MONITORING OF COUNTRY COMPLIANCE UNDER THE OECD ANTI-BRIBERY CONVENTION

Compilation of responses from the public consultation on the parameters for Phase 4

4 December 2014

A total of 13 organisations – including international legal experts, multi-lateral organisations, NGOs, accounting and auditing professionals and private-sector representatives – commented on the Call for Comments Paper on the Parameters of Phase 4. This document includes all comments, organised in alphabetical order.

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CALL FOR COMMENT

The OECD Working Group on Bribery (WGB) invites public comments on the next phase of country monitoring under the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention).

Written submissions are invited from all persons, institutions, and organisations with an interest in the WGB's monitoring of Parties' implementation of the Anti-Bribery Convention. Submissions are due by 1 December 2014 and should be sent to Lynn.Robertson@oecd.org. Following the consultation process, written submissions will be made public on the OECD website.

The Anti-Bribery Convention and related OECD Anti-Bribery instruments require the 41 Parties to criminalise bribery of foreign public officials in international business transactions and provide for a host of related measures that make this effective. Parties' compliance with the Convention is monitored through an ongoing system of peer-review which is carried out by the WGB. This rigorous monitoring process has developed a reputation as the "gold standard" of country monitoring.

By mid-2015, almost all Parties will have undergone three phases of monitoring. Each Phase has a different focus:

- **Phase 1** evaluates the adequacy of a country's legislation to implement the Convention.
- **Phase 2** assesses whether a country is applying its legislation effectively.
- **Phase 3** focuses on enforcement of the laws implementing the Convention and associated instruments.

All of the monitoring reports are published on the OECD website. Phases 2 and 3 provide for an on-site visit, including face-to-face discussions with public agencies, law enforcement, companies, business organisations, private sector lawyers, non-governmental organisations, media and academia. More information on the WGB and the evaluation process, and access to countries' evaluation reports, is available at www.oecd.org/corruption/anti-bribery.

The WGB is now planning its next round of evaluations (Phase 4). It is imperative for the ongoing success of the Convention that the WGB's high standard of monitoring is maintained throughout Phase 4. Inclusion of the private sector and civil society has always been an essential component of monitoring; hence, stakeholders are invited to comment on any relevant area of interest. The following questions may provide a starting point:

1. Phase 4 will focus more closely on detection, enforcement, and corporate liability, and other major topics relevant to adequate implementation of the Convention's obligations. What in your view are the most relevant areas relating to bribery of foreign public officials which should be assessed?
2. Phase 4 will take a more tailored approach, focusing more closely on the specific enforcement situation in each country. Are there any specific areas which, in your view, should be covered relating to the country's enforcement of its foreign bribery legislation under the Convention?
3. What steps would you recommend that the WGB consider in the case of continued failure of a country to adequately implement its obligations under the Convention?
4. What would be the most beneficial and practical way for the private sector and civil society engagement in this next round of monitoring?
5. How would you suggest that the WGB increase the visibility of its work?

RESPONSES TO THE CALL FOR COMMENT

AIRBUS

Public Consultation on Phase 4 Monitoring of the OECD Anti-Bribery Convention

1. Phase 4 will focus more closely on detection, enforcement, and corporate liability, and other major topics relevant to adequate implementation of the Convention's obligations. What in your view are the most relevant areas relating to bribery of foreign public officials which should be assessed?

Since the SFO, though UKBA has almost the same "supra-territoriality" as the FCPA to prosecute potential acts of corruption committed anywhere in the world, the private sector and industry will face a "me too" effect with several other countries' jurisdictions (alike France and/or Germany, etc.). In case of investigations for better cooperation, to which country's jurisdiction or organisation body, the investigated international company will report to?

2. Phase 4 will take a more tailored approach, focusing more closely on the specific enforcement situation in each country. Are there any specific areas which, in your view, should be covered relating to the country's enforcement of its foreign bribery legislation under the Convention?

A What is the progress made by each signatory country to fight against "solicitations" or "soft extortion" (considering that "extortions" might be covered by each respective jurisdiction)? Would it be wise to promote one or several body(ies) outside any particular country (ie, branch of OECD) where companies suffering solicitations could record?

B In order to expedite the settlements and then, ease more investigations, in particular for self-disclosure, how have the jurisdiction modifications progressed allowing kind of "Plea Bargain". We mean countries where this is not easy contemplated by the law (ie France and Germany).

3. What steps would you recommend that the WGB consider in the case of continued failure of a country to adequately implement its obligations under the Convention?

As export control sanctions list for individuals. We suggest taking incremental steps placed by law abiding countries on their public bids on larges companies owned by countries falling to implement.

4. What would be the most beneficial and practical way for the private sector and civil society engagement in this next round of monitoring?

Benchmarking and exchanging respective policies and rules.

5. How would you suggest that the WGB increase the visibility of its work?

Media campaign; As Transparency International, who became almost a standard reference (even if some "black holes" remain on the way the CPI are computed), why not issue a yearly Country Ranking on actual implementation of Convention obligations?

BIAC (Business and Industry Advisory Committee to the OECD)

Implementation of the OECD Anti-Bribery Convention: Initial BIAC comments on a future "Phase 4 review"

I. Key achievements of the Anti-Bribery Convention

More than 15 years after its entry into force, the OECD Anti-Bribery Convention remains a landmark in the global fight against bribery and corruption. The Convention is the only international legally binding instrument that specifically addresses the bribing of public foreign officials. It has become a recognized international standard against which the performance of governments can be benchmarked.

All OECD countries and seven non-member economies have ratified and implemented the Convention, which has committed the world's leading exporting countries to make it a crime to bribe foreign public officials when engaging with them in cross-border business transactions. The 41 parties to the Convention represent a significant proportion of global trade and global outward foreign direct investment.

However, several G20 countries, including China and India, are not yet parties to the Convention, which has the potential to undermine the efforts to create a level playing field for international business. The OECD should therefore use its well-established cooperation with key partners to bring them closer to OECD policy standards, with the ultimate objective to work towards their adherence to the Convention to ensure a global level playing field.

Countries' implementation and enforcement of the Convention are monitored through a rigorous peer-review monitoring system, which has so far taken place in three phases, with phase 1 evaluating the adequacy of a country's legislation to implement the Convention, phase 2 assessing whether a country is applying this legislation effectively, and phase 3 focusing on enforcement of the Convention, the 2009 Anti-Bribery Recommendation, and outstanding recommendations from phase 2. Peer pressure has proven to be essential to ensure the highest level of compliance with the Convention.

The OECD has further established an informal exchange of views with business and other stakeholders as an integral part of the review process. BIAC considers that this dialogue is important and should be further reinforced as it helps to better determine the impact that the laws and enforcement have on actual behavior.

II. Initial remarks on a possible phase 4 review

Going forward and building on the successful work of the 3-phase review process, BIAC would like to offer the following initial comments as the OECD is currently reflecting on a possible phase 4 review:

- As a starting point, due consideration should be given to the question about the pros and cons of launching a phase 4, if the phase 3 review process has not been fully accomplished. A possible phase 4 should not take away emphasis, energy and resources from fully implementing and enforcing the Convention. Even if major steps in the implementation of the Convention have been taken, there is still work to be done to ensure that all the recommendations are comprehensively implemented and efficiently enforced. This implies that due emphasis needs to be given to the results of phases 1-3, identifying gaps and areas

for further action. While reflecting on the focus of a future phase 4, it is therefore important not to lose sight of the goals of the previous phases to ensure that we do not forget about the "basics".

