



# **SOUTH AFRICA: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS**

**June 2016**

This report, submitted by South Africa, provides information on the progress made by South Africa in implementing the recommendations of its Phase 3 report. The OECD Working Group on Bribery's summary of and conclusions to the report were adopted on June 01 2016.

The Phase 3 report evaluated South Africa's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

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## SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

### Summary of findings

1. In March 2016, South Africa presented its written follow-up report to the OECD Working Group on Bribery (Working Group), outlining its responses to the recommendations and follow-up issues identified during its Phase 3 evaluation in March 2016. South Africa has taken initial steps to implement the Working Group's Phase 3 recommendations with 6 recommendations fully implemented, 23 partially implemented and 10 not implemented. One recommendation is no longer relevant and has been converted to a follow-up issue.

2. In Phase 3, the Working Group raised concerns about South Africa's lack of enforcement and insufficient sanctions for legal persons (**recommendations 2 and 3a**). These concerns remain as South Africa was not able to present statistics and relevant examples to demonstrate adequate enforcement of legal person liability. In addition, sanctions for legal persons remain low, particularly where foreign bribery cases fall under the jurisdiction of the Regional Courts. South Africa has drafted amendments to address this concern; however, they remain at a very preliminary stage and, as currently drafted, would only address sanctions in cases that fall under the jurisdiction of the High Court. Regarding its confiscation capacity, South Africa has demonstrated an increase in the value of assets being seized in domestic corruption cases and taken positive steps to raise awareness of and improve its coordination on seizure and confiscation of assets in relation to foreign bribery.

3. Since Phase 3, the South African Government has highlighted its commitment to fighting foreign bribery in a number of national policy documents and has developed five work programmes within its inter-departmental Anti-Corruption Task Team to coordinate the government's anti-corruption activities. In spite of these welcomed efforts, serious concerns remain about South Africa's overall lack of active enforcement. At the time of its Phase 3 report, it had only 4 ongoing investigations from 10 allegations, all of which were far from reaching prosecution. While South Africa has yet to prosecute a case, its written follow-up report demonstrates some progress. South Africa now has 11 open investigations (from a total of 17 allegations) and has taken formal investigative steps in 4 of these cases. However, most of these cases appear far from prosecution and few formal investigative tools have been used in the majority of cases. This low level of enforcement remains particularly concerning in light of South Africa's large economy and the sectors and countries with corruption risks in which it operates.

4. Since its Phase 3 report, South Africa has taken positive steps with respect to MLA, including assigning a specialized unit to handle MLA and tracking response times for processing incoming requests (**recommendation 6**). However, it emerged from South Africa's follow-up report that the majority incoming requests (49 out of 54) have not been acted upon and that South Africa has only used MLA in connection with one of its ongoing investigations.

5. Few steps have been taken to address Phase 3 concerns that political and economic considerations may influence the investigation and prosecution of foreign bribery (**recommendations 4a and 4g**). While the Supreme Court has reviewed and requested amendments to the South African Police Service Amendment Act to improve guarantees of independence, the revised Act has not yet been passed and other concerns with regard to the independence of investigation and prosecution remain unaddressed.

6. With respect to money laundering, South Africa has provided training and guidelines on the detection of foreign bribery as a predicate offence to its supervisory authorities and the Financial Intelligence Centre. However, this training has not been extended to reporting institutions and South Africa still does not maintain comprehensive statistics on money laundering investigations and prosecutions.

7. South Africa has taken substantial measures to encourage the reporting of foreign bribery among the accounting and auditing profession. It has also taken positive steps to raise awareness among publicly listed and state owned enterprises of the requirement to establish social and ethics committees to further strengthen internal controls for preventing and detecting foreign bribery (**recommendations 9d and 9e**). However, in the absence of statistics, South Africa is unable to show whether it is effectively investigating, prosecuting, or sanctioning false accounting offences. In addition, no steps have been taken to close loopholes that may allow entities to escape external audits required by law (**recommendations 9a and 9b**).

8. South Africa is now systemically using language in its bilateral tax treaties to enable the use of information for non-tax purposes (**recommendation 10f**). It has also taken some steps to raise awareness of non-deductibility of bribe payments among small-medium sized enterprises and has provided training to tax auditors on detection of bribe payments (**recommendations 10b and 10c**). However, South Africa's written follow-up report did not demonstrate that authorities are systemically auditing criminal defendants' tax returns to determine whether bribes have been deducted (**recommendation 10a**). It was also unclear from South Africa's report whether tax authorities are detecting and reporting bribe payments discovered in the course of their work (**recommendation 10e**).

9. In Phase 3, the Working Group noted an urgent need for South Africa to ensure whistleblowers are in practice afforded the protections guaranteed by the law (**recommendations 12b and 12c**). During the oral presentation of its report, South Africa provided new information that clauses 43 and 49 of the Protection of State Information Bill, which raised concerns during Phase 3, had been withdrawn. However, the Group could not properly assess the revised Bill at this late stage. While South Africa has drafted a Bill to strengthen its Protected Disclosures Act, awareness raising of whistleblower protections remains limited and no concrete steps have been taken to ensure that reporting can occur without fear of reprisal or retaliatory action. This is particularly concerning in an environment where there was a public perception of serious reprisals against whistleblowers. South Africa has however, taken steps to raise awareness of the foreign bribery offence more generally, though more could be done to target small to medium sized enterprises (**recommendation 11**).

10. Finally, regarding public advantages, South Africa has taken no action to ensure that adequate controls are in place to prevent foreign bribery in relation to official development assistance, including routinely checking contracting parties against international and domestic debarment lists (**recommendation 13a**). However, it has continued to train and raise awareness of foreign bribery among staff in the Export Credit Insurance Corporation (**recommendation 13b**).

### **Conclusions of the Working Group on Bribery**

10. Based on these findings, the Working Group concludes that recommendations 3c, 9d, 9e, 10c, 10f, and 13c have been fully implemented; recommendations 1, 2, 3d, 3e, 4a, 4b, 4c, 4d, 4e, 4f, 4g, 5, 6, 8a, 8b, 8c, 8d, 9c, 10b, 1, 10d, 10e, 11, and 12a have been partially implemented; and recommendations 3a, 3b, 9a, 9b, 10a, 12b, 12c, 12d, 13a, and 13b have not been implemented. Recommendation 7 is no longer relevant and has been converted to a follow-up issue. The Working Group also agreed to continue to monitor follow-up issues 14a-m as case law and practice develops.

11. The lead examiners recommend that the Working Group ask South Africa to report back in writing in one year on: (i) enforcement action including against legal persons (under **recommendations 1 and 2**); (ii) PRECCA amendments to raise the level of sanctions available to legal persons (**recommendation 3a**); (iii) steps taken to ensure that factors forbidden under Article 5 of the Convention do not influence the investigation and prosecution of foreign bribery cases (under **recommendations 4a and 4g**) whistleblowing (under **recommendations 12b, 12c and 12d**). Although South Africa has made strides on a number of the recommendations, the lack of enforcement actions remains a concern. The

Working Group is similarly concerned by supplementary information, sometimes contradicting earlier written reports, provided too late in the evaluation process to allow a proper assessment. If significant progress is not made by the time of the additional one year follow up report, the possibility of a Phase 3bis evaluation will be considered by the Working Group.

## PHASE 3 EVALUATION OF SOUTH AFRICA: WRITTEN FOLLOW-UP REPORT

<b>Name of country:</b>	<b>South Africa</b>
<b>Date of approval of Phase 3 evaluation report:</b>	<b>13 March 2014</b>
<b>Date of Information:</b>	<b>15 February 2015</b>

### PART I: RECOMMENDATIONS FOR ACTION

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

##### **Text of recommendation 1:**

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

##### **Action taken as of the date of the follow-up report to implement this recommendation:**

The South African Government's commitment to fighting corruption, including the OECD foreign bribery offence (OECD offence), is expressed in key national policy documents inclusive of the National Development Plan (NDP, Chapter 14: Fighting Corruption), the 2014-2019 Medium-Term Strategic Framework (MTSF) and the National Security Strategy (NSS).

Appropriate structures have been established to coordinate and manage the detection, investigation and prosecution of serious corruption offences. In June 2014, the President of the Republic of South Africa, Mr Jacob Zuma, established the Anti-Corruption Inter-Ministerial Committee (ACIMC) to, at an executive level, coordinate and exercise oversight over all public and private sector anti-corruption initiatives. The ACIMC is chaired by the Minister in the Presidency and comprises of nine Cabinet Ministers whose portfolios have a direct connection with combating corruption related activities. They are: the Ministers of Justice and Correctional Services, State Security, Police, Cooperative Governance and Traditional Affairs, Public Service and Administration, Finance, Home Affairs, Social Development and the Minister for Planning, Monitoring and Evaluation in the Presidency.

