



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

ISRAEL: PHASE 1

**REVIEW OF IMPLEMENTATION OF THE CONVENTION AND
1997 REVISED RECOMMENDATION**

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ISRAEL: PHASE 1

**REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 REVISED
RECOMMENDATION**

A. IMPLEMENTATION OF THE CONVENTION

Formal issues

1. On 16 May 2007, the OECD Council decided to open discussions with Israel for accession to the Organisation. The Accession Roadmap, which sets out the terms, conditions and process for the accession of Israel to the OECD, provides that Israel should commit to “full compliance with the requirements of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions” [C(2007)102/FINAL].

2. The Israeli government formally applied on 10 February 2008 to the OECD Secretary-General to become a full participant in the OECD Working Group on Bribery in International Business Transactions (the “Working Group”, the “Group”, or “WGB”) and to accede to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “Convention”). Israel started to be a participant in the Working Group in December 2008. The Government of Israel approved its accession to the Convention on 12 February 2009 and deposited its instrument of accession on 11 March 2009. The Convention will enter into force for Israel on 10 May 2009 (Article 13(2)).

3. The present report has been prepared for the purpose of the Phase 1 review of Israel. In accordance with the procedure agreed by the OECD Members of the Working Group on Bribery [DAF/INV/BR(2008)9/REV1], a specific assessment of Israel will subsequently be undertaken for the purposes of OECD accession [DAF/INV/BR/ACS(2008)3].

The Convention and the Israeli legal system

4. On 14 July 2008, Israel enacted legislation amending its Penal Law 1977 to establish the offence of bribing a foreign public official into Israeli law. The offence entered into force on 21 July 2008. Israel has also taken steps to amend its Income Tax Ordinance 1961 to include an explicit prohibition against deduction of payments constituting a violation of any law, although these amendments have not yet been completed.

5. Israel has a dualist system with respect to the incorporation of international agreements into Israeli law. International agreements to which Israel is a party do not become part of Israeli law unless the Knesset enacts a law allowing the incorporation of the agreement, or its provisions.¹

6. Decisions to ratify or accede to an international treaty are made by the Government. In practice, the Government does not approve ratification or accession unless Israel's domestic law enables it to fully implement the agreement and adhere to the international obligations under the agreement.² Israel accordingly took the steps described paragraph 3 herein prior to accession to the Convention. Other legislation exists through which the requirements of the Convention are able to be complied with, including: the Accountants Law 1955; the Combat against Criminal Organizations Law 2003; the Companies Law 1999; the Extradition Law 1954; the Income Tax Ordinance 1961; the International Legal Assistance Law 1998; and the Prohibition on Money Laundering Law 2000.

7. Israeli law contains an interpretative presumption that the laws of Israel should correspond with Israel's international obligations. The Supreme Court has repeatedly held that any legislation, including the Penal Law, must be interpreted on the basis of this presumption, as much as it is possible to do so, to avoid any contradiction between domestic law and international conventions in respect of which Israel is a party.³ The principle of *stare decisis* applies to judicial decisions in Israel.

1. Article 1: The Offence of Bribery of Foreign Public Officials

8. Article 291A of the Penal Law 1977 makes it an offence to bribe a foreign public official:

291A. Bribing a Foreign Public Official

(a) A person who gives a bribe to a foreign public official for an act in relation with his functions, in order to obtain, to assure or to promote business activity or other advantage in relation to business activity, shall be treated in the same manner as a person who commits an offence under Article 291.

(b) No indictment shall be issued in respect of an offence under this article unless given written consent from the Attorney General.

(c) For the purpose of this article:

“foreign country” includes, but not limited to, any governmental unit in the foreign country, including national, district or local unit.

“foreign public official” includes any of these:

¹ See also Israel's Response to Supplementary Questions to the Phase 1 Questionnaire [DAF/INV/BR/WD(2008)12], para 3.

² See further Israel's Answers to Phase 1 Questionnaire: First Self-Evaluation and Mutual Review of Implementation of the Convention and 1997 Recommendation (“Phase 1 Answers”) [DAF/INV/BR/WD(2009)1], pp 6-7; and Response to Supplementary Questions to the Accession Questionnaire (“Supplementary Accession Answers”) [DAF/INV/BR/WD(2008)12], paras 1 and 2.

³ See, for example: *Horev v State of Israel*, Crim. A. 9937/01, PD 58(6) 378; and *Kamiar v State of Israel*, Crim. A. 131/67, PD 22(2) 85, 112.

(1) An employee of a foreign country and any person holding a public office or exercising a public function on behalf of a foreign country; including in the legislative, executive or judiciary branch of the foreign country, whether by appointment, by election or by agreement;

(2) A person holding a public office or exercising a public function on behalf of a public body constituted by an enactment of a foreign country, or of a body over which the foreign country, directly or indirectly, control;

(3) An employee of a public international organization, and any person holding a public office or exercising a public function for a public international organization;

“public international organization” means an organization formed by two or more countries, or by organizations formed by two or more countries.

9. In considering this offence, it should be noted that:

- The offence extends the application of the domestic offence of active bribery to the bribery of a foreign public official. Therefore, apart from the purpose of the bribe and the definition of the term “foreign public official” (see sections 1.1.8-1.1.10 below), the elements of the offence are identical to those for the domestic offence of bribery. In extending this offence, the law does not *specifically* clarify that the elements of the offence are the same, but provides more ambiguously that the person who commits an offence of foreign bribery should be treated in the same manner as a person who commits an offence under section 291. Israeli authorities explain that the main reason for this extension is to allow the application of existing interpretative case law to the foreign bribery offence. This is a matter that should be followed up in future evaluations to see how the courts apply the offence.
- Article 291 of the Penal Law provides that the penalty for domestic active bribery is half of that applicable to passive bribery, i.e. a person convicted of active bribery (domestic or foreign) will be liable to 3.5 years’ imprisonment or a fine of 202,000 ILS (approximately 38,000 EUR or 60,000 USD). This same penalty applies to the offence of foreign bribery.
- Article 34U of the Penal Law provides that where provisions of the Law can be interpreted in more than one way, the interpretation to be adopted must be the one most favourable to those subject to criminal responsibility. The Supreme Court has clarified that this will be the case only where such an interpretation also fulfils the purpose of the law.⁴
- The standard of proof in criminal cases in Israel is beyond reasonable doubt.

⁴

State of Israel v Halil Fauzat Asad (2004) PD NH(5) 547, 555-556.

1.1 *The elements of the offence*

1.1.1 *any person*

10. Article 291A(a) of the Penal Law refers to acts committed by “a person”. Israeli authorities explain that the offence is thereby directed towards any person whose actions fulfil the elements of the offence, including legal persons.⁵

1.1.2 *intentionally*

11. Article 291A of the Penal Law does not include any reference to the need to establish intent (*mens rea*) on the part of the offender.

12. The rules regarding intent in Israeli law are set down in Articles 19 and 20 of the Penal Law. The level of intent required under Israeli criminal law, when there is no provision to a contrary effect, is awareness by the offender of the factual elements which comprise the legal elements of the offence. Israeli authorities explain that this principle applies to the foreign bribery offence. Under Israeli law, wilful blindness is considered to constitute awareness of factual elements (Article 20(c)(1) of the Penal Law).

1.1.3 *to offer, promise or give*

13. The wording of Article 291A appears to prohibit only the actual *giving* of a bribe. Article 294(b) clarifies, however, that a person who offers or promises a bribe shall be deemed to be a person who gives a bribe.

14. Article 294(b) is qualified, in that a person is deemed to give a bribe “even if he meets with refusal”. Israeli authorities advise that Article 294(b) prohibits an offer or promise regardless of the reaction of the foreign public official, or of his or her knowledge of the offer or promise. Israel therefore states that an offer or promise would (by itself) be sufficient to complete the offence under Article 291A, without any need to rely upon Articles 25 to 28 of the Penal Law (which relate to attempts). This position is supported by the Supreme Court of Israel, which has referred to the domestic bribery offence as including acts regarded as an attempt or preparation to give a bribe.⁶

1.1.4 *any undue pecuniary or other advantage*

15. Article 293(1) of the Penal Law explains that a bribe can consist of “money, valuable consideration, a service or any other benefit”. Israeli case law has interpreted the term “benefit” as including non-pecuniary advantages such as sexual favours,⁷ or appointments to a public position.⁸

16. Israel has chosen not to introduce an exception of small facilitation payments. Phase 2 should examine whether they are taken into account in practice.

⁵ Article 23 of the Penal Law addresses the attribution of liability for offences under the law to legal persons (see section 2 in this report). More generally, Article 4 of the Interpretation Law 1981 provides that a “person” includes an association of people, regardless of whether or not it is incorporated.

⁶ *Ronen v State of Israel*, 53 PD (1) 728. The court did not rely on Articles 25 to 28 of the Penal Law (which relate to attempts), but instead held that the scope of the offence of bribery was broad enough to cover, as complete offences, acts that would normally be considered as acts of preparation or attempt.

⁷ *Cohen v State of Israel*, Cr.A 766/07, and *Covilio v State of Israel* Cr.A 534/78.

⁸ *State of Israel v Sadan*, Criminal Case (Haifa) 4021/05.

1.1.5 *whether directly or through intermediaries*

17. Article 291A of the Penal Law does not expressly cover bribing through an intermediary, but is supplemented by Articles 293(5) and 295(c) of the Law. Article 293(5) covers the act of bribery through an intermediary, by clarifying that an offence of bribery is committed where a bribe is given “personally by the person who gives it or through another person”. Article 295(c) provides that a person who gives money to an intermediary shall be treated as a person giving a bribe.

18. Israeli authorities advise that the offence of bribery through an intermediary does not depend upon the state of mind or knowledge of the intermediary. Thus, for example, the foreign bribery offence would be complete where a bribe is given through an intermediary even if the intermediary does not know that the money (or other advantage) is a bribe but simply transfers it to the foreign public official.

19. As to the liability of intermediaries themselves, see part 1.2 below.

1.1.6 *to a foreign public official*

20. Article 291A(c) of the Penal Law contains an autonomous definition of “foreign public official”, as including the following:

(1) An employee of a foreign country and any person holding a public office or exercising a public function on behalf of a foreign country; including in the legislative, executive or judiciary branch of the foreign country, whether by appointment, by election or by agreement;

(2) A person holding a public office or exercising a public function on behalf of a public body constituted by an enactment of a foreign country, or of a body over which the foreign country exercises, directly or indirectly, control;

(3) An employee of a public international organization, and any person holding a public office or exercising a public function for a public international organization;

21. This definition is very broad and covers the categories of foreign public officials required of Article 1 of the Convention. The definition expressly includes “the legislative, executive or judiciary branch of the foreign country, whether by appointment, by election or by agreement”. It also expressly covers public entities “over which the foreign country exercises, directly or indirectly, control”. Israel has taken a positive step by clarifying this coverage directly in the law. Israeli authorities explain that this part of the definition applies where more than one foreign government exercises such control, including in the case of State-owned enterprises, in accordance with Commentary 14 to the Convention.

22. Authorities further explain that direct or indirect “control” is normally understood to mean the ability to direct the activities of the entity in question. This would normally be presumed when the foreign country holds a majority of the means of control in the entity, although there would be circumstances in which holdings of less than a majority of the means of control would be considered as “control”.⁹ This is a matter which could be further considered in Phase 2, including whether this approach would cover the situation where the foreign country directly or indirectly exercises a dominant influence (including de facto control in the absence of majority shareholding or voting rights).

⁹ See, for example, Article 1 of the Securities Law 1968.

1.1.7 *for that official or for a third party*

23. Article 291A does not expressly apply to the case where the bribe is for the benefit of a third party. Article 293(5) clarifies, however, that bribery includes a situation where the bribe is given to a third party. This appears to cover situations where a bribe is transferred directly to a third party, on behalf of the public official, which is consistent with Israeli case law relating to domestic bribery. It also appears to cover a situation where agreement is reached between the briber and the foreign public official to transmit the advantage directly to a third party for that third party's benefit.¹⁰ However, the Working Group remains uncertain whether Article 293(5) would apply to all cases where the bribe is given to a third party for the benefit of the third party. Consideration of additional cases applying Article 293(5) would be a matter for further analysis in Phase 2.

1.1.8 *in order that the official act or refrain from acting in relation to the performance of official duties*

24. Article 291A(a) provides that the bribe must be given to the foreign public official for "an act in relation to his functions". The Hebrew wording of this expression is identical in the offence of domestic bribery under Article 290. Case law has interpreted this wording as signifying any act performed in relation to the public official's function, including cases where the public official was not authorised to perform such acts.

25. Although Article 291A does not specifically state that a bribe must be given in order that the foreign public official act or refrain from acting in relation to the performance of official duties (Article 1 of the Convention), Article 293(2) of the Penal Law clarifies that a bribe occurs whether it is given for "an act or an omission, or for delaying, expediting or retarding anything, or for discriminating in favour of or against any person". Article 293(3) further provides that the offence of bribery not only includes bribes given for specific acts, but also for preferential treatment in general. Case law has interpreted the latter provision in a very broad manner and has held that a bribe is deemed to have been given to a public official even if it is in the hope that some time in the future the public official will reward the person giving the bribe in some general way.¹¹

26. Case law has also held that if a public official has been given a benefit by a person with whom he has an official connection, a presumption of fact arises that such benefit was given for an act related to his function as a public official. It has also been held that a presumption of fact arises as to the mental element, whereby the public official taking such benefit is presumed to be aware that the benefit was given to him for an act related to his function.¹² Furthermore, the act does not have to be an act of the public official who took the bribe, but may also consist of the public official exerting influence on some other person (Article 293(4) of the Penal Law). Consideration should be given, in Phase 2, to what constitutes an "official connection" between a public official and the person from whom a benefit is received, and whether these presumptions would apply to active bribery offences.

¹⁰ The Israeli Supreme Court held in *Algarisi v State of Israel* that an act of domestic bribery occurred even though the bribe was given for the benefit of a municipal sports organisation, rather than for the personal benefit of the public official – see *Algarisi v State of Israel*, Cr.A 8027/04.

¹¹ See, for example, the *Algarisi* case (ibid).

¹² *State of Israel v Ben Atar*, 53 PD (4) 695, para10.