- Continued monitoring of a correct implementation and enforcement of the Convention, where necessary, should therefore remain high on the OECD agenda going forward. Peer reviews have been essential to boost governments' anti-corruption agenda and should be consistently pursued. However, peer reviews often focus on the number of cases or convictions. Going forward, reviews should not be undertaken based on a formalistic approach or focusing mainly on the number of cases, but rather be oriented towards a functional equivalence approach.

- With these considerations in mind, one goal of a future phase 4 review could be to reach greater consistency of international anti-corruption standards, by focusing not only on 'vertical' analysis, involving close but separate scrutiny of each signatory's anti-bribery laws and enforcement, but more on 'horizontal' assessment, comparing the laws and practices of the signatories to encourage compliance and additional consistency. As a result, best practices and good examples could be identified, which would encourage countries to make their standards more consistent according to identified best practice measures.

- One important way to foster integrity and accountability is to encourage companies to develop and adopt adequate internal controls, ethics and compliance programs or measures for the purpose of preventing and detecting foreign bribery, as suggested in the OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009). The implementation of the recommendation that member states should require eligible contractors to demonstrate that they have functioning compliance programs should be duly monitored.

- For obvious reasons, phases 1-3 focus on the implementation of the Convention in national legislation and its effective use and enforcement. While a party may use various approaches to fulfil its obligations as mentioned in the commentaries on the Convention, from the business perspective, it is also worthwhile that future reviews further reflect on the following "key performance indicators" to be included in a future phase 4 methodology:

  - Are the parties of the Convention encouraging and steering an effective dialogue with business on how to fight corruption?

  - Are the parties of the Convention supportive of modern anti-corruption measures, for example by engaging in Collective Action (cooperation between stakeholders), Integrity Pacts and compliance monitoring of public infrastructure projects?

Do the parties of the Convention encourage and incentivize compliance efforts of companies and acknowledge voluntary disclosure by companies as well as their cooperation with law enforcement?

III. Looking beyond phase 4

From the point of view of securing a truly level playing field for international business, due consideration should be given to the question whether launching a phase 4 would be the most appropriate next step to be taken. It should be born in mind that without a renewed effort to expand adherence to the Convention, the achievements of phases 1-3 would be undermined.

Regardless of whether a phase 4 review is launched and despite the major achievements of the Convention, further efforts are required, including on issues currently not included in the Convention. Open-minded reflections to effectively curb corruption and provide a real level playing field for international business in and outside OECD countries are essential. Therefore the OECD should pay attention to the following issues going forward:

- **Address the demand side**: We strongly encourage the OECD to effectively address the demand side of bribery, i.e. bribe solicitation and extortion by public officials. This would represent a significant step towards a more corruption-free business environment that helps the business community to establish the necessary confidence.

- **Additional adherence**: Seeking continuous expansion of adherence to the Convention, including major emerging economies, will be essential for ensuring a global level playing field and effectively addressing bribery and corruption.

- **Incentivize self-reporting**: We recommend dedicated OECD work on how to encourage and duly recognize voluntary efforts of companies, e.g. by rewarding voluntary self-disclosure of companies. Companies should further have the possibility to mitigate blacklisting/debarment decisions by implementing effective compliance measures after a corrupt activity was detected and remediated.

- **Avoid double jeopardy (principle of *ne bis in idem*):** We recommend that the OECD "translate" the principle contained in article 4.3 of the OECD Convention into a more immediate and effective rule of international *ne bis in idem* to be introduced in the various anti-bribery national acts and legislations. Avoiding duplicating proceedings for the same offense in several jurisdictions could in many cases accelerate remediation of the underlying causes of the offense.

- **Build capacity**: Education, training and capacity building should remain a key priority to foster a culture of integrity and promote knowledge sharing. This would include education and training of current and future managers, engineers, government officials and civil society leaders, SMEs, but also capacity building campaigns in emerging and developing countries with the aim to reduce compliance risk for companies.

- **Promote public-private dialogue**: Governments and business should promote coordinated partnerships to leverage resources for advancing technical assistance efforts and engage in discussions on how companies can join forces with public institutions of the countries where they do business in order to reduce corruption risks.

- **Set-up high level reporting mechanisms**: High-level Reporting Mechanisms would constitute an important tool for companies to rely on when faced with bribe solicitation including the area of public procurement. This process allows companies to report quickly and effectively on bribe solicitation to a dedicated and high-level institution that is tasked with responding swiftly and in a non-bureaucratic manner.

- We also encourage the OECD as a multi-disciplinary organization to reflect the importance of addressing bribery and corruption in different work areas, including among others, investment, responsible business conduct, governance, to name just a few. The OECD Integrity Forum plays an important role in highlighting the importance of consistency between different initiatives. BIAC looks forward to making an active contribution.

Ernst and Young LLP

EY Response to the Invitation from the OECD Working Group on Bribery in International Business Transactions Public Consultation on the Parameters for Phase 4

Introduction

This short paper has been prepared by EY in response to the Invitation from the OECD Working Group on Bribery in International Business Transactions Public consultation on the Parameters for Phase 4.

EY wishes to record its support for the OECD's anti-corruption activities. These activities are a fundamental element of the ongoing global effort against corruption. EY has shown its support of the OECD Working Group in earlier Phases and intends to continue its support going forward.

An essential aspect of EY's perspective on this most challenging of global issues is the importance of co-operation between public bodies, NGOs and the private sector in order to successfully combat corruption, especially as regards commercial activities. This perspective is indeed reflected in our comments below.

We hope you find EY's comments set out below to be helpful.

1. Phase 4 will focus more closely on detection, enforcement, and corporate liability, and other major topics relevant to adequate implementation of the Convention's obligations. What in your view are the most relevant areas relating to bribery of foreign public officials which should be assessed?

Detection

- It would be informative to survey the effectiveness of private sector whistleblowing controls in various jurisdictions. This would require access to private sector businesses.

- It would be informative to survey the impact and potential of social media for disclosing bribery in various jurisdictions.

- It would be informative to survey the nature of and extent to which unclassified intelligence and other relevant information is shared by enforcement agencies across various jurisdictions, especially intelligence sourced from higher risk territories.

- It would be informative to survey the perception of the role and responsibility of the following in detecting corrupt activities in various jurisdictions.

  - The Internal Audit function.
  - The Compliance function.
  - The business units.
  - The External Auditors of financial statements.

The perceptions of private sector businesses, the audit profession and of the general public would be of relevance in this regard.

Enforcement

See answer to question 2.

Corporate liability

It would be informative to survey the effectiveness of the introduction of corporate liability for bribery offences and the introduction of "adequate procedures" type defenses for bribery offences in driving the development of bribery risk management systems within those businesses affected. This would require access to private sector businesses.

Other

It would be informative to survey any other measures being taken in the various jurisdictions to encourage businesses to implement effective compliance programs.