At an operational level and working under the oversight of the ACIMC, the Anti-Corruption Task Team (ACTT) has been established as the central body to implement government's anti-corruption strategy. This structure has developed several inter-related programmes aimed at ensuring a structured, consolidated and coordinated governmental and societal approach to fight corruption:

- Programme 1 - Communication and Awareness (Convened by the Department of Communications.)
- Programme 2 - Intelligence Coordination, Policy & Strategy Development (Convened by the National Intelligence Coordinating Committee - NICOC).
- Programme 3 - Public Sector Policy and Capacity Development (Convened by the Department of Public Service and Administration - DPSA).

- Programme 4 - Vulnerable Sector Management (Convened by National Treasury - NT).
- Programme 5 - Crime Operations and Resolutions (Convened by the Directorate for Priority Crime Investigation - DPCI).

The following Government Departments form part of the ACTT structure:

- Department of Communications
- Department of Justice & Constitutional Development (DoJ&CD)
- DPC) of the South African Police Service (SAPS)
- DPSA
- Financial Intelligence Centre (FIC)
- National Prosecuting Authority of South Africa (NPA)
- NT (both the Offices of the Chief Procurement Officer and the Accountant-General)
- Public Service Commission
- South African Revenue Service (SARS)
- Special Investigation Unit (SIU)
- State Security Agency (SSA) and NICOC
- The Presidency (Department of Monitoring and Evaluation)

The ACTT has an Executive Management Committee which is comprised of the Directors General or his/her delegated representative of the Departments represented in the structure and an Operational Management Committee that takes decisions regarding the investigation and prosecution of corruption offences. All decisions relating to the investigation and prosecution of the OECD offences also take place under the auspices of the ACTT Operational Management Committee. Without prejudicing the NPA's and DPCI's constitutional obligation to perform their duties without fear, favour or prejudice, all decisions are taken as a collective.

The following interventions have been adopted to address the Working Group's criticisms pertaining to the detection, investigation and prosecution of foreign bribery:

- As a result of the Working Group's criticisms relating to the OECD offence, it was decided to locate all matters pertaining to that offence within the ACTT structure.
- Programme 3, convened by the DPSA, focuses on domestic implementation of, and reporting on identified international anti-corruption obligations, including the OECD Convention. An Inter-Departmental Task Team (Task Team) has been established under this programme, to ensure the implementation of recommendations made by the OECD Working Group and other multi-lateral structures which directly addresses issues relating to the OECD offence. This structure meets

once a month. This Task Team comprises the following Government Departments:

- Auditor-General of South Africa (AGSA)
- Department of International Relations & Cooperation (DIRCO)
- Department of Public Enterprises (DPE)
- DoJ&CD
- DPCI
- DPSA (as coordinating department)
- FIC
- NPA
- NT
- SARS

Subcommittees have been established to address specific issues relevant to the implementation of the Working Group's recommendations.

- The ACTT decided that the investigation of OECD offences will be conducted by the component of the DPCI which investigates serious domestic corruption falling within the ACTT mandate.
- The National Director of Public Prosecutions (NDPP) acceded to a request by the ACTT to appoint a Senior Deputy Director of Public Prosecutions (SDDPP) in his office to serve as the dedicated prosecutor for all OECD offences. This appointment required of him to manage and direct all the OECD offences, to participate in the programme 3 task team and to present all matters pertaining to the OECD offence to the Working Group.
- Engagements were held with other government and private structures which could contribute to the investigation and prosecution of the OECD offences.

## **SIGNIFICANT EFFORTS TO DETECT, INVESTIGATE AND PROSECUTE THE OECD OFFENCE**

### **Initiatives by the ACTT**

- Providing training for investigators appointed to investigate OECD offences. The training was provided by the dedicated prosecutor, the NPA's Legal Administration Division (LAD), the NPA's expert on mutual legal assistance and extradition, as well as by Interpol.
- This two-day training session was followed up by the dedicated prosecutor, providing legal guidance on topics such as money laundering, reporting under section 34 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 (PRECCA), the admissibility of evidence

obtained via mutual legal assistance, corporate liability, and other relevant issues.

- Engaging with Interpol to ensure that a dedicated Interpol official would be able to facilitate all foreign police liaison relevant to the OECD offence and to familiarise all Interpol officials posted in foreign missions with the OECD offence so as to fast-track the reporting of OECD offences detected in foreign states. This has already led to the fast-tracking of cooperation from countries such as Malawi, Lesotho, Zimbabwe, Denmark and Iran. In the last matter, it was established that South Africa did not have a liaison officer in Iran. Nevertheless, use was made of the Interpol Head Office in Lyon, as well as a Middle East Interpol member with a presence in Iran to make contact with the Iranian authorities and to secure an undertaking that assistance would be rendered.
- The appointment of dedicated FIC officials to work directly with the dedicated prosecutor to gather financial intelligence relevant to the OECD offence, both domestically and externally through the EGMONT Group. This has significantly contributed to the fast-tracking of gathering financial evidence and has enabled a speedy evaluation of a potential OECD offence to be conducted. It has also resulted in previously unconnected Suspicious Transaction Reports (STRs) being linked to an OECD offence.
- Arranging with DoJ&CD (which serves as the country's Central Authority) that all incoming Mutual Legal Assistance (MLA) requests of an economic nature be referred to the ACTT before deciding whether to approve such requests. This was to ensure that any OECD offences disclosed in MLA requests would be detected and properly investigated. The requests are read by the dedicated prosecutor and captured on the ACTT data base. Liaison also takes place with the DPCI's Commercial Crime Component and Cyber Crime Component to address MLA requests disclosing other serious economic crimes warranting local investigations. The data base captures the country making the request, whether the country is a member of the Working Group, the nature of the offences and a recommendation regarding the approval of the request. This process enables the Central Authority to make informed decisions regarding the approval and execution of MLA requests. The process has already detected two OECD offences, one involving a Working Group member state and another non-member. Both cases have resulted in local OECD offences being investigated.
- The channelling of reports of OECD offences from all sources (whistleblowing, STRs received by the FIC, statutory reporting under section 34 of the Prevention and Combating of Corrupt Activities Act (PRECCA), etc.), directly to the ACTT ensures that the information is properly followed up from the onset. The ACTT has established an email address dedicated solely to the receipt of complaints relating to the foreign bribery offence. One case relating to a case on the matrix for the United States of America has been received and has resulted in an evaluation being conducted to determine whether the matter should be investigated as a domestic corruption case.
- The dedicated prosecutor provided the Commanders' Conference of the DPCI's Commercial Branch with a briefing on the OECD offence to enable that component to detect any OECD offences which may be disclosed in the investigation of other economic crimes.
- The ACTT prepared information pamphlets concerning the OECD and related offences for distribution to role players.
- The Specialised Audit Services of NT made available a director to assist the dedicated prosecutor and investigators with the investigation of OECD offences involving State-owned

Companies (SOCs) or Government Departments.

### **Initiatives by the Task Team**

- The dedicated prosecutor provided detailed training on the OECD and related offences (e.g. false accounting, money laundering) to the following key role players:
  - All investigators and prosecutors of the NPA’s Asset Forfeiture Unit (AFU)
  - All relevant members of the FIC’s two offices in Pretoria and Cape Town
  - The regulatory bodies of the institutions under reporting obligations to the FIC. This included: The Johannesburg Stock Exchange (JSE) as well as the South African Reserve Bank
  - The Head Office component of the SIU. The dedicated prosecutor also briefed a senior member of the SIU on companies under investigation by Working Group member states in order to establish whether such companies feature in investigations being conducted by the SIU
  - Representatives from SARS’s Criminal Investigation and Tax Audit Components
  - Auditors from the Office of AGSA
- The dedicated prosecutor had a series of meetings with the Independent Regulatory Board of Auditors (IRBA) to address the Working Group’s concern regarding the lack of awareness of the OECD offence by private auditors, as well as the lack of protection for auditors’ reporting offences. Inter alia, IRBA was provided with details of the OECD and related offences, as well as the laws which provided protection for private auditors. As a result of these engagements, IRBA has now compiled a revised advisory for auditors, addressing the Working Group’s concerns.
- The dedicated prosecutor and other members of the Task Team have engaged with the Anti-Intimidation and Ethical Practices Forum (AEPF). This structure was established by the South African Institute of Chartered Accountants (SAICA) to promote whistleblowing and protection of accountants when reporting.
- The dedicated prosecutor has made contact with the legal advisor of the Public Protector in order to promote awareness of the OECD offence within her office.
- The dedicated prosecutor and other members of the Task Team compiled guidelines for the implementation of internal compliance programmes to enable public and private companies to meet their reporting obligations in terms of section 34 of PRECCA. These guidelines are based on international best practices. The dedicated prosecutor, DPSA and AGSA met with DPE to emphasise the OECD offence and the reporting obligations applicable to SOCs. The DPE in turn facilitated an awareness session with the dedicated prosecutor, DPSA and AGSA, providing the Government Shareholder Forum with a briefing on the same topics. The chairperson of the forum in turn distributed the OECD offence awareness raising pamphlets to all affected SOCs and directed that the Task Team can be approached to give training directly to specific SOCs.