1.1.9 *in order to obtain or retain business or other advantage; and*

27. The foreign bribery offence criminalises the giving of a bribe to a foreign public official “in order to obtain, to assure or to promote...” business activity or other advantage in relation to business activity (Article 291A(a)). Although this wording does not expressly cover bribery for the purpose of retaining business that has already been acquired, Israeli authorities explain that the expression “to assure or to promote” includes the notion of giving a bribe to retain business. This position is supported by Article 293, which explains that bribery occurs “whether it is given... for discriminating in favour of or against any person” (Article 293(2); emphasis added), or “whether it is given for a specific act or to obtain preferential treatment in general” (Article 293(3); emphasis added). Article 291A(a) therefore appears to cover bribery for the purpose of retaining business. Phase 2 could consider whether there has been any case law interpreting Article 293 as including the retention of business already acquired.

28. Article 293(7) further states that it is immaterial whether a bribe is given for a *deviation* from lawful conduct or for an act which the public official is *required* to do by virtue of his or her function. Case law in Israel clarifies that the bribery offence is committed even where the briber was entitled to receive the benefit or service.¹³ Israeli authorities therefore explain that the foreign bribery offence would include a situation where the briber was the best-qualified bidder or could have otherwise been properly awarded the business. This is consistent with Commentary 4 to the Convention.

1.1.10 *in the conduct of international business*

29. Article 291A(a) criminalises the giving of a bribe to a foreign public official in order to obtain, to assure or to promote “business activity or other advantage in relation to business activity” (Article 291A(a)). This wording is broader than that in Article 1 of the Convention (“business or other improper advantage in the conduct of international business”) and, while in practice foreign bribery will be linked to international business, it eliminates the need to prove that the business was international.

1.2 *Complicity*

30. Article 1(2) of the Convention requires States parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

Complicity by intermediaries

31. Article 295 of the Penal Law sets out a complex set of provisions concerning the liability of intermediaries, which are inter-linked with the sanctions provisions in Articles 290 (passive bribery) and 291 (active bribery). Article 295(b) now expressly includes the liability of an intermediary for active bribery of a foreign public official. The operative parts of the amended Article now provide that: “If a person received money, valuable consideration, a service or any other benefit intended to induce... a foreign public official within the meaning of Article 291A(b), to give preferential treatment or to practice discrimination, he shall be treated as having taken a bribe”. The balance of Article 295 continues to apply to complicity in all bribery offences.¹⁴

¹³ *Titleman v State of Israel*, Crim. A. 658/88, PD 43(1)263; and *State of Israel v Ben Atar*, Crim. A. 1877/99, PD 53(4)695, para. 13.

¹⁴ Israeli authorities explain that there was no need to amend the balance of Article 295 of the Penal Law to make express reference to foreign public officials. Indeed, the reason for amending Article 295(b) was brought about only due to its earlier reference to “public officials” (i.e. Israeli officials) and thus the need to clarify that its provisions apply to foreign as well as domestic public officials.

32. A consequence of these provisions is that an intermediary who is convicted under Article 295 is liable to a higher penalty than the person from whom the bribe originated (giving a bribe renders a person liable to 3.5 years imprisonment under Article 291) because the intermediary would be deemed as having taken a bribe (receiving or soliciting a bribe renders a person liable to 7 years imprisonment under Article 290). This difference in applicable sanctions is consistent with the domestic sanctions regime for passive and active bribery.

Complicity by persons other than intermediaries

33. Aiding, abetting, instigating, or conspiring in the commission of any offence are covered by Articles 29 to 34D and 34W(b). Article 34D of the Penal Law stipulates that unless the Law states or implies otherwise, any legal principle that applies to the commission of a completed offence applies also to attempt, solicitation, attempt to solicit or aiding and abetting the offence.

34. The definition of an aider and abettor is set out in Article 31, which stipulates that an aider and abettor is a person who prior to the commission of the offence, or at the time of its commission, acted in a way to enable the commission of the offence, to facilitate it or to guarantee it, or to prevent the capture of its perpetrator, the discovery of the offence or its loot, or to contribute in any other way to the creation of the conditions necessary to perform the offence. Case law has established that the aider and abettor's contribution is by assisting, through acting or refraining from acting, in creating the conditions to commit the offence, whether the contribution is a physical or mental aid.¹⁵

35. In order to constitute an aiding offence, it is not necessary for the primary offence to have been completed. It will be sufficient under Israeli law for the primary offender to have attempted to commit the offence. Furthermore, it is not necessary for the primary offender to be prosecuted.¹⁶ The abettor of an offence of foreign bribery would be liable to half the maximum penalties applicable to the principal offence (Article 32).

36. The incitement of a criminal act (referred to as "solicitation" under Israeli law) is stipulated in Article 30 of the Penal Law. Article 30 determines that a person who causes another to perform an offence through persuasion, encouragement, demand, plea or any other means of exerting pressure, is a solicitor of an offence. The punishment for solicitation is the same as that of the primary perpetrator (Article 34D).

37. Where the solicited offence has not in fact been committed, whether due to refusal of the person being solicited to perform the offence, or because the solicitation efforts remained unknown to the person being solicited, the act will constitute an offence of attempted solicitation, punishable by half the punishment prescribed by law for the offence the solicitor tried to solicit (Article 33 of the Penal Law). If the person being solicited attempted to perform the offence but it was not completed, both the solicitor and the solicited person will have committed an attempted offence.¹⁷

38. The Penal Law does not refer explicitly to the authorisation of an act of foreign bribery. Israeli authorities explain that, in most cases, authorisation of an act of bribery would be considered a form of joint perpetration of a bribery offence, as the authoriser usually has control over the commission of the

¹⁵ *John Doe v The State of Israel* (1995) 51 PD (3) 388, p 405; *Najar v The State of Israel* (1993) 51 PD (4) 221, p 238; *Weitzman v The State of Israel* (2001) 51 PD (3) 187, p 233.

¹⁶ *John Doe v The State of Israel* (1999) PD 55(3) 31.

¹⁷ *State of Israel v Cohen* 57 PD 366.

offence. An example of authorisation of bribery in the case law is *Arye Der'i v the State of Israel* (emphasis added).¹⁸

It was concluded that the aforementioned requirement of Article 29(b) – “in committing acts for its performance” – can also be fulfilled through consent to the commission of an offence, when under the relevant circumstances, execution requires consent... Such is the present case: the consent of Arie Weinberg and Moshe Weinberg for the money to be given to Der'i by Rubin, constituted an “initial and requisite step” in making the joint decision to give it. The legal conclusion resulting from the above is that all three petitioners - Arie Weinberg, Moshe Weinberg and Yom-Tov Rubin – bear criminal liability for the offence of giving a bribe to Deri.

39. There may be instances where the authoriser will be considered a solicitor, rather than a joint perpetrator. This will usually happen when the authoriser did not take any part in the commission of the offence.¹⁹ This approach would seem to satisfy the requirement of authorisation, but may warrant further consideration in Phase 2.

1.3 Attempts and conspiracy

40. Article 1(2) of the Convention requires that attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of the State party.

41. Under Article 294(b) of the Israeli Penal Law, and interpretative case law, a person who offers or promises a bribe shall be deemed to be a person who gives a bribe, regardless of whether the bribe is actually given or accepted (see part 1.1.3 above). Other forms of attempts or conspiracy, e.g. an attempt to offer a bribe, would be covered by Articles 25 to 28 and 499 of the Penal Law.

42. Articles 25 to 28 of the Penal Law cover any attempt to commit any offence. Article 25 provides that a person attempts to commit an offence when, with this aim, he or she performed an act which is not limited to preparation, and the offence was not completed. Article 26 stipulates that for the purposes of an attempted offence, it is immaterial whether the commission of the offence was impossible due to a factual situation of which the offender was unaware or in respect of which he was mistaken. Case law has clarified the distinction between “preparation” and “attempt to commit an offence” as follows:²⁰

In order to prove the factual basis for an attempted offence, it is necessary to prove behavior that goes beyond preparation and reaches the level of an act or acts that are part of a chain of events which, if left undisturbed, would constitute the behavioral element of the offence. In particular, it is not necessary for the behavioral element to constitute the last or final act, it is sufficient for it to fall within “the range of attempt”, that is to say – between minimal behavior that goes beyond preparation and behavior that concludes the completed offence.

43. Pursuant to Article 34(d), an attempt carries with it the same maximum penalties applicable to the principal offence, although it would be useful to examine in Phase 2 whether the practice of Israeli courts is to impose less stringent penalties to convictions for attempt.

¹⁸ *Arye Der'i v the State of Israel* 54 PD (2) 721, p. 778.

¹⁹ See *Yosef Efraim v The State of Israel* 55 PD (3) 617.

²⁰ *Moshe Madar v The State of Israel* (1997) 53 PD (3) 236, pp 239-240.

44. Conspiracy to commit an offence is provided for in Article 499 of the Penal Law, which renders a person criminally liable if he or she conspires with another to commit a felony (which includes the foreign bribery offence), or to commit an act abroad which would have constituted a felony in Israel and which is also an offence in the foreign territory. Conspiracy to bribe a foreign public official is punishable to the same extent as the principal offence.

45. Article 28 of the Penal Law provides a defence to the attempted commission of an offence, where a person (of his or her own accord) abstains from completing an act, or substantially contributes to preventing the consequences on which the completion of the offence depended.²¹ As discussed in part 1.1.3 above, the Supreme Court of Israel held in *Ronen v State of Israel* that the scope of the offence of bribery is broad enough to cover, as a complete offence, acts that would normally be considered as acts of preparation or attempt. It therefore appears that Article 28 would not act as a defence to the foreign bribery offence under Article 291A. Israeli authorities explain that a person who conspired to commit an offence and decides not to proceed with the principal offence can still be criminally liable for the offence of conspiracy. This is a matter which could be further considered in Phase 2.

46. A further defence is available under Article 34(a) of the Penal Law concerning the instigation, abetment, or attempted instigation of an offence. Article 1(2) of the Convention requires States parties to ensure that all such conduct “shall be a criminal offence”, whereas Article 34(a) of the Penal Law provides a defence where the person “prevents the commission or completion of the offence or if he informs the authorities of the offence in time in order to prevent its commission or completion and acted otherwise to the best of his ability to such purposes”. Israeli authorities explain that this rule reflects a belief that a strong internal transformation which brings an individual to repent and to cease to practice criminal behaviour, to the extent that they prevent the commission of the offence, should be taken into consideration and encouraged. The defence in Article 34(a) would be applicable to the same extent in the case of an attempt or conspiracy to bribe a public official of Israel, and thus appears to be in compliance with the requirement that attempt and conspiracy in relation to foreign bribery be treated in the same manner as domestic bribery (final sentence of Article 1(2) of the Convention). This issue may warrant follow-up in Phase 2. It should be noted that the defence under Article 34(a) is not one of “effective regret”, since it applies only when action is taken to *prevent* the commission of an offence.

2. Article 2: Responsibility of Legal Persons

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

Legal entities subject to liability

48. Article 23(a)(2) of the Penal Law provides for a corporate body to be subject to criminal liability. Corporations are not limited to companies, and are defined in Article 3 of the Interpretation Law 1981 as: “A legal body, qualified in respect of obligations, rights and legal actions”. Case law expands upon this description as follows:²²

²¹ Article 28 of the Penal Law provides that: “A person who attempts to commit an offence shall not bear criminal liability for the attempt if he proves that, solely of his own accord, and from repentance, he abstained from completing the act or contributed substantially to the prevention of the consequences on which the completion of the offence depended; however, the aforesaid shall not derogate from criminal liability for another, completed, offence involved in the act.

²² *Ayala Zaks Abramov v the Land Registry Office* (1994) 50 PD(2) 206.

Legal personality is an entity upon which the Law confers capacity to bear rights and duties (in the broad sense)... such recognition is explicit when a statutory provision establishes a particular entity as a legal personality... recognition of such entity as a legal personality - distinct from the legal personality of the persons acting within the scope thereof - requires the existence of a statutory provision recognizing such entity, expressly or implicitly, as a legal personality... it is not sufficient for a statutory provision to be neutral regarding the possibility of applying legal personality to a non-natural person. Any one seeking to attribute to such statutory provision recognition of legal personality must demonstrate that such provision by its very purpose implicitly creates legal personality.

49. Israeli authorities explain that prosecutions are possible against both the corporate body and the natural person who undertakes the acts in question.²³ Imposing criminal liability on a corporation does not exempt the person who committed the offence from criminal liability or from the possibility of criminal proceedings. Likewise, imposing criminal liability on the person who committed the offence does not exempt the corporation from criminal liability.

50. There is no legal principle preventing the prosecution of State-owned or State-controlled companies for criminal offences. Such companies may bear criminal liability in Israel. Examples of prosecutions against State entities include cases against municipalities in the environmental protection field.²⁴

Standard of liability

51. Israeli authorities explain that the criminal liability of legal persons is limited to situations in which it is possible to attribute the acts and intentions of the person to those of the corporate body, and that liability will only occur if the offence is one which is capable of being committed by legal persons (e.g. not an offence of indecent assault).²⁵ As to the attribution of intention, Article 23(a)(2) provides that the act and *mens rea* of a natural person shall be regarded as that of the body corporate if this is demanded by “the circumstances of the case and in view of the function of the person concerned, [and] his authority and responsibility for managing the affairs of the body corporate”. This appears to be similar in nature to the underlying basis for responsibility in many common law countries, which now or previously provided for liability where the offence is committed by a “directing mind” or the “ego” of the company. It is not clear, however, if the attribution would apply when a person in authority knowingly does not prevent an employee from committing the offence, although Israeli authorities are of the opinion that criminal liability would apply and have proceeded on this basis in indicting a company and obtaining a conviction (although only following a plea agreement).²⁶ As to the qualification that the offence must be appropriate for legal persons, this does not appear to be a problem in foreign bribery cases. The leading case of *Modiim Construction and Development Corporations Ltd v The State of Israel* explains that there should be a presumption that all criminal offences apply to legal persons, unless “a different intention can be derived”.²⁷

²³ *Modiim Construction and Development Corporations Ltd v The State of Israel*, 45 PD (4) 364.

²⁴ *State of Israel v Lower Galilee Regional Council* (2003) Cr.A Request 7861/03; and *State of Israel v Dimona Municipality* (2005) CC 1188/00.

²⁵ Israeli authorities set out their explanation at paragraphs 67-73 of their response to the Accession Questionnaire.

²⁶ *State of Israel v Leumi* CC 2665/2007 (Tel Aviv).

²⁷ *Modiim Construction and Development Corporations Ltd v The State of Israel*, 45 PD (4) 364.