2. Phase 4 will take a more tailored approach, focusing more closely on the specific enforcement situation in each country. Are there any specific areas which, in your view, should be covered relating to the country's enforcement of its foreign bribery legislation under the Convention?

It would be informative to survey the nature and effectiveness of DPAs and self-reporting regimes in various jurisdictions.

It would be informative to survey the development of bribery risk management systems in regulated sectors compared to non-regulated sectors. This should indicate the relative effectiveness of regulatory enforcement compared with criminal prosecution, and the risk thereof, as an incentive to build bribery risk management systems. This would require access to private sector businesses.

It would be informative to survey the impact of the perception of individual criminal liability of senior officers in businesses in driving the development of bribery risk management systems. This would also require access to private sector businesses.

3. What steps would you recommend that the WGB consider in the case of continued failure of a country to adequately implement its obligations under the Convention?

The WGB may wish to explore ways to connect obligations under the OECD convention to the receipt of international aid, lending or assistance.

The WGB may wish to consider a formal country grading system similar to that applied to sovereign debt.

The WGB may wish to consider introducing probationary periods for countries that fail to adequately implement their obligations.

4. What would be the most beneficial and practical way for the private sector and civil society engagement in this next round of monitoring?

Involving the private sector appears essential to us (and is reflected in the above responses) as this is where essential anti-bribery measures are taken. The WGB may wish to interview compliance officers and general counsel in the private sector. The WGB may wish to consider running "summits"

in various jurisdictions at which representatives from the private sector and civil society can contribute in workshops to the issues that WGB wishes to address. The WGB may also wish to consider engaging with business consultants which routinely conduct surveys in this area to co-develop surveys.

5. How would you suggest that the WGB increase the visibility of its work?

Without a better understanding of the purpose WGB has in mind for increasing the visibility of its work and its target audience, it is difficult to make specific recommendations. WGB should therefore specify the purpose and target audience. WGB should also specify its objectives in the context of those of the OECD in this area.

Author: Chris Costa, Global Chief Operating Officer, Fraud Investigation & Dispute Services, EY

ETHIC Intelligence

OECD Working Group on Bribery in International Business Transactions: Consultation on Phase 4 Monitoring

Beyond enforcement, creating incentives for compliance

ETHIC Intelligence takes note of the Working Group's focus on pursuing the question of enforcement in Phase 4 monitoring of the Convention. Since effective enforcement is critical to increasing the cost of non-compliance and to establishing authorities' credibility on the matter, this can only be encouraged. Because companies look to case law to determine the real level of risk they face, it is only logical that in the absence of investigations, prosecutions, and proper fines, this risk be perceived as low despite the legal framework in place.

However, when evaluating the level of enforcement within signatory countries, ETHIC Intelligence encourages the Working Group to evaluate ways in which the country creates incentives for compliance. Some signatory countries, such as France, do not currently have mechanisms for companies to plead guilty and negotiate settlements for corruption offenses. As a result, companies are incentivized to conceal offenses and prolong legal proceedings. In the absence of plea bargaining for such offenses, companies do not report wrongdoing or cooperate fully during investigations, leading to fewer convictions and reducing the level of enforcement overall. During its evaluation, the Working Group is encouraged to push for reform in this direction.

Conversely, by allowing for plea bargaining and taking into account companies' efforts to prevent corruption in enforcement action, authorities can:

1. Create incentives for companies to develop and implement quality corruption-prevention programs, ultimately reducing the incidence of corruption and encouraging companies to rethink their way of doing business;

2. Reduce overall costs of investigations and accelerate legal proceedings;

3. Facilitate cross-border investigations and settlements, in particular with other countries which allow plea bargaining.

As a certification agency specialized in anti-corruption compliance programs, ETHIC Intelligence recognizes that anti-corruption compliance programs represent not only a considerable investment for companies, but also a vehicle for them to conduct business with integrity. The more robust the vehicle, the more effective it will be in helping the company reach this objective. Recognition by authorities of corporate compliance programs can go a long way to encouraging desirable behavior as opposed to purely threatening sanctions for undesirable behavior. Focus on the quality and effectiveness of compliance programs by authorities can help promote their added value among the private sector and increase 'compliance buy-in'.

ETHIC Intelligence is a certification agency specialized in anti-corruption compliance programs. It is a private company headquartered in Paris and presided by Philippe Montigny, former member of the OECD Office of the Secretary-General and former adviser to the President of the OECD Development Centre (1987-1997).

Since 2006, ETHIC Intelligence provides best practices certification of corporate anticorruption compliance programs so companies can communicate easily and credibly on their compliance

achievements. Thanks to expert recommendations by on-site accredited auditors and a committee of international lawyers, companies can identify areas for improvement and strengthen their programs. Certified companies are comforted in knowing that their programs meet highest international standards (FCPA, UKBA, OECD, ICC, TI, ISO, ...) and are adapted to mitigate their own specific corruption risks.

Certification: reassures investors, attracts honest talent, serves as compliance management tool, and much more. www.ethic-intelligence.com.

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Call for Comment: OECD Working Group on Bribery: Monitoring of country compliance under the Anti-Bribery Convention

Topic 1: Jurisdiction

Foreign bribery schemes are growing in complexity. They usually consist of chains established between a huge number of intermediaries, subsidiaries and agents operating all around the world. The problem is that in many emerging countries foreign bribery is under-regulated and often not criminalized at all; corporations and their management are then allowed to bribe or at least hide behind complicated systems of corporate veils.

The only way how to capture foreign bribery is to equip national enforcement authorities with wide jurisdictional frameworks. In this context, the so-called extraterritorial jurisdiction is the key issue because it allows national enforcement authorities to reach domestic or foreign companies anywhere in the world. For instance, a Chinese corporation might be under certain circumstances investigated for its foreign bribes paid in Nigeria by U.S. or U.K. authorities. This kind of enforcement is increasing.

However, the fight against foreign bribery is not anymore only about detection and active enforcement. It has been increasingly also about enforcement cooperation and coordination. Broad jurisdictional frameworks are necessary but they also imply many challenges such as determination of appropriate jurisdiction and existence of competing jurisdictional claims. For instance, Article 4 (3) of the Convention allows national enforcement authorities to use a wide discretion when it comes to determination of their "appropriate" jurisdiction. In this sense jurisdiction is complicated and politically sensitive issue.

Suggestions:

1. It might be useful to think about a harmonized standard of jurisdiction for all signatories and come up with "Good Jurisdictional Practices" guidelines. Such guidelines might provide examples of model bribery schemes and set a benchmark of what might be considered as "appropriate jurisdiction".

2. The OECD should evaluate how jurisdiction is used in practice. It is important because transnational enforcement activities raise the question whether they are prone to protectionist enforcement. Moreover, anti-bribery enforcement authorities are not known for their transparency and it is a challenge to obtain appropriate empirical data. For instance, why a corporation headquartered in Country X and listed in country Y is only investigated by Country Y's anti-bribery authorities? Such a review should also analyze why County X's authorities were or were not active and whether and how they cooperated in investigation.