- These guidelines have been made available to AGSA for distribution within all sections falling within its mandate.
- The dedicated prosecutor and other members of the Task Team have made contact with the Export Creditor Insurance Corporation (ECIC) administered by the Department of Trade & Industry (DTI). This structure provides financial guarantees to companies involved in foreign trade. The outcome is that specialised training will be given to the ECIC officials by members of the Task Team. The ECIC will make available to the Task Team their list of clients who are engaged in trade with foreign governments so that awareness raising with such clients can be rolled out.
- DIRCO has been provided with the pamphlets compiled by the ACTT relating to the OECD and related offences for distribution amongst its foreign missions. This is to encourage detection of OECD offences by the members of the countries' foreign missions.
- The CEO of Business against Crime (BAC) published an article in its magazine, emphasising the OECD offence and the reporting obligations of companies.
- Contact was made with Business Unity South Africa (BUSA) to address the findings made by the Working Group in its March 2014 report.
- AGSA has adopted several initiatives aimed at promoting the detection of the OECD and related offences within the auditing of entities subject to audit by AGSA.
- The FIC published a number of advisories on its website to promote awareness of the OECD offence.
- The Task Team established a subcommittee comprising the FIC, DPSA, AGSA and dedicated prosecutor to develop typologies for distribution to the financial institutions and auditing bodies so as to assist with the detection of OECD offences.
- The NPA has issued various advisories relating to the OECD offence to its staff.

As a result of the above initiatives, the OECD offence may be primarily detected through the following sources:

- Ordinary reporting by members of the public to SAPS
- Reporting by relevant state institutions
- Anonymous reporting via state-run hotline and other whistleblowing mechanisms
- STRs submitted to the ACTT by the FIC
- Section 34 of PRECCA reports filed by public and private enterprises
- Incoming MLA and extradition applications received by DOJ&CD and Interpol
- Reporting by public and private auditors during the course of the auditing of public and private enterprises

- Reporting via Interpol liaisons
- Reporting to the ACTT email
- Reporting by DIRCO
- Other information sharing by foreign Governments and law enforcement agencies
- Perusing the matrix for cases where South African entities are implicated
- Participation by the dedicated prosecutor in Working Group Law Enforcement engagements
- Credible media reports

The threshold for initiating an investigation on the basis of an allegation is a reasonable suspicion which may exist in an inadmissible format, because the purpose of the investigation is to convert suspicion into proof beyond reasonable doubt. The ACTT has three investigative stages to deal with OECD offence reports:

- The registration of an incident based on a report establishing a reasonable suspicion. This triggers an evaluation to establish whether the suspicion contains merit and can be taken further forward.
- The registration of a potential priority crime if the suspicion meets the above threshold.
- The registration of a priority crime if the allegations can lead to a successful prosecution.

The dedicated ACTT investigators take investigative steps during all three stages under the direction of the dedicated prosecutor utilising all the available investigative tools dealt with hereunder.

The ACTT focuses not only on the bribery of foreign government officials to secure or retain international business, but also on all cases on the matrix for other states where South Africa has been implicated as being the recipient of the bribes. This is to enable all such cases to be properly managed and to give proper feedback to the Working Group when all such cases are raised at the tour de table.

The successful implementation of the above measures has been demonstrated by the ongoing increase in the number of investigations since the March 2014 report. Reports on progress with the investigations have been provided to the Working Group in October 2014, December 2014,

March 2015 and a further report submitted in December 2015.

South Africa's expertise in the detection and investigation of OECD offences has been recognised by the Working Group which requested presentations on the following topics:

- South Africa's use of investigative tools (Law Enforcement Group – December 2014).
- Corruption in the defence industry (Tour de table – March 2015) Canada requested a copy of the presentation for training.
- Corruption in the petroleum extraction industry (Law Enforcement Group – June 2015).

As a result of the negative findings made in March 2014, the Working Group required South Africa to submit a special written report in October 2014 and further written reports in March 2015 and March 2016. The Working Group was highly complementary of the implementation measures reported on in October 2014. As a result, the Working Group exempted South Africa from its obligation to submit a written report in March 2015. The oral report of March 2015 was also favourably received. The Working Group did however request an oral report to be given in October 2015 regarding issues relating to key departments forming part of the ACTT structures. This report was accepted without reservation when presented.

**Text of recommendation 2:**

2. Regarding the liability of legal persons, the Working Group recommends that South Africa take steps to (i) ensure that prosecutors make full use of the broad range of possibilities available under section 332 of the Criminal Procedure Act (CPA) to effectively enforce the liability of legal persons for acts of foreign bribery; and (ii) encourage the National Prosecution Authority to include such enforcement within their quantified targeted objectives and monitored conviction rates. [Convention Article 2; 2009 Recommendation III ii), V, Annex I B]

**Action taken as of the date of the follow-up report to implement this recommendation:**

The dedicated prosecutor's work plan requires that all the Working Group's recommendations relating to investigations/prosecutions are fully implemented, which would include ensuring that s332 of the CPA is properly applied.

The dedicated prosecutor is fully aware of the relevance of corporate liability and has transferred his knowledge to the investigators by issuing them with a written advisory setting out all the relevant principles.

The manner in which the OECD offences are being investigated demonstrates that corporate liability is receiving attention where applicable.

In addition, on 1 June 2014, the NDPP issued Prosecution Policy Directives i.t.o section 179 of the Constitution. Part 42 deals exclusively with the prosecution of corporations and members of associations and is binding on all prosecutors and must be observed in the prosecution of corporate bodies for any offences.

**Text of recommendation 3(a):**

3. Regarding sanctions, the Working Group:

a) Urges South Africa to take steps to ensure that the penalties applied to legal persons in practice are sufficiently effective, proportionate and dissuasive; [Convention Article 3; 2009 Recommendation III (ii) and V]

**Action taken as of the date of the follow-up report to implement this recommendation:**

South Africa is taking the necessary steps to ensure that the penalties applied to legal persons in

practice are sufficiently effective, proportionate and dissuasive. Fines that may be imposed for corruption offences as prescribed by section 26(1)(a) of PRECCA, 2004 (Act 12 of 2004) were increased with effect from 1 February 2013.

The penalties prescribed in section 26 applicable to legal persons are already dissuasive. Notwithstanding same:

- On 30 January 2013, the Minister: DoJ&CD issued a Government Notice, which entered into effect on 1 February 2013, increasing the maximum fines which may be imposed by the lower courts.
- Part 11, para 7 of the NPA's Prosecution Policy Directives requires that all OECD offences must be treated as potential High Court cases, thereby placing them within the penal jurisdiction of the High Court as opposed to the lower courts.
- The DPSA Task Team held a workshop on 30 October 2014, involving all the key governmental role players to identify amendments to PRECCA.
- The Task Team met with the State Legal Advisors of DoJ&CD to fast-track a process whereby PRECCA could be amended.
- The Task Team then established a subcommittee comprising of the NPA, DPSA, NT and DoJ&CD to draft amendments to PRECCA. The amendments to PRECCA include increasing the maximum fines which may be imposed in the lower courts and extending the ambit of section 26(3) so as not to limit a fine to merely five times the value of the gratification involved.

None of the foreign bribery cases have as yet led to a prosecution / sentence. The legislative measures taken above demonstrate a commitment to ensure that dissuasive sentences are imposed. The manner in which the cases are currently being managed also supports this conclusion. South Africa has not only ensured that the four cases reported on by the Working Group in March 2014 are now being properly investigated, but has increased, on an ongoing basis, the number of investigations. Where legal persons are implicated, the corporate entities themselves are investigated in addition to their servants and directors who may have been liable in their individual capacities.

In 2014, an accused received a non-custodial sentence having been convicted of an extremely serious pyramid scheme, where pension funds were defrauded. The NPA appealed against the sentence imposed and the Appeal Court imposed an effective 15 years direct imprisonment. The rationale of the court was that wealthy accused should not be permitted to "buy their way out of going to jail". This judgment would be regarded as persuasive authority when sentencing an accused convicted of the OECD offence.

**If no action has been taken to implement recommendation 3(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

The proposed amendments to PRECCA will be submitted to DOJ & CD early in 2016.

**Text of recommendation 3(b):**

3. Regarding sanctions, the Working Group:

b) Recommends that South Africa continue to draw attention of prosecutors and judges to section 28 of the Prevention and Combating of Corrupt Activities Act, 2004 ('PRECCA') to ensure the possible endorsement of natural and legal persons convicted of foreign bribery on the Register of Tender Defaulters and possible termination (subject to applicable court orders) of their on-going relations with the South African National Treasury; [Convention Article 3; 2009 Recommendation III (ii) and V]

**Action taken as of the date of the follow-up report to implement this recommendation:**

Currently section 28 of PRECCA does not apply to the OECD offence. The amendment of section 28 so as to include the OECD offence is receiving the attention of the tasking as outlined under para (a). Other amendments are proposed regarding the register of tender defaulters.

