applied on an “adopt or explain” basis.

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144 See footnote 130 above for further information on public interest scores.
Commentary

The lead examiners welcome the improvements made for publicly-listed and state-owned enterprises to strengthen internal controls, ethics and compliance measures for the purpose of preventing and detecting foreign bribery, including through the establishment of social and ethics committees. However, they recommend that South Africa raise awareness among companies of the requirement to establish such committees.

They also recommend that South Africa further encourage SMEs and non-publicly listed companies to adopt effective internal controls, ethics and compliance measures designed to prevent and detect foreign bribery. These efforts should include promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance in Annex II of the 2009 Anti-Bribery Recommendation.

8. Tax Measures for Combating Bribery

(a) Non-deductibility of bribes

132. There has been no change to South Africa’s legislation regarding non-deductibility of bribes since Phase 2. Bribes are expressly non-deductible in South Africa, pursuant to section 23(o) of the Income Tax Act, 1962. At the on-site visit, South African Revenue Service (SARS) officials stressed that a taxpayer claiming a deduction bears the burden of proof of showing that the expense is deductible. They further indicated that they can audit the returns and conduct a criminal investigation of taxpayers convicted of any criminal offence, including foreign bribery, as well as matters involving the “acquisition of wealth”, to determine if a related tax offence, including an illegal deduction of a bribe, was committed. However, it does not appear that SAPS routinely informs SARS of corruption convictions to facilitate the enforcement of the non-tax deductibility of bribe payments. SARS may also re-examine tax returns for bribes when they learn of a potential case through media reports, after such cases are risk profiled to determine if there is a need to audit or investigate. The statute of limitations is 3 years. However, in the case of fraud, misrepresentation and material non-disclosure in returns, no statute of limitations applies to tax audits and assessments. However, SARS was unable to confirm or deny whether it has re-examined the tax returns of any of the companies involved in the on-going foreign bribery investigations, citing confidentiality obligations under the Tax Administration Act, 2011 (Act 28 of 2011) (TAA).

Commentary

The lead examiners regret not being able to better assess South Africa’s efforts to enforce the non-tax deductibility of bribe payments due to limited practice. The lead examiners recommend that SARS proactively enforce the non-tax deductibility of bribe payments against defendants in foreign bribery cases, including by systematically auditing criminal defendants’ (including legal persons) tax returns for the relevant years to verify whether bribes had been deducted. They also recommend that the Working Group follow-up to ensure that SAPS routinely inform SARS of foreign bribery convictions.

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146 See South Africa Phase 2 report, paras. 68-69 for a description of this provision.
147 Section 102 of the Tax Administration Act, 2011.
148 Section 99(2) of the Tax Administration Act, 2011.
(b) Awareness-raising and detection

133. In Phase 2, the Working Group asked South Africa to take further action to improve awareness among companies, particularly SMEs active in foreign markets, about its foreign bribery legislation and the non-tax-deductibility of bribes (recommendation 1(b)). In South Africa’s Phase 2 written follow-up, the Working Group considered this recommendation to be satisfactorily implemented, but given the need to sensitize SMEs in this area, decided to continue to follow-up efforts to advise and assist companies in Phase 3. At the on-site visit, it was confirmed that SARS still does not specifically provide targeted guidance to SMEs on the non-deductibility of bribes to foreign public officials, and the types of expenses which are deemed to constitute bribes, including gifts and entertainment expenses. SARS officials noted however that they regularly interact with and provide guidance on such matters to “tax intermediaries”, such as tax preparers and accountants who are registered tax practitioners, which are often used by SMEs to prepare tax returns or to provide tax advice. Given the concerns expressed by private sector representatives (including business associations and lawyers) at the on-site visit regarding the low level of awareness of foreign bribery among SMEs, the lead examiners recommend that SARS strengthen its efforts to sensitize SMEs.

134. In Phase 2, the Working Group also asked South Africa to consider drawing attention of tax examiners to the OECD Bribery Awareness Handbook for Tax Examiners (Handbook), thereby alerting them to the importance and means of detecting foreign bribery through tax audits. In South Africa’s Phase 2 written follow-up report, South Africa noted that SARS had made the Handbook available on its website, and informed tax inspectors about it in its newsletter. In Phase 3, SARS has continued to raise awareness of the foreign bribery offence and detection methods among tax examiners using revised versions of the Handbook in yearly trainings. Following the on-site visit, South Africa has provided relevant training materials for tax examiners, and stated it has disseminated the Handbook during 9 training sessions for tax examiners around the country in 2012-2013. However, the lack of detection or reporting of suspected foreign bribery by tax authorities to date suggests the need for continued guidance to tax examiners in their audits, including the types of “red flag” expenses that could constitute bribes.

135. As tax audits can be a potential source of detection of foreign bribery, the lead examiners explored South Africa’s tax audit mechanisms during the on-site visit. Audit cases may be selected based both on a randomized process, as well as risk-based factors.149 Pursuant to the revised 2012 National Treasury Regulations, which are expected to enter into force in April 2014, SARS will be also required to perform tax audits on all persons listed in the Database of Restricted Suppliers (see also section 3 on sanctions). Approximately 5 697 annual tax audits were performed on legal persons between 2009-2013 fiscal years. Tax audits on natural persons varied widely in recent years, from a surprising low of 1 847 in 2011-2012, to a high of 54 031 in 2010-2011. The percentage of tax returns of natural and legal persons which are audited each year - which would have allowed the lead examiners to put the above figures into perspective - was not provided. South Africa’s low tax audit and investigations numbers in some years appear to be at least partially attributable to SARS’ expressed concerns at the on-site visit about its “very limited resources”, especially with regards to high-skilled auditors.

Commentary

The lead examiners recommend that South Africa provide targeted guidance to taxpayers that are small and medium sized enterprises, on the non-deductibility of bribes to foreign public officials, along with the type of expenses that could constitute bribes, including gifts and entertainment expenses.

149 These could include unaccounted income, excessive commissions or consultancy fees, “concerned industries” (e.g., construction), offshore payments, government contracts, etc.
They also recommend that South Africa disseminates the new OECD Bribery and Corruption Awareness Handbook for Tax Examiners and continue regular training of tax auditors, including through the provision of tailored, country-specific red flag indicators to help tax auditors detect bribe payments.

The lead examiners further noted SARS’ concerns about its “very limited resources”, especially with regards to high-skilled auditors. The lead examiners therefore recommend that South Africa ensure adequate resources (including adequately skilled personnel) are made available to SARS, which could improve its ability to detect possible cases of foreign bribery through tax audits and investigations.

(c) Sharing of tax information

i. With law enforcement authorities

136. The 2009 Tax recommendation, Part II, recommends Parties to the Convention establish an effective legal and administrative framework and provides guidance to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities. The TAA includes provisions on enabling sharing of information. In Phase 2 it was noted that section 4 of the Income Tax Act 1962 contains general rules on the preservation of secrecy. At the time, several other tax Acts also contained secrecy provisions. However, the provisions in the different tax Acts were repealed and are now contained in Chapter 6 of the TAA and apply to all tax Acts, with effect from 1 October 2012.

137. Chapter 6 of the TAA describes SARS’ ability to disclose information to South African law enforcement authorities under specified circumstances. Generally, SARS may disclose confidential taxpayer information that relates to, and constitutes material information for the proving of a tax offence to the SAPS and NPA. A SARS official may also disclose this information as a witness in civil or criminal proceedings under a tax Act. However, in addition to secrecy waiver provisions in various serious crimes legislation, the TAA allows for an ex parte court application by SARS, the SAPS or the NPA for the purposes of the “disclosure of information regarding specified types of serious offences (other than tax offences).” For example, if SARS discovers a serious criminal offence in the course of an audit or investigation, which would include foreign bribery, it is required to seek an ex parte order from a judge before it may disclose this information to SAPS or the NPA. At the on-site visit, SARS officials stated that there was a pending customs matter being brought before a judge for an ex parte order, which would be the first time SARS had independently detected a serious non-tax offence that it sought to disclose to other authorities using this provision. After the on-site visit, SARS officials confirmed that the ex parte order was approved within a day. South Africa stated that generally, an ex parte order can be obtained on a fairly expedited basis, as in a matter of a few days. However the mere fact that SARS has no experience in reporting suspicions of foreign bribery is of concern.

138. SARS authorities are also obligated (as “persons of authority” in government departments) under section 34 of the PRECCA to report any suspected foreign bribery to the SAPS. In Phase 2, the lead examiners noted that SARS representatives were “not aware of any reporting relating to a PRECCA offence in practice.” Therefore, Phase 2 recommendation 2a, required, inter alia, that South Africa regularly inform SARS officials of their obligations under PRECCA to report instances of foreign bribery.

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150 See for example, sections 36, 37, 69, 71 of the TAA.
151 Section 71 TAA.
152 South Africa Phase 2 report, para. 74.
and encourage and facilitate such reporting. In its Phase 2 written follow-up, the Working Group considered this recommendation to be fully implemented, noting, among other things, the SARS Fraud and Anti-Corruption Hotline and website. However, SARS authorities encountered at the on-site visit did not appear to be aware of their automatic reporting obligations under PRECCA. After the on-site, SARS authorities stated that its various enforcement units are aware of the reporting obligations, as exemplified by recent practice and reports of PRECCA violations being made by SARS to the SAPS. Four such cases were reported in the financial year 2010-2011, while 9 such cases were reported in 2011-2012, and 4 cases in 2012-2013. Still, given the overall picture, it appears in Phase 3 that recommendation 2a was in fact not fully implemented. Of concern, not a single foreign bribery related report has been made by SARS to SAPS pursuant to PRECCA to date.

Commentary

Given the need for South Africa to seriously enhance its detection capacity and to broaden its sources of allegations of foreign bribery (as discussed under section 5 of this report), the lead examiners are significantly concerned that no “serious offences” regarding foreign bribery have ever been reported by SARS to law enforcement authorities to date.