3. The OECD should initiate establishment of an effective enforcement network with specific rules on coordination and cooperation between enforcement agencies. For instance, once an enforcement authority X concludes an investigation, it should disclose which other jurisdictions might have been relevant and why, whether it has asked them to cooperate and what was their response. It should be transparent whether contacted enforcement authorities were willing to cooperate and coordinate with other authorities and in case of failure, it should be made public.

4. In this context, it might be also useful to evaluate and rank enforcement authorities according to their willingness to coordinate and cooperate in enforcement. It is true that such ranking might bring tensions but it is necessary to initiate active discussion among enforcement authorities about foreign bribery cases and make the process more transparent.

5. It is important to activate small countries. Most importantly, it would be useful to specify what the role of small enforcers might be and how their jurisdiction might play the role. Even if they might not have capacity to lead big bribery cases, they might play a very important role in assisting big countries. See for instance good practices regarding Hewlett-Packard bribery case.

Topic 2: OECD and the EU Context

This year the EU Commission has released its first EU Anti-Corruption Report 2014 which also includes issues related to the OECD Anti-Bribery monitoring mechanism. Furthermore, also for instance the European Court of Auditors have sent a strong message that it will play an active role in the EU anti-corruption dialogue and further development of the EU anti-corruption policy.

The new report and the work of the EU Court of Auditors do not replicate the OECD reports, though they build upon its recommendations. It would be a good idea if the OECD for instance would initiate more cooperation with the EU in this emerging policy area and influence the process.

For instance, in the case of continued failure of certain EU Member States to adequately implement its obligations under the Convention, a special notification from the OECD to the EU Commission might increase a pressure and positively impact compliance with the Convention. Moreover, active participation on these EU-context anti-corruption processes might seriously increase the visibility of the WGB work.

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IBA (International Bar Association) Anti-Corruption Committee

Consultation Response to Phase 4 Monitoring of the OECD Anti-Bribery Convention

Introduction

The Anti-Corruption Committee of the International Bar Association (**IBA**) has formed a Working Group and would like to take this opportunity to make a submission on the Phase 4 monitoring processes to be considered under the OECD Anti-Bribery Convention.

The Working Group members are made up of experienced practitioners practicing in the areas of foreign bribery and anti-corruption compliance, investigation, prosecution and defence work. The spread of the Working Group covers experience in both the common law and civil law jurisdictions. You will find the names of the Working Group members listed at the end of the submission

This submission is made by the IBA on behalf of the IBA Anti-Corruption Committee. The comments made in this report are the personal opinions of the Working Group members and should not be taken as representing the views of their firms, employers or any other person or body of persons apart from the IBA Anti-Corruption Committee of which they are a member.

The IBA is the global voice of the legal profession and includes over 45,000 of the world's top lawyers and 197 Bar Associations and Law Societies worldwide. The IBA is registered with the OECD with number 1037 55828722666-53.

The IBA Anti-Corruption Committee has nearly 587 members from around the world, made up of anti-corruption lawyers (in private practice and in the public sector), academics, prosecutors, investigators, Judges and forensic accountants. This membership gives the Committee a unique opportunity to comment upon important policy initiatives that affect anti-bribery and anti-corruption laws, policies and how they are implemented.

OECD Anti-Bribery Convention

In 1999, the OECD published its Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions (the **Convention**).

Since that date, 41 member States of the OECD have taken steps to implement the Convention. Not all of the parties have taken steps to criminalise bribery of foreign public officials in international business transactions and to actively enforce that obligation by changes to domestic laws and to resource the robust investigation and enforcement of those laws in their relevant jurisdictions.

There are important Articles of the Convention to note, which in substance state that each party shall:

- take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or indirectly or through intermediaries, to a foreign public official in order that the official act or refrain from acting in relation to the performance of

official duties, in order to obtain or retain business or other improper advantage in the conduct of international business;[1]

- take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence;[2]

- take such measures to establish the liability of legal persons for the bribery of a foreign public official;[3]

- take steps to make the bribery of a foreign public official punishable by effective, proportionate and dissuasive criminal penalties, and in the case of natural persons, shall include deprivation of liberty sufficient to enable effective mutual legal assistance and extradition;[4]

- take such measures to provide that the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to such proceeds, are subject to seizure and confiscation;[5]

- take such steps to ensure its jurisdiction is effective against the bribery of foreign public officials;[6] and

- the investigation and prosecution of the bribery of a foreign public official shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.[7]

Compliance with the Convention is monitored through an ongoing system of peer reviews which are carried out by the OECD's Working Group on Bribery (**WGB**).

To date, there has been 3 Phases of monitoring which have applied a different focus:

- **Phase 1** – has evaluated the adequacy of a country's legislation to implement the Convention.

- **Phase 2** – has assessed whether a country is applying its legislation effectively.

- **Phase 3** – has focused on the enforcement of the laws in implementing the Convention and associated instruments.

Proposed Phase 4

The OECD and the WGB is now planning the next range of, Phase 4, evaluations. It is anticipated that the Phase 4 process will include contributions during the monitoring process from the private sector and civil society.

[1] Convention, Article 1(1).
[2] Convention, Article 1(2).
[3] Convention, Article 2.
[4] Convention, Article 3(1).
[5] Convention, Article 3(3).
[6] Convention, Article 4(4).
[7] Convention, Article 5.

The IBA Anti-Corruption Working Group is of the opinion that such contributions from the private sector and civil society are an essential part of the monitoring process. It is critical that the OECD and the WGB hear from as wide an audience as possible in determining and assessing compliance with the terms of the Convention. It is the Working Group's experience that while many countries appear quick to agree to and sign up to the Convention, in practice, they demonstrate a much greater reluctance to resource and fund their internal investigation agencies to proactively and robustly target foreign bribery transactions which can invariably involve very senior local public officials.

Questions for comment

The following questions proposed by the OECD on behalf of the WGB have been considered by the IBA Anti-Corruption Committee Working Group and the responses are set out below.

Question 1: Phase 4 will focus more closely on detection, enforcement, corporate liability and other major topics relevant to adequate implementation of the Convention's obligations. What in your view are the most relevant areas relating to bribery of foreign public officials which should be assessed?

IBA Anti-Corruption Committee Working Group Response

The Working Group considers that there are a number of key areas relating to the bribery of foreign public officials which should be assessed in terms of the bribery of foreign public officials.

In relation to the private sector, the critical issue within corporate organisations is the extent to which corporate governance measures exist and are proactively implemented in the business community. The Working Group considers the OECD should actively assess during the course of any Phase 4 review process the following:

- the role played by supervisory boards and/or boards of directors, any audit committees established by management or the board of directors and any boards of statutory auditors (for example, such as board or other similar statutory bodies that exist in Italy as those constituted as the *Organisimo di Vigilanza* under Italian law 231);

- the role of corporate compliance managers and officers who are individually, and collectively through their employment duties, responsible for overseeing and managing regulatory and compliance issues within companies;

- the role of external auditors and the role of any internal audit function; and

- the effectiveness of the exchange of information as between these parties.