**Text of recommendation 3(c):**

3. Regarding sanctions, the Working Group:

c) Recommends that South Africa consider reviewing its debarment process to ensure the systematic inclusion in the Register of Tender Defaulters of all natural and legal persons convicted of foreign bribery; [Convention Article 3; 2009 Recommendation III (ii) and V]

**Action taken as of the date of the follow-up report to implement this recommendation:**

This recommendation will be implemented once the amendments to PRECCA referred to in para (b) enter into effect.

**Text of recommendation 3(d):**

3. Regarding sanctions, the Working Group:

d) Recommends that South Africa (i) continue to maintain statistics on convictions of natural and legal persons for foreign bribery; (ii) maintain statistics on convictions of natural and legal persons for other intentional economic crimes, including levels of fines, actual time served by natural persons under prison sentences, and the Court which imposed the sanction; [Convention Article 3; 2009 Recommendation III (ii) and V]

**Action taken as of the date of the follow-up report to implement this recommendation:**

i) The ACTT has established an electronic database where all relevant information relating to each OECD offence under investigation is captured. This database will also capture all relevant information relating to convictions and sentences when such are obtained. The information on convictions and sentences will also be shared with SARS and the Department of Correctional Supervision (when custodial sentences are imposed).

**Text of recommendation 3(e):**

3. Regarding sanctions, the Working Group:

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

In terms of making use of the provisions in POCA to freeze and confiscate the bribe and proceeds of foreign bribery, all members of the AFU have received training over the past two years on the foreign bribery offence. Members of the AFU have been appointed to the ACTT operation management team and liaise directly with the dedicated prosecutor regarding all foreign bribery cases requiring attention from the AFU.

Although in criminal prosecutions the conviction must be secured beyond reasonable doubt, the test for forfeiture in both chapter 5 and chapter 6 of POCA is on the lower standard of the balance of probabilities. The same test is applied in respect of restraint and preservation orders.

The following constitute examples of how the courts have applied this test:

- “We therefore have no reason to approach the powers POCA confers on courts with reserve, we should embrace POCA as a friend to democracy, the rule of law and constitutionalism and as indispensable in a world where the institutions of state are fragile and the instruments of law sometimes struggle against criminal that subvert them.” (NDPP V Elran 2013 (1) SACR 429 CC).
- “The defendant was not deprived of his property arbitrarily. He was simply restrained from dealing with property that was alleged to be the proceeds until such time as he had been convicted and a court was persuaded that such proceeds should be confiscated.” (NDPP v Van Staden and others 2013 (1) SACR 531 SCA)
- “Hennie J held that the holding of property should be given a wide enough meaning to curb the concealment by criminal of their interest in the proceeds of crime. Where the proceeds of crime had been placed in the hands of an innocent party with separate and distinct legal personality such as a trust, such proceeds can still be restrained.” (NDPP v Cunningham and others 2012 (2) SACR 591 WCC)
- “The purpose of a restraint order is to preserve property in the interim so that it will be available

to be realised in satisfaction of such an order. A court was not required to satisfy itself that the defendant was probably guilty of an offence and that he or she has properly benefited from the offence. It must only appear to the court on reasonable grounds that there might be a conviction and confiscation order. The court need only ask whether there was evidence that might reasonably support a conviction and a consequent confiscation order.” (NDPP v Rautenbach and others 2005 (1) SACR 530 SCA)

- “The defendant committed an offence and distributed the proceeds to a trust in an attempt to shield it from the provisions of POCA, where such sanitised proceeds were then further distributed by the trust to its beneficiaries; they were still affected gifts in terms of the Act irrespective of whether the beneficiaries knew or did not know the truth.” (NDPP v Cunningham and others 2012 (2) SACR 591 WCC)
- “There was no basis for declaring any section forming part of Chapter 6 much less Chapter 6 as a whole unconstitutional. The court held that section 50, which sets the test for forfeiture as a balance of probabilities was not unconstitutional.” (NDPP v Mohamed and others 2003 (1) SACR 561 CC)
- “Only at the forfeiture stage under section 48 was it necessary to prove on the balance of probabilities. It was held that all what was necessary was that a nexus should be established between the property and the offence.” (Ex PARTE NDPP v Madou and another 2009 (1) SACR 68 C).

During the financial year 2014-2015, the AFU has secured 221 restraint orders to the value of R 2 674 479 591 and 345 forfeiture orders to the value of R 176 515 081. A substantial percentage of such restraint and forfeiture orders stem from domestic corruption cases dealt with by the ACTT.

#### **Text of recommendation 4(a):**

4. Regarding the investigation and prosecution of foreign bribery, the Working Group:

a) Strongly recommends that South Africa take concrete steps to ensure that national economic interests and the identities of the natural or legal persons involved do not influence the investigation or prosecution of foreign bribery cases, including decisions made by the NDPP; [Convention Article 5]

#### **Action taken as of the date of the follow-up report to implement this recommendation:**

Pertaining to article 5 considerations, constitutional and legislative guarantees within the NPA and SAPS Acts require of all officials involved with the OECD offence to perform their duties without “fear, favour or prejudice”:

Section 179(4) of the Constitution of the Republic of South Africa, 1996 (hereafter called the Constitution) requires that national legislation ensure that the Prosecuting Authority exercises its function without fear, favour or prejudice.

The national legislation referred to is the National Prosecuting Authority Act, No 32 of 1998 (NPA Act), where this obligation is recognised in the preamble to the Act. The following provisions of the NPA Act are also relevant:

- i. Section 31(a) of the NPA Act requires that members of the Prosecuting Authority serve impartially and perform their duties in good faith and without fear, favour or prejudice, subject only to the Constitution and the law.
- ii. Section 32(1)(b) of the NPA Act provides that no organ of state and no member or employee of any organ of state nor any other person shall improperly interfere with, hinder or obstruct the Prosecuting Authority or any member thereof in the exercise, carrying out or performance of its, his or her powers, duties and functions.
- iii. Section 32(2)(a) and (b) of the NPA Act require that all members of the Prosecuting Authority take an oath, swearing to uphold and protect the Constitution and the fundamental rights entrenched therein and enforce the law without fear, favour or prejudice.
- iv. Section 41(1) of the NPA Act makes it a criminal offence, punishable by a fine or imprisonment not exceeding 10 years for any person to improperly influence any member of the Prosecuting Authority in the performance of his or her duties.

Section 179(5)(d) of the Constitution enables the NDPP to review any decision to prosecute or not to prosecute after consultation with all the affected parties. Any person (the right to make representations is not limited to the complainant, but to any member of the public and any public interest body) aggrieved with a decision not to prosecute by the dedicated prosecutor, may have such decision reviewed by the NDPP. In the event of the NDPP confirming the decision not to prosecute, any member of the public (including public interest bodies) having the necessary interest in the matter, may have such decision reviewed by a High Court of South Africa.

In two landmark decisions of the Supreme Court of Appeal relating to decisions not to prosecute, in high profile domestic corruption matters, the relevant principles were articulated as follows:

**Democratic Alliance & Others v The Acting National Director of Public Prosecutions & Others** (Case no: 288/11) (Relating to a decision not to prosecute the then Head of the ruling political party)

“The exercise of public power was regulated by the Courts through the judicial review of legislative and executive action. This was done by applying constitutional principles of the common law, including the supremacy of Parliament and the rule of law. Judicial review served the purpose of enabling Courts .... to place constraints upon the exercise of power”.

“The standards applied by the Courts in judicial review must ultimately be justified by constitutional principles which govern the proper exercise of public power in any democracy. A constitutional principle achieves practical effect as a constraint on the exercise of all public power. Where the principle is violated it is enforced by the Courts ...”

“In fulfilling the constitutional duty of testing the exercise of public power against the Constitution, Courts are protecting the very essence of a constitutional democracy. Put differently, it means that none of us is above the law. It is our best guarantee against tyranny, now and in the future.”

“The Office of the NDPP exercises public power and is subject to the constraints set out ... referred to above. It is of fundamental importance to our democracy that an institution such as the NPA, which is integral to the rule of law, acts in a manner consistent with constitutional precepts and within its powers.”

“It follows that the DA (the major opposition political party) has the standing to act in its own interests as well as in the public interest and is entitled to pursue that application to its conclusion.”

**National Director of Public Prosecutions & Others v Freedom Under Law** (Case No: 67/2014)  
(Relating to a decision not to prosecute a senior police official for corruption)

“FUL’s (Freedom Under Law - a public interest organisation) mission to promote accountability and democracy and to advance respect for the rule of law and the principle of legality in this country has been recognised by this Court. I agree with the finding by the Court a quo that the matter is one of public interest and national importance. FUL therefore has the necessary locus standi to bring the review.”

“As I see it, the underlying considerations of policy can be no different with regard to decisions not to prosecute or to discontinue a prosecution.”

“I can see no reason why, at common law, a decision will in principle be immune from judicial review just because it can be labelled provisional ... I do not believe a decision to withdraw a criminal charge ... can be described as provisional just because it can be reinstated.”