They therefore recommend that South Africa take steps to ensure (i) that an effective legal and administrative framework is in place to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities; and (ii) that guidance is provided to SARS officials to that effect. They also recommend that the Working Group follow-up on the effectiveness of the requirement to obtain ex parte orders, to ensure that it is effective in facilitating reporting.

They further recommend that SARS regularly inform tax officials of their obligation under section 34 of the PRECCA to report instances of foreign bribery, and that it encourage and facilitate such reporting.

ii. With other countries

139. South African authorities may exchange information for tax purposes with foreign authorities on the basis of an international instrument providing for mutual assistance (Double Tax Convention, Tax Information Exchange Agreement (TIEAS), regional instruments, etc.). South Africa states it is party to 78 bilateral tax treaties and 12 TIEAS. The 2009 Tax Recommendation I.iii includes considerations for adding optional language in bilateral tax treaties (referenced in paragraph 12.3 of the former commentary to Article 26 of the OECD Model Tax Convention). The optional language allows the sharing of information received for tax purposes with other law enforcement agencies and judicial authorities on certain high priority matters, including corruption. In July 2012, Article 26 of the OECD Model Tax Convention was revised, with the formerly optional language now included within Article 26, paragraph 2.153 The revised article now expressly states that when the receiving State wishes to use the information for any non-tax purpose (such as foreign bribery investigations), it should (i) specify to the supplying State the non-tax purpose for which it wishes to use the information and (ii) confirm that the receiving State can use the information for such non-tax purpose under its own laws.

South Africa confirmed that it historically did not include the language regarding sharing of tax information for non-tax purposes in its bilateral treaties. At present, only 10% of its bilateral treaties include such language. This could hinder South Africa from effectively detecting foreign bribery. However, following the on-site visit, South Africa stated that the Protocol to the Double Tax Agreement signed (but not ratified at the time of drafting of this report) with India includes the latest wording from Article 26 of the OECD Model Tax Convention. South Africa also stated its intention to include this wording in treaties with other countries when they are due for re-negotiation, as well as when South Africa enters into new treaties. South Africa has signed and ratified (on 8 October 2013) the Multilateral Convention on Mutual Administrative Assistance on Tax Matters (Multilateral Convention). The Convention entered into force on 1 March 2014, Article 22(4) of the Multilateral Convention will permit it to achieve the same aim as that contemplated by the revised wording of revised Article 26 of the OECD Model Tax Convention.

Commentary

While South Africa has moved towards including language regarding sharing of tax information for non-tax purposes in its bilateral tax treaties, until it incorporates this language into all its bilateral tax treaties, the lead examiners remain concerned that this may be a significant obstacle in the detection of bribery. The lead examiners welcome South Africa’s intention to include language from Article 26 of the OECD Model Tax Convention in all future bilateral tax treaties.

The lead examiners also welcome the ratification by South Africa of the Multilateral Convention on Mutual Administrative Assistance on Tax Matters and recommend that South Africa consider systematically including the language of Article 26.2 of the OECD Model Tax Convention (on the use of information for non-tax purposes) in its future bilateral tax treaties with countries that are not signatories of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters.

9. International Cooperation

(a) Mutual legal assistance

Since Phase 2, there have been no changes to South Africa’s framework for mutual legal assistance (MLA). South Africa may provide MLA in criminal matters on the basis of bilateral or multilateral treaties. In addition, MLA can be provided under the International Cooperation in Criminal Matters Act (ICCMA), including to countries with which South Africa does not have a treaty. The Director General of the Department of Justice and Constitutional Development (DoJ&CD) serves as the Central Authority for all matters pertaining to MLA and extradition.

In Phase 2, South Africa’s MLA legislation was found to be generally compliant with the Convention standards, with one exception. Section 16 of the ICCMA provides for the possibility to 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 because of the current state of South Africa’s extradition law, which requires that the offence for which extradition is

154 These include: Austria, Bahamas, Bermuda, Cayman Islands, Gibraltar, Guernsey, Jersey, San Marino.

155 See paras. 174-181 of the South Africa Phase 2 report for further information on South Africa’s MLA framework.
sought be committed within the jurisdiction of the requesting state (see also section 9(b) below on Extradition). 156

143. The Working Group also found several weaknesses in Phase 2 with the operation of South Africa’s MLA system in practice. Consequently, it recommended that South Africa “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” (recommendation 9a). The Working Group found this recommendation implemented at the time of South Africa’s Phase 2 written follow-up because of steps taken to render more efficient the execution of MLA requests. This included the establishment of a dedicated unit within the DoJ&CD and the development of several training initiatives.157

144. In Phase 3, however, the evaluation team finds that sending and responding to MLA requests in foreign bribery cases continues to be a problem in South Africa in practice. South Africa has not made any formal outgoing MLA requests, and has still not responded to incoming MLA requests in the Military Contract Case. Furthermore, South Africa did not respond to questions in the Phase 3 questionnaire indicating whether MLA requests relating to foreign bribery cases were received from Parties or non-Parties to the Convention, stating that “information is not available at this stage.” This raises questions as to the efficiency of the new system in place, and its ability to track incoming MLA requests and ensure timely responses.

i. Incoming MLA requests

145. Since 2009, South Africa has received 360 incoming MLA requests, of which 3 relate to foreign bribery. South Africa was only able to confirm whether they came from parties to the Convention two days prior to its evaluation by the Working Group. To date, requests have been received by three Parties to the Convention and one non-Party. In general, response time to MLA requests can range from one month to over a year. Information requested by the evaluation team after the on-site visit on the time it took to respond to the foreign bribery-related requests and how many remain outstanding was not provided by South Africa.

146. One incoming MLA request from a non-Party to the Convention which implicated a South African state-owned defence company in foreign bribery remains outstanding since Phase 2 (see also Military Contract Case in section A.5). The state-owned enterprise and the foreign country are also in commercial arbitration over a contractual dispute. In its responses to the Phase 3 questionnaire, South Africa stated that it would provide the requested information to the foreign country upon (i) conclusion of the arbitration proceedings, and; (ii) receipt of detailed information about the criminal proceedings in the foreign country, and identification of persons against whom criminal conduct is investigated. In Phase 2, the Working Group expressed concern that a private arbitration process would delay the provision of MLA in a criminal investigation.158 The Phase 2 report also noted that following the Phase 2 on-site visit, South Africa informed the evaluation team that it had responded to the MLA request in 2010.159 However, this

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156 South Africa Phase 2 report, para. 178.
157 See South Africa Phase 2 written follow-up report, at para. 10.
158 South Africa Phase 2 report, para. 180.
159 Ibid.
information was incorrect and South Africa has not yet responded to the request, despite statements made by the government that it would.160

147. During the Phase 3 on-site visit, South Africa further explained that the reason for inaction was because the MLA request did not meet the requirements under the ICCMA. South African officials referred to the requirement under section 7(ii) of the ICCMA which states that “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.” However, it is unclear how this requirement was not met in view of publicly-available information pointing to a criminal investigation in the requesting State.161 Furthermore, South Africa could have responded to the request under section 7(ii), which also allows for information to be provided “where there are reasonable grounds for believing that an offence has been committed in the requesting State.”162 The state-owned enterprise was blacklisted in the foreign country from bidding on defence contracts for alleged bribery, and it is unclear why South Africa did not view this as sufficient to determine a reasonable suspicion that a criminal act occurred in the requesting State. In September 2013, the foreign country announced that it closed its criminal investigation into passive bribery because no evidence was found which could substantiate the allegations of corruption.163 As discussed above under section A5, South Africa’s investigation into the foreign bribery allegations remains on-going.

ii. Outgoing MLA requests

148. In Phase 2, the Working Group was also concerned that South African authorities were insufficiently proactive in requesting MLA to obtain and assess evidence available abroad concerning foreign bribery allegations involving South African companies or individuals.164 At the time of the Phase 3 on-site visit, South African law enforcement authorities stated that no outgoing MLA requests had been made in any of the five on-going foreign bribery investigations.165 There are concerns that South Africa is taking a reactive approach by relying on the outcome of cases in foreign jurisdictions. For example, in the Sale of Farming Equipment Case, South Africa states that it will await the outcome of the case underway in Portugal before taking steps to determine whether there are any charges to be laid on South African nationals. As discussed above, an incoming MLA request from a non-Party to the Convention in the Military Contract Case also did not trigger any outgoing MLA request from South Africa in relation to its on-going investigation. Two of the five on-going foreign bribery investigations (Oil Case and Military Contract Case) in South Africa also involve major South African state-owned enterprises operating in the defence and oil and gas sectors. The absence of proactive outgoing MLA requests in both these investigations, and delays in responding to an incoming request, raises concerns that law enforcement authorities have not been making adequate use of international cooperation mechanisms in foreign bribery cases, and that economic considerations may be influencing decisions to request or respond to MLA (see also section 5 on Article 5). During the on-site visit, representatives from the National Prosecution Authority (NPA) conceded that South Africa needed to be more proactive in making MLA requests in foreign bribery investigations, including by visiting the foreign countries and making greater efforts to work with foreign law enforcement authorities.

160 “South Africa assures CBI chief all help in Denel arms case”, The Times of India (3 October 2012).
161 See, for example: “New Bid to Clear Bribe Cloud over Denel in India”, Business Day Live (6 August 2012) and “CBI Hopeful of Headway in Denel and Tatra Cases”, The Times of India (7 October 2012).
162 See South Africa Phase 2 report, at para. 176.
163 See: “CBI closes Denel case after 8 years of probe”, ZeeNews, 30 September 2013.
164 South Africa Phase 2 report, para. 181 and recommendation 9a.
165 Since 2009, South Africa has made a total of 27 outgoing MLA requests in criminal matters.
Commentary

The lead examiners are extremely concerned by South Africa’s delays in responding to incoming MLA requests, despite steps taken since Phase 2 to render the system more efficient. They are especially concerned by the reasons provided by South Africa for not responding to an incoming MLA request in the Military Contract Case. The lead examiners therefore recommend that South Africa ensure its authorities respond to MLA requests without unnecessary delays. They also recommend that South Africa ensure that its central authority (DoJ&CD) maintain statistics on the number of requests that come from Parties to the Convention as well as the response time, in order to help monitor efficiency of their MLA system.