52. In the determination of both factors giving rise to corporate liability (attribution of intention, and offences appropriate only for natural persons), the commission of an offence by an organ of a corporate body will not automatically give rise to corporate liability. Both case law and Article 23 require such liability to be found “in the circumstances of the case”. Authorities explain that this gives the Court discretion in deciding whether to convict a corporation for the offence attributed to it, according to the unique circumstances of each case.²⁸ This discretion is said to apply because of reasons such as the large variety of corporations, and the freedom they have in shaping the conduct of their operations. Authorities state that defining a closed and limited list of conditions upon which corporations would be held liable for criminal offences might cause difficulties when implementing these conditions with respect to specific circumstances. It is further explained that: “The discretion given to the Court enables the conviction of corporations *only* in those cases where their conviction would help attain the desired social aims” (emphasis added).

53. Reliance upon the circumstances of each case might give rise to the risk of inconsistent application, arbitrariness or uncertainty, as to the liability of legal persons. Israeli authorities point to the Supreme Court decision in *State of Israel v Leumi Investment Bank* as setting out the legal question in this regard, being: “How can the social aims that society seeks to achieve by imposing liability on the corporate body be promoted? The main considerations are deterrence and preventing repetition of the offences”.²⁹ In *Modiim Construction*, a company was convicted for a traffic offence committed by one of the company’s drivers, even though the driver’s identity had not been determined.³⁰ While this case appears to deal with a strict liability offence, corporate bodies have been convicted in Israel for the domestic offence of giving bribes.³¹ As to the range of considerations that may be taken into account when attributing liability, Israeli authorities state that considerations that are inconsistent with Article 5 of the Convention are not relevant to a court’s discretion under Article 23. Without undertaking the level of examination of this issue as would occur in Phase 2, however, the lead examiners remain concerned that the vagueness of the law might provide a rationale for consideration of prohibited factors.

54. The Phase 2 evaluation of Israel should include further analysis of the precise range of factors applicable to determining whether this discretion is consistent with Article 2 of the Convention, including: (i) the application in practice of the “directing mind” principle of corporate liability; (ii) how it is determined whether corporate liability is “necessary in the circumstances”; (iii) whether Article 23 will have by then have been used to prosecute and convict a corporate entity of the foreign bribery offence; and (iv) whether it is consistent with Article 5 of the Convention.

3. Article 3: Sanctions

55. The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are subject to “effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that, for a natural person, criminal penalties include

²⁸ Reaffirmed in *State of Israel v Norden Petroleum (1998) Ltd* (SCC (Jerusalem) 856/05, 18.12.07, not yet published).

²⁹ *State of Israel v Leumi Investment Bank*, 49 PD (2) 4.

³⁰ *Modiim Construction* (note 25 above).

³¹ For example, in *State of Israel v Cohen and others*, Criminal Case (Be’er-Sheva) 147/02. Although there have been no proceedings against a corporate body for the domestic offence of receiving bribes, Israeli authorities report that they consider there is no reason why, in principle, receipt of a bribe by a corporate body would not result in liability.

the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1 Criminal penalties for the bribery of domestic and foreign public officials; and

3.2 Effective, proportionate and dissuasive criminal penalties

56. Foreign bribery is an indictable felony offence under the Israeli Penal Law (one that is punishable by more than three years’ imprisonment – Article 24(1) of the Penal Law). Article 291A(a) provides for a convicted person to be treated in the same manner as a person who commits a domestic offence of active bribery under Article 291 of the Law. In turn, a person convicted under Article 291 is liable to half the penalty specified for passive bribery under Article 290, namely a maximum of three and a half (3.5) years’ imprisonment, or imprisonment and a fine.³² Article 36 of the Penal Law clarifies that it would be possible to impose a fine without also imposing a term of imprisonment.

57. Because the foreign bribery offence is punishable by more than three years’ imprisonment, Article 61(a)(4) of the Penal Law allows a sentencing court to impose a maximum fine of 202,000 ILS (approximately 38,000 EUR or 60,000 USD). Financial sanctions are the same for legal persons as they are for natural persons. Although the penalties regime complies with Article 3(1) of the Convention to the extent that these penalties are equal to those applicable to the offence of domestic active bribery, the maximum penalties are very low, particularly in the case of legal persons. Having regard to the discretionary nature of any additional sanctions under Article 63 of the Penal Law (discussed below), and that confiscation is also discretionary (see part 3.6 below), it is doubtful that Israel is able to guarantee the imposition of effective, proportionate and dissuasive penalties in all cases.

58. Penalties for theft, fraud and cartel offences are as follows:

- The maximum penalty for the basic offence of theft is 3 years imprisonment (Article 384 of the Penal Law). There are other theft offences, including, *inter alia*, theft by public official (Article 390) the maximum penalty for which is 10 years imprisonment; theft by employee (Article 391) the maximum penalty for which is 7 years imprisonment; and car theft (Article 413B), the maximum penalty for which is 7 years imprisonment.

³²

Israeli authorities advise that there are two forms of early release. The first is a conditional release decided by a Release Committee, headed by a judge, under to the Conditional Release from Imprisonment Law. The Committee may decide (based on certain considerations specified in the Law) to release an offender after s/he has completed at least two thirds of the prison term for which s/he has been sentenced. The second form of early release is under the Prisons Ordinance. According to the Ordinance, if the actual prison population exceeds the official capacity set by the Minister of Public Security with the approval of the Knesset Committee of Internal Affairs and Environment, then the Prison Service Commissioner has the authority to deduct specific periods of time from the sentences imposed on prisoners. The number of days deducted from the sentence is proportionate to the length of the sentence (the longest period of imprisonment that can be deducted is 24 weeks, for prisoners sentenced to terms exceeding 132 weeks).

- The maximum penalty for the offence of “obtaining an object by deceit” is 3 years imprisonment, and 5 years imprisonment in aggravated circumstances (Article 415). The maximum penalty for the offence of fraud and breach of trust is 3 years imprisonment (Article 284).³³
- The maximum penalty for cartel offences is 3 years imprisonment or a fine of up to 10 times the fine set in Article 61(a)(4), and an additional fine of 10 times the fine set in Article 61(c) for each day in which the offence continues. Where the defendant is a body corporate, the maximum fine will be twice the fine or the additional fine. In aggravated circumstances, the maximum penalty is 5 years imprisonment or the abovementioned fines.

59. The maximum terms of imprisonment for these offences can be greater, when aggravating features apply, than for the foreign bribery offence. Certain fraud offences can also attract higher maximum sentences of imprisonment, including the falsification of documents of a corporation (Article 423 of the Penal Law), the maximum penalty for which is 5 years’ imprisonment. Phase 2 should consider whether the penalty of 3.5 years’ imprisonment for foreign bribery amounts, when weighed against comparable offences in Israeli law, to an effective, proportionate and dissuasive sanction against natural persons, taking into account available financial sanctions.

60. In the case of intermediaries, the construction of the offence under Article 295(b) for the liability of intermediaries means that an intermediary would be subject to a higher penalty than the person from whom the bribe originated because the intermediary would be deemed as having taken a bribe (liable to 7 years imprisonment under Article 290 of the Penal Law, and a fine of 202,000 ILS). As to conspiracy and incitement, the abettor of an offence would be liable to half the maximum penalties applicable to the principal offence (Article 32), and an attempt to instigate a person to commit an offence is liable to half of the applicable maximum penalties for the principal offence (Article 33). This translates to maximum penalties of 21 months’ imprisonment and a fine of 67,300 ILS (approximately 13,000 EUR or 20,000 USD) for abetting foreign bribery; and 21 months’ imprisonment and a fine of 67,300 ILS (approximately 13,000 EUR or 20,000 USD) for an attempt to instigate the bribery of a foreign public official. These again represent very low levels of sanctions.

61. It should be noted that Article 63 of the Penal Law supplements these sanctions by allowing a fine of up to four times the benefit obtained by the offence, even if that amount exceeds the maximum fine prescribed for the offence. While this might offset the low penalties identified in the two preceding paragraphs, three problems remain:

- The power under Article 63 is discretionary.
- The discretionary power is only available where pecuniary damage is caused to another person, or where a benefit has been obtained for the offender or a third party. It would therefore not be available in cases where the bribery offence consists of an offer or promise of a bribe to a foreign public official, or a gift where the briber has not received a benefit in return. The availability of the discretionary power in the case of attempts and complicity would also be limited, depending upon the particular circumstances. In the context of legal persons, this means that if an Israeli

³³ There are other fraud related offences, including, *inter alia*, false demand by public servant (Article 279) the maximum penalty for which is 3 years imprisonment; false certificate (Article 281) the maximum penalty for which is 5 years imprisonment; false assumption of authority (Article 282) the maximum penalty for which is 3 years imprisonment; forgery (Article 418) the maximum penalty for which is 1 to 5 years imprisonment, dependent on the circumstances; forgery by public servant (Article 421) the maximum penalty for which is 3 to 7 years imprisonment, dependent on the circumstances; false entry in documents of body corporate (Article 423) the maximum penalty for which is 5 years imprisonment.

company offers a bribe to a foreign public official, the only sanction available against the company is a maximum fine equivalent to 38,000 EUR. This could not be supplemented by Article 63 (for the reason just explained), nor by any confiscation (since there would be no bribe to confiscate – see section 3.6 below). The lead examiners observe that this does not appear to be dissuasive for corporations. Moreover, this appears to be the lowest sanction available in such circumstances for any State party to the Convention, by a significant margin.

- Calculation of the benefit obtained in a foreign bribery case is likely to be difficult. It is also unclear how Israeli courts have interpreted the term “benefit” for the purpose of Article 63 and, therefore, whether the power under Article 63 would be activated in all instances where the briber has not received a benefit in return for the bribe.

62. As to the discretionary nature of the power under Article 63, an examination of the application in practice of this discretion would be useful in Phase 2. Israeli authorities have in the meantime pointed to the decision in *Eitan Yochananoff v The State of Israel* where the court explained that, especially when determining sentences for crimes that have a negative impact on the market or put other market participants at a disadvantage and harm the fair play of commerce, sentences should aim at the offender's pocket, although it is unclear whether the harm caused would be restricted to harm upon the Israeli market. The fine should be high, the court explained, in order to deter offenders from the temptation of easy profit.³⁴ Israeli authorities have further explained that the Court uses its discretion in determining the applicable sentence, taking different considerations into account in each case. These considerations relate both to the circumstances of the offence itself, as well as the offender's personal circumstances, including: the circumstances surrounding commission of the offence which impact upon the severity of the offence; the offender's role in planning and executing the offence; the offender's criminal record; the extent to which the offender cooperates with the police during the investigation; the offender's chances for rehabilitation; and the danger that the offender poses to society. Israeli officials explain that the government intends to codify the principles for exercising discretion in sentencing, as well as including a list of conditions that justify easing or increasing sentences, under the Penal Law Amendment (Modelling Judicial Discretion in Sentencing) Bill 2006.³⁵ Phase 2 should also follow-up on the status and content of this reform.

3.3 Penalties and mutual legal assistance

63. Under Israeli law, mutual legal assistance does not require any minimum sentence, except in cases where such assistance involves wiretapping. Assistance in the form of wiretapping is permissible only when the relevant offence is punishable by at least 3 years imprisonment *either* in Israel *or* in the requesting State (International Legal Assistance Law 1998, Article 31). Because foreign bribery is punishable by more than three years imprisonment in Israel, wiretapping assistance is always available in MLA requests concerning foreign bribery

3.4 Penalties and extradition

64. Israeli Law authorises extradition of persons, including of Israeli citizens, in respect of offences punishable by one year imprisonment or more (Extradition Law 1954, Article 2). Most serious crimes

³⁴ *Eitan Yochananoff v The State of Israel* Cr.A 7553/05 (not yet published).

³⁵ The Bill passed a first reading in the 17th Knesset. Due, however, to the need for a new Knesset to be elected following the general elections in February 2009, the Bill will need to be adopted by the new Minister of Justice and, if approved, brought before the Ministerial Committee for Legislation and Law Enforcement which will then be asked to approve continuation of the Bill.

involving corruption, including the bribery of domestic and foreign public officials, are thus extraditable offences.

3.5 Penalties and criminal responsibility of legal persons

65. This part of the Phase 1 standard questionnaire is not relevant. Question 3.5 asks:

If, under your legal system, criminal responsibility is not applicable to legal persons (and hence criminal penalties for legal persons are not described in the reply to 3.1 and 3.2 above) describe the effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, applicable to legal persons for bribery of foreign public officials.

3.6 Seizure and confiscation

66. Article 3(3) of the Convention requires each Party to take necessary measures to provide that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable”.

Pre-trial seizure

67. Under Article 32 of the Criminal Procedure Ordinance, the Police may seize an “object” when there is reason to believe that:

- the object was used, or is about to be used, for the commission of any offence; or
- that it is likely to serve as evidence in a legal proceeding; or
- that it was given as payment for the commission of an offence or as means of committing it.

68. According to Article 1 of the Ordinance, the definition of an “object” includes, but is not limited to, certificates, documents, computerised materials or animals. In *Association of Independent Jurists v State of Israel* (PD 55(1) 657), the Court held that the definition in Article 1 is not exhaustive, and that its aim is to expand the regular meaning of the term “object”. The Court gave a broad interpretation to the term “object”, to include also intangible assets, for example, a bank account. The power to seize an object under Article 32 would therefore appear to include the bribe as well as its proceeds. The application of Article 32 of the Ordinance could be considered further in Phase 2.

69. Israeli authorities advise that, where pre-trial seizure is not available, monetary sanctions cannot be imposed as an alternative measure. Civil forfeiture might be available, however, if a bribe and its proceeds are laundered (see part A(7) herein, below).

70. The authority under Article 32 is discretionary, although there is no need for police to obtain a court order to exercise this power. Nevertheless, Article 3(3) of the Convention requires the bribe and its proceeds to be subject to seizure and confiscation, or the imposition of monetary sanctions of comparable effect. There is a concern that the reasons that make pre-trial seizure unavailable would also be reasons that make it not subject to seizure. This would warrant further consideration in Phase 2.

71. Article 32 applies to legal persons to the same extent as it does to natural persons.

Confiscation

72. The criminal forfeiture in bribery cases is normally governed by Article 39 of the Criminal Procedure Ordinance 1969 and Article 297 of the Israeli Penal Law. Criminal forfeiture is also possible under the Prohibition of Money Laundering Law 2000 and the Combating Organized Crime Law 2003.