The Supreme Court of Appeal proceeded to confirm the setting aside of the decision to withdraw fraud and corruption charges.

The then NDPP adopted a Code of Conduct for Prosecutors (hereafter called the Code), which came into effect on 18 October 2010 and was subsequently published in Government Notice R1257 of 29 December 2010. This Code required that the decision to institute and stop criminal proceedings be exercised independently and free from political, public and judicial interference. Prosecutors are required to perform their duties without fear, favour or prejudice. Prosecutors were required to not only comply with the Code, but to report any instances of unprofessional conduct so that appropriate disciplinary steps could be taken in terms of the Public Service Regulations, 2001 and the NPA Act.

On 1 June 2014, the Prosecution Policy Directives, issued in terms of section 179(5)(b) of the Constitution, came into effect again requiring that prosecutors perform their functions without fear, favour or prejudice and prescribing that the foreign bribery offence must be a High Court case (Part 12, para 3.p). In terms of section 179(5)(c) of the Constitution, the NDPP may intervene in any process which is in breach of the policy directives.

The National Prosecution Policy, issued in terms of section 179(5)(a) of the Constitution, was amended so as to exclude economic considerations from being considered in making decisions not to prosecute. The Minister for Justice and Correctional Services concurred to the amendment on 5 June 2013 and the amended policy was included in the 2013/2014 NPA Annual report to Parliament. A circular was signed off by the National Director, providing guidelines and issuing instruction relating to decisions to prosecute and the prosecution of offences of corruption of foreign public officials. It encourages the development of training and awareness programmes relating to the prevention, detection, investigation and prosecution of the offence of corruption of foreign public officials.

Similarly, the South African Police Service Amendment Act, No 68 of 1995 (SAPS Act) has a number of provisions, which require that all members of the DPCI perform their functions without fear, favour or prejudice.

- b) Section 17E(10) requires that all members take an oath of office, committing to perform their duties in such a manner.
- c) Section 17E(11) makes it a criminal offence for any person to attempt to improperly influence a member of the DPCI in the performance of his/her duties.
- d) Section 17L establishes a complaints mechanism, headed by a retired judge, who has already been appointed.
- e) In terms of section 17L(4)(a), any member of the public may complain of the infringement of his/her rights as a result of a DPCI investigation.
- f) Section 17L(4)(b) enables any member of the DPCI to make a complaint regarding the improper influence of his/her duties.

In addition, complaints may be made to the Independent Police Investigative Directorate (IPID), which has been established to ensure independent oversight over SAPS and the Municipal Police Services (MPS), and to conduct independent and impartial investigations of identified criminal offences allegedly committed by members of the SAPS and the MPS, and make appropriate recommendations.

In *Commissioner of the South African Police Service & Ano v Southern Africa Human Rights Litigation Centre Trust & Ano* (SCA Case No: 485/2012), the Supreme Court of Appeal found that decisions by SAPS not to initiate investigations were reviewable in the same manner as decisions not to prosecute by the NPA were.

On two separate occasions, the courts have declared as unconstitutional certain provisions of the SAPS Act relating to the independence of the DPCI. Finality was however achieved on

27 November 2014 when the Constitutional Court handed down its judgment in *Helen Suzman Foundation v President of the Republic of South Africa and Others: Glenister v President of the Republic of South Africa and Others* (CCT 07/14 and CCT 09/14). The Court held that the primary constitutional obligation was to create an anti-corruption unit which enjoyed structural and operational independence. The Constitutional Court itself (by not following the normal procedure of referring back to Parliament) amended the provisions which it considered in conflict with this obligation. Consequently these amendments entered into effect immediately upon the handing down of the judgment. The amendments related to the extension of tenure of the National Head of the DPCI; undue political interference in the operations of the DPCI through ministerial policy guidelines and the power of the Minister of Police to remove the Head: DPCI. The Constitutional Court's rulings relating to the removal of the National Head of the DPCI were followed by the High Court in a matter relating to the suspension of the then National Head of the DPCI.

Besides legislative guarantees, governance arrangements within the ACTT support objective investigations and prosecutions. The management of both the investigations and prosecutions of foreign bribery-related offences is conducted by a Senior Deputy Director of Public Prosecutions in the Office of the NDPP and reporting via a Deputy NDPP directly to the NDPP and a Colonel in the DPCI, reporting via the Head of the Anti-Corruption Component (Operational Commander).

The NDPP has in this regard invoked section 20(3)(b) of the NPA Act to exclude all foreign bribery-related matters from the jurisdiction of Directors and Special Directors. The recommendations regarding the institution of investigations by this official are submitted to the Operations Management Committee of the ACTT, which is responsible for registering the investigation and appointing investigators.

The conduct of each investigation is personally overseen by the dedicated prosecutor (NPA) and the Operational Commander (DPCI). The dedicated prosecutor is responsible for the decision whether or not to prosecute and the conduct of prosecutions. In this regard his functions fall under the direct supervision of the NDPP and a designated Deputy NDPP.

The manner in which the OECD offences are being investigated, as reported to the Working Group on an ongoing basis, demonstrates that article 5 considerations are not being taken into account.

**Text of recommendation 4(b):**

4. Regarding the investigation and prosecution of foreign bribery, the Working Group:

b) Strongly recommends that South Africa increase the financial resources available to the specialist prosecutors charged with fighting corruption to ensure the effective investigation and prosecution of foreign bribery cases, including, through (i) the recruitment of the additional human resources needed; and (ii) ensuring that there is sufficient specialised expertise for foreign bribery cases including more permanently integrated forensic accountants in the Specialised Commercial Crime Unit (SCCU); [Convention Article 5; 2009 Recommendation XIII and Annex I D]

**Action taken as of the date of the follow-up report to implement this recommendation:**

Pertaining to the increase of financial resources available to specialist prosecutors, the following:

- Initially, this issue was addressed by the NDPP appointing a senior specialist prosecutor to prosecute the OECD offences. The dedicated prosecutor's performance contract with his immediate supervisor made provision for him to identify and mentor additional prosecutors when required. The dedicated prosecutor's operational duties were funded directly out of the budget of the NDPP. With the appointment of a new NDPP, this initial arrangement was formalized, resulting in the Serious Commercial Crimes Unit (SCCU) being tasked to manage foreign bribery cases. This effectively beefed up South Africa's prosecutorial capacity to address foreign bribery cases, by increasing funding for foreign bribery prosecutions, the number of investigators and level of experience.
- Regional AFU offices have been established in all major centres to ensure that all the law enforcement requirements relating to the securing of restraint and forfeiture orders are met. At no stage was the AFU unable to operate due to a lack of funds.
- Due to the fact that the OECD investigations are at an early stage, no restraint and forfeiture orders have been obtained in respect of such offences.
- As indicated, all members of the AFU received training from the dedicated prosecutor.
- The dedicated prosecutor has extensive previous experience with the investigation and prosecution of complex international crimes, and so does the SCCU prosecutors. The written guidance the dedicated prosecutor has provided to the ACTT investigators demonstrates this knowledge as does the extensive training given to other departments and role players. His presentations given to the Working Group on complex topics also confirm

his expertise.

- Forensic audits form part of the investigation component and consequently the appointment of forensic accountants is the responsibility of the DPCI. Use is made of the country's leading, private forensic auditing companies through a public procurement process. In addition, in cases involving SOCs or Government departments, NT may itself appoint forensic auditors to assist the DPCI and dedicated prosecutor.

"We are responsible to conduct forensic investigation for all spheres of government and co-ordinating all investigations and feed them to the Anti-Corruption Task Team." "We are also assisting the country to investigate foreign bribery. My unit is capacitated with advocates, chartered accountants, cyber specialists and there are 10 forensic firms that are assisting us throughout the country. I believe that we will conquer and we will succeed."

- Ms. Zanele Mxunyelwa, Head of the Specialised Audit Service of NT, when being named as the 2015 Certified Examiner of the Year by the Association of Certified Fraud Examiners (ACFE) in September 2015.

**Text of recommendation 4(c):**

4. Regarding the investigation and prosecution of foreign bribery, the Working Group:

c) Recommends that South Africa make full use of the newly established integrated approach to investigating complex commercial crimes – i.e. the coordination and cooperation between the South African Police Service (SAPS) and the National Prosecuting Authority of South Africa (NPA) including through the ACTT – at the outset of foreign bribery cases; [Convention Article 5; 2009 Recommendation XIII and Annex I D]

**Action taken as of the date of the follow-up report to implement this recommendation:**

This is demonstrated by the progress with and the increase in investigations as reported to the Working Group on an ongoing basis.

**Text of recommendation 4(d):**

4. Regarding the investigation and prosecution of foreign bribery, the Working Group:

d) Urges South Africa to make full use of the broad range of investigative measures available, including special investigative techniques and access to financial information, in order to effectively investigate suspicions of foreign bribery; [Convention Article 5; 2009 Recommendation XIII and Annex I]

**Action taken as of the date of the follow-up report to implement this recommendation:**

South Africa is making full use of the broad range of investigative measures available. This is demonstrated by the manner in which the cases are being investigated.