The lead examiners further note with concern that South Africa has not been proactive in seeking MLA. They recommend that South Africa take steps to ensure that its authorities are more proactive in seeking MLA or other forms of international cooperation in possible foreign bribery cases.

(b) Extradition

South Africa has not made or received any foreign bribery-related extradition requests. In Phase 2, the Working Group identified a loophole in South Africa’s extradition legislation regarding foreign bribery. Under section 3 of the Extradition Act, extradition can only be provided in cases where the offence for which extradition is sought was “committed within the jurisdiction” of the requesting State. Consequently, South Africa cannot 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. An Extradition Bill (2009), which would remedy this situation, was intended to be submitted to Parliament in 2011. The Working Group consequently recommended in Phase 2 (recommendation 9b) that South Africa promptly adopt the Bill in order to be able to provide extradition for foreign bribery, regardless of where the foreign bribery has been committed. At the time of South Africa’s written follow-up report in June 2012, the Working Group considered this recommendation not implemented because the Bill had yet to be passed and enacted into legislation. Two days prior to South Africa’s evaluation by the Working Group, it indicated that, after consideration of its legislation, it disagreed with the Group’s Phase 2 conclusion regarding the existence of a loophole in its extradition legislation. The lead examiners had insufficient time to consider the position raised by South Africa.

Commentary

The lead examiners strongly reiterate Phase 2 recommendation 9b that South Africa promptly proceed with the adoption of its Extradition Bill to ensure that it can provide extradition for foreign bribery, regardless of where the foreign bribery has been committed.
10. Public Awareness and the Reporting of Foreign Bribery

150. This section addresses awareness-raising efforts, reporting of foreign bribery, and whistleblowing. The reporting obligations of accounting and auditing professionals, tax officials, and officials involved in the disbursement of public advantages are respectively addressed under sections 7, 8 and 11.

(a) Awareness of the Convention and the offence of foreign bribery

151. South Africa has taken measures to raise awareness within the public sector of foreign bribery. The Department of Public Service and Administration (DPSA) circulated an article on the Convention to all government departments. In 2010, the DPSA also developed anti-corruption training programmes for public servants, which covered the PRECCA, the Convention and South Africa’s Phase 2 report. South Africa states that between 2010 and 2013, a total of 1,774 public servants received the training. In November 2010, the Department for International Development and Cooperation (DIRCO) also circulated a presentation on the foreign bribery offence to all departmental managers and Heads of Mission. The Convention has also been included in the Foreign Service training programme. As DIRCO officials were absent from the on-site visit discussions, the evaluation team was unable to assess the effectiveness of such efforts. During the on-site visit, the Directorate for Priority Crime Investigation (DPCI) also mentioned plans to raise awareness of corruption, including foreign bribery, on a national television programme.

152. With regard to private sector awareness-raising, the DPSA partnered with Business Unity South Africa (BUSA) to develop and implement a three-year programme to increase private sector capacity to prevent and combat corruption, including foreign bribery. The Convention, OECD Good Practice Guidance and other anti-corruption training materials are also made available on BUSA’s website. However, as BUSA did not attend the on-site visit, the evaluation team was unable to discuss the results of its programmes in practice. In 2012, South Africa also launched a communications campaign, in which billboards and posters were developed to raise awareness of anti-corruption issues, including foreign bribery. The campaign covered major airports, train stations and highway off-ramps to target business travellers. In 2010, DIRCO organised briefings with business communities in its overseas missions. According to South Africa, DIRCO officials “continuously” brief South African companies conducting business abroad on the Convention and its implications. However, as noted above, DIRCO was absent from the on-site visit discussions and the evaluation team could therefore not discuss practical experiences advising South African companies confronting bribe solicitations abroad. The lead examiners were not advised of any steps South Africa has taken to raise awareness of foreign bribery among SMEs or provide assistance in efforts to prevent foreign bribery; a follow-up issue identified by the Working Group. The need to sensitise South African SMEs on foreign bribery risks is particularly important in view of their increasing business activities abroad (see section A.4).

153. The low levels of detection and enforcement of foreign bribery in South Africa raise concerns that awareness-raising and training measures are not translating into practice or yielding results. A cross-section of panellists from the non-governmental sectors were also of the view that the government could do more to raise awareness within the private sector. SMEs in particular were noted as having low levels of awareness and lacking the resources to adopt measures to prevent foreign bribery. Crucially, a number of panellists stated that a low level of awareness is linked to a lack of enforcement and that most companies are deterred by enforcement actions in foreign jurisdiction (e.g. the UK and US), rather than by South Africa’s enforcement of foreign bribery.
(b) Reporting suspected acts of foreign bribery

154. As noted in Phase 2, the Public Service Regulations 2001 (‘Regulations’) impose a duty on all public servants to report suspicions of corruption, including foreign bribery, to the appropriate authorities. Public service employees must report hierarchically to their supervisors or may report the matter directly to the Public Protector. Departments first investigate the allegations of corruption, and, where necessary, refer the allegations to an appropriate agency for further investigation. Those who do not comply with this duty would be charged with misconduct. The duty to report under the Regulations does not apply to employees of state-owned enterprises. To date, no public service employee has reported suspected foreign bribery under the Regulations. South Africa was unable to provide any information on the reporting obligations and procedures developed, if any, for DIRCO staff including those posted in overseas missions.

155. Section 34 of the PRECCA also places a duty on certain employees holding “positions of authority” within the public and private sectors (including state-owned enterprises) to report suspicions of corruption, including foreign bribery, to the DPCI. Any person who fails to comply with this duty is guilty of an offence. The DPCI monitors reports received under section 34 of the PRECCA; since 2010, it has received 2,359 reports, of which 2 related to foreign bribery (see also discussion under section 5).

156. While it is positive that 2 foreign bribery allegations have been uncovered through the use of section 34, there remain concerns about its effectiveness in practice. For example, in the Military Contract Case, no report was made by senior management of the company to the DPCI, despite the company’s blacklisting in the foreign country in 2005 for alleged bribery. Sanctions were also not imposed on any senior employee for failing to report. General awareness among the private sector of section 34 also appears to be limited. At the on-site visit, South African officials stated that while information is available on the SAPS website, there has been no awareness-raising targeting senior management of South African companies. Civil society panellists also highlighted this low level of awareness and stated that even if there was awareness, it is not taken seriously because of a lack of enforcement. At the on-site visit, lawyers also commented on the lack of an express provision in the PRECCA affording protection to those who report under section 34. While such reports should be protected separately by South Africa’s Protected Disclosures Act (PDA) (discussed below), one lawyer explained that those reporting may feel more comfortable doing so under a different piece of legislation which expressly affords protection, resulting in the risk that reports get lost in the system.

157. A National Public Service Anti-Corruption 24-hours hotline (NACH) was established to facilitate the general reporting of corruption. Between 2004 and March 2012, the NACH received 137,512 complaints, of which 14,287 related to reports of alleged corruption. Of these reports, the Public Service Commission which independently administers the hotline, referred 9,881 cases of alleged corruption to relevant authorities for investigation. Between 2011 and 2012, 120 cases were referred to the SAPS. None of these cases related to suspected foreign bribery.

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Section 34(4) broadly defines persons 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 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.
Commentary

In view of the low number of foreign bribery reports that have been generated to date, the lead examiners recommend that South Africa step up its efforts to raise awareness of the foreign bribery offence within both the public and private sectors, including the reporting obligations and sanctions under section 34 of the PRECCA. South Africa should also ensure that specific reporting obligations and procedures on foreign bribery are developed for DIRCO staff posted in overseas missions. In its awareness-raising efforts, South Africa should highlight that those who report under section 34 of the PRECCA would be protected under the PDA. Noting that engagement with SMEs is a horizontal issue that affects many other Parties to the Convention, the lead examiners also recommend that South Africa pay particular attention to SMEs in its foreign bribery awareness-raising efforts.

Finally, the lead examiners note that strong enforcement of the foreign bribery offence is one of the most effective ways to raise awareness. The lead examiners hope that South Africa will promptly develop a track record of successful foreign bribery enforcement actions which would, in turn, further contribute to awareness-raising.

(c) Whistleblowing and whistleblower protection

South Africa’s Protected Disclosures Act (PDA) provides protection for public and private sector employees who report unlawful or irregular conduct of an employer or an employee of that employer. In Phase 2, the Working Group commended South Africa for having adopted whistleblower protection legislation, but expressed concern regarding its application in practice and the level of awareness among the public of the PDA. South Africa was therefore recommended to “take 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” (recommendation 2b.). In its Phase 2 written follow-up, the Working Group found this recommendation unimplemented.

South Africa explains that in 2012, the DoJ&CD prepared a draft Protected Disclosures Amendment Bill to address a number of loopholes in the PDA, including to extend protection to independent contractors, consultants and temporary employees. The Bill also seeks to strengthen the PDA by introducing a duty on employers to investigate disclosures of unlawful or irregular conduct and by providing for immunity from civil and criminal liability. The Bill was submitted to the Minister of Justice and Constitutional Development for consideration, whose further instructions are currently pending.