(i) Criminal forfeiture under the Penal Law and Criminal Procedure Ordinance

73. Article 39 of the Ordinance is the primary avenue for confiscation, and operates in two possible ways (depending on whether the object in question is owned by the person convicted of the offence in question):

- Article 39(a) of the Ordinance gives the courts a discretion to forfeit the object if it belongs to a person who was convicted of the offence.
- Article 39(b) gives the courts a discretion to forfeit if it was given by its owner (or person who has legal possession of it) as payment for the commission of an offence of which the defendant was convicted, or as a means of committing it, or as payment for the commission of another offence that is related to the offence of which the defendant was convicted, or as a means of committing the other offence, even if the defendant did not commit the other offence and even if the defendant did not intend to commit it.

74. Article 39(c) of the Ordinance allows the prosecution to petition for criminal forfeiture after sentencing has been completed. The ability to do so was confirmed in *Salomon v State of Israel* (Cr.A 5905/04).

75. Article 297 of the Penal Law expands upon the above provisions in the case of bribery offences, whereby the court has a further discretion to order the forfeiture of what was given as a bribe, or any assets to which it was converted, as well as order the person who gave the bribe to pay to the State Treasury the value of the benefit derived by him from the bribe. Israeli authorities explain that Article 297 of the Penal Law has been used in only a few bribery cases, and that courts have in most cases utilised the forfeiture provisions in Article 39 of the Criminal Procedure Ordinance, or other tools including those under the Prohibition of Money Laundering Law. Israel's Answers to the Phase 1 Questionnaire set out the facts concerning four cases in which criminal forfeiture has been ordered in domestic bribery cases.³⁶

76. As to the exercise of the discretionary powers under Article 39 of the Ordinance and Article 297 of the Penal Law, Israeli authorities explain that the consideration that guides the Court in deciding whether to forfeit is the principle of restitution, and that if the grounds enumerated in the Article are met, the Court will therefore usually order forfeiture. The application in practice of this would be a matter to further consider in Phase 2.

77. Forfeiture under Articles 39 of the Ordinance and Article 297 of the Penal Law is discretionary. Consideration should be given in Phase 2 to how this discretion is applied in order to achieve an overall effective, proportionate and dissuasive sanctions regime. Israeli officials advise that a bill is being prepared on the subject of confiscation, including whether confiscation should be mandatory under Israeli law. Phase 2 should also consider the content and status of this.

³⁶

See paras 104-107.

78. In the case of a bribe and its proceeds which have been transferred to a non-bona fide third party, case law in Israel, and Article 39(b) of the Ordinance, can allow for their forfeiture. The extent to which this is the case is a matter which should be considered in Phase 2.

79. The criminal forfeiture provisions identified apply to legal persons to the same extent as they do to natural persons.

(ii) Other criminal forfeiture provisions

80. Criminal forfeiture is also possible under Prohibition of Money Laundering Law 2000 (PMLL) and the Combating Organized Crime Law 2003 (COCL). As opposed to 'normal' criminal forfeiture, criminal forfeiture under these statutes is mandatory, unless the Court concludes there are special grounds not to confiscate.

81. Article 21 of the PMLL authorises confiscation of property (or its equivalent monetary value) if the property: was the subject of the offence; was used in the commission of the offence; or enabled the commission of the offence or was intended for that purpose. Property which can be made subject to civil forfeiture under the PMLL includes any property found in the possession or control of the convicted person, including their bank account (Article 21(b)). Where insufficient property is found to implement the forfeiture order in full, the Court has the ability to implement the forfeiture order against the property of another person, where the acquisition of that property was financed by the convicted person, or transferred from the convicted person without consideration (Article 21(c)). The criminal forfeiture regime under the PMLL is thus much more robust in its application than normal criminal forfeiture provisions. In the context of combating bribery, however, its application is very limited since Article 21 is only activated where a person has been convicted of an offence under Articles 3 or 4 of the PMLL, i.e. where a person is convicted of laundering (in Israel) a bribe or its proceeds.

82. A similar forfeiture regime is available under Article 5 of the COCL, providing for the mandatory forfeiture of property connected to an offence under Articles 2, 3 or 4 of the Law which is found in the possession of the convicted person, under the person's control, or in the person's bank account, or the monetary value of that property. The offences in question relate to criminal conduct undertaken within the framework of a criminal organisation and would therefore fail to capture the foreign public officials by non-criminal companies, or by individuals acting outside the definition of a criminal organisation under the COCL.

83. Israeli authorities explain that the criminal forfeiture mechanisms under the PMLL and COCL apply to both natural and legal persons. Criminal forfeiture under the PMLL is mandatory, unless the court is of the opinion that forfeiture should not be ordered for special reasons. Forfeiture under the COCL is mandatory under certain conditions. These aspects would be matters for further consideration in Phase 2.

3.7 Monetary sanctions of comparable effect

84. This part of the Phase 1 standard questionnaire is not relevant. Question 3.7 asks:

If your legal system does not provide for seizure and confiscation of the bribe, the proceeds of the bribery of a foreign public official, or the property the value of which corresponds to that of such proceeds (the reply to 3.5 is null), describe how your legal system applies monetary sanctions of comparable effect.

3.8 Additional civil and administrative sanctions

85. Article 22 of the PMLL establishes a discretionary mechanism for civil forfeiture. Because bribery (including the foreign bribery offence) is a predicate offence under the PMLL, this mechanism may be available to foreign bribery cases. The Article 22 mechanism applies in cases where the person suspected of having committed one of the main offences under the PMLL does not permanently reside in Israel or cannot be located and, consequently, charges cannot be brought against him, or where the property designated for forfeiture was discovered after conviction. The property subject to forfeiture is property obtained, directly or indirectly, by means of one of the main offences enumerated in the PMLL, or as a reward for such an offence, or where the offence was committed therewith.

86. Article 14 of the COCL includes a similar discretionary civil forfeiture mechanism, pertaining to property connected to an offence under the COCL, or where the property belongs to a criminal organization (as defined in the Law), irrespective of whether any person has been convicted of an offence under the COCL.

87. Israeli authorities explain the abovementioned civil forfeiture mechanisms apply to both natural and legal persons.

88. Israeli authorities identify the further potential avenues for sanctions:

- The bribery offence normally involves a question of “moral turpitude”. Conviction of such offences can disqualify an individual from holding certain public positions, or prevent the person from practicing certain professions.
- When a person who gave a bribe is a civil servant, that person can be prosecuted by the Civil Service Disciplinary Tribunal for a disciplinary offence. The Tribunal has the authority to impose various disciplinary penalties, including: warning, reprimand, forfeiture of salary, demotion in rank, transfer of the civil servant to a different position, disqualification from fulfilling certain functions, dismissal with or without severance pay, dismissal together with disqualification from serving in the civil service.
- Article 221 of the Municipalities Ordinance 1964 allows a District Commissioner of the Ministry of the Interior to require a person who made an illegal payment (such as bribery of a foreign public official) and did so using municipality funds, to refund the sum out of the person’s own pocket. The Ministry of the Interior’s Charging Committee is responsible for administrative proceedings regarding the issuance of such a sanction. The Minister of Interior has the authority both to execute and to cancel such sanctions.

4. Article 4: Jurisdiction

4.1 Territorial jurisdiction

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

90. The Israeli Penal Law categorises offences by location under Article 7, as either “domestic offences” or “foreign offences”. A “domestic offence” is defined as one “all or part of which was

committed within Israeli territory”. The wording of Article 7 is therefore compatible with the requirement of Article 4(1) of the Convention.

91. The question of whether a certain act (e.g. a telephone conversation, an email or a fax transmission originating in Israel) would constitute “a part of an offence” is determined by the nature of the act in the specific context of the offence. According to *State of Israel v Abergil* (PD 44(2) 133), “part of an offence” can be constituted by a part of the direct commission of a crime within Israeli territory, or by an act of assisting, inducing or conspiracy performed in Israel, while the offence itself was committed outside Israel. Article 7(a)(2) of the Penal Law further provides that a domestic offence includes “an act of preparation to commit a crime, an attempt to commit a crime, an attempt to induce or incite a crime, or the conspiracy to commit a crime, even when committed outside of Israeli territory” where the intended crime was to have been committed in whole or in part in Israel. Thus, under Israeli legislation and case law, the definition of domestic criminal offences allows for a significant range of jurisdiction over extra-territorial acts.

92. Article 7 defines “Israeli territory” as “the area of Israel sovereignty, including the strip of its coastal waters, as well as every vessel and every aircraft registered in Israel”. Israeli authorities have explained that:³⁷

- The Gaza Strip is regarded by Israel as foreign territory, to which the Penal Law does not apply.
- Israel’s internal legislation, including the Penal Law, does not extend to the West Bank.
- The Penal Law, including the foreign bribery offence, applies to the Golan Heights and Jerusalem.

93. Concerning the application of the offence to officials in the West Bank and Gaza, Israel believes that Article 291A of the Penal Law may be sufficient to cover a bribe given to a member of the Palestinian Authority in the West Bank, or an elected official in the Gaza Strip.³⁸ With the aim of making this position clear, Israel intends to amend Article 291A to expressly include a political entity that is not a State, including the Palestinian Authority. Article 291A would thereby expressly cover the situation of a briber being given by an Israeli natural or legal person to a member of the Palestinian Authority or an elected official in Gaza. Israel advises that the proposed Bill will probably be published within a few months.

4.2 Nationality jurisdiction

94. Article 4(2) of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”.

³⁷ See Israel’s Response to Supplementary Questions to the Phase 1 Questionnaire [DAF/INV/BR/WD(2008)12], para 28.

³⁸ The Extension of Validity of Emergency Regulations Law (Jurisdiction and Legal Assistance) (Judea and Samaria) 1967 states that in addition to any law, Israeli courts shall have jurisdiction, according to the applicable law in Israel, over persons present in Israel, regarding acts which took place in Judea and Samaria, with the exception of the territory of the Palestinian Authority; and over Israelis, regarding acts which took place in the Palestinian Authority, as far as the act would have been considered as felony, had it occurred within the jurisdiction of the courts in Israel. This provision does not apply to a person who, at the time the act took place, was not an Israeli.

95. In all instances where an offence is not a “domestic offence” under Article 7 of the Israeli Penal Law (considered in the preceding section), the offence will be categorised as a “foreign offence”, to which two forms of jurisdiction may apply: nationality jurisdiction; and jurisdiction over crimes under international treaties.

Nationality jurisdiction

96. Nationality jurisdiction is expressly provided for in respect of “foreign offences” which amount to felonies and misdemeanours under Article 15 of the Penal Law. Since the foreign bribery offence carries a penalty greater than three years’ imprisonment, it is a felony offence under the Law and would thus be captured by Article 15. Nationality jurisdiction applies to Israeli citizens as well as residents of Israel. Israeli authorities state that they believe this basis of jurisdiction to be applicable to legal persons, the application of which could be considered further in Phase 2.³⁹ It should also be noted that, pursuant to section 9(b) of the Penal Law, the prosecution of a “foreign offence” can only take place with the written consent of the Attorney-General, upon his determination that this is in the “public interest” (this expression is considered further in section 5.1 below).

97. Jurisdiction under Article 15 is made subject to restrictions set out in Article 14(b) and (c). Three matters should be noted in this regard. First, Article 14(b)(1) provides that Israeli penal laws shall not apply if the offence in question is not an offence under the domestic law of the country in which the offence took place. Israeli authorities explain that, in the absence of precedents on the effect of this provision upon the foreign bribery offence, the consequences of this provision should be as follows:

- If an Israeli who is in a foreign country bribes an official of that country, then it is enough for jurisdiction in Israel if bribery of a *domestic* public official is an offence in the foreign country. This does not appear to be problematic.
- If an Israeli who is in a foreign country bribes there an official of a third country, then nationality jurisdiction under Article 14(b)(1) will only be exercised if bribery of a foreign public official is an offence in the foreign country. This will be problematic since it means that nationality jurisdiction is likely only to be applicable where the foreign country is a party to the Convention. This might be offset in light of the increasing party status to the UN Convention against Corruption, although ratification of UNCAC does not necessarily mean that the foreign bribery offence will have been established.

98. A further restriction is contained in Article 14(b)(2), which allows jurisdiction so long as “no restriction of criminal liability applies to the offences under the laws of that state”. This might be problematic for two reasons:

- Criminal liability may be restricted in a foreign State due to the application of defences which are incompatible with the Convention.
- Criminal liability might also be restricted in a foreign State for other reasons which are incompatible with the Convention, such as the expiry of a very short statute of limitations, or the application of immunity.

³⁹ Article 4 of the Interpretation Law 1981 provides that a “person” includes an association of people, regardless of whether or not it is incorporated. Israeli law also provides for the criminal liability of legal persons (see Article 23 of the Penal Law, discussed in section 2 of this report).

99. The final restriction upon the exercise of nationality jurisdiction is found in Article 14(c), which provides that no penalty may be imposed for a foreign offence that is more severe than that which could have been imposed under the laws of the country in which the offence was committed. This requirement is linked to the dual criminality condition in Article 14(b)(1). It is even more problematic than dual criminality, however, since it makes Israel's sentencing authority dependent upon a foreign country's treatment of the foreign bribery offence. Thus, if a foreign country applies low, ineffective and non-dissuasive sanctions to the offence, Israel would be bound by that sentencing regime in the application of nationality jurisdiction.

100. A matter requiring clarification in Phase 2 would be whether Article 14(c) would also impact upon the ability to seize and forfeit the bribe and its proceeds. Israeli authorities indicate that this should not be the case, since forfeiture is not considered to be a punitive measure in Israel.

101. Although the restrictions set out in Article 14 apply to nationality jurisdiction in respect of all offences in Israel (thus complying with Article 4(2) of the Convention), a matter requiring further analysis in Phase 2 is whether Article 14 of the Penal Law is "effective in the fight against the bribery of foreign public officials" (Article 4(4) of the Convention).

Jurisdiction over crimes under international treaties

102. Where Israel has undertaken to punish a foreign offence as a result of its party status to an international convention, Article 16 of the Penal Law provides that jurisdiction shall apply even if the offence was committed by a person who is not an Israeli citizen or resident and no matter where it was committed. Israeli authorities state that they believe this basis of jurisdiction to be applicable to legal persons, the application of which could be considered further in Phase 2.⁴⁰

103. This appears to be an extremely broad basis of jurisdiction, which may act to counter some of the deficiencies noted above concerning nationality jurisdiction. Again, however, the restrictions under Articles 14(b)(2) and 14(c) continue to apply (discussed in the preceding section).