In relation to the public sector, there are a range of important areas that the OECD should assess during the Phase 4 review process. These areas include:

- the resourcing, funding and expertise of public prosecutors in foreign bribery matters and the specialisation of any national agency dedicated in a particular jurisdiction to both investigate and prosecute foreign bribery matters;

- whether the prosecutions and investigations that are undertaken are implemented consistently with the terms of the Convention and that factors such as political considerations

or inter-State relationships do not sway or materially impact upon such investigators or prosecutions;

- the real and substantial independence of the judiciary, uninfluenced by any government, person, political party, interest group or entity;

- the effectiveness of co-operation as between various member State government agencies including exchanging meaningful mutual legal assistance;

- the effectiveness of how member States address the issue of double jeopardy in multi-jurisdictional investigations so potential defendants are not materially prejudiced;

- the consistency among member States regarding expectations for compliance programs, which can be a defence or a mitigation factor in an investigation or prosecution;

- the incentives, or lack of incentives, for companies and individuals to self-report potential foreign bribery offences and an assessment of the effectiveness of such incentives (and mechanisms) for the reporting of foreign bribery offences;

- the adequate level of protection for both public sector and private sector employees who blow the whistle on potential corruption and illegal conduct and, following the lead of the United States (under the whistle-blower bounty scheme under the *Exchange Act* administered by the Securities & Exchange Commission Office of the Whistle-blower), whether some form of merit-based remuneration system or scheme should be implemented to incentivise and reward whistle-blowers for disclosing illegal conduct rather than the more traditional attitude of penalising, demonising and ostracising whistle-blowers;

- the real adequacy of sanctions (fines, penalties, the disgorgement of profits and/or the restraint and forfeiture of the proceeds of crime) against both companies and individuals;

- the effective extension of criminal liability to corporate entities;

- the effective extent to which there should be corporate liability upon parent or holding companies for the conduct of either wholly owned, or partly (and if so to what extent) owned, subsidiaries of a parent or holding company for the criminal conduct of a subsidiary and/or the subsidiary's employees;

- the presence and/or effectiveness of ancillary sanctions, including bans from participating in public procurement tenders or other forms of self-publicised "naming and shaming" corporate entities; and

- whether there should exist under the criminal law in each member State to the Convention, an effective plea-bargaining system reflecting, for example, the United Kingdom Deferred Prosecution Agreement procedure which provides for a judicially-supervised process for the review and approval of effective plea-bargaining arrangements as between prosecutors on the one hand and corporate entities on the other hand[8]. If such a scheme is considered desirable in order to promote the ultimate disclosure and self-reporting of serious criminal offences (of which foreign bribery is one), the OECD should consider whether some other form of plea-bargain arrangements can or should be implemented as between prosecutors on

[8] *Crime and Courts Act 2013* (UK), Schedule 17.

the one hand and individual potential offenders on the other hand should be examined during the Phase 4 Reviews.

In relation to civil society issues, the IBA Anti-Corruption Committee Working Group considers that the key areas which should be addressed by the OECD during the Phase 4 Reviews should include:

- whether, and if so, to what extent there is real and genuine political will in a country the subject of a review to implement effective, robust and pro-active measures consistent with that State's obligations under the Convention;

- the presence of a real pro-active domestic culture of investigation and prosecution, in respect of company entities, directors and/or officers, companies of all conduct where credible allegations are made that a company or its controllers engaged in or condoned foreign bribery; and

- maintaining a role during the Review process of seeking contributions from non-government organisations who advocate pro-active and robust conduct towards targeting and combatting foreign bribery.

Issues Relating to Double Jeopardy

Double jeopardy is a fundamental principle of law.

The European *Convention on Human Rights* states as follows, in the Seventh Protocol)

> *No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he or she has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.*

State legislation may permit the reopening of a case in the event that new evidence is found or if there was a fundamental defect in the previous proceedings:

The question of how member States treat double jeopardy is a real and material issue facing companies and individuals in multi-jurisdictional investigations and prosecutions. There is a real risk that companies and individuals face investigation, prosecution and conviction in different countries for the same conduct.

While the double jeopardy principle is well recognised in many countries, the United States often refuses to accept it in circumstances where conduct occurred in a non-United States country and the United States regulators want to prosecute companies and individuals (under the extra-territorial reach of its laws) without regard to how another country, where the conduct occurred, responds to the conduct by way of investigation and prosecution.

While the Working Group understands that a member State needs to investigate and prosecute potential breaches of its own laws, a more uniform approach for multi-jurisdictional cases is required as companies and individuals run serious risks of being investigated and prosecuted and penalised twice for the same offence.

The IBA Anti-Corruption Working Group considers that the OECD should promote during the Phase 4 reviews a greater level of awareness of how the principle of double jeopardy operates in a

country under review and the willingness of member States to adopt a principled coordinated approach to its application.

The Role of National Interest in Foreign Bribery Investigations and Prosecutions

The Working Group is particularly concerned to ensure that where prosecutions occur, there is maximum transparency in the legal process, subject to appropriate protections to ensure that any individual (incorporated or a natural person) is presumed innocent until guilt is proved according to the requisite standard. There should be no role played by national governments in determining what is or is not made public in relation to a prosecution.

The Working Group has noted with concern at least two examples where the conduct of a Government raises serious questions about that Government's commitment to transparently investigate and prosecute foreign bribery cases.

Australia's only foreign bribery prosecution

Australia has had only one foreign bribery prosecution. It concerns allegations that two subsidiaries (Securency and Note Printing Australia) of Australia's central bank, the Reserve Bank of Australia and several executives, engaged in systematic conduct to secure very valuable banknote printing contracts from central banks across Asia and other parts of the world by the use of intermediaries bribing or offering to bribe high ranking foreign public officials in order to secure those contracts. The prosecution started in July 2011, over 3 years ago. Other than commencing the prosecution in a blaze of publicity, almost everything else associated with the prosecution has been suppressed from the public domain.

In June 2014, allegations were made against a range of leading Asian politicians that they were directly implicated in the banknote printing corruption scandal and the identity of the politicians was disclosed. With remarkable speed, the Australian Government moved to apply to the Supreme Court of Victoria to suppress the publication of any details in Australia by seeking Australia-wide suppression or non-disclosure orders. The application was made orally to the Court by the Australian Department of Foreign Affairs with an affidavit sworn by Gillian Bird, the recently appointed Australian ambassador to the United Nations. The details of the Court's orders and the identity of all politicians allegedly involved in giving or receiving bribes could not be published by any media outlet in Australia. It was however, published by WikiLeaks and circulated freely throughout Asia.

This, in the Working Group's opinion, has the potential to bring the administration of justice, in an open court system, into disrepute and it adds weight to the appearance that governments are seeking to protect other governments by suppressing information (clearly of great public interest), all in the name of an unstated "national security".

It very much appears that the Australian Government was acting to prevent the identity of the politicians being disclosed in Australia (but not throughout Asia) in circumstances which sit very uncomfortable with Australia's obligation under the Convention that any foreign bribery prosecution not be influenced by inter-State relations, national economic interests or the identity of anyone involved in such a case.