The legislative measures being taken to strengthen the PDA are welcome. However, encouraging whistleblowing and affording adequate protection in practice continues to be a serious problem in South Africa. During the on-site visit, a cross-section of panelists from the private sector, business organisations, civil society and the media reported that reprisals against whistleblowers, which have included death threats, are perceived to be widespread. Recently, two anti-corruption whistleblowers who reported allegations of corruption in the allocation of social housing were killed.167 A civil society representative specialising in whistleblower protection explained that the lack of protection afforded in practice has deterred whistleblowers from coming forward and has resulted in a decrease in reporting. While a number of South African companies have established internal whistleblowing hotlines168 to encourage reporting, one panelist stated that whistleblowing remains a sensitive issue in companies because of fears of

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168 Research undertaken on 28 major South African companies shows that 27 of the 28 have a company whistleblowing policy in place.
workplace reprisals and inadequate protection. The downward trend in whistleblower reports was also recently identified in a South African survey on economic crime, which reported that crime detected through whistleblower reporting dropped from 16% in 2007 to 6% in 2013.169

i. The Protection of State Information Bill

161. According to a number of both government and non-governmental panellists, South Africa’s Protection of State Information Bill has also created a chilling effect on whistleblowing. The Bill is primarily aimed at the classification and de-classification of state information. However, it has been subject to a significant amount of controversy regarding provisions that would sentence whistleblowers who disclose classified information to up to 25 years in prison.170 In January 2012, the Chair of the Working Group sent a letter to the Minister of State Security to request further information on the Bill and its impact on the provisions of the Anti-Bribery Convention regarding the protection of whistleblowers.

162. South Africa asserts that the Bill would not affect the protected disclosures of foreign bribery. South Africa highlights clause 43, which states that those who disclose classified information will be guilty of an offence and liable to a fine or imprisonment of up to five years, except where such disclosure is protected by the PDA. As discussed above, foreign bribery reporting is protected under the PDA. South Africa further states that new clauses have been incorporated which strengthen the position on reporting foreign bribery. In particular, clause 14(2) has been amended to state that “the classification of state information may not under any circumstances be used to [inter alia] conceal breaches of the Prevention and Combating of Corrupt Activities Act”.

163. However, clause 49 of the Bill (“Prohibition of the Disclosure of State Security Matter”) could pose an obstacle to the reporting of foreign bribery and whistleblower protection. Clause 49 prohibits the intentional disclosure of a state security matter, and any person who breaches this clause is subject to imprisonment of up to 15 years. Unlike clause 43, clause 49 is not tempered by an exception of where a disclosure is protected under the PDA. This could therefore undermine disclosures of foreign bribery suspicions in connection with a defence or arms contract, for example, which one could argue falls within the ambit of “state security”. Representatives from both the government and civil society noted this risk, stating that the Bill’s open definition of “state security” may deter whistleblowers from coming forward. Other representatives from the government stated that fears generated by the Bill are unfounded, and that a government-led awareness-raising campaign to rectify misconceptions may be warranted.

Commentary

The lead examiners have grave concerns about reports in South Africa of retaliatory acts taken against whistleblowers. Whistleblowers play a key role in the detection of corrupt activities, and an enabling environment needs to be created by the government to encourage and facilitate reporting by ensuring whistleblowers are effectively protected. The lead examiners therefore recommend that South Africa take concrete and meaningful steps to ensure that those who report suspected acts of foreign bribery in good faith and on reasonable grounds are in practice afforded the protections guaranteed by the law.


They also recommend that South Africa take steps to publicly clarify that those who blow the whistle on suspicions of foreign bribery in good faith and on reasonable grounds would not run afoul of the Protection of State Information Bill. In this regard, they also recommend that South Africa clarify the relationship between clauses 43 and 49 of the Bill to ensure there are no loopholes preventing foreign bribery whistleblowers from being afforded protection under the PDA.

11. Public Advantages

(a) Official development assistance

164. Official Development Assistance (ODA) is primarily administered by the African Renaissance and International Cooperation Fund (ARF), which operates within the Department for International Relations and Cooperation (DIRCO). The ARF is expected to be replaced by the South African Development Partnership Agency (SADPA) in 2014. While the ARF is South Africa’s primary ODA (or development cooperation) agency, it is estimated that nearly half of all South African government departments are engaged in the provision of some form of international assistance.171 One of the main rationales for SADPA’s establishment is to centralise and better coordinate such development partnerships and outgoing aid.

165. According to DIRCO, ZAR 270.7 million (EUR 20.5 million as of 16 September 2013) was disbursed as outgoing ODA by the ARF in 2011-2012.172 However, these figures may not be complete, as other government departments may be involved in the disbursement of ODA. A recent study conducted by the South African Institute of International Affairs (SAIIA) states that South African development cooperation could in fact be as high as 1 per cent of the country’s gross national income (GNI),173 making South Africa a top performer in ODA in comparison with members of the OECD Development Assistance Committee.174 In light of this new information, measures to prevent and detect foreign bribery in ODA-funded contracts are even more imperative. However, as DIRCO was absent from the on-site visit discussion on ODA, these issues and the wider implications of non-ARF disbursed ODA could not be fully explored by the evaluation team.

166. South Africa has not adequately addressed a number of recommendations made by the Working Group in Phase 2 that would help prevent and detect foreign bribery in ODA-funded contracts. In Phase 2, South Africa was recommended to raise awareness of foreign bribery among officials working with ODA (recommendation 1a), and to incorporate anti-bribery declarations in ARF’s standard contracts for ODA-funded projects (recommendation 4(i)). At the time of its written follow-up report, the Working Group

171 “South Africa Development Partnership Agency: Strategic Aid or Development Packages for Africa?” by Neissan Allesandro Basharati, South African Institute of International Affairs, August 2013, at p. 31.

172 DIRCO Annual Report (2011-2012). The main ODA country recipients were the Democratic Republic of the Congo, Somalia and Cuba. ODA was also channelled to or through the African Union, International Atomic Energy Agency, Southern African Development Community and the UN Human Rights Commission.

173 In 2012, South Africa’s GNI was estimated at USD 572.5 billion purchasing power parity (PPP) dollars, The World Bank.

174 “South Africa Development Partnership Agency: Strategic Aid or Development Packages for Africa?” supra note 157, at p. 32. Note: The study concedes that this figure may not be fully accurate in the absence of data from all government departments and other entities engaged in international assistance. The assistance provided may not all be considered as ODA within the DAC-OECD definition. However, the study nevertheless highlights the significance of South Africa’s development cooperation and need for improved monitoring and coordination.
found that while anti-bribery declarations had been incorporated in ARF’s standard contracts, awareness-raising on foreign bribery was still lacking. In Phase 3, however, the evaluation team was unable to assess the anti-bribery declarations incorporated in ARF’s standard contracts. When asked to provide the standard clause, South Africa instead provided a series of clauses it had signed with other aid agencies as an ODA recipient. This raises a concern that such declarations have not in fact been incorporated and that understanding on this issue remains limited. As new information reveals that government departments other than the ARF may also be disbursing ODA, steps should be taken to ensure that anti-bribery declarations are also incorporated in those contracts. No foreign bribery awareness-raising efforts have been undertaken for officials working with ODA since Phase 2. While such officials would be subject to public sector reporting obligations, including under the PRECCA (see section 10), there have been no specific measures undertaken to remind staff to report credible information of foreign bribery they may uncover in the course of their work to law enforcement authorities.

167. South Africa provides no information on whether it may suspend from ODA-funded contracts companies convicted of foreign bribery. It is not the standard practice of the ARF to consult the debarment lists of the multilateral development banks or domestic debarment lists. At the on-site visit, officials were unable to confirm whether this would become practice under the SADPA. South Africa has also not implemented Phase 2 recommendation 4(ii) that the ARF be encouraged “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” (recommendation 4(ii)). South Africa explained at the time of its written follow-up report that this recommendation was not implemented because the SADPA was in the process of being established. However, this does not satisfactorily explain why such measures were not implemented within the ARF and/or other departments disbursing ODA, which remain in operation.

**Commentary**

*The lead examiners are concerned that South Africa has not implemented a number of critical measures that can help prevent and detect foreign bribery in ODA-funded contracts. In light of recent information that South Africa’s ODA may be significantly larger than previously estimated, such measures are particularly important.*

*In this regard, the lead examiners strongly reiterate Phase 2 recommendation 1a that South Africa raise awareness of foreign bribery among all officials working with ODA and, in addition, that such efforts include awareness of the reporting obligations and procedures for staff when they uncover foreign bribery in the course of their work. The lead examiners also reiterate Phase 2 recommendation 4(ii) that the ARF take into account a company’s internal controls, ethics and compliance programmes in deciding whether to grant an ODA-funded contract. As debarment from ODA-funded contracts can be a significant deterrent to engaging in foreign bribery, the lead examiners further recommend that South Africa exclude companies convicted of foreign bribery from receiving such contracts, and that routine checks against international and domestic debarment lists form part of the due diligence process.*

*Finally, the lead examiners note that the establishment of the SADPA will create a more centralised and coordinated aid agency. In light of the decentralised way ODA has been administered in South Africa, they welcome the establishment of an agency that can ensure anti-bribery measures in ODA-funded contracts are consistently applied. In this regard, they recommend that South Africa ensure that anti-bribery declarations are incorporated in all outgoing ODA-funded contracts.*
Public procurement

Public procurement policies are set by the National Treasury. While South Africa is not a signatory to the WTO Agreement on Government Procurement (GPA), it subscribes to some of the mandatory standards of the Agreement, including standards with regard to mandatory exclusion grounds and transparency in procurement. As mentioned above in the Introduction, South Africa’s public procurement system allegedly has been subject to a significant amount of abuse and corruption. In 2012, South Africa started a process of revising its National Treasury Regulations for all institutions compliant with the Public Finance Management Act (‘draft Treasury Regulations’) which will set out inter alia, rules that contracting accounting officers and accounting authorities must apply in assessing a bid. In efforts to curb corruption, the draft Treasury Regulations set out principles (“Five Pillars of Procurement”) that require contracting accounting officers and accounting authorities to ensure that the supply chain management system gives effect to the core principles of behaviour as envisaged by the Five Pillars of Procurement, which are fairness, equity, transparency, competitiveness, and cost effectiveness. According to South Africa, a supply chain management that is aligned to the five pillars will (a) recognise and disclose any conflict of interest that may arise; (b) treat all suppliers and potential suppliers equitably; (c) reduce incidents of impropriety, (d) ensure credibility or integrity of the supply chain management system, and (e) combat corruption and fraud in the supply chain management system. This will also assist authorities to “provide assistance in the elimination of fraud and corruption” and promote “openness and transparency in administration by external scrutiny through public reporting.”