4.3 Consultation procedures

104. Article 4(3) of the Convention requires that when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

105. Israel does not currently have specific procedures in place concerning consultation with other Parties to the Convention in the event that more than one State has jurisdiction over a foreign bribery offence. Israeli authorities nevertheless state that they may choose under certain circumstances or due to a legitimate interest at issue, to defer a case to the authorities of another State and to allow prosecution over

⁴⁰ It should be noted that the non-official translation of Article 16(a) provided by Israel is as follows and would give rise to the explanation just given: "Israel penal laws shall apply to foreign offences, which the State of Israel undertook – under multilateral international conventions that are open to accession – to punish, and that even if they were committed by a person who is not an Israel citizen or an Israel resident and no matter where they were committed". In the normal course of research, an alternative translation was found online which reads: "Israeli penal law shall apply to foreign offences which Israel, by multilateral international conventions, has undertaken to punish even if they are committed by a person who is not an Israeli national or resident of Israel regardless of where they were committed" (<http://wings.buffalo.edu/law/bclc/israeli.htm>). The latter translation could be interpreted to mean that the international convention in question must require the punishment of non-nationals regardless of where the offence is committed. This is a matter which should be clarified in Phase 2.

an offence to take place in another country instead of in Israel. Where this occurs, authorities state that Israel endeavours to cooperate in the exchange of effective legal assistance to assure that criminal offenders will be prosecuted and that the interests of justice will be served.

4.4 Review of bases of jurisdiction

106. Israeli authorities state that they examined the effectiveness of its jurisdiction, when considering whether there was a need to enact a specific offence of bribery of a public official or if the legal tools already at its disposal provided a sufficient legislative framework for the adoption and implementation of the Convention. As a result of that examination, it was concluded that there was a need for a new offence, which led to the enactment of Article 291A of the Penal Law. With the enactment of this provision, authorities believe that the current basis for jurisdiction will be sufficiently effective in the fight against bribery of foreign public officials.

5. Article 5: Enforcement

107. Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official “shall not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved”.

5.1 Rules and principles regarding investigations and prosecutions

108. In Israel, rules and principles regarding investigation and prosecution of a foreign bribery offence are essentially contained in (i) the Israeli Penal Law; (ii) the Criminal Procedure Law 1982; (iii) and the State Attorney’s Guideline Number 1.1 (Considerations for Closing a Case due to Lack of Public Interest).

Investigation

109. The Israeli Police has primary authority for the detection and investigation of criminal activity in Israel. Until January 2008, there were several national units within the Israeli Police capable of investigating corruption. As part of Israel’s national plan to fight corruption (based upon a 2006 decision approved by the Government, entitled *The Battle against Severe Crime and Organized Crime and their Outcomes*), these units were brought under the direction of one body called “Lahav 433” and continue to operate as follows:

- The main branch of the Israeli Police responsible for the fight against corruption is the National Fraud Unit, in charge of detecting and investigating corruption on the municipal and national levels, as well as financial crimes and cases of sophisticated fraud which require special investigative skills. It also investigates matters of particular public sensitivity at the request of the Police Commissioner, the Head of the Investigations Division of the Israeli Police, or the Attorney-General. The Unit operates nationwide, with offices in the north, south and centre of the country. Most of the Unit’s staff are experts in the relevant fields, such as accountancy, computing, economics, and public administration.
- The Unit for Severe National Crimes and International Crimes is responsible for the detection and investigation of severe crimes and crimes which have international ramifications. It also conducts investigations of special public importance, and responds to requests of inquiry from foreign courts of law. The unit provides investigative assistance to foreign agencies.

- Added to these national units are the National Unit for Economic Investigations, in charge of handling corruption cases in the fields of real-estate and infrastructure; the National Unit for Combating Car Theft, responsible for handling corruption cases relating to vehicle registration; and the Immigration Administration Unit, in charge of corruption cases related to the employment of illegal residents.

110. The efficiency of Lahav 433 and its management of these units could be further analysed in Phase 2.

111. According to Article 59 of the Criminal Procedure Law 1982 (CPL), the Israeli Police is obliged to initiate a criminal investigation whenever it receives information regarding an offence, whether through a complaint or in some other way. Although Israeli Police have the ability to terminate a non-felony offence on certain grounds, including public interest, this authority does not apply to felony offences such as the foreign bribery offence. Article 60 of the CPL requires law-enforcement authorities to provide the materials obtained in an investigation into any felony offence to the District Attorney.

Prosecution

Prosecution authorities

112. The Public Prosecution in Israel is headed by the Attorney General, who is in charge of law enforcement and the representation of the State before the courts in all legal areas, as well as professional responsibility over public prosecutors. While the Israeli Police has Prosecution Units which are capable of undertaking public prosecutions, Israeli authorities advise that the body responsible for the prosecution of corruption and bribery offences is the State Attorney's Office.

113. The State Attorney's Office is divided into a National State Attorney's Office and six District Offices. The National Office, responsible for coordination, the setting of policies, and handling of appeals before the Supreme Court, is itself divided into 12 departments. Of those, the Criminal Department handles criminal cases, and the Economic Department handles economic crimes and white-collar felonies. The District Offices are in charge of criminal prosecution within their respective districts' jurisdiction. This involves examining and evaluating evidence gathered by the Israeli Police, and deciding, based upon an assessment of the evidence, whether to prosecute. Where prosecutions are commenced, the District Office is responsible for all aspects of procedures before the court.

Prosecution principles

114. Following the referral of an investigation by the Israeli Police to the District Attorney's office under Article 60 of the Criminal Procedure Law, the prosecution will examine and evaluate the evidence gathered. The prosecution may require the Israeli Police to continue the investigation if the prosecutor considers this necessary in order to make a decision whether to prosecute, or to enable the efficient conduct of the trial (Article 61 of the CPL). Where it appears to the prosecutor that there is sufficient evidence to issue an indictment, the offence must be prosecuted unless the prosecutor is of the opinion that there is "no public interest" to prosecute. Israeli authorities explain that only a prosecutor of the District Attorney's Office (subject to approval from the District Attorney or his delegate) may decide not to prosecute a bribery offence for lack of public interest. The principles in determining the application of a public interest against prosecution are considered further in section 5.2 below.

115. The general court system is comprised of three instances: Magistrates' Courts; District Courts; and the Supreme Court. Where a decision to prosecute a bribery allegation is made, jurisdiction to hear the matter is normally taken by the Magistrates Court, since it has jurisdiction over offences for which a

maximum penalty of up to seven years' imprisonment can be imposed. The Head of each of the State Attorney's District Offices can, however, decide to submit an indictment to the District Court. A matter to be further considered in Phase 2 is when and why this would occur, and how this might impact upon the prosecution of the foreign bribery offence.

Attorney-General's consent to indictment of foreign bribery cases

116. Any prosecution of foreign bribery will require the consent of the Attorney General, arising by operation of two provisions. First, Article 291A(b) provides that no indictment in respect of an offence under Article 291A can be issued without the prior written consent of the Attorney General, or of a person to whom that authority has been delegated (the provision includes, as potential delegates, the State Attorney, the Deputy State Attorneys, and the Director of the Criminal Department of the State Attorney's Office). Secondly, even if this was not an express requirement of Article 291A, it should be noted that Article 9(b) of the Penal Law requires the consent of the Attorney General, or delegates, for the prosecution of any "foreign offence". As noted earlier, the bribery of a foreign public official would be a foreign offence where no part of the offence took place within the territory of Israel (section 4.2 above).

117. Israeli authorities explain that all criminal indictments are issued pursuant to the authority of the Attorney General, and that his express consent to a prosecution under Article 9(b) and Article 291A exists due to the international considerations involved in such prosecutions. In the case of consent under Article 9(b), such consent will be based upon the Attorney General's "determination that [prosecution] is in the public interest". The potential for this discretion to impact upon Article 5 of the Convention is considered further in section 5.2 below.

118. There are no set procedures for the process and timeframe for obtaining the Attorney-General's consent under these provisions. Israeli authorities explain that the relevant investigating unit normally refers an investigation file to a prosecutor at the relevant District Attorney's (Criminal Division) office. Police will normally indicate whether there appears to be an evidential basis to prove the offence, although this does not amount to a recommendation to the prosecution service. The prosecutor examines the material and will give an opinion on the indictment. Where the AG's consent is required, the file will then be referred to the Attorney-General's Office. The AG's decision is normally given in a matter of few days. A matter to be further considered in Phase 2 is whether authorities obtain a preliminary opinion from the Attorney-General prior to undertaking an expensive and lengthy investigation.

Cancellation of indictment, or stay of proceedings

119. The prosecution may terminate proceedings at any stage after an indictment has been presented by cancelling the indictment. Cancellation of an indictment after arraignment normally results in acquittal (Article 93 of the CPL). The prosecution is not limited to any specific grounds in its decision to withdraw an indictment, although it is common practice for reasons to be given for the withdrawal of an indictment. Israeli authorities explain that, without a substantial change of circumstances, it is unlikely that the prosecution would withdraw an indictment due to a lack of public interest.

120. In addition, the Attorney General (or delegates) can order a stay of criminal proceedings, including proceedings under Article 291A, at any time after the presentation of the indictment and before sentencing. An order to stay proceedings stops the trial. Israeli authorities explain that a stay of proceedings is an unusual measure, which is taken only under exceptional grounds normally connected to the accused (such as severe illness), and that this would not include the grounds prohibited under Article 5 of the Convention.

121. A stay of proceedings can be made on a conditional basis (Article 231 of the CPL), including upon a commitment to refrain from future offending, a condition (in the case of public officials) requiring the instigation of disciplinary proceedings against the official, or a voluntary agreement to supervision by the Israeli Probationary Authority. In the case of proceedings stayed under Article 231 the Attorney General may, by written notice, reopen a prosecution (Article 232 of the CPL) provided that this occurs within five years from the date of the stay of proceedings in the case of a felony (or within one year in the case of a misdemeanour).

Out-of-court settlements

122. In addition to a conditional stay of proceedings, two further avenues exist for out-of-court settlements:

- **Plea-bargaining.** 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 mutually agreed sentence either relate to a specific sentence, or an agreement to limit arguments in the sentencing phase of the trial to an agreed range of sentences. A plea-bargain must be approved by the court and be affirmed as a judgment. Plea-bargaining arrangements are not currently codified into law, but a Bill on the subject is being prepared. Consideration should be had in Phase 2 to: (i) the Bill; (ii) the existence of any accompanying sentencing guidelines for plea-bargaining; and (iii) the level to which plea-bargaining is used in bribery cases.
- **Conditional Waiver.** The prosecution and an accused can agree that an indictment will not be presented on the condition that the accused take responsibility for the conduct in question and agree to be under the supervision of the Probation Authority, or on the condition that the accused perform community services (also under the auspices of the Probation Authority). This procedure is regulated by Article 8 of the Criminal Offenders Probation Regulations 1977. A governmental Bill includes a more elaborate and detailed framework for this arrangement. Israeli authorities state that such arrangements are intended for minor offences only, or offences committed in mitigating circumstances. They state that it is unlikely that conditional waiver would be found suitable for bribery offences.

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

123. In the prosecution of the foreign bribery offence, the potential for considerations such as national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved to become involved arise in two contexts:

- Once an investigation has been referred by the Israeli Police to the District Attorney's office under Article 60 of the Criminal Procedure Law, the prosecution may take the view that there is no "public interest" in prosecuting the alleged offence. Decisions by a prosecutor not to prosecute felony offences due to lack of public interest require approval from the District Attorney or a senior attorney empowered by the District Attorney (Article 62).
- Any decision to prosecute the foreign bribery offence under Article 291A of the Penal Law is specifically subject to the prior consent of the Attorney-General (Article 291A(b)). Article 9(b) of the Penal Law also requires the consent of the Attorney General, or delegates, for the prosecution of any "foreign offence", which might include the bribery of a foreign public official where no part of the offence took place within the territory of Israel.

124. Israeli authorities explain that, according to the High Court of Justice Decision in *Ganor v The Attorney General*,⁴¹ and the State Attorney's Guideline Number 1.1 (Considerations for Closing a Case due to Lack of Public Interest), the underlying assumption is that if the legislator determined that a certain kind of behaviour constitutes an offence, there is public interest to prosecute suspects of such behaviour. They further state that a suspect would not be brought to justice if, for example, "his prosecution will cause severe harm to social interests and values, outweighing the harm caused by not bringing him to justice". The Guidelines also stipulate that matters of security, political or public importance, might also necessitate a decision to refrain from presenting an indictment. The Guidelines do not explicitly exclude consideration of matters prohibited by Article 5, although Israeli officials advise that this is implicit.

125. Authorities also explain that decisions not to prosecute due to lack of public interest must be made by the prosecutor or Attorney-General after considering all the relevant factors, and these factors alone, in good faith, in a non-arbitrary manner, without discrimination, fairly and reasonably. In assessing the factors for and against prosecution, consideration must be given, *inter alia*, to the severity of the act, the personal circumstances of the suspect and the victim, institutional considerations of the public prosecution and the Court, and other vital interests of the State.

126. The Guidelines add that, in exercising discretion, prosecutors must be free from any external pressure. Any decision not to proceed with a prosecution on grounds of public interest is subject to judicial review by the Supreme Court sitting as the High Court of Justice. Israeli authorities further explain that the prosecution is not subject to the instructions or policy of any Minister or the Government, and that the Attorney-General is not a political figure.⁴² Israeli authorities state that "it is hard to conceive of a decision not to prosecute, due to lack of public interest, when there is evidence for the offence of bribery, as it is considered a severe offence and the perpetrators are perceived as guilty of undermining public order".

127. Notwithstanding the safeguards just mentioned, the wording of the AG's Guidelines, as well as the absence of any reference to prohibited grounds for an offence of foreign bribery, raises concerns that public interest might include considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal persons involved, contrary to Article 5 of the Convention.

⁴¹ *Ganor v The Attorney General* (1989) PD 42(2) 485.