Turkey's December 2013 Government Bribery Scandal

In late December 2013, Turkish police arrested the sons of three cabinet ministers and at least 34 other persons. The detentions went to the heart of the Erdoğan administration and included leading

businessmen known to be close to the Government and officials said to be engaged in suspected corruption, bribery and tender-rigging. Turkish analysts saw the surprise wave of arrests as a strong sign of the worsening conflict between the Erdoğan government and his former allies, a movement of moderate Islamists lead by exiled cleric Fethullah Gülen.

According to Turkish media reports, the sons of the interior minister, the economics minister and the environment and city planning minister were among those detained. Other detainees included the head of the state-controlled Halkbank, the mayor of an Istanbul district considered to be a stronghold of the ruling party as well as the three construction sector tycoons, Ali Agaoglu, Osman Agca and Emrullah Turanli.

The IBA Anti-Corruption Committee Working Group understands that in response to these arrests and the public identification of leading politicians and businessmen involved in serious corruption, the Turkish Government sought to amend local laws, to move and allocate Judges and prosecutors to the cases and to commence investigations into the conduct of the police officers who had triggered the arrests.

Such conduct, whether it is true, is of great concern as it appears to demonstrate that a Convention signatory seeks to act with impunity when its own integrity is challenged rather than permitting the rule of law to take its course to determine the veracity of the allegations.

In addition, by a Government seeking to manipulate the judicial process, the very integrity of any independent system of justice is seriously called into question and can hardly be conduct consistent with the Convention.

Question 2: Phase 4 will take a more tailored approach, focusing more closely on the specific enforcement situation in each country. Are there any specific areas which, in your view, should be covered relating to the country's enforcement of its foreign bribery legislation under the Convention?

IBA Anti-Corruption Committee Working Group Response

In relation to the enforcement situation in a subject state under review, the Working Group considers that the issues identified under Question 1 apply equally in respect to the enforcement of foreign bribery laws. The Working Group considers that there are certain key criteria that should be assessed in relation to enforcement, which include the following:

- the resourcing, funding and expertise of public prosecutors in foreign bribery matters and the specialisation of any national agency dedicated in a particular jurisdiction to both investigate and prosecute foreign bribery matters;

- whether, and if so, to what extent there is real and genuine political will in a country the subject of a review to implement effective, robust and pro-active measures consistent with that State's obligations under the Convention; and

- transparent and open administration of justice in respect to criminal prosecutions, which has to balance the legitimate public interest in foreign bribery prosecutions being public, balanced against the right of an accused to be presumed innocent until found guilty and to be entitled to a fair trial.

In the Working Group's opinion, each country under review needs to be thoroughly assessed in terms of not what it says it will do but in fact what it does. For example, the OECD should carefully consider whether a country adequately funds and resources its corporate regulators or whether budget cuts and funding limitations play a real role in limiting the effective investigation and prosecution of foreign bribery cases. If that is the case, the OECD should encourage governments during the review process into committing adequate resources for the investigation and prosecution of foreign bribery cases consistent with the Convention and the recent commitment to address anti-corruption initiatives from the G20 meetings in Australia during November 2014.

Question 3: What steps would you recommend that the WGB consider in the case of continued failure of a country to adequately implement its obligations under the Convention?

IBA Anti-Corruption Committee Working Group Response

The Working Group considers that where a member State as a signatory to the Convention continues or fails to adequately implement its obligations under the Convention, and in particular, is seen to be either tardy in its response to previous OECD Reviews (under Phases 1 to 3 inclusive), the following steps should be adopted by the OECD. Those steps include:

- *publishing an updated response in relation to the country in default every 6 months on the* basis that such updated publications occur automatically unless the negligent country takes proactive steps to address any issues or topics on which it is in default;

- consideration be given to whether a defaulting State should be suspended from the OECD (with or without conditions) and whether a form of fine or penalty should be imposed as a condition of any suspension being lifted;

- publishing a "score" or "index" representing how different countries are implementing their obligations under the Convention[9];

- organise meetings with representatives of the relevant country in default to discuss what may or may not be the actual, real or perceived barriers to the implementation of the Convention obligations, and extend those meetings not just to formal government representatives, but to other interested parties (representatives of civil society, the legal profession, the accounting profession and the business community) in order to understand what in fact is happening in the negligent country and whether what the defaulting country representatives say is in fact the case rather than "a government line" being presented to the OECD;

- to set deadlines for the implementation and control of the progress made by each country at any expiring date and to publicise all steps or non-steps taken by a country; and

- to publicise all of the above on the OECD website.

In the IBA Anti-Corruption Committee Working Group's opinion, it is critical that there is constant pressure on governments to live up to their commitments to target foreign bribery. So often, it is the experience of private practitioners that many countries say a lot and do a lot less. This creates a real and damaging impression that foreign bribery is not important and sends completely the wrong signals to the business community and others engaged in international trade and commerce.

[9]A potential model for such an Index, the *Corruption Perception Index World Map* published by Transparency International is a good guide and is widely circulated.

Question 4: What would be the most beneficial and practical way for the private sector and civil society engagement in this next round of monitoring?

IBA Anti-Corruption Committee Working Group Response

Many members of the IBA's Anti-Corruption Committee have been involved in the pre-existing Phase 1 to 3 Reviews. The IBA Anti-Corruption Committee Working Group considers that the involvement of the private sector and civil society is essential in achieving a broad understanding of how, in real terms, the Convention's obligations are being implemented in a member State, and if they are not, the reasons for that non-implementation.

The IBA Anti-Corruption Committee Working Group strongly urges the OECD not to limit the process of monitoring purely to Government agencies and representatives which, in the Working Group members' experience, invariably results in a particular Government-sponsored point of view being presented to the OECD.

The Working Group considers that it is critical that non-government organisations, journalists, political parties, companies (both large and small) industry associations and private practitioners such as lawyers, forensic accountants, and academics be involved in face to face or video conference meetings during the Phase 4 Reviews so that practical ideas and issues as to the compliance or non-compliance of a State's obligations under the Convention can be discussed, debated and analysed. If it is necessary, consideration should be given to requiring a country under review to provide reasonable financial support for civil society organisations in order that they can participate in the review process in a meaningful manner.

Questions have arisen whether contributions from civil society should be held with the OECD Review Panel in confidence, with or without Government representatives present or in a form that permits some level of anonymity. The IBA Anti-Corruption Working Group is of the opinion that open and transparent dialogue should occur wherever possible. However, the Working Group recognises that in many countries, those who speak out against an incumbent government can face various forms of direct and indirect reprisals. The IBA Anti-Corruption Committee Working Group strongly recommends that where open and transparent dialogue during the review phase cannot occur, or do so would place an unacceptable risk on civil society participants, some level of private or confidential sessions be used by the OECD to ensure that civil society contributions can be effectively made to the review process.

Where possible, the OECD should encourage an open and frank dialogue between the Government agency representatives during the review process. It is the experiences of members of the IBA Anti-Corruption Committee that rarely do such agencies make themselves available for effective question and answer sessions with civil society. Rather, they often just sit in on civil society sessions and take notes. This creates, unintentionally, an appearance of secret sessions and Government views that cannot or will not be discussed with civil society representatives. While the Working Group recognises that they can be legitimate reasons for certain sensitive issues not to be canvassed in open forums, this should be limited where possible.