Companies convicted of foreign bribery may be debarred in South Africa from receiving public contracts. As discussed in section 3, section 28 of the PRECCA makes provision for courts to issue an order directing that the convicted legal or natural person’s information be placed on the Register of Tender Defaulters (‘Register’). To date, there are only two natural persons listed on the Register for non-foreign bribery-related corruption offences. This low number has raised concerns about the Register’s effectiveness in practice, and its deterrent effect therefore remains questionable (for further discussion see section 3). In addition to the Register, the National Treasury maintains a “Database of Restricted Suppliers” (‘Database’) which sets out the names of legal and natural persons found to be “fraudulent, corrupt or improper” in its activities, or where “poor performance” issues have arisen. Treasury did not confirm that this would be interpreted to include foreign bribery, but stated that it is something that could be looked into in the future. To date, there are 623 companies and individuals listed on the Database, of which approximately 15 were found to have engaged in fraudulent activities.

The Treasury Regulations expressly state that any prospective supplier whose name appears on the Register or Database must be prohibited by contracting authorities from doing business with the public sector. Natural and legal persons tendering for a public procurement contract are required to disclose any listings on the Register or Database. Contracting accounting officers and accounting authorities must also independently verify the information to ensure that no recommended tenderers are listed therein. The debarment lists of the multilateral development banks are not consulted as a part of due diligence.

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169. Article 20.3.1(a), (c) on Fairness and Transparency, Draft National Treasury Regulations for Departments, Constitutional Institutions and Public Entities Regulations (2011).

170. See: Register of Tender Defaulters.

176. See: Database of Restricted Suppliers.

177. Article 22.3.4, Draft Treasury Regulations, supra note 161.

178. Ibid., Article 30.9.1(c), (f).
However, consideration of internal controls, ethics and compliance programmes are also not taken into account in decisions to grant public procurement contracts.

Commentary

The lead examiners note the practice of mandatory exclusion of companies convicted of corrupt behaviour and recommend that South Africa include foreign bribery in the category of such behaviour that would prevent companies convicted of foreign bribery from receiving public contracts. The lead examiners further note the draft Regulations South Africa has put in place requiring contracting authorities to verify whether prospective tenders have been listed in the Register for Tender Defaulters and Database of Restricted Suppliers, and recommend that South Africa promptly proceed with the adoption of the Treasury Regulations in this regard. They further recommend that public contracting authorities take into account the debarment lists of the multilateral development banks in their due diligence and decisions to award a public contract.

(c) Officially supported export credits

171. The Export Credit Insurance Corporation (ECIC) is South Africa’s officially supported export credit and insurance company. ECIC’s homepage links to its anti-bribery policy, the Convention and the PRECCA. While South Africa has not formally adhered to the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits (‘Export Credits Recommendation’), the Working Group found in its Phase 2 written follow-up report that ECIC had integrated in its policies all of the standards of the Export Credits Recommendation.

172. Accordingly, ECIC informs exporters of the legal consequences of bribery within its application forms and encourages the development, application and documentation of appropriate management control systems to combat bribery. Applicants and exporters must also declare in the application form that they, and anyone acting on their behalf in connection with the transaction, have not engaged and will not engage in bribery. ECIC applies a five per cent ceiling on agents’ commission fees, and conducts due diligence on such fees. This includes requesting additional information on the agent’s tasks and verifying that the commissions are reasonably proportionate to the value of the product or service provided. Between January 2012 and March 2013, ECIC held 12 anti-corruption awareness-raising sessions with exporters, lenders and sponsors, with some sessions covering anti-corruption awareness.

173. ECIC verifies the debarment lists of the multilateral developments banks in its decisions to grant cover. If an exporter is listed therein, ECIC will refuse to approve credit, cover or other support for the period of the listing ECIC also refuses support to exporters convicted of foreign bribery in a national court (or equivalent national administrative measures) within a five-year period. Where there is credible evidence that bribery was involved in the transaction before support was granted, ECIC would suspend the contract and conduct enhanced due diligence. ECIC’s Procedure and Processes Manual provides detailed guidelines on anti-bribery enhanced due diligence and related training has also been provided for staff. If ECIC concludes that bribery was involved in the transaction, support will be refused. If credible evidence of bribery arises after support has been granted, ECIC may inter alia invalidate cover, deny indemnification or demand repayment.

174. In practice, ECIC has come across a case of foreign bribery in its contracts. In November 2012, ECIC was notified by a buyer of allegations of bribery by an exporter in the execution of the export contract. ECIC did not provide cover to the exporter by ECIC on the transaction and the export contract was subsequently terminated by the buyer. ECIC conducted enhance due diligence on the allegations in accordance with the Anti-Bribery Policy. The information provided by the buyer during the due diligence
on the bribery allegations were disclosed to law enforcement in June 2013 in accordance with the Anti-Bribery Policy and Section 34 of PRECCA. It is unclear what investigative steps law enforcement authorities have taken with regard to these allegations.

175. ECIC officials are not public officials and are not subject to the reporting obligations under the Public Sector Regulations. However, section 34 of the PRECCA imposes an obligation on “persons of authority” within ECIC to report suspected foreign bribery to law enforcement (see also section 10). ECIC’s Anti-Bribery policy also expressly states that ECIC shall “promptly inform law enforcement authorities” of credible evidence of bribery. ECIC has also established a confidential whistleblowing hotline (‘Tip-Off Anonymous’) which allows ECIC staff and external parties to report suspected instances of fraud and corruption. However, it appears to mainly address complaints of alleged corruption concerning ECIC staff. Broadening the scope of the hotline to cover reports of foreign bribery by ECIC clients would thus help detection efforts.

Commentary

The lead examiners note that ECIC uncovered a foreign bribery allegation in one of its contracts and duly reported it to law enforcement authorities. The effective implementation of its Anti-Bribery Policy in this regard is welcomed by the lead examiners. To further help detect foreign bribery committed by ECIC exporters, the lead examiners recommend that ECIC continue to raise awareness among staff of the foreign bribery offence and reporting obligations. They further recommend that ECIC expand its Tip-Off Anonymous hotline to expressly include the reporting of foreign bribery committed by ECIC clients.
C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

176. The Working Group on Bribery is seriously concerned with South Africa’s lack of enforcement of its foreign bribery offence. Since South Africa became a Party to the Convention in 2007, of the only 10 allegations that have surfaced, none has generated a single prosecution or progressed beyond the preliminary stage. South African authorities did not proactively investigate or seek the co-operation of foreign authorities in any of these cases. The Working Group is also seriously concerned that South Africa’s foreign bribery investigations and prosecutions may potentially be influenced by political and economic considerations prohibited under Article 5 of the Convention. The low level of foreign bribery allegations also raises concerns on the levels of awareness, reporting and detection. This is of particular concern given South Africa’s economic links to a number of countries with corruption risks.

177. The Phase 2 evaluation report on South Africa adopted in June 2010 included recommendations and issues for follow-up (as set out in Annex 1). Of the recommendations that had not been fully implemented at the time of South Africa’s September 2012 written follow-up report, the Working Group concludes that: recommendation 7e has been implemented, recommendations 5c and 7f have been partially implemented, recommendations 4, 5b, 5d, 6, 7c, 7d and 8 remain partially implemented and recommendation 2b remains not implemented. While recommendations 10b and 12a were respectively deemed partially implemented and satisfactorily implemented in the Phase 2 written follow-up report, further assessment in Phase 3 has shown that these were in fact not implemented. Similarly, while recommendation 12b was deemed no longer relevant in the Phase 2 written follow-up report, it was deemed necessary to re-assess in Phase 3.

178. In conclusion, based on the findings in this report on South Africa’s implementation of the Convention, the 2009 Recommendation and related instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow-up the issues identified in Part 2. The Working Group requests that South Africa provide a written self-assessment report in 6 months (i.e., by October 2014) on progress made in (i) pro-actively investigating and prosecuting foreign bribery; and (ii) ensuring that investigations and prosecution are not influenced by political and economic considerations, including on implementation of recommendations 1, 4a, 4e, 6, 12c and 12d. It also invites South Africa to submit a written follow-up report on its implementation of all recommendations and on all follow-up issues within two years (i.e., by March 2016). South Africa is further invited to provide detailed information in writing on its foreign bribery-related enforcement actions when it submits these two reports. The Working Group will take appropriate measures throughout this process, including the possibility of a Phase 3bis evaluation, should South Africa have failed to take steps to address its recommendations.