**Text of recommendation 4(d):**

4. Regarding the investigation and prosecution of foreign bribery, the Working Group:

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

Compliance with this recommendation is dealt with in (d) supra.

An outline of all available investigative tools has been compiled by the NPA and has been rolled out to all the DPCI foreign bribery investigators at training sessions.

Process for compelling a competent but uncooperative witness to provide testimony or to access private and confidential information (e.g. bank statements, business records, personal communications)	Section 205 of the Criminal Procedure Act, Act No.51 of 1977, CPA)  The dedicated prosecutor submits a request to a Magistrate to issue a subpoena on the holder of the evidence on the basis of an affidavit supplied by the DPCI investigator
Securing evidence in the possession of the suspect	Search warrant in terms of sections 20 and 21 of the CPA, issued by a Magistrate of the district where the suspect resides on the basis of evidence under oath by the DPCI investigator. Such warrant would include the seizure of documents, computers, other electronic data and any other evidence relevant to the offence
Securing evidence located abroad	Informal police-to-police cooperation facilitated by Interpol  Formal requests for MLA compiled by the dedicated prosecutor in terms of MLA legislation and treaties
Securing attendance for trial of suspects located abroad	Issuing of Interpol Red Notices, facilitated by Interpol  Formal applications for extradition compiled by the NPA in terms of extradition legislation and treaties

Securing the arrest of the suspect	Warrant of arrest, issued by a Magistrate upon application by the dedicated prosecutor
Under-cover operations	Section 252A of the CPA, issued by the dedicated prosecutor on the basis of an affidavit from the DPCI investigator
Monitoring and interception	Regulation of Interception and Provision of Communication-related Act, No 70 of 2002
The exercise of the investigative powers in terms of section 28 of the NPA Act	Section 17D(3) requires the Head: DPCI to approach the NDPP to appoint a Director to exercise such powers. The DPCI investigator will be required to provide the Head: DPCI with the prerequisite evidence and the dedicated prosecutor

**Text of recommendation 4(f):**

4. Regarding the investigation and prosecution of foreign bribery, the Working Group:

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

- (i) The above table describes the relevant investigative tools.
- (ii) The sources of information as set out in the response to recommendation 1 address this issue.

**Text of recommendation 4(g):**

4. Regarding the investigation and prosecution of foreign bribery, the Working Group:

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

The appointment of a dedicated prosecutor by the National Director after the March 2014 OECD report raising article 5 considerations is per se proof that article 5 considerations are not being taken into

account with the investigation and prosecution of foreign bribery offences.

**Text of recommendation 5:**

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

The investigations being conducted as reported to the Working Group demonstrate that section 35 of PRECCA is being fully employed and all persons involved with such investigations are fully aware of the relevant provisions.

The South African Judicial System has as its corner stone the principle of judicial impartiality (implying judicial ignorance) which is premised on the assumption that judges are ignorant as to the facts and law upon which they are required to adjudicate. The onus is on the parties to present their cases on any legal or factual issues which they believe would advance their cases. It is only when the parties have fully presented their cases that the judge is required to properly apply the law and facts so as to deliver the correct judgment. Training of the judiciary on the provisions of section 35 would be in conflict with this principle and result in an application for recusal of any judge who had been so trained from a case where section 35 is at issue. Consequently it is open to a litigant to challenge the jurisdictional basis for section 35 and for the judge to permit the party to fully argue the point. The safeguard against a wrong judgment is two-fold: the prosecutor must properly present the case of the jurisdictional grounds of section 35 and in the event of the Court misinterpreting section 35, the matter may be taken on appeal. A classic example of this principle is the *S v Basson* matter, which was considered by the OECD in the July 2013 onsite visit. In that matter, the accused was charged for contravening the provisions of the Riotous Assemblies Act by conspiring to commit crimes outside the territory of South Africa. The Court a quo accepted an argument by the defence that the Act was not of extraterritorial effect. The state appealed this decision and the Constitutional Court found that the Act was in fact of extraterritorial effect, taking into account the international obligations applicable and the principles relating to transnational offences.

In passing it should be noted that when regard is had to the investigations in progress, it is clear that section 5(2) of PRECCA is not being interpreted as being limited only to acts performed in the state of the foreign public official.

**Text of recommendation 6:**

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

(i) DoJ&CD as central authority maintains statistics on MLAs and their turnaround times. The Chief Directorate conducted an audit of the register on 9 February 2015 and it was found that only one request received since 1 July 2014 was not processed within the time limit. The auditors provided the Chief Directorate with a document setting out, in percentage, the following performance indicators: audited performance, estimated performance and targets. The Register of the Chief Directorate provides for the following information to be recorded: Reference number; date received; country; offence; name of request; date to be finalised; date memorandum submitted to Director-General/Minister; date memorandum returned; and name of official responsible for matter. The date to be finalised is included, as the relevant director of the Chief Directorate on a daily basis peruses the register to ascertain whether officials adhere to the time restrictions.

The Chief Directorate conducted a workshop in February 2015, to improve the general managing of MLAs. As indicated in the response to recommendation 1, a mechanism has in addition been implemented whereby all incoming MLAs of an economic nature are referred to the ACTT for assessment prior to making a decision regarding approval. As a result of this new structure, the Serious Fraud Office (SFO) of the United Kingdom directly contacted the dedicated prosecutor, requesting assistance in a serious fraud matter where the accused claimed that he had been employed in South Africa. On 9 October 2015, the SFO informed the prosecutor that as a result of his assistance, the accused had pleaded guilty and been sentenced to 10 years' imprisonment and that this was due to the valuable assistance and cooperation given in the matter.

Since 2012, South Africa made the following progress in terms of MLAs:

- South Africa finalised negotiations on the MLA and Extradition Treaties with the Republic of Belarus in September 2012.
- An arrangement on MLA was signed with Taiwan (Republic of China) in July 2014. This arrangement is in force.
- MLAs as well as Extradition Treaties were negotiated with Ethiopia in July 2014.
- An Extradition Treaty with the Islamic Republic of Pakistan was negotiated in September 2014.
- Finalised an MLA treaty with the Republic of Botswana in February 2015.
- MLA and Extradition Treaties were negotiated with the Republic of Mozambique.
- South Africa is also finalising an MOU between the NPA and the Office of the Prosecutor-General of the Russian Federation.

(ii) This is demonstrated in the reports submitted to the Working Group regarding the progress with investigations.

(iii) This is dealt with in para (i).

#### **Text of recommendation 7:**

7. With respect to extradition, the Working Group recommends that South Africa promptly proceed with the adoption of the Extradition Bill to ensure that it can provide extradition for foreign bribery, regardless

of where the foreign bribery has been committed. [Convention Article 10]

**Action taken as of the date of the follow-up report to implement this recommendation:**

This recommendation arises from a finding made in phase 2 to the effect that the existing Extradition Act did not make provision for extradition for crimes committed outside the territory of the requesting state. This is in turn based on a flawed interpretation of the Act. The Act makes provision for extradition in respect of offences within the jurisdiction of the requesting state (i.e. not the territory). Jurisdiction includes extraterritorial jurisdiction. All the extradition treaties concluded in terms of the provision of this Act make provision for extraterritorial jurisdiction. In respect of a constitutional challenge to the Bilateral United States Extradition Treaty, the Constitutional Court ruled that the provision was constitutional. The United States treaty specifically provided for extraterritorial jurisdiction. The purpose of amending the Act is to address issues other than extraterritorial jurisdiction.

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

**Text of recommendation 8(a):**

8. Regarding money laundering, the Working Group:

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

South Africa maintains statistics on the predicate offences for money laundering. The reports provided to the Working Group on the progress with investigations demonstrate that attention is paid to money laundering connected with the OECD offence.

**Text of recommendation 8(b):**

8. Regarding money laundering, the Working Group:

b) Urges South Africa to promptly ensure that institutions and professions required to report suspicious transactions, their supervisory authorities, as well as the Financial Intelligence Centre, receive appropriate directives and training on the identification and reporting of information that could be linked to foreign bribery; [Convention, Article 7 and 2009 Recommendation, III (i)]

**Action taken as of the date of the follow-up report to implement this recommendation:**

The dedicated prosecutor provided training to all FIC members on the foreign bribery offence with particular emphasis on the role of the FIC and reporting institutions. This was followed up with additional training to the regulatory bodies reporting to the FIC. In addition, the FIC issued advisories on

its website (see the response to recommendation 1).

**Text of recommendation 8(c):**

8. Regarding money laundering, the Working Group:

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

See the response under para (b). In addition, the DPSA Task Team has established a subcommittee to develop typologies for distribution. .

**If no action has been taken to implement recommendation 8(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Typologies will be developed around finalised cases

**Text of recommendation 8(d):**

8. Regarding money laundering, the Working Group:

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

See the response under para (b).