In addition, the Working Group strongly considers that when the OECD prepares any draft report or finding relevant to a country, copies of such draft reports be circulated on a strictly confidential and embargoed basis, to nominated civil society representatives to comment upon. This process will ensure that the OECD receives the widest, most-informed contributions to the question of the extent to which a country is really committed to the Convention.

Questions 5: How would you suggest that the WGB increase the visibility of its work?

IBA Anti-Corruption Committee Working Group Response

The Working Group considers that the OECD presently provides a considerable level of visibility and publicity in relation to its work in the arena of foreign bribery and anti-corruption initiatives. To the extent that the WGB can increase the visibility of its work, the IBA Anti-Corruption Committee Working Group recommends that the OECD consider the following:

- involving representatives from non-government organisations, companies, and private practitioners (lawyers and forensic accountants) working in the area of anti-corruption as guest or non-permanent members in some capacity as a part of the WGB to obtain their input on important questions of policy and ultimately, how that policy plays out in practice in the real commercial world;[10]

- the wide and broad dissemination of public reports in respect to each relevant State and its compliance or non-compliance with, or lack of commitment to, the Convention;

- media briefings targeted to each State as and when reports are made public;

- a dedicated section on the OECD's website focused on the WGB, its members, its functions, the type of work that it undertakes and links to its publications and initiatives; and

- an increased presence by the WGB in attending public functions and other professional associations to explain and discuss the work undertaken by the WGB, its targets and initiatives on foreign bribery work and engaging with the private sector and civil society.

Working Group Members:

- *Robert Wyld, Partner, Johnson & Slattery, Australia; Co-Chair, IBA Anti-Corruption Committee*
- *James Tillen, Partner, Miller & Chevalier, USA; Co-Chair IBA Anti-Corruption Committee*
- *Bruno Cova, Partner, Paul Hastings, Italy; Europe Regional Officer, IBA Anti-Corruption Committee*
- *Sevi Firat, Partner, Firat & Izui, Turkey; Membership Officer, IBA Anti-Corruption Committee*

[10] There can be appropriate restrictions on the disclosure of case sensitive information and matters concerning ongoing investigations.

ICC (International Chamber of Commerce) Netherlands

Public Consultation on Phase 4 Monitoring of the OECD Anti-Bribery Convention

1. Phase 4 will focus more closely on detection, enforcement, and corporate liability, and other major topics relevant to adequate implementation of the Convention's obligations. What in your view are the most relevant areas relating to bribery of foreign public officials which should be assessed?

- The OECD should focus more on prevention in the form of training and instruction of public and private personnel, and should actively support public-private partnerships in this area, in accordance with the *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transaction, 26 Nov. 2009*, recommendation III.i and the *G20 Anti-corruption Plan 2015-16* (private sector transparency and integrity). Training and instruction is becoming more relevant every day, especially in the context of increased focus on personal liability.

- A more holistic approach to anti-bribery is needed. Governments are encouraged to share best practices, for example on mitigating the risks of third parties (due diligence). The OECD should actively support collective action by governments and the private sector. Reference is made to the *G20 Anti-corruption Plan 2015-16* (international cooperation) and relevant recommendations of the B20 to the G20.

- Continuous attention is needed for the relevant areas formulated by the G20.

2. Phase 4 will take a more tailored approach, focusing more closely on the specific enforcement situation in each country. Are there any specific areas which, in your view, should be covered relating to the country's enforcement of its foreign bribery legislation under the Convention?

- Regarding enforcement, ne bis in idem (no double jeopardy) should be a leading principle in international practice. Prosecution of a legal entity of a corrupt action by an authority of one country should exclude prosecution addressing the same action by other national authorities. The OECD is encouraged to stress the importance of a 'clean slate' after prosecution (f.e. in the context of tenders).

- Exchange of best practices, in particular those regarding assessment of bribery risks will lead to more streamlined and consistent enforcement.

3. What steps would you recommend that the WGB consider in the case of continued failure of a country to adequately implement its obligations under the Convention?

- It is recommended to actively involve such countries in horizontal projects, exchange of information and formulation of best practices.

- Adequate reporting on areas of progress and concerns remains necessary.

4. What would be the most beneficial and practical way for the private sector and civil society engagement in this next round of monitoring?

- As mentioned, the private sector would be a valuable contributor to public-private cooperation in the field of training and instruction.

- With regard to the national assessment sessions, in order for the private sector to be able to actively engage and contribute, it is recommended to provide more insight in relevant documents and involved parties.

5. How would you suggest that the WGB increase the visibility of its work?

- Coordinate actions and more cooperation with other international forums like the UN, B20, G20 and EU.

- Social Media and Blog visibility.

Jones Day

Phase 4 Monitoring of the OECD Anti-Bribery Convention

Jones Day is a law firm with 41 offices across 19 countries; we advise corporations on preventing, identifying and resolving bribery and corruption in their business worldwide. We are pleased to provide the OECD Working Group on Bribery with the following submission on Phase 4 of the monitoring of states parties' compliance with the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention).[1]

In our view, Phase 4 should include focus on certain structural issues faced by corporations that are real obstacles to the effectiveness of the Anti-Bribery Convention. This submission has been prepared by Australian lawyers at Jones Day, drawing on our experience in that jurisdiction. Whether the views and recommendations expressed in this submission are relevant to other jurisdictions is a matter that no doubt the Working Group will take into consideration.

On the basis of the matters set out in this submission, Phase 4 should examine:

1. whether there is sufficient guidance to facilitate self-reporting of foreign bribery law violations, particularly by corporations. Phase 4 should examine whether prosecutors and regulators have sufficient alternative mechanisms for the enforcement of foreign bribery law beyond prosecution and, if not, consider whether Australia should implement such mechanisms;

2. whether enforcement actions by multiple government agencies within the same jurisdiction arising from substantively the same conduct can be resolved simultaneously and using enforcement mechanisms other than prosecution;

3. whether enforcement actions by agencies across multiple jurisdictions arising from substantively the same conduct or a pattern of conduct can be resolved simultaneously and using enforcement mechanisms other than prosecution;

4. whether there is clarity around how suspected foreign bribery should be reported to multiple agencies within the same jurisdiction, and whether it would be desirable for one agency within the jurisdiction to be formally nominated as a "single point of contact" for reports of suspected foreign bribery;

5. whether persons seeking to report suspected foreign bribery (including persons located outside the jurisdiction of the agency receiving the report or a person who wishes to report suspected offences in multiple jurisdictions) have adequate guidance;

6. whether foreign bribery whistleblowers (including whistleblowers located outside the jurisdiction of the agency receiving the report) are adequately guided, encouraged and/or protected; and

[1] This submission does not constitute legal advice to any person or the representation of any person. Jones Day accepts no liability for any reliance placed upon the submission by any person for any purpose. The intellectual property rights of documents cited below remain with their authors and/or publishers, as applicable. Jones Day retains any and all intellectual property rights in relation to this submission but permits the OCED Working Group on Bribery to publish the submission for purposes connected to its review of country compliance under the Anti-Bribery Convention. The opinions of the authors are not necessarily the views of Jones Day. The opinions contained within documents cited below are not necessarily those of the authors or Jones Day.