1. Recommendations of the Working Group

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

1. The Working Group recommends that South Africa significantly step up efforts to detect, investigate and prosecute foreign bribery. [Convention Article 1, 2009 Recommendation, V]

2. Regarding the liability of legal persons, the Working Group recommends that South Africa take steps to (i) ensure that prosecutors make full use of the broad range of possibilities available under section 332 of the Criminal Procedure Act (CPA) to effectively enforce the liability of legal persons for acts of foreign bribery; and (ii) encourage the National Prosecution Authority to include such enforcement within their quantified targeted objectives and monitored conviction rates. [Convention Article 2; 2009 Recommendation III ii), V, Annex I B]
3. Regarding sanctions, the Working Group:
   a) Urges South Africa to take steps to ensure that the penalties applied to legal persons in practice are sufficiently effective, proportionate and dissuasive; [Convention Article 3; 2009 Recommendation III (ii) and V]
   b) Recommends that South Africa continue to draw attention of prosecutors and judges to section 28 of the Prevention and Combating of Corrupt Activities Act, 2004 (‘PRECCA’) to ensure the possible endorsement of natural and legal persons convicted of foreign bribery on the Register of Tender Defaulters and possible termination (subject to applicable court orders) of their on-going relations with the South African National Treasury; [Convention Article 3; 2009 Recommendation III (ii) and V]
   c) Recommends that South Africa consider reviewing its debarment process to ensure the systematic inclusion in the Register of Tender Defaulters of all natural and legal persons convicted of foreign bribery; [Convention Article 3; 2009 Recommendation III (ii) and V]
   d) Recommends that South Africa (i) continue to maintain statistics on convictions of natural and legal persons for foreign bribery; (ii) maintain statistics on convictions of natural and legal persons for other intentional economic crimes, including levels of fines, actual time served by natural persons under prison sentences, and the Court which imposed the sanction; [Convention Article 3; 2009 Recommendation III (ii) and V]
   e) Recommends that South Africa (i) make full use of the provisions available under the Prevention of Organised Crime Act (POCA) to freeze and confiscate the bribe and proceeds of foreign bribery; and (ii) ensure that the evidentiary threshold necessary to apply for freezing and confiscation orders under the POCA is not too high in practice. [Convention Article 3; 2009 Recommendation III (ii) and V]

4. Regarding the investigation and prosecution of foreign bribery, the Working Group:
   a) Strongly recommends that South Africa take concrete steps to ensure that national economic interests and the identities of the natural or legal persons involved do not influence the investigation or prosecution of foreign bribery cases, including decisions made by the NDPP; [Convention Article 5]
   b) Strongly recommends that South Africa increase the financial resources available to the specialist prosecutors charged with fighting corruption to ensure the effective investigation and prosecution of foreign bribery cases, including, through (i) the recruitment of the additional human resources needed; and (ii) ensuring that there is sufficient specialised expertise for foreign bribery cases including more permanently integrated forensic accountants in the Specialised Commercial Crime Unit (SCCU); [Convention Article 5; 2009 Recommendation XIII and Annex I D]
   c) Recommends that South Africa make full use of the newly established integrated approach to investigating complex commercial crimes – i.e. the coordination and cooperation between the South African Police Service (SAPS) and the National Prosecuting Authority of South Africa (NPA) including through the ACTT – at the outset of foreign bribery cases; [Convention Article 5; 2009 Recommendation XIII and Annex I D]
   d) Urges South Africa to make full use of the broad range of investigative measures available, including special investigative techniques and access to financial information, in order to
effectively investigate suspicions of foreign bribery; [Convention Article 5; 2009 Recommendation XIII and Annex I D]

e) Recommends that South Africa: (i) make full use of the legal tools available to gather evidence, including, as appropriate, the issuing of subpoenas to natural and legal persons; and (ii) continue to include the availability and use of subpoenas as an investigative tool in foreign bribery training programmes; [Convention Article 5; 2009 Recommendation XIII and Annex I D]

f) Recommends that South Africa: (i) clarify which investigative tools are available at each stage of an investigation, and under what standards or circumstances, in order to enhance their ability to proactively investigate allegations of foreign bribery; and (ii) increase the use of proactive steps to gather information from diverse sources at the pre-investigative stage both to increase sources of allegations and enhance investigations; [Convention Article 5; 2009 Recommendation XIII and Annex I D]

g) Recommends that South Africa raise awareness among prosecutors, including the National Director for Public Prosecutions (NDPP), of the legally-binding nature of the Prosecution Policy to ensure that the considerations prohibited by Article 5 are respected in foreign bribery cases. [Convention Article 5; 2009 Recommendation XIII and Annex I D]

5. Regarding jurisdiction, the Working Group recommends that South Africa ensure that future training provided to law enforcement authorities and the judiciary include the full range of possibilities available under section 35 of the PRECCA to establish jurisdiction, in particular with regard to legal persons. [Convention Article 4]

6. With respect to mutual legal assistance (MLA), the Working Group recommends that South Africa ensure: (i) its authorities respond to MLA requests without unnecessary delays; (ii) its authorities are more proactive in seeking MLA; and (iii) its Central Authority (DoJ&CD) maintain statistics on the number of requests that come from Parties to the Convention, as well as the response time, in order to help monitor the efficiency of its MLA system. [Convention Article 9]

7. With respect to extradition, the Working Group recommends that South Africa promptly proceed with the adoption of the Extradition Bill to ensure that it can provide extradition for foreign bribery, regardless of where the foreign bribery has been committed. [Convention Article 10]

**Recommendations for ensuring effective prevention, detection and reporting of foreign bribery**

8. Regarding money laundering, the Working Group:

a) Urges South Africa to maintain statistics on the predicate offences for money laundering as well as statistics on enforcement of the money laundering offence to allow South Africa and the Working Group to assess the efficiency of its money laundering regime in identifying foreign bribery as a predicate offence to money laundering; [Convention, Article 7 and 2009 Recommendation, III (i)]

b) Urges South Africa to promptly ensure that 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 and 2009 Recommendation, III (i)]

c) Recommends that South Africa consider issuing guidelines and typologies to reporting entities that specifically refer to foreign bribery as well as providing better feedback by SAPS to the
Financial Intelligence Centre (FIC) and reporting institutions regarding suspicious transactions reports (STRs) with a view to improving the quality of reporting; [Convention, Article 7 and 2009 Recommendation, III (i)]

d) Recommends that further training be provided to the reporting entities and the Financial Intelligence Centre to improve detection and reporting of money laundering offences. [Convention, Article 7 and 2009 Recommendation, III (i)]

9. Regarding accounting and auditing, corporate compliance, internal controls and ethics, the Working Group recommends that South Africa:

a) Ensure that false accounting cases are vigorously investigated and effectively prosecuted, where appropriate, and that sanctions imposed in practice for false accounting offences are effective, proportionate and dissuasive; [Convention Article 8]

b) Take steps to close any loopholes that may allow entities to escape the requirement to be subject to external audit under the Companies Act, 2008, or any other applicable legislation; [Convention Article 8]

c) Take appropriate steps to raise awareness specifically on the foreign bribery offence among auditors, including within the Auditor General of South Africa (AGSA), and ensure that the profession benefits from regular training, including specific methods for detecting foreign bribery, in order to facilitate their more active role in detecting foreign bribery; [Convention Article 8; 2009 Recommendation III.i.]

d) Take further steps to encourage the reporting of foreign bribery within the auditing profession and the AGSA, and take concrete and meaningful steps to ensure that auditors who report reasonably and in good faith suspicions of foreign bribery are protected from legal or other retaliatory action, and to raise awareness within the profession of those protections; [2009 Recommendation III.iv., X.B.v.]

e) (e) Raise awareness among publicly listed and state-owned enterprises of the requirement to establish social and ethics committees, to further strengthen internal controls, ethics and compliance measures for the purpose of preventing and detecting foreign bribery; [2009 Recommendation Annex II]

10. Regarding tax measures to combat bribery of foreign public officials, the Working Group recommends that:

a) South Africa proactively enforce the non-tax deductibility of bribe payments against defendants in foreign bribery cases, including by systematically auditing criminal defendants’ (including legal persons) tax returns for the relevant years to verify whether bribes had been deducted; [2009 Tax Recommendation]

b) South Africa provide targeted guidance to taxpayers that are small and medium-sized enterprises on the non-deductibility of bribes to foreign public officials, along with the type of expenses that could constitute bribes, including gifts and entertainment expenses; [2009 Tax Recommendation]

c) South Africa disseminates the new OECD Bribery and Corruption Awareness Handbook for Tax Examiners and continues regular training of tax auditors, including through the provision of tailored, country-specific red flag indicators to help tax auditors detect bribe payments; [2009 Tax Recommendation]
d) South Africa ensure that adequate resources (including adequately skilled personnel) are made available to South African Revenue Service (SARS), to improve its ability to detect possible cases of foreign bribery through tax audits and investigations; [2009 Tax Recommendation]

e) South Africa take steps to ensure (i) that an effective legal and administrative framework is in place to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties to the appropriate domestic law enforcement authorities; (ii) that guidance is provided to SARS officials to that effect; and (iii) that SARS regularly inform tax officials of their obligation under section 34 of the PRECCA to report instances of foreign bribery, and that it encourage and facilitate such reporting; [2009 Tax Recommendation]

f) South Africa consider systematically including the language of Article 26.2 of the OECD Model Tax Convention (on the use of information for non-tax purposes) in its future bilateral tax treaties with countries that are not signatories of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters. [2009 Tax Recommendation]

11. Regarding **awareness-**raising, the Working Group recommends that South Africa (i) step up efforts to raise awareness of the foreign bribery offence within both the public and private sectors, including the reporting obligations and sanctions under section 34 of the PRECCA; and (ii) encourage SMEs and non-publicly listed companies to adopt effective internal controls, ethics and compliance measures designed to prevent and detect foreign bribery, including by promoting the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance in Annex of the 2009 Anti-Bribery Recommendation. [2009 Recommendation III.i, X.C.i., Annex II]

12. With respect to the **reporting of foreign bribery**, the Working Group recommends that South Africa:

   a) Ensure that specific reporting obligations and procedures on foreign bribery are developed for DIRCO staff posted in overseas missions; [2009 Recommendation III.iv., IX.i. and ii.]

   b) Urgently, take concrete and meaningful steps to ensure that those who report suspected acts of foreign bribery in good faith and on reasonable grounds are in practice afforded the protections guaranteed by the law, and; [2009 Recommendation IX.iii.]

   c) Clarify the relationship between clauses 43 and 49 of the Protection of State Information Bill to ensure that there are no loopholes preventing foreign bribery whistleblowers from being afforded protection under the Protected Disclosures Act; [2009 Recommendation IX.iii.]

   d) Highlight, in its awareness-raising efforts, that those who report suspicions of foreign bribery are protected under the Protected Disclosures Act, and publicly clarify that those who report on such grounds will not run afoul of the Protection of State Information Bill. [2009 Recommendation IX.iii.]