⁴² The Attorney General is appointed by the Government from among candidates recommended by a permanent professional public Committee, headed by a former Supreme Court Justice and including a former Minister of Justice or a former Attorney General, a member of the Knesset, a private attorney, and an academic scholar expert in the fields of public law and criminal law. According to the Attorney General's Guidelines 4.1001 (Prosecutorial Independence), the Attorney General will exercise the powers given him by law in criminal matters based on his independent judgment in each and every case, in accordance with the facts, the law, and the prosecution's policy, without being subject to the instructions or policy of a Minister or of the Government. A person currently involved in political activities, or who was involved in such activities during the three preceding years, cannot be nominated as Attorney General. The Attorney-General serves a six-year term. The Government can remove the Attorney-General from office, in consultation with the Committee, in the following situations: (1) substantial and prolonged differences of opinion between the Government and the Attorney-General resulting in inability to cooperate effectively; (2) the Attorney-General acted in an improper *manner not befitting* his status and position; (3) the Attorney-General is no longer capable of performing his duties; or (4) the Attorney-General is subject to a criminal investigation or to an indictment presented to the court.

6. Article 6: Statute of Limitations

128. Article 6 of the Convention requires that any statute of limitations with respect to bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of this offence.

129. Article 9(a)(2) of the Criminal Procedure Law provides that, where no contrary rule is stipulated, the statute of limitations for a felony offence will be 10 years from the date on which the offence was committed. The foreign bribery offence under Article 291A is a felony offence, and there is no express mention of the statute of limitations applicable to it. Israeli authorities thus confirm that the applicable limitation period to Article 291A is 10 years.

130. Article 9(c) of the CPL further provides that an investigation of an offence stops the clock running on the period of limitation for that offence. The limitation period also stops running in cases where, during the course of the limitation period, an indictment was issued or a court procedure was held regarding the offence. In such cases, the limitation period begins on the date of the last procedure within the investigation or the court proceedings, or on the date in which the indictment was issued (the latest of the three). According to Article 9(d), Article 9(c) also applies to extradition requests submitted to the State of Israel by foreign States. In such cases, certain actions conducted in the requesting State, as enumerated in Article 9(c), would extend the period of limitation as if those actions were conducted in Israel.

7. Article 7: Money Laundering

131. Article 7 of the Convention provides that, if a Party has made bribery of its own public official a predicate offence for the purpose of its money laundering legislation, it shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred.

132. Israel is not a member of the Financial Action Task Force (FATF), nor the Middle East and North Africa Financial Action Task Force, although Israeli authorities state that Israel is interested in joining the FATF. Although Israel had been added to the FATF list of Non-Cooperative Countries and Territories (NCCTs) in June 2000, it was de-listed after a short period in June 2002 following its prompt enactment and implementation of necessary reforms. Israel is an Active Observer in the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL). MONEYVAL conducted an on-site visit to Israel as part of its mutual evaluation process in November 2007, and adopted its report in July 2008. Israel is also a member of the EGMONT Group of financial intelligence units.

The money laundering offence

133. Articles 3 and 4 of the Prohibition on Money Laundering Law 2000 (PMLL) establish criminal liability for the laundering of money (or property) originating directly or indirectly from, or used to commit or enable the commission of, a wide range of predicate offences. The money laundering offence is punishable by up to ten years’ imprisonment, and/or heavy fines.

134. The money laundering offence under the PMLL applies to legal persons as well as natural persons. The offence applies to persons who themselves commit a predicate offence (self-laundering) as well as persons who launder property that directly or indirectly represents the proceeds of crime committed by others. Article 1 of the PMLL defines “property” as “immovable and movable property, monies and rights, inclusive of property which is the proceeds of any such property, and any property accruing or originating from the profits of any such property”. Article 3(a) in turn defines “prohibited property” as any one of the following:

- Property originating directly or indirectly from an offence;
- Property used to commit an offence; or
- Property enabling the commission in an offence.

135. For the purpose of classifying property as “prohibited property”, it is not necessary that a person be convicted of a predicate offence. Predicate offences include all offences of bribery under the Penal Law 1977 (paragraph 6 of the First Schedule to the PMLL) which includes the foreign bribery offence under Article 291A of the Penal Law. The predicate offences extend to conduct that occurred in another country (Article 2 of the PMLL).

136. It is an offence under the PMLL to perform a transaction related to “prohibited property”:

- With the object of concealing or disguising its source, owners, location or disposition (Article 3(a) of the PMLL); or
- Where the perpetrator knows it is prohibited property and that the property is of a certain kind and value (Article 4 of the PMLL, i.e. monies in excess of 450,000 ILS (approximately 91,000 EUR or 125,000 USD) or real estate, securities, artefacts, and other specified items if their value is 135,000 ILS (approximately 27,500 EUR or 37,500 USD) or more, cumulated within a period of three months).

137. Under Article 3(b) of the PMLL, it is also an offence to perform a property transaction (even if it the property is not “prohibited property”), or to deliver false information, where this is done to prevent reporting or cause false reporting under the reporting obligations in the PMLL.

138. Prosecution of offences under Articles 3 and 4 does not require the perpetrator to know of the specific predicate offence. It is sufficient, under Article 5 of the PMLL, if it is proved that “the person performing the act knew that the property was prohibited property even if he did not know to which specific offence the property is connected”. The statute of limitation for money laundering offences is ten years.

139. Property obtained in violation of Articles 3 or 4 may be forfeited in both criminal and civil proceedings (Articles 21 and 22 of the PMLL). The Executive Summary to MONEYVAL’s report on Israel indicates that Israel’s legislative provisions criminalising money laundering are largely in accordance with international standards and expectations.⁴³ However, international Conventions do not generally allow for money laundering up to any particular threshold before an offence is committed. This is a matter to be further considered in Phase 2.

Money laundering reporting

140. The Israeli Financial Intelligence Unit (also known as the State of Israel Money Laundering and Terror Financing Prohibition Authority, or IMPA) was established under the PMLL and became

⁴³ MONEYVAL’s recommendations included: adding piracy and environmental crimes as predicate offences; removing the threshold approach under Article 4 of the PMLL; and extending modern legislation on forfeiture and provisional measures to the full range of relevant predicate offences.

operational in 2002.⁴⁴ The IMPA is authorised to collect, analyse, and store reports transmitted to it under the Law.

141. As well as requiring financial institutions to identify their clients before performing a transaction and to maintain appropriate records, Article 9 of the PMLL requires them to report “certain transactions” to the IMPA. The nature of the transactions to be reported is governed by regulations issued by the Governor of the Bank of Israel, and others.⁴⁵ Israeli authorities indicate that this includes activities perceived by financial institutions to be unusual in view of information in their possession, including transactions that appear to have been performed in order to circumvent the reporting requirements. Phase 2 should consider the content of the applicable regulations.

142. The “financial institutions” subject to the reporting obligations mentioned are banking corporations, members of the stock exchange, portfolio managers, insurers and insurance agents, management companies (in relation to providential funds under their management), providers of currency services (as defined in Article 11(c) of the PMLL), and the Postal Bank. Israeli officials advise that the government intends to make reporting obligations applicable to the precious stones traders sector.⁴⁶

143. The PMLL includes powers to seize monies and the use of monies (Article 11), and provides the Registrar of Currency Services with the ability to suspend the registration of a currency provider. Financial sanctions may be imposed for failure by a financial institution to report in accordance with the PMLL. The PMLL also requires individuals entering or leaving the State of Israel to report any funds they are carrying with them, when those funds exceed 90,000 ILS (approximately 17,000 EUR or 27,000 USD).

8. Article 8: Accounting

144. Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, each Party prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations for the purpose of bribing foreign public officials or of hiding such

⁴⁴ The MONEYVAL evaluators noted that, within its legal confines, the IMPA performs its assignment in a well organized and professional manner resulting in a quality output. Recommendations included: improving the IMPA’s efficiency as an analytical unit, which is currently affected by the incomplete direct access to relevant law enforcement and administrative information; enhancing effectiveness through opportunities for more fully exploiting FIU intelligence; removing the legal requirements on trust service providers to obtain, verify and retain records of the trusts they create, including beneficial ownership details.

⁴⁵ Regulations made by the Governor of the Bank of Israel apply to banking corporations. Regulations are also issued by the Chairman of the Israel Securities Authority (for portfolio managers and stock exchange members); the Superintendent of Insurance in the Ministry of Finance (for insurers and insurance agents); the Commissioner of the Capital Market in the Ministry of Finance (for provident funds and companies managing a provident fund); the Registrar for Providers of Currency Services in the Ministry of Finance (for providers of currency services); and the Minister of Communications for the Postal Bank.

⁴⁶ On 11 July 2007 a Bill (dealing with this issue) to amend the Prohibition of Money Laundering Law (Amendment No. 7) 2007 was published. The Bill passed the first reading in the Knesset and was forwarded for review to the Knesset’s Constitution, Law and Justice Committee. Due, however, to the need for a new Knesset to be elected following the general elections in February 2009, the Bill will need to be adopted by the new Minister of Justice and, if approved, brought before the Ministerial Committee for Legislation and Law Enforcement which will then be asked to approve continuation of the Bill.

bribery. The Convention also requires that each Party provide for effective, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1 Accounting and auditing requirements; and

8.2 Companies subject to requirements

Books and records

145. Pursuant to Article 130 of the Income Tax Ordinance, the Director of the Tax Authority has established the Tax Directives (Management of Accounting Books) 1973. The Directives establish a duty of book-keeping which is imposed on all taxpayers and stipulates, *inter alia*, the type of books, documents and information that must be kept, the manner in which they should be kept, and for how long. The particular accounting books that are required to be kept by taxpayers who are individual-independent-workers or companies are determined on the basis of the business sector to which they belong, the size of the business turnover, and the number of employees employed in the business. Each taxpayer must maintain an accounting system (accounting books and other specified documentation) pursuant to the schedule to the Directives which applies to him and in accordance with the provisions of the Directives.

146. Article 25(c) provides that an accounting system must be kept for a period of seven years from the end of the fiscal year to which it refers, or six years from the date on which the taxpayer filed the tax-return for that fiscal year, whichever is later. By virtue of Article 25(d), certain documents that are not included in the schedule to the Directives are to be kept for a period of three years from the date of filing of the income tax-return for that particular fiscal year. These documents include those prepared in the course of business such as statistical reports, orders, internal memos, contracts and minutes of meetings; and documentation and accounting books that the taxpayer kept either voluntarily (i.e. in addition to the requirements of the schedule to the Directives) or pursuant to other legal requirements under the Securities Law 1968 and the Companies Law 1999 (which include order books in a wholesale business, and records and reports to the Ministry of Industry Trade and Labor).

147. The Securities Regulations (Periodic Statements) 1970 also require submission of quarterly and annual statements, which must contain information required by the accounting rules applicable to the company. These statements are submitted to and inspected by the Israel Securities Authority (ISA).

148. Further analysis of the precise content and requirements of the Directives and Article 25 of the Ordinance should be undertaken in Phase 2, as well as of the relevant provisions of the Securities Law and the Companies Law, to more carefully consider whether these amount to a requirement that companies maintain “adequate records” within the meaning of Revised Recommendations V(A)(i).

Accounting standards

149. There are three main sets of accounting standards that apply to the Israeli private sector and to companies trading in Israel:

- The International Financial Reporting Standards (IFRS) which, as a rule, apply to all publicly trading corporations. Since 1 January 2008, Israeli reporting corporations have been obligated to prepare their financial statements in accordance with the IFRS.
- The US Generally Accepted Accounting Principles (GAAP) standards set by the Financial Accounting Standard Board, which apply to some Israeli companies which trade in the US, as

well as to Israeli Banks. Foreign companies that are listed in Israel may, subject to certain conditions, apply IFRS or GAAP standards.⁴⁷

- Israeli legislation and regulations, and accounting standards established by the Israeli Accounting Standards Board (IASB) are applicable to all other companies, although these other companies may choose to apply IFRS standards.

150. The accounting standards applicable to government companies are determined by the Israel Government Companies Authority in accordance with the provisions of the Government Companies Law 1975. These are generally the same as applicable in the private sector, and also include specific auditing standards that apply to government companies which are additional to the general standards or which constitute clarifications or broadening of specific issues that are relevant to government companies”. A “government company” is one in which more than half the voting power at general meetings, or the right to appoint more than half of its directors, is held by the Israeli State, or by the State together with a government company or with a government subsidiary (Article 1(a) of the Government Companies Law).

External auditing requirements

151. Under Israel’s Companies Law 1999 all companies are required to appoint an auditing accountant to undertake an annual audit of the company’s financial statements and give an opinion on those statements. In the case of companies whose business cycle does not exceed 500,000 ILS (approximately 95,000 EUR or 150,000 USD), Article 158 deems such a company to be “inactive” and allows it to resolve not to appoint an auditing accountant, unless 10% or more of the shareholders are opposed to this.

152. Corporations based or trading in Israel are required to comply with auditing standards set out in Israeli law, as principally set out in the Accountants Regulations (Accountants’ Method of Operation) 1973 and the Companies Law 1999. Professional standards are also published by the Institute of Certified Public Accountants in Israel.

153. The work of an auditing accountant is externally reviewed by the Peer Review Institute, under the supervision of the Institute of Certified Public Accountants in Israel. Accounting auditors in government companies must also report and answer to the Israel Government Companies Authority.

154. An auditing accountant is only appointed for a term of one year at a time, renewable at the annual meeting of the shareholders, although a longer appointment can be made by the general assembly if the constitution of the company permits this. Appointment must be by the general assembly of shareholders at its annual meeting, except in the case of a newly formed company before its first annual meeting (Article 155 of the Companies Law). Article 162 of the Companies Law allows a company to cease using the services of a particular auditor, by decision of the general assembly of shareholders. Article 10 of the Accountants Law 1955 sets out the general principle of independence for auditing accountants and the Accounting Regulations (Conflict of Interest and Harming the Independence as a Result of Additional Occupation) 2008 set out further conditions aimed at securing independence, including a prohibition against making fees dependent upon circumstances which would act to limit the way in which the audit is undertaken. Further provisions impacting upon the independence of an auditing accountant are to be found in the Companies Law; the August 1992 resolution of the ISA (concerning financial or familial relations between an auditing accountant and the company being audited); and the 1994 Briefing of the Institute of Certified Public Accountants in Israel (concerning the replacement of auditing accountants).

⁴⁷ This applies to foreign companies listed in Israel if: more than 50% percent of the company’s income is not received in Israel and if the company is not controlled by Israeli permanent residents; or if the company is listed both in Israel and in the London stock exchange or in specific US stock exchanges.

155. All public companies are also required to establish an audit committee, comprised of at least three people and whose role is discussed in the following section of this report (Articles 114-117 of the Companies Law). According to Article 279 of the Companies Law, at least two members of the audit committee must be external directors of the company. The presence of at least one of these members is required in order for a decision to be made by the committee. Membership in an audit committee is excluded to the chairman of the board of a company, any director who is employed by the company or provides services to it on a regular basis, a controlling shareholder, or any relative thereof. Specific rules concerning government companies are to be found in the Government Companies Law and circulars of the Israel Government Companies Authority.