**Text of recommendation 9(a):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

The false reporting offence is dealt with in the training provided by the dedicated prosecutor as set out in the response to recommendation 1.

**Text of recommendation 9(b):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

In line with the aims of the Department of Trade and Industry, the regulatory burden on companies has been reduced but for SOCs and public companies there are stricter requirements regarding accountability and transparency. The Companies Act encourages higher standards of corporate governance in that minimum accounting standards having been set for company annual reports, there are stricter provisions governing directors' conduct and liability, and their common law duties and liabilities have now been codified.

The new Companies Act indicates that all companies now require either an audit or an 'independent review' except for those very small owner managed companies where all the shareholders are directors and all the directors are shareholders of the company. Private companies now have to determine whether they require an audit or an independent review and need to make appropriate arrangements accordingly. A private company may stipulate in its Memorandum of Incorporation (MOI) that it must be audited, or it may voluntarily submit itself to audit. Any private profit or non-profit company must be audited if, in the ordinary course of its primary activities, it holds assets in a fiduciary capacity for persons who are not related to the company, and the aggregate value of such assets held at any time during the financial year exceeds R5 million. Companies which fall outside the above audit requirement nevertheless have to have an annual independent review by an independent accounting professional. "Independent reviews" are to be done in accordance with the International Standard on Review Engagements (ISRE) 2400. The Regulations specify who may be independent accounting professionals and that an independent review may not be performed by anyone who is responsible for preparing the annual financial statements.

**Text of recommendation 9(c):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

The dedicated prosecutor has provided training to the staff of AGSA and has had a series of engagements with IRBA, resulting in IRBA developing a new advisory dealing specifically with the OECD offence and the reporting obligations of auditors. The AGSA has in addition implemented a number of internal measures. In 2012 training material was developed, the OECD Bribery and Corruption Awareness Handbook for Tax Examiners, which was made available to SARS employees and training was provided to some tax auditors. This process is ongoing.

**Text of recommendation 9(d):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

As indicated in the response to recommendation 1, the dedicated prosecutor has provided IRBA with a breakdown of all the legal provisions which protect auditors from intimidation and contact has been established with the SAICA. The amendments proposed to sections 18 and 34 of PRECCA will also provide further protection to members of the auditing profession.

**Text of recommendation 9(e):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

Contact has been made with both AGSA and the DPE. The criteria for internal compliance programmes has been compiled and made available to AGSA and DPE. NT distributed a circular raising awareness on the duty to report known or suspected corrupt transactions (section 34 of PRECCA) to accounting officers of departments and Constitutional Institutions, accounting authorities of Public Entities and head officials of provincial treasuries.

**Text of recommendation 10(a):**

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

recommends that:

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

An internal reference guide addresses the issues raised under this recommendation.

**Text of recommendation 10(b):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

SARS has officially opened 138 small business desks nationally. These desks seek to reduce the compliance burden for small businesses and also serve as a means to advise small and medium-sized enterprises on important issues such as corruption and bribery.

**Text of recommendation 10(c):**

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

c) South Africa disseminates the new OECD Bribery and Corruption Awareness Handbook for Tax Examiners and continues regular training of tax auditors, including through the provision of tailored, country-specific red flag indicators to help tax auditors detect bribe payments; [2009 Tax Recommendation]

**Action taken as of the date of the follow-up report to implement this recommendation:**

SARS made the 2013 revision of the OECD Bribery and Corruption Awareness Handbook for Tax Examiners available to its staff. In addition, training in cooperation with other government institutions was also conducted.

**Text of recommendation 10(d):**

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

recommends that:

d) South Africa ensure that adequate resources (including adequately skilled personnel) are made available to South African Revenue Service (SARS), to improve its ability to detect possible cases of foreign bribery through tax audits and investigations; [2009 Tax Recommendation]

**Action taken as of the date of the follow-up report to implement this recommendation:**

Training is an ongoing endeavour. Training with the assistance of other government institutions was arranged. In addition, an internal reference guide was developed and published on our intranet. The guide on bribery and corruption awareness seeks to assist SARS officials to identify potential bribery and corruption committed by taxpayers and to ensure that they understand their obligation relating to reporting such activities. The reference guide will be further supported by future training.

**Text of recommendation 10(e):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

An internal reference guide addresses the issues raised under this recommendation. (iii) The National Prosecuting Authority has a special unit tasked with the prosecution of bribery offences residing under the Convention. There is an open channel of communication between the NPA and SARS through membership in the ACTT and conviction data is shared in that forum. (iv) SARS is already implementing this recommendation. The following bilateral tax treaties include the new OECD Model Tax Convention language (these jurisdictions are parties to the Multilateral Convention): Austria Protocol in force, India Protocol in force, Netherlands Protocol negotiated but not signed, and Luxembourg Protocol negotiated but not signed.

**Text of recommendation 10(f):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

SARS is already implementing this recommendation. The following bilateral tax treaties include the new OECD Model Tax Convention language (these jurisdictions are parties to the Multilateral Convention): Austria Protocol in force, India Protocol in force, Netherlands Protocol negotiated but not signed and Luxembourg Protocol negotiated but not signed.

Link to the DTAs and Protocols:

Africa: [http://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/DTAs-and-Protocols-\(Africa\).aspx](http://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/DTAs-and-Protocols-(Africa).aspx)

Rest of the world: [http://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/DTAs-and-Protocols-\(Rest-of-the-World\).aspx](http://www.sars.gov.za/Legal/International-Treaties-Agreements/DTA-Protocols/Pages/DTAs-and-Protocols-(Rest-of-the-World).aspx)

**Text of recommendation 11:**

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

(i) This is dealt with in the response to recommendation 1.

(ii) If regard is had to the matrix, it would appear almost without exception that the OECD offence is committed by major corporate bodies in the pursuit of extremely lucrative international business contracts. This is certainly the case in respect of the cases on the matrix for South Africa. As set out above, major initiatives have been implemented to address these crimes. Once the initiatives outlined above have been rolled out, attention will then be paid to Small Medium Enterprises and small business.

**Text of recommendation 12(a):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

See the response to recommendation 1.

**Text of recommendation 12(b):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

In November 2015, Cabinet approved the introduction of the Protected Disclosures Amendment Bill of 2015 in Parliament. The Bill extends the application of the Protected Disclosures Act, 2000 (Act 26 of 2000) beyond the traditional employer and employee relationship. The amendments regulate joint liability, introduce a duty to investigate disclosures, provide for immunity against civil and criminal liability in certain circumstances and criminalise intentional false disclosures. The Bill contributes to government's commitment to fight fraud and corruption by strengthening the protection of whistle blowers..

**Text of recommendation 12(c):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

The concern of the Working Group was informed by version B6B of the Protection of State Information Bill ("the Bill") and related to the fact that section 43 provided a defence inter alia in terms of the Protected Disclosures Act, whereas section 49 failed to make reference to this Act. This presumably led the Working Group to speculate whether a person would still be guilty of contravening section 49 even if the disclosure fell within the ambit of the Protected Disclosures Act.

The Bill has yet to enter into effect and currently version B6B has been superseded by version B6F. The circumstances under which a person will avoid prosecution under section 41 have been considerably expanded upon from version B6B. Currently a person may not be prosecuted if the disclosure was protected not only under the Protected Disclosures Act, but also:

- The Companies Act
- PRECCA

- The National Environmental Management Act
- The Labour Relations Act authorised by the Bill or
- Any Act of Parliament that reveals criminal activity, including any criminal activity in terms of section 45 of the Bill.

Section 49 has been deleted in its entirety. These revisions demonstrate unequivocally that it is not the intention of the legislator to use the Bill to prevent whistle blowers from disclosing corrupt activities.

What was previously sought to be protected under section 49 is dealt with under section 34 (espionage and related offences) and section 36 (hostile activity offences). Neither of these sections refers to the protections specifically bulleted in section 41. It is however not permissible to justify the inference that a person would be guilty of contravening section 34 or 36, even if the protections referred to in section 41 applied. The reason why these protections are not specified is simply because from the very nature of the activities proscribed in sections 34 and 36, these would not be applicable in the case of a whistle blower revealing evidence of corrupt activities.

Section 34 specifically relates to making classified state information available for the benefit of a foreign state. The information which may not be transmitted is state information, classified either as “top secret”, “secret” or “confidential”. State information is defined in the preamble as information generated or received by organs of state. In terms of section 11 of the Act, state information is classified as:

- Confidential “if its disclosure would cause demonstrable harm to the national security of the Republic”.
- Secret “if it is sensitive information which could reasonably cause serious demonstrable harm to the national security of the Republic
- Top secret “if it is sensitive information which could cause irreparable or exceptionally grave harm to the national security of the Republic”
- National security is defined in the preamble as:

“the protection of the people of the Republic and the territorial integrity of the Republic against

–

(a) The threat of use of force or the use of force;

(b) The following acts:

(i) Hostile acts of foreign intervention directed at undermining the constitutional order of the Republic;

(ii) Terrorism or terrorist related activities;

(iii) Espionage;

(iv) Exposure of a state security matter with the intention of undermining the constitutional order of the Republic;

- (v) Exposure of economic, scientific or technological secrets vital to the Republic;
- (vi) Sabotage; and
- (vii) Serious violence directed at overthrowing the constitutional order of the Republic;

(c) Acts directed at undermining the capacity of the Republic to respond to the use of, or the threat of the use of, force and carrying out of the Republic's responsibilities to any foreign country and international organisations in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not, but does not include lawful political activity, advocacy, protest or dissent".