13. Regarding **public advantages**, the Working Group recommends that:

   a) In relation to official development assistance (ODA), (i) South Africa raise awareness of foreign bribery among all officials working with official development assistance and, in addition, that such efforts include the reporting obligations and procedures for staff when they uncover foreign bribery in the course of their work; (ii) the ARF take into account a company’s internal controls, ethics and compliance programmes in deciding whether to grant an ODA-funded contract; (iii) South Africa exclude companies convicted of foreign bribery from receiving ODA-funded contracts, and that routine checks against international and domestic debarment lists form part
of the due diligence process; and (iv) South Africa ensures that anti-bribery declarations are incorporated in all outbound ODA-funded contracts; [2009 Recommendation XI (ii)]

b) South Africa promptly proceed with the adoption of the draft Treasury Regulations requiring public procurement contracting authorities to verify whether prospective tenderers have been listed in the Register for Tender Defaulters and the Database of Restricted Suppliers, and that public contracting authorities take into account the debarment lists of the multilateral development banks in their due diligence and decisions to award a public contract; [2009 Recommendation XI (iii)]

c) The Export Credit Insurance Corporation (ECIC) continue to raise awareness among its staff of the foreign bribery offence and reporting obligations, as well as expand its Tip-Off Anonymous hotline to expressly include the reporting of foreign bribery committed by ECIC clients. [2009 Recommendation XII; 2006 Export Credit Recommendation]

2. Follow-up by the Working Group

14. The Working Group will follow up the issues below as case law and practice develops:

a) 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;

b) 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;

c) 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, such as 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 enterprises;

d) The use of the Database of Restricted Suppliers to ensure that it is being used to include all those convicted of domestic and foreign bribery;

e) Whether natural persons convicted of foreign bribery offenses serve their sentences and, if not, the circumstances surrounding any reductions;

f) The use of freezing orders and confiscation measures, whether conviction or non-conviction based;

g) Whether South Africa ensures adequate resources are available to the AFU, including ensuring adequately qualified staff, so that it remains effective and capable of handling high-value complex cases, including foreign bribery cases;

h) The effectiveness and efficiency of the newly established integrated strategy to investigating complex commercial crimes – i.e. the coordination and cooperation between the SAPS and the NPA – including the ACTT;

i) The ability of bodies charged with investigating corruption allegations, including commissions of inquiry, to access classified information without unnecessary delay;
j) The independence and effectiveness of the DPCI regarding the investigation of foreign bribery cases;

k) 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);

l) Whether SAPS routinely inform SARS of foreign bribery convictions;

m) With regard to the sharing of tax information with law enforcement authorities, the requirement to obtain *ex parte* orders to ensure that it is effective in facilitating reporting.
# ANNEX 1 – PHASE 2 RECOMMENDATIONS TO SOUTH AFRICA AND ASSESSMENT OF IMPLEMENTATION BY THE WORKING GROUP ON BRIBERY IN 2012

<table>
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<th>Phase 2 Recommendations – 2010&lt;sup&gt;181&lt;/sup&gt;</th>
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<tr>
<td><strong>1. Recommendations</strong></td>
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<tr>
<td><strong>Recommendations for ensuring effective measures for preventing and detecting foreign bribery</strong></td>
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<tr>
<td>1. With respect to prevention, awareness raising and training activities, the Working Group recommends that South Africa:</td>
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<td>(a) Provide 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</td>
<td>Satisfactorily implemented</td>
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<td>(b) Take 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)].</td>
<td>Satisfactorily implemented</td>
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<tr>
<td>2. With respect to the detection and reporting of suspected foreign bribery to the competent authorities, the Working Group recommends that South Africa:</td>
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<td>(a) Regularly 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</td>
<td>Satisfactorily implemented</td>
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<td>(b) Take 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].</td>
<td>Not implemented</td>
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<td>3. With 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</td>
<td>Satisfactorily implemented</td>
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<sup>181</sup> This column sets out the recommendations of the Working Group on Bribery to South Africa, as adopted in June 2010: Phase 2 Report of South Africa.

<sup>182</sup> This column sets out the findings of the Working Group on Bribery on South Africa’s Written Follow-up Report to Phase 2, as adopted by the Working Group in September 2012.
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].

4. With 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 IX(i) and (ii), X.C(vi), and XII].

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

(a) Consider 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.];

(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) 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].

6. With 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].

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<th>Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery</th>
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<tr>
<td>7. Regarding the investigation and prosecution of foreign bribery and related offences, the Working Group recommends that South Africa:</td>
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<td>(a) Ensure that sufficient resources are made available and that training is provided to</td>
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Satisfactorily
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];

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(b) Develop 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];

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(c) Take 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];

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(d) Make 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];

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

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(f) 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

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(g) 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]; and

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8. 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].

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

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(a) 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

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(b) 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].

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

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<tr>
<th>(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 [Convention, Article 2, and 2009 Recommendation, Sections II, III(ii), V. and IX]; and that</th>
<th>Satisfactorily implemented</th>
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<tr>
<td>(b) 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].</td>
<td>Partially implemented</td>
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</tbody>
</table>

**11.** 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].

**12.** Regarding *sanctions for foreign bribery*, the Working Group recommends that South Africa:

| (a) 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]; | Satisfactorily implemented |
| (b) 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]; | No longer relevant |
| (c) 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 | Satisfactorily implemented |
| (d) 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]. | Satisfactorily implemented |

### 2. Follow-up by the Working Group

**13.** The Working Group will follow up the issues below as case law develops:

| (a) The effect of the institutional rearrangement of law enforcement authorities on the investigation and prosecution of foreign bribery cases; | Continue to follow up |
| (b) 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; | Continue to follow up |
| (c) 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; | Continue to follow up |
| (d) 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 | Continue to follow up |
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].

| (e) | 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.]; | Continue to follow up |
| (f) | 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 | Continue to follow up |
| (g) | The 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]. | Continue to follow up |
ANNEX 2  LEGISLATIVE EXTRACTS

Foreign Bribery Offence

The Prevention and Combating of Corrupt Activities (PRECCA) Act 12 of 2004,

CHAPTER 2 – OFFENCES IN RESPECT OF CORRUPT ACTIVITIES

Part 2: Offences in respect of corrupt activities relating to specific person

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

(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.

Legal Persons

Interpretation Act 1957

Section 2. A reference in any Act to “person” includes
(a) any divisional council, municipal council, village management board, or like authority;
(b) any company incorporated or registered as such under any law;
(c) any body of persons corporate or unincorporated.

Criminal Procedure Act, 1977

Section 332(1) 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.
Sanctions

PRECCA, CHAPTER 5
Section 26. Penalties
(1) Any person who is convicted of an offence referred to in-
   (a) Part 1, 2, 3 or 4, or section 18 of Chapter 2, is liable-
       (i) in the case of a sentence to be imposed by a High Court, to a fine or to imprisonment up to a period
           for imprisonment for life
       (ii) in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment up to a
           period for imprisonment not exceeding 18 years
       (iii) in the case of a sentence to be imposed by a magistrate's court, to a fine or to a period of
           imprisonment for a period not exceeding five years:
   (b) section 17(1), 19, 20, 23(7)(a) or (b) or 34(2), is liable-
       (i) in the case of a sentence to be imposed by a High Court or a regional court, to a fine or to
           imprisonment for a period not exceeding 10 years: or
       (ii) in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment for a
           period not exceeding three years: or
   (c) section 28(6)(b), is liable to a fine of R250 000 or to imprisonment for a period not exceeding three years.
(2) A person convicted of an offence referred to in section 21 is liable to the
    punishment laid down in subsection (1) for the offence which that person attempted or conspired to commit or aided, abetted, induced, instigated, instructed, commanded, counseled or procured another person to commit.
(3) In addition to any fine a court may impose in terms of subsection (1) or 13), the court may impose a fine equal to five times the value of the gratification involved in the offence.
(4) Notwithstanding anything to the contrary in any law, a magistrate’s court shall be competent to impose the penalty provided for in subsection (1)(a)(iii), (1)(c), or (3).
[Subs. (4) added by s. 35 of Act 66/2008]

Section 28. Endorsement of Register
(1) (a) A court convicting a person of an offence contemplated in section 12 or 13, may, in addition to imposing any sentence contemplated in section 26, issue an order that -
       (i) the particulars of the convicted person;
       (ii) the conviction and sentence; and
       (iii) any other order of the court consequent thereupon,
       be endorsed on the Register.
   (b) If the person so convicted is an enterprise, the court may also issue an order that-
       (i) the particulars of that enterprise;
       (ii) the particulars of any partner, manager, director or other person who wholly or partly exercises or
           may exercise control over that enterprise and who was involved in the offence concerned or who
           knows or ought reasonably to have known or suspected that the enterprise committed the offence
           concerned; and
       (iii) the conviction, sentence and any other order of the court consequent thereupon, be endorsed in the
           Register.

Jurisdiction

PRECCA, CHAPTER 5
Section 35. Extraterritorial jurisdiction
(1) Even if the act alleged to constitute an offence under this Act occurred outside the Republic, a court of the
    Republic shall, regardless of whether or not the act constitutes an offence at the place of its commission, have
    jurisdiction in respect of that offence 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.

(2) Any act alleged to constitute an offence under this Act and which is committed outside the Republic by a person, other than a person contemplated in subsection (1), shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to have been committed also 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.

(3) Any offence committed in a country outside the Republic as contemplated in subsection (1) or (2), is, for the purpose of determining the jurisdiction of a court to try the offence, deemed to have been committed-

(a) at the place where the accused is ordinarily resident; or
(b) at the accused person’s principal place of business.

(4) Where 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.

Extradition

Extradition Act 67 of 1962

Section 3. Persons liable to be extradited

(1) Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence.

(2) Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered.

[Sub-s. (2) substituted by s. 3 (a) of Act 77 of 1996.]