Reporting

156. The duties of an auditing accountant, set out primarily in the Accountants Regulations (Accountants' Method of Operation) 1973, include an obligation to report to the Chairman of the Board on negative reviews, reservations and non-compliance with accounting standards (Articles 13 and 17-18 of the Regulations). Article 21 allows an auditing accountant not to report such matters for professional reasons, which must be stated in his or her report. Article 21 is subject to the overriding legal requirements in Article 169 of the Companies Law, which requires that where the auditing accountant is aware, as a result of an act of audit, of substantial deficiencies in the financial statement of a company, s/he must report thereon to the chairman of the board of directors. The chairman of the board is then required, without delay, to convene a meeting of the board of directors to discuss the matter. The availability of the auditing accountant's report to the public depends upon the nature of the company being audited.⁴⁸

157. Although an auditing accountant is required to report to the chairman of the board under Article 169 of the Companies Law, accountants are prohibited by Article 1A(3) of the Accountants Regulations (Behaviour Unfitting the Dignity of the Profession) 1965 from disclosing information obtained in the course of providing their professions services, unless "required by any other statutory provision to disclose such information". In response to a supplementary question (asking whether an auditor is required to report suspected criminal activity to law-enforcement authorities), Israel pointed to Article 262 of the Penal Law as having the potential to act, in certain circumstances, as a statutory provision requiring disclosure of information for the purposes of Article 1A(3) of the Accountants Regulations. Article 262 of the Penal Law requires a person who is aware of a felony (which includes the foreign bribery offence) to use all reasonable means to prevent its commission. Israeli authorities state that "it would be reasonable to assume that he [an auditor] is required to act, report for example, whenever he comes across information, in the course of his audit, indicating that a felony is in the process of being committed or is about to be committed". While this might be correct: (i) this link is not clear and is unlikely to be apparent to an auditing accountant; and (ii) this would not cover the situation where an auditing accountant becomes

⁴⁸ In the case of companies subject to the Securities Law 1968, reports of an auditing accountant are publicly available. Reports of such companies are normally available through an electronic report system operated by the Israel Securities Authority (www.magna.isa.gov.il). In the case of non-listed private companies, the Companies Law (Articles 171-175) requires the submission of audited reports, approved by the board of directors, to the shareholders of the company, but are not available to the general public. In the case of non-profit corporations, these are generally required by the Amutot (associations) Law 1980 to submit audited annual reports to the Registrar of Non Profit Organizations. Article 38(a)(3) stipulates that the reports of an auditing accountant must be attached to the audited annual reports. The audited reports, along with the report of the auditing accountant, are available for public viewing at the office of the Registrar of Non Profit Organizations. In the case of government companies, the Israel Government Companies Authority publishes an annual report of government companies. This report is publicly available and includes, inter alia, key details from the financial reports of the companies and key details from the report of the auditing accountant, mainly for the larger companies.

aware of an already completed act of foreign bribery. This is a matter which should be further considered in Phase 2.

158. The role of the audit committee mentioned in the previous section includes taking note of deficiencies in the company's business management, including that reported by the company's internal auditor or auditing accountant, and propose to the board of directors ways in which such deficiencies may be corrected. In the case of government companies, Article 46 of the Government Companies Law requires the auditing accountant to report to the board of directors and to the Israel Government Companies Authority (IGCA), identifying "substantial deficiencies" discovered in a company's financial report, and any action discovered which fails to comply with the Government Companies Law, government decisions, and circulars and guidelines of the IGCA. Further requirements are imposed under the Government Companies Regulations (Additional Reports Regarding the Effectiveness of Internal Auditing on Financial Reporting) 2007 and circulars of the IGCA.

8.3 Penalties

159. Failure to comply with book-keeping and accounting requirements can have one or more of the following consequences:

- Article 130 of the Income Tax Ordinance provides that when divergence from the Tax Directives (Management of Accounting Books) 1973 or deficiencies found in the accounting books are substantial with regards to the determination of the taxpayer's income, the assessing officer may disqualify the taxpayer's books and issue an assessment in accordance with his or her best judgment. Further analysis of what constitutes a "substantial" divergence or deficiency, and the manner in which the discretionary power under Article 130 operates, should be undertaken in Phase 2.
- Article 216(5) of the Ordinance can render a person liable for a criminal offence where there is a failure to keep documents in accordance with the provisions of the Directives, punishable by up to one year's imprisonment and/or a fine of 26,100 ILS (approximately 5,000 EUR or 6,400 USD). This will be the case where the conduct in question is "without sufficient cause", although Article 216 does not specify exactly when action or inaction is performed without sufficient cause. Nor does Article 216(5) stipulate criteria to determine what amounts to a failure to keep accounting books. Israeli authorities explain that "each case is examined on a case-by-case basis by tax assessment supervisors". This is a matter which could be further considered in Phase 2.
- Under Chapter 9 of the Securities Law, a company which submits reports that are not as required by law (including the omission of significant expenses, deception, or fraud) may be subject to sanctions. This applies to reports required under the Securities Law, but not those required under the Income Tax Ordinance or Companies Law. Sanctions include fines and imprisonment, depending upon the particular offence under Article 53 of the Securities Law (e.g. omissions, deception and fraud with regard to the prospectus and a company's financial reports). The application of Article 53 is a matter which could be further considered in Phase 2.
- In the case of a "government company" which fails to submit complete financial statements, and where the chairman of the company or a director knew or should have known of this and did not take proper precautions to prevent it, the chairman or director will be treated as having failed in

the performance of their duties and may be removed from office (Article 33D(a) of the Government Companies Law).⁴⁹

160. Sanctions for violation by auditing accountants of their obligations are mainly disciplinary, and subject to investigation and sanctioning by the Accountants Council (established under Article 2 of the Accountants Law 1955). Disciplinary offences involve violation by an auditing accountant of: the Accountants Regulation (Behaviour Unfitting the Dignity of the Profession) 1965; the Accountants Regulations (Accountant Method of Operation) 1973; and the Accountants Regulations (Conflict of Interest and harming the Independence as a Result of Additional Occupation) 2008. Sanctions include a warning; reprimand; suspension of license; or revocation of license.

9. Article 9: Mutual Legal Assistance

9.1 *Laws, treaties and arrangements enabling mutual legal assistance*

161. Article 9(1) of the Convention requires that each Party co-operate with other Parties to the fullest extent possible in providing “prompt and effective legal assistance” with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

162. Legal assistance in both criminal and civil matters, with respect to both natural and legal persons, is governed by the International Legal Assistance Law 1998 and the International Legal Assistance Regulations 1999. Where a request is made of Israel for legal assistance, Article 8 of the 1998 Law allows Israeli authorities to conduct any form of assistance requested as if the matter to which the request relates had occurred and was being investigated in Israel, subject to the requirement that the assistance must not

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A Chairman can be removed from office in the following circumstances:

- The company did not submit a written report on its activity (as required by Article 25) and on the work of its Board of Directors to the Ministers (the Minister of Finance and the Minister responsible, under this law, for the company's affairs), and the Government Companies Authority once every six months; and also whenever the Ministers or the Government Companies Authority so request.
- The company did not submit a draft of the budget and plans, as required by Articles 32(a)(2), 33(a) and 34(a)(1).
- The company did not submit, according to Articles 34(a)(1) and 33(a), one month before the date for their consideration the drafts of the following reports: balance sheet; profit and loss account including the purposes to which profits are to be applied; a report of resources and how they were used, consolidated financial reports unless it is not possible; (unless a shorter period of time was assigned for this by the ministers after consultation with the Government Companies Authority).
- The company did not submit the latter immediately after the Board of Directors approved them (Article 34(a)(1)).
- The reports submitted by a company (as listed above) were incomplete (Article 33D (a)(1)).

A Director can be removed from office if:

- The company did not submit a report or notice to present particulars in financial reports as required by the Government Companies Authority, where the Authority saw that public interest required such a report according to Article 33B.
- The company submitted a report other than according to the provisions of Article 33B and the Authority is satisfied that the company digressed on substantive matters (Article 33D(a)(2)).

A Chairman and Director can be removed from office in the following circumstances:

- The chairman of the Board of Directors becomes aware of any matter of the company which, prima facie, indicates violation of law or of moral standards or another flaw, and did not inform the Ministers, the State Comptroller and the Government Companies Authority of the matter (article 35).
- The Board of Directors did not set each year the reports as mentioned in Articles 32(a)(2), which is directed to by Articles 33D(a)(1) and Article 34(a)(1).

violate Israeli law. There is no judicial interpretation in Israel of the latter qualification, but authorities explain that the understanding and application of this provision has been straightforward: Israel cannot execute a form of assistance for another State where that form of assistance would have been *illegal* in Israel in connection with a domestic investigation or proceeding. Thus, for example, privacy protections pertaining to the conducting of wiretaps in Israel would apply as well to wiretaps conducted on the basis of international requests. This restriction appears satisfactory under Article 9(1) of the Convention, which requires States parties to provide prompt and effective legal assistance “to the fullest extent possible under its laws”.

163. Israel’s legal assistance provisions seem broad in their availability in two respects. First, dual criminality is not a prerequisite for the granting of legal assistance (see section 9.2 below). The second way in which legal assistance is available on a broad basis is that it does not rely on the existence of an applicable treaty between it and the requesting State, so long as the request is submitted by an authority competent (within the requesting State) to do so. Israel has nevertheless entered into numerous legal assistance treaties with a large number of States including the United States, Canada, and Australia, and has acceded to the Council of Europe’s Convention on Mutual Legal Assistance in Criminal Matters and to the Second Additional Protocol to that Convention.

164. In the case of the execution of foreign judgments, the International Legal Assistance Law is more restrictive. Israeli authorities explain that only “under certain circumstances” will legal assistance include the enforcement of foreign court orders for the forfeiture of assets that are the instruments or proceeds of certain designated serious crimes. These crimes include money laundering, drug offences, and the financing of terrorism. It is further explained that this includes “money laundering consisting of the transfer of money or other assets in connection with an offence related to bribery”. Israeli authorities explain that the following conditions apply to the enforcement of foreign forfeiture orders:

- The order must relate to an offence which is among the serious offences included in Schedule Two of the Law (Article 33(a)(1)).
- The Competent Authority (the Minister of Justice or his designee) will make a preliminary determination that the property in Israel which is the subject of the foreign forfeiture order “was used or intended to be used as a means for the commission of an offence or to enable the commission of an offence, or it was directly or indirectly obtained as remuneration for the offence or as the result of the commission of the offence” (Article 33(a)(2)).
- Following such determination, the Competent Authority will transfer the request to a District Attorney (a senior prosecution authority) who must determine “whether the evidence on the strength of which the foreign forfeiture order was handed down would have sufficed for the issue of a forfeiture order under Israeli Law” (Article 33(b)).
- If the District Attorney makes the above determination, a petition for enforcement of the foreign forfeiture order will be made by the District Attorney to the Israeli District Court (Article 33(b)). The District Court must then itself find if the above conditions have been met (Article 34(a)).
- An enforcement order will only be issued when the person claiming a right to the property has been given an opportunity to be heard before the Israeli court (Article 35(a)).
- The owner of the property is entitled to raise defenses that he was unaware of and did not consent to the criminal use made of his property or that he had acquired the property for consideration and in good faith “without the possibility of knowing that it had been used in or obtained in connection with an offence” (Article 35(b)).

- The Court must be satisfied that the owner of the property and his family will have “reasonable means of support and reasonable housing” following enforcement of the forfeiture order (Article 35(c)).
- Certain forms of personal property are not subject to forfeiture under Israeli law (Article 35(d)).
- Property forfeited pursuant to an Israeli forfeiture order enforcing a foreign forfeiture order under the International Legal Assistance Law will only be transferred to the Requesting State upon receipt of an undertaking from the Requesting State that if the forfeiture order in Israel is subsequently rescinded the Requesting State will then return the property or (if this is not feasible) its equivalent value to the person claiming the property, along with compensatory payments for damage or depreciation of the property (Article 43).

165. The Competent Authority for the granting of legal assistance is the Minister of Justice. Article 5 of the International Legal Assistance Law provides a number of discretionary bases upon which the Minister is permitted to *refuse* assistance, including that:

- “the act is liable to prejudice Israel’s sovereignty, security, public order, public welfare or safety, or some other vital interest of the State” (Article 5(a)(1));
- the request for legal assistance is for an offence that is political in nature or for some other offence that is connected to an offence of a political nature (Article 5(a)(2));
- the request is for a “fiscal offence” (Article 5(a)(4));⁵⁰
- the requesting State refrains from assisting Israel in its own legal assistance requests (Article 5(a)(6); or
- performance of the act involves an unreasonable burden on the State (Article 5(a)(7)).

166. The Minister may also postpone legal assistance where immediate performance of the requested assistance would interfere with the conduct of a pending criminal trial in Israel, or would cause unreasonable harm to some other legal proceeding (Article 6(a)).

167. Before refusing a request for legal assistance (Article 5), or postponing such a request (Article 6), certain procedures and requirements for consultation with other Ministers are set out in Regulations 4 and 5 of the International Legal Assistance Regulations 1999.⁵¹ Decisions of the Minister of Justice under Articles 5 and 6 are subject to administrative law standards (i.e. they must be reasonable and based on proper and adequate considerations), and are thus subject to judicial review. Further analysis of the application of each of the discretionary bases under Articles 5 and 6 could be undertaken in Phase 2.

168. As well as the regime under the International Legal Assistance Law, Israeli authorities point to the existence of other mechanisms which allow the provision of assistance in the investigation of crimes. A number of investigative and regulatory bodies in Israel (including the Israel Securities Authority, the Israel Money Laundering and Terror Financing Prohibition Authority, and the Israel Tax Authority) are able to provide information and other forms of assistance to similar bodies in other States pursuant to legislation

⁵⁰ A fiscal offence is defined under Article 1 as “a violation of tax laws of any kind whatsoever, including an offence in connection with currency control”.