Section 36 deals broadly with disclosures to benefit a non-state actor engaged in hostile activity which would prejudice the national security of the Republic. Hostile activity is defined in the preamble as being:

- “(a) aggression against the Republic;
- (b) sabotage or terrorism aimed at the people of the Republic or a strategic asset of the Republic, whether inside or outside the Republic;
- (c) an activity aimed at changing the constitutional order of the Republic by the use of force or violence; or
- (d) A foreign or hostile intelligence operation”.

It is simply impossible to slot the legitimate reporting of corruption with any of the above categories and consequently neither section 34 nor section 36 could be invoked to prosecute a whistle blower.

The Bill contains numerous provisions which unequivocally demonstrate that it is not intended to prosecute whistle blowers or suppress the exposure of corruption:

- The preamble recognises that the right of access to information is a corner stone of “our democracy and that the right of access to any information held by the State may be restricted where necessary for reasons of national security”. The harm caused by excessive secrecy is specifically recognised as is the desire to protect state information within a transparent and sustainable legislative framework. Finally the preamble concludes that the object of the Bill is to promote the free flow of information within an open and democratic society without compromising the national security of the Republic.
- Section 45 makes it a crime for any person to intentionally classify state information for any ulterior purpose, including to conceal contraventions of PRECCA. This provision therefore prevents state officials from concealing the detection of their corrupt activities by classifying the documentary evidence.
- Section 48 requires the written authorisation of the NDPP to institute a prosecution for any offence under the Bill which carries a sentence of imprisonment for five years or more. This is an extremely important safeguard and ensures that inexperienced prosecutors do not deal with extremely sensitive matters.

The Bill cannot be used to prevent surrendering evidence to the law enforcement agencies

investigating corruption offences. This conduct is specifically prohibited by section 45 and would run counter to all the other provisions which promote transparency and access to information.

In *The State v Jacob Sello Selebi* (Case No: 25/09) the State Security Agency sought to prevent a member of the Agency from testifying in the prosecution of the then National Commissioner of Police, charged with corruption. The Trial Judge dismissed the application and the agency thereafter sought to petition both the Supreme Court of Appeal and the Constitutional Court for leave to appeal against the decision. Neither Court was prepared to grant the agency leave to appeal. (Judgment: pp 21-22). This constituted strong authority for the proposition that the Courts will not allow secrecy to trump the prosecution of persons charged with corruption offences.

**Text of recommendation 12(d):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

An awareness campaign on the implications and effect of the Protection of State Information Bill can only be launched after the relevant Act comes into effect which has to date not taken place.

As indicated earlier in this report, contact has been made with IRBA and the SAICA to address concerns raised by the auditing profession.

**Text of recommendation 13(a):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

All ODA agreements (incoming ODA) that have been processed and signed since 2006, have an anti-corruption/anti-bribery clause included. It should also be noted that where SA procurement procedures are followed, the PFMA is adhered to and where the donor procurement is followed, the rules are also clear on anti-corruption/anti-bribery. All ODA contracts are to have a clause regarding anti-

corruption and bribery which should also state that should such a practice be uncovered, it is to be reported to the relevant authorities through the appropriate channels. The OECD published list of companies that have been convicted of foreign bribery are consulted as part of the due diligence process before any contract is awarded.

**Text of recommendation 13(b):**

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

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

National Treasury Regulations 16A9.1 (c) and Municipal Supply Chain Regulations section 38 (1) (c) makes provision that the Accounting Officer /Accounting Authority check that a supplier is not listed as a person prohibited from conducting business with public sector before awarding a contract

**Text of recommendation 13(c):**

3. Regarding public advantages, the Working Group recommends that:

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

**Action taken as of the date of the follow-up report to implement this recommendation:**

ECIC is continuing with awareness raising efforts as reported to the Working Group during the phase 3 evaluation and training of its staff on the OECD offence will be provided by members of the Task Team.

**If no action has been taken to implement recommendation 13(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:**

Training will be done continuously.

## PART II: ISSUES FOR FOLLOW-UP BY THE WORKING GROUP

### Text of issue for follow-up:

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

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

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

State vs Blom – Addressed the issue of intent.

### Text of issue for follow-up:

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

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

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

Extradition Bill.

### Text of issue for follow-up:

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

c) The application in practice of the foreign bribery offence with respect to legal persons, including as concerns (i) the liability of parent companies for acts of bribery by intermediaries, including related legal persons, such as subsidiaries abroad; (ii) the implications of the requirement that the foreign bribery offence be committed “in furthering or endeavouring to further the interests of that corporate body”; and (iii) the application of corporate liability to state-owned and state-controlled enterprises;

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

FIC Bill - It looks at beneficial ownership, which will per implication address foreign bribery. See [http://www.fic.gov.za/DownloadContent/NEWS/PRESSRELEASE/612791\\_1.pdf](http://www.fic.gov.za/DownloadContent/NEWS/PRESSRELEASE/612791_1.pdf). (9 October 2015, for public input). Date for final input was moved to 8 Jan 2016 – see Press Release on FIC website: <http://www.fic.gov.za/DownloadContent/NEWS/PRESSRELEASE/FIC%20Bill%20->

%20website%20notice.pdf.).

S v Tshopo - The SCA confirmed a conviction relating to beneficial ownership of a natural person using a juristic person as a proxy.

S vs Nomagugu Trading Enterprises CC + Colenso Magaleni

S vs Tertius Stiemie & All Tax Services CC

S vs HM Irrigation CC and another

S vs J Hinzelman and others – Adies Painters CC

S vs Ndude and others – Sithaba Holdings (Pty) Ltd

**Text of issue for follow-up:**

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

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

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

PRECCA amendments

S vs Block and others

**Text of issue for follow-up:**

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

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

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

**Text of issue for follow-up:**

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

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

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

Number of conviction based freezing orders 2015/2016 (up to Dec 2015): Restraint 23, R 29 415 751.75  
Number of non-conviction based freezing orders 2015/2016 (up to Dec 2015): Preservation 198, R 440 861 173.18  
Number of conviction based final confiscation orders 2015/2016 (up to Dec 2015): Confiscation 120, R 47 705 409.48  
Number of non-conviction based final confiscation orders 2015/2016 (up to Dec 2015): Forfeiture 172, R 222 553 312.36

**Text of issue for follow-up:**

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

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

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

NDPP vs Gauteng Health  
NDPP vs Mde  
NDPP vs Social Housing Regulatory Authority  
NDPP vs Victory Ticket and Buffalo City Officials  
NDPP vs Nyameka and Thumeka Qongqo  
Tannenbaum case  
Surapure drinks (Pty) Ltd  
Ndpp vs Shu Wei Lu  
Mulaudzi case  
NDPP vs Sibongile Mayana  
NDPP vs Kalmar  
NDPP vs Diamond Smuggling Syndicate  
NDPP vs Msimango  
NDPP vs Mugnaioni  
NDPP vs Spies  
NDPP vs Maqubela

**Text of issue for follow-up:**

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

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

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

See recommendation 1 of Part I  
S vs Fredericks and another  
S vs Khambi and others  
S vs Mothoa and another  
S vs Msimango and others  
S vs Owakaneme and Another  
s vs Hinzelman  
S vs Ditlhakanyane and others

**Text of issue for follow-up:**

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

i) The ability of bodies charged with investigating corruption allegations, including commissions of inquiry, to access classified information without unnecessary delay;

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

Refer to section 15 of the Public Audit Act.  
See Promotion of Access to Information Act (PAIA)

**Text of issue for follow-up:**

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

j) The independence and effectiveness of the DPCI regarding the investigation of foreign bribery cases;

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

See recommendation 1 of part I  
  
S vs Block and others  
S vs Ncitha & others  
S vs Molokoane and others  
S vs Ndebele and others

**Text of issue for follow-up:**

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

k) The application of territorial and nationality jurisdiction concerning offences committed in whole or in part abroad, to ensure that the South African authorities can take action against legal persons for bribery of foreign public officials, whether it is committed directly or through intermediaries (including related legal persons such as foreign subsidiaries);

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

PRECCA provides for this

**Text of issue for follow-up:**

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

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

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

See recommendation 1 part I (ACTT)

**Text of issue for follow-up:**

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

m) With regard to the sharing of tax information with law enforcement authorities, the requirement to obtain ex parte orders to ensure that it is effective in facilitating reporting.

**With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:**

See recommendation 1 part I (ACTT)