(3) Any person accused or convicted of an extraditable offence committed within the jurisdiction of a designated State shall be liable to be surrendered to such designated State, whether or not the offence was committed before or after the designation of such State and whether or not a court in the Republic has jurisdiction to try such person for such offence.

[Sub-s. (3) added by s. 3 (b) of Act 77 of 1996.]

Protection of State Information Bill (2010)

Clause 43. Disclosure of classified information

Any person who unlawfully and intentionally discloses classified information in contravention of this Act is guilty of an offence and liable to a fine or imprisonment for a period not exceeding five years, except where such disclosure is—

(a) protected under the Protected Disclosures Act, 2000 (Act No. 26 of 2000) or section 159 of the Companies Act, 2008 (Act No. 71 of 2008); or
(b) authorised by any other law.

Clause 49. Prohibition of disclosure of state security matter

Any person who has in his or her possession or under his or her control or at his or her disposal information which he or she knows or reasonably should know is a state security matter, and who—

(a) intentionally discloses such classified information to any person other than a person to whom he or she is authorised to disclose it or to whom it may lawfully be disclosed;
(b) intentionally publishes or uses such classified information in any manner or for any purpose which is prejudicial to the national security of the Republic;

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(c) intentionally retains such classified information when he or she has no right to retain it or when it is contrary to his or her duty to retain it, or neglects or fails to comply with any directions issued by lawful authority with regard to the
(d) return or disposal thereof; or
(e) neglects or fails to take proper care of such classified information, or so to conduct himself or herself as not to endanger the safety thereof,
is guilty of an offence and liable on conviction to imprisonment for a period not exceeding 10 years, or, if it is proved that the publication of disclosure of such classified information took place for the purpose of its being disclosed to a foreign state to imprisonment for a period not exceeding 15 years.

2012 National Council of Provinces Proposed Amendments to the Bill
Clause 43:
1. On page 20 in line 31 to omit “43” and substitute with “41”.
2. On page 20 in line 31 after “discloses” to insert “or is in possession of” and after “classified” to insert “state” and after “disclosure” to omit “is” and substitute with “or possession”.
3. On page 20 in line 34 before “protected” to insert “is” and after “protected” to insert “or authorized” and after “2000)” to omit “or section 159 of” and substitute with “the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004),” and after “2008)” to insert with “, the Labour Relations Act (Act No. 66 of 1995), or the National Environmental Management Act (Act No. 107 of 1998);”.
4. On page 20 in line 36 to omit “authorized by any other law,” and substitute with “is authorized in terms of this Act or any other Act of the National Parliament; or”
5. On page 20 after line 36 to insert new clause (c)
“(c) reveals criminal activity, including any criminal activity in terms of section 45 of this Act.”

Article 43 and 49 of Whistleblower Protection
ANNEX 3 LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Public Sector
- Accounting Standards Board (ASB)
- Anti-Corruption Task Team (ACTT)
- Auditor General of South Africa (AGSA)
- Companies and Intellectual Property Commission (CIPC)
- Department of Justice and Constitutional Development (DoJ&CD)
- Department of Public Service and Administration (DPSA)
- Department of Trade and Industry (DTI)
- Export Credit Insurance Corporation of South Africa (ECIC)
- Financial Intelligence Centre (FIC)
- Independent Regulatory Board of Auditors (IRBA)
- National Prosecuting Authority (NPA)
- National Treasury
- Public Service Commission (PSC)
- South African Police Service (SAPS), Directorate for Priority Crime Investigation (DPCI)
- South African Revenue Service (SARS)
- Special Investigation Unit (SIU)

Private Sector

Private enterprises
- Business Connexion
- Compliance SA
- Denel
- PetroSA
- Vodacom

Business associations
- National Business Association Initiative (NBI)

Legal profession
- Edward Nathan Sonnenbergs
- Goldman Judin Inc.
- Norton Rose Fulbright
- Webber Wentzel

Accounting and auditing profession
- Deloitte
- Ernst and Young
- Institute of Internal Auditors South Africa
- KPMG
- PricewaterhouseCoopers
- South African Institute of Chartered Accountants (SAICA)

Civil Society and Media
- Business Times (media)
- Corruption Watch
- Ethics Institute South Africa
- Mail and Guardian (media)
- Open Democracy Advice Centre
- Sunday Times (media)
### ANNEX 4  LIST OF ABBREVIATIONS AND ACRONYMS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ACTT</td>
<td>Anti-Corruption Task Team</td>
</tr>
<tr>
<td>AFU</td>
<td>Asset Forfeiture Unit</td>
</tr>
<tr>
<td>AGSA</td>
<td>Auditor General of South Africa</td>
</tr>
<tr>
<td>AML</td>
<td>anti-money laundering</td>
</tr>
<tr>
<td>APA</td>
<td>Accounting Profession Act</td>
</tr>
<tr>
<td>APRM</td>
<td>African Peer Review Mechanism</td>
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<td>ARF</td>
<td>African Renaissance and International Cooperation Fund</td>
</tr>
<tr>
<td>BUSA</td>
<td>Business Unity South Africa</td>
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<tr>
<td>CA</td>
<td>Companies Act, 2008</td>
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<tr>
<td>CIPC</td>
<td>Companies and Intellectual Property Commission</td>
</tr>
<tr>
<td>CIPRO</td>
<td>Companies and Intellectual Property Registration Office</td>
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<tr>
<td>CPA</td>
<td>Criminal Procedure Act, 1977</td>
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<tr>
<td>DA</td>
<td>Democratic Alliance</td>
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<tr>
<td>DIRCO</td>
<td>Department for International Relations and Cooperation</td>
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<tr>
<td>DJCD</td>
<td>Department of Justice and Constitutional Development</td>
</tr>
<tr>
<td>DPCI</td>
<td>Directorate for Priority Crime Investigation</td>
</tr>
<tr>
<td>DPSA</td>
<td>Department of Public Service and Administration</td>
</tr>
<tr>
<td>DSO</td>
<td>Directorate for Special Operations</td>
</tr>
<tr>
<td>ECIC</td>
<td>Export Credit Insurance Corporation</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>EUR</td>
<td>euro</td>
</tr>
<tr>
<td>FATF</td>
<td>Financial Action Task Force</td>
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<tr>
<td>FCPA</td>
<td>U.S. Foreign Corrupt Practices Act 1977</td>
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<tr>
<td>FDI</td>
<td>Foreign Direct Investment</td>
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<tr>
<td>FIC</td>
<td>Financial Intelligence Centre</td>
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<tr>
<td>FICA</td>
<td>Financial Intelligence Centre Act, 2001</td>
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<tr>
<td>GNI</td>
<td>gross national income</td>
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<tr>
<td>GPA</td>
<td>WTO Agreement on Government Procurement</td>
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<tr>
<td>IAS</td>
<td>International Accounting Standards</td>
</tr>
<tr>
<td>ICCMA</td>
<td>International Cooperation in Criminal Matters</td>
</tr>
<tr>
<td>IFRS</td>
<td>International Financial Reporting Standards</td>
</tr>
<tr>
<td>IRBA</td>
<td>Independent Regulatory Board for Auditors</td>
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<tr>
<td>ISA</td>
<td>International Standards on Auditing</td>
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<tr>
<td>MLA</td>
<td>mutual legal assistance</td>
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<tr>
<td>MFMA</td>
<td>Municipal Finance Management Act</td>
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<tr>
<td>NACH</td>
<td>National Anti-Corruption Hotline</td>
</tr>
<tr>
<td>NDPP</td>
<td>National Director for Public Prosecutions</td>
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<tr>
<td>NGO</td>
<td>Non-governmental organisation</td>
</tr>
<tr>
<td>NPA</td>
<td>National Prosecuting Authority of South Africa</td>
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<tr>
<td>OCIPE</td>
<td>Office of Companies and Intellectual Property Enforcement</td>
</tr>
<tr>
<td>ODA</td>
<td>Official Development Assistance</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
</tr>
<tr>
<td>PAJA</td>
<td>Promotion of Administrative Justice Act</td>
</tr>
<tr>
<td>PCMC</td>
<td>Priority Crime Management Centre</td>
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<tr>
<td>PDA</td>
<td>Protected Disclosure Act</td>
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<tr>
<td>PEP</td>
<td>Politically Exposed Person</td>
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<tr>
<td>PFMA</td>
<td>Public Financial Management Act</td>
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<tr>
<td>POCA</td>
<td>Prevention of Organised Crime Act</td>
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<tr>
<td>PRECCA</td>
<td>Prevention and Combating of Corrupt Activities Act, 2004</td>
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<tr>
<td>SAAS</td>
<td>South African Auditing Standards</td>
</tr>
<tr>
<td>SADPA</td>
<td>South African Development Partnership Agency</td>
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<td>SAICA</td>
<td>South African Institute for Chartered Accountants</td>
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<td>SAIIA</td>
<td>South African Institute of International Affairs</td>
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<tr>
<td>SAPS</td>
<td>South African Police Service</td>
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<td>SARS</td>
<td>South African Revenue Service</td>
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<tr>
<td>SCCC</td>
<td>Specialised Commercial Crime Court</td>
</tr>
<tr>
<td>SCCU</td>
<td>Specialised Commercial Crime Unit</td>
</tr>
<tr>
<td>SIU</td>
<td>Special Investigating Unit</td>
</tr>
<tr>
<td>SME</td>
<td>Small and medium-sized enterprise</td>
</tr>
<tr>
<td>SOE</td>
<td>state-owned enterprise</td>
</tr>
<tr>
<td>STR</td>
<td>Suspicious Transaction Report</td>
</tr>
<tr>
<td>TAA</td>
<td>Tax Administration Act, 2011</td>
</tr>
<tr>
<td>USD</td>
<td>United States dollar</td>
</tr>
<tr>
<td>ZAR</td>
<td>South African Rand</td>
</tr>
</tbody>
</table>