⁵¹ The text of Regulations 4 and 5 are set out in the Supplementary Answers of Israel, paras 72 and 73.

governing the conduct of those bodies and under applicable agreements and memoranda of understanding. The Israel Tax Authority has entered into more than 40 treaties for the avoidance of double taxation with foreign States, permitting the exchange of information relating to tax matters in order to avoid double taxation of income and in order to prevent tax evasion. Similarly, the Prohibition of Money Laundering Law 2000 (PMLL) permits the Israeli Financial Intelligence Unit to transmit information from its database to a foreign authority of its kind to assist it in the investigation of criminal offences related to money laundering (Article 30(f) of the PMLL).

9.2 Dual criminality

169. Under Article 9(2) of the Convention, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence in respect of which assistance is sought is within the scope of the Convention.

170. Dual criminality is not a prerequisite for the granting of legal assistance in Israel. Israeli authorities cite, by way of example, the fact that Israel had regularly provided legal assistance to foreign States investigating or prosecuting money laundering cases prior to enactment of its Prohibition of Money Laundering Law 2000.

9.3 Bank secrecy

171. Pursuant to Article 9(3) of the Convention, a Party shall not decline to provide mutual legal assistance on the grounds of bank secrecy.

172. Israel states that mutual legal assistance requests will not be denied on grounds of bank secrecy, since bank secrecy is not one of the grounds for refusal of a request under Article 5 of the International Legal Assistance Law (see section 9.1 above).

173. Authorities further explain that the obtaining of confidential bank records is one of the most common forms of assistance granted by the Israeli authorities to foreign authorities. If a request is received from a foreign State for disclosure of confidential bank account information in connection with a bribery offence, the Israeli authorities would possess the same authority (and be subject to the same safeguards) as if the crime had occurred and were being investigated in Israel. This means that the Israeli Police would have to obtain an appropriate court order from an Israeli Court, albeit that the information contained in the request (connecting the account information to the alleged crime) would provide the basis for the issuance of the order. In such cases, the court would need to be satisfied that there is a factual basis for (a) the suspicion that a crime has occurred and (b) that the disclosure of confidential bank records is likely to promote the investigation of that crime. As for most forms of requested assistance, Israeli authorities explain that such court orders are routinely issued on the basis of a statement of facts from the requesting State.

10. Article 10: Extradition

10.1 Extradition for bribery of a foreign public official; and

10.2 Legal basis for extradition

174. Article 10(1) of the Convention provides that bribery of a foreign public official shall be deemed to be an extraditable offence under the laws of the Parties and the treaties between them. Article 10(2) states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

175. Israel's Extradition Law 1954 permits the extradition of persons who are accused or have been convicted in the requesting State of an extradition offence, being an offence for which the punishment is imprisonment for one year or more (Article 2A(a)(2)). As an offence punishable by up to three and a half years, the foreign bribery offence qualifies as an extradition offence.

176. Any extradition request must be made pursuant to an extradition agreement in place between the State of Israel and the requesting State (Article 2A(a)(1) of the Extradition Law). Article 2A(c)(1) clarifies that this can include a multilateral convention containing extradition provisions and Israeli authorities state that the Convention could thereby serve as an extradition agreement for the purposes of Article 2A(a)(1) of the Extradition Law (in compliance with Article 10(2) of the Convention). Article 2A(c)(2) also allows Israel to conclude ad-hoc agreements for the extradition of persons. Israel is also party to a number of bilateral extradition treaties, including with the United States, Canada, and Australia.

177. Where an extradition request is made prior to conviction and the purpose of extraditing an individual for trial, Article 9(a) of the Extradition Law requires a court considering the request for an extradition order to be satisfied that "there is evidence which would be sufficient for committing him for trial for such an offence in Israel". Furthermore, if the offence in question carries the death penalty in the requesting State and not in Israel, Israeli law requires an undertaking that the death penalty will not be applied (Article 16).

178. Article 2B of the Extradition Law sets out a number of mandatory bases upon which an extradition request will be refused, including in respect of political offences, or where allowing the request is likely to harm public order or "a vital interest of the State of Israel" (paragraphs (1) and (8)). In this regard:

- Concerning the scope of political offences, Israeli authorities explain that the fact that a bribe went to a politician, a political party, or to further a political interest, would not by itself be sufficient to characterise the offence as a political offence.
- The expression "a vital interest of the State of Israel" has never been subject to interpretation by Israeli courts. Authorities explain that "to be 'vital' an interest must be so grave and essential as to outweigh the usual important public policy inherent in the obligation to cooperate with other States in the extradition of fugitive criminals". While Article 10 of the Convention provides that extradition for foreign bribery is to be subject to the conditions set out in the domestic law and applicable treaties of each State Party, further analysis in Phase 2 should consider whether the application of Article 2B of the Extradition Law is consistent with the object and purpose of Article 10 of the Convention and with the requirement in Revised Recommendation VII(iii) for an "adequate basis" for co-operation.

179. The Department of International Affairs in the State Attorney's Office deals with both incoming and outgoing extradition requests and serves as the Attorney General's representative in extradition proceedings. Department attorneys examine the evidentiary material that accompanies incoming extradition requests, check whether the conditions for extradition set out in Article 2A are met, and whether there are any applicable restrictions under Article 2B. The request for extradition is then submitted to the Minister of Justice, who may direct that a petition be submitted to the Jerusalem District Court, requesting that the wanted person be declared extraditable, in accordance with Article 3 of the Extradition Law. The decision of the District Court is subject to appeal to the Israeli Supreme Court.

180. Authorities explain that it is rare that the Minister would disregard a determination that an extradition request satisfies the requirements of the law and applicable treaty. A refusal to extradite under the Minister's discretion might relate to humanitarian considerations particular to the specific case. It has,

however, been recognised that where extradition of an Israeli citizen and resident is involved, and the applicable treaty does not mandate the extradition of citizens and residents, a decision to proceed on an extradition request may be granted on a conditional basis, e.g. conditional upon a commitment by the requesting State that the extradited person be allowed to serve any sentence of imprisonment, if imposed, in Israel. The Israeli Supreme Court recognized in *Aloni v The Minister of Justice* that a decision of the Minister of Justice in proceeding with an extradition request is an administrative decision (which is subject to judicial review) and must therefore be reasonable and based on proper and adequate considerations.⁵²

10.3 Extradition of nationals

181. Article 10(4) of the Convention provides that each Party shall take necessary measures either to allow for the possibility of extraditing its nationals or prosecuting them for a foreign bribery offence. Where a Party refuses to extradite a person solely on the basis that such person is a national, it shall submit the case to its own authorities for prosecution.

182. Israeli nationals and permanent residents may be extradited, subject to the conditions that the request is intended to bring the person to trial in the requesting State, and that the requesting State undertakes to return the person to the State of Israel for the purpose of serving any sentence imposed (Article 1A(a) of the Extradition Law).

10.4 Dual criminality

183. Under Article 10(4) of the Convention, where dual criminality is necessary for a Party to be able to extradite a person, it shall be deemed to exist if the offence in respect of which extradition is sought is within the scope of the Convention.

184. Although dual criminality is not a prerequisite for legal assistance, it is for extradition (Article 9(a)). In light of the enactment of Article 291A of the Penal Law, the element of dual criminality required by Article 9 of the Extradition Law would be satisfied in the event of an extradition request being made by a State party to the Convention.

11. Article 11: Responsible authorities

185. Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

186. The Department of International Affairs of the Office of the State Attorney, in the Ministry of Justice, is the competent authority to:

- Receive mutual legal assistance requests under Article 9 of the Convention;
- Make extradition requests under Article 10 of the Convention; and
- Take action in respect of requests for consultation under Article 4(3) of the Convention.

187. Requests for extradition under Article 10 of the Convention should be transmitted to Israel, through diplomatic channels, through Israel's Ministry of Foreign Affairs.

⁵² *Aloni v Minister of Justice*, H CJ 852/86, 51 PD (2), 1.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. Tax deductibility

188. Recommendation IV of the Revised Recommendation of the Council on Combating Bribery in International Business Transactions urges the prompt implementation by Member countries of the 1996 Recommendation, which reads as follows: “that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal.”

189. Israel’s Income Tax Ordinance 1961 does not expressly deny the deduction of bribe payments. However, Article 17 of the Income Tax Ordinance sets out the general principles regarding deductible expenses incurred to generate income. In its Collection of Interpretations of the Income Tax Ordinance (“*Habak*”), the Income Tax Authority has ruled, inter alia, that “the deduction of payments made in violation of any law shall be prohibited”. Case law has clarified that payments made “in violation of the law” include bribe payments.⁵³ The Supreme Court recently held, in *Hydrola Ltd v Tel Aviv Assessment Officer Number 1*, that bribery expenses paid to authorities of a foreign State to expedite a transaction may not be considered deductible for tax purposes.⁵⁴ Israeli authorities further explain that a “payment” includes costs and expenses.

190. Israeli officials advise that the government intends to introduce an amendment to the Income Tax Ordinance to codify the existing legal situation under the binding decision of the Supreme Court in *Hydrola Ltd*, which is consistent with the Tax Authority’s policy, by expressly including any “payment, in money or money’s worth, when there is a reasonable basis to believe it constitutes a violation of any law” in the list of prohibited deductions under Article 32 of the Ordinance. Israeli officials state that the combination of this amended provision with Article 291A of the Penal Law will make it clear that bribe payments to a foreign public official or intermediary are non-deductible. The status of this amendment, and application of the amended provision, could be further analysed in Phase 2.

191. When reviewing a tax return, tax inspectors are required to ensure that non-deductible payments (being those identified in Article 32 of the Income Tax Ordinance, the *Habak*, or judicial decisions) are not included as deductible business expenses. Tax inspectors are provided with intensive training prior to taking up duties and also attend courses, workshops and lectures on various topics linked to their roles during the course of their employment. Israeli authorities did not provide information on whether specific guidance or training is provided on how to distinguish between legitimate business expenses and illicit payments. This is a matter that could be further considered in Phase 2.

⁵³ *Alarbia Hotels Ltd v Jerusalem Assessment Officer*, Income Tax Appeal 54/84 (1997).

⁵⁴ *Hydrola Ltd v Tel Aviv Assessment Officer Number 1* (2008) CR.A 6726/05. See also *Company Ltd v The Netanya Assessing Officer*, Income Tax Appeal 1015/03 (2008).

EVALUATION OF ISRAEL

General Comments

192. The Working Group commends Israeli authorities for the high level of co-operation and openness during the examination process. The Group appreciates that authorities liaised regularly with the Secretariat while preparing the responses to the Phase 1 questionnaire and supplementary questions.

193. Article 291A of the Israeli Penal Law 1977 criminalises the bribery of foreign public officials by extending the application of the offence of domestic bribery to the bribery of a foreign public official when the bribe is given for purposes relevant to the Convention. The extension of existing offences makes it necessary to examine the interpretation given to the elements of this offence in order to assess whether it meets the requirements of the Convention, which is a matter to be addressed in Phase 2. The Working Group considers that Israel's legislation appears largely capable of conforming to the standards of the Convention. However, the Working Group has certain reservations, some of which are noted below.

Specific issues

1. The offence of bribery of foreign public officials

Bribes given to third parties

194. Article 293(5) of the Penal Law appears to cover all situations where a bribe is transferred to a third party. However, the Working Group remains uncertain whether Article 293(5) would apply to all cases where the bribe is given to a third party for the benefit of that third party. Consideration of additional cases applying Article 293(5) would be a matter for further analysis in Phase 2.

2. Sanctions

Effective, proportionate and dissuasive criminal penalties

195. A person convicted of the foreign bribery offence may be subject to a term of imprisonment of up to 3.5 years, and/or a maximum fine of 202,000 ILS (approximately 38,000 EUR or 60,000 USD). Financial sanctions are the same for legal persons as they are for natural persons. Although the penalties regime seems to comply with Article 3(1) of the Convention to the extent that these penalties are equal to those applicable to the offence of domestic active bribery, the maximum penalties are low, particularly for legal persons. While fines can be supplemented by additional sanctions under Article 63 of the Penal Law, it is noted that: (i) the power under Article 63 is discretionary; (ii) the discretionary power is not available in all circumstances and fails to capture cases where a bribe is *offered*; and (iii) calculation of sanctions under Article 63 is likely to be difficult. It is further noted that the low level of sanctions is compounded by the discretionary nature of confiscation provisions under Israeli law. While the overall effectiveness of sanctions would benefit from further review in Phase 2, the Working Group urges Israel to take legislative steps to increase the level of financial penalties available against legal persons in foreign bribery cases so that they are effective, proportionate and dissuasive (Article 3(1) and (2) of the Convention).

3. Jurisdiction

Application of the foreign bribery offence in Gaza and the West Bank

196. Israeli officials believe that Article 291A is likely to be sufficient to cover a bribe given to a member of the Palestinian Authority in the West Bank, or an elected official in the Gaza Strip. The Working Group recommends that Israel clarify this aspect of the application of Article 291A to expressly include a political entity that is not a State, including the Palestinian Authority.

Restrictions on the exercise of nationality jurisdiction

197. The Working Group has taken note of restrictions on nationality jurisdiction under Article 14 of the Penal Law. These restrictions present a number possible obstacles which may hinder the effective exercise of nationality jurisdiction. The Working Group recommends that Israel ensure that, consistent with Commentary 26 of the Convention, dual criminality is deemed to be met if the act is unlawful where it occurred, even if under a different statute, and that the dual criminality restrictions in Article 14 do not act to prevent the exercise of jurisdiction over the foreign bribery offence when committed outside Israeli territory.

4. Enforcement

Considerations contrary to Article 5 of the Convention

198. Once an investigation has been referred by the Israeli Police to the District Attorney's office, the prosecution may take the view that there is no "public interest" in prosecuting the alleged offence (Article 62 of the Criminal Procedure Law). In the specific case of the foreign bribery offence, any decision to prosecute the offence is subject to the prior written consent of the Attorney-General (Article 291A(b) of the Penal Law). Consent to the exercise of nationality jurisdiction is also subject to the Attorney General's consent. The Working Group notes that this need for consent is not accompanied by written procedures and timeframes. Furthermore, consent will be based upon the Attorney-General's determination that prosecution is in the "public interest", which according to case law includes severe harm to social interests and values. While there are a number of safeguards in the operation of determinations based on the public interest, there are concerns that the public interest might be taken to include considerations of national economic interest, the potential effect upon relations with another State, or the identity of the natural or legal persons involved, contrary to Article 5 of the Convention. The Working Group therefore urges Israel to take steps to expressly clarify that the Attorney-General's Guidelines on Considerations for Closing a Case due to a Lack of Public Interest do not permit consideration of matters prohibited by Article 5 of the Convention.