7. whether there is sufficient prosecutorial guidance on key concepts of corporate criminal liability in the context of foreign bribery law.

We explain our recommendations in our submission below.

1. Foreign bribery and underenforcement of foreign bribery law is a concern for the Australian business community

The detrimental effect of foreign bribery[2] on markets is well-known and need not be repeated here. However, the issue of foreign bribery is possibly more important for Australian businesses than for those in many other OECD states. While Australia is not seen[3] as a jurisdiction with a high degree of domestic corruption[4] and Australian companies are seen as less likely to pay bribes to foreign officials than those from other jurisdictions,[5]5 Australia's geographic position and small domestic market means that many Australian businesses are highly active in markets that bear a relatively high risk of bribery and corruption. For example, 40.8%[6] of Australian exports in 2013 were to markets that scored 50 or lower on Transparency International's Corruption Perception Index.[7]

2. The Anti-Bribery Convention and the relevant Australian foreign bribery law

In October 2012, the Working Group on Bribery published findings on the third phase[8] of its review of Australia's implementation of the Anti-Bribery Convention. The Working Group on

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[2] Unless otherwise specified below, "foreign bribery" refers to the bribery of foreign public officials to retain or obtain a business advantage in the course of international business transactions i.e. the subject of the Anti-Bribery Convention.

[3] See Simon Bronitt, 'Policing corruption and corporations in Australia: Towards a new national agenda' (2013) 37 Criminal Law Journal 283. Bronitt argues that "public opinion and perceptions about levels of corruption are not necessarily the best guide for the development of government or legal policy in this field. Like family violence and institutional sexual abuse, offending behaviour in relation to corruption has often been either hidden from view or 'normalised' in the communities". He also perceives "clear signs of a growing public anxiety about corruption in Australia"

[4] See Transparency International, 'Corruption Perceptions Index 2013' (Research Report, 3 December 2013), Transparency International, 'Corruption Perceptions Index 2012' (Research Report, 5 December 2012), Transparency International, 'Corruption Perceptions Index 2011' (Research Report, 1 December 2011), Transparency International, 'Corruption Perceptions Index 2010' (Research Report, 30 September 2010). The authors' anecdotal observation is supported by the results of Transparency International's *Corruption Perception Index*, which has consistently identified Australia as a country in which the public sector has a low degree of corruption. Of the 150+ countries surveyed, Australia placed 9th in 2013, 7th in 2012, 8th in 2011, 8th in 2010 etc. It is possible that Australia's ranking will worsen in the forthcoming 2014 survey, as domestic perceptions of corruption may be affected by a string of high-profile investigations of politicians and civil servants.

[5] See Transparency International, 'Bribe Payers Index 2011' (Research Report, 2 November 2011); Transparency International, 'Bribe Payers Index 2008' (Research Report, 29 February 2008), Transparency International, 'Bribe Payers Index 2006' (Research Report, 4 October 2006). Transparency International publishes the Bribe Payers Index. It ranks countries according to "the perceived likelihood of companies from these countries to pay bribes abroad. It is based on the views of business executives". Australia ranked 8th out of 24 in 2011, 8th of 22 in 2008 and 3rd of 30 in 2006.

[6] Department of Foreign Affairs and Trade, 'The APEC Region Trade and Investment 2014' (Research Report, Australian Government, 24 October 2014).

[7] See Transparency International, 'Corruption Perceptions Index 2013' (Research Report, 3 December 2013). The relevant export markets, their share of Australian exports and their ranking on Transparency International's Corruption Perception Index in 2013 are as follows: China (31.8%, 40), Indonesia (2%, 32), Malaysia (2.3%, 50), Mexico (0.1%, 34), Papua New Guinea (0.9%, 25), Philippines (0.6%, 36), Russia (0.3%, 28), Thailand (1.8%, 35) and Vietnam (1%, 31).

[8] Working Group on Bribery reports summarising review were: *Review of Implementation of the Convention and 1997 Recommendation*, December 1999, which focused on Australia's legislative obligations under the Anti-Bribery Convention (Phase 1 Australia Report); *Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions*, January 2006, which focused on sanctions for foreign bribery offences, communication between domestic agencies on foreign bribery matters, and communication between Australian and foreign agencies on foreign bribery matters (Phase 2 Australia Report); *Follow-Up Report on the Implementation of the Phase 2 Recommendations*

Bribery expressed "serious concerns that overall enforcement of the foreign bribery offence to date has been extremely low" in Australia.[9] The underlying report identified issues around corporate criminal liability, co-operation between the Australian Securities and Investments Commission (ASIC) and the Australian Federal Police (AFP), resourcing of the Commonwealth Department of Public Prosecutions (CDPP), sanctions upon conviction of foreign bribery offences, the status of facilitation payments, the obligations on public agencies to report foreign bribery, and the protection of whistleblowers that were likely responsible for under-enforcement of Australian foreign bribery law, and made recommendations for their correction.

While we do not disagree with those recommendations, we do not consider them adequate to explain the under-enforcement of foreign bribery law in Australia. In our view there are significant structural issues faced by corporations that inhibit the effectiveness of detection of foreign bribery by Australian law enforcement agencies, the enforcement of foreign bribery law by Australian prosecutors and, ultimately, reducing the incidence of Australian citizens and corporations engaging in foreign bribery.

For reasons we articulate below, we recommend that Phase 4 should focus on engagement with the private sector to raise detection of foreign bribery and improve enforcement of foreign bribery law. That focus is consistent with the conclusion of the OECD that "[e]ngagement with the private sector is … key to preventing and detecting foreign bribery"[10] and the conclusion of the G20 that "governments cannot fight corruption alone, and the private sector is an essential partner in helping us to achieve our anti-corruption goals."[11]

3. Lack of guidance and encouragement for self-reporting by corporations inhibits detection of foreign bribery

3.1. Self-reporting by corporations results in increased detection of foreign bribery

Corporations *are* by far the most important actors in international business transactions. If the Anti-Bribery Convention and Australia's foreign bribery law is to have a meaningful impact, it must be enforced: "a thorough enforcement of the criminal law against corporate offenders, where appropriate, will have a deterrent effect, protect the public and support ethical business practices".[12] However, the concept of enforcement should extend to self-enforcement by corporations. That is, corporations which do not condone foreign bribery but nonetheless discover that its employees or officers have acted corruptly should be encouraged not only to stop the conduct but also to bring it to the attention of the appropriate regulators.

Responsible corporations (and the boards that are ultimately responsible for their conduct), having discovered potentially illegitimate conduct within its ranks, are faced with the difficult decision of whether or not to voluntarily report that conduct to the relevant regulators. To the

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Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Revised Recommendation on Combating Bribery in International Business Transactions; and the *Phase 3 Report on Implementing the OECD Anti-Bribery Convention In Australia,* October 2012 (Phase 3 Australia Report). All documents last accessed online on 28 November 2014.

[9] Phase 3 Australia Report.

[10] G20 Anti-Corruption Working Group, 'Enforcement of Foreign Bribery Offences: G20 ACWG Note prepared by the OECD' (Note, G20, 23 October 2014) 3.

[11] G20 Anti-Corruption Working Group, '2015-2016 G20 Anti-Corruption Action Plan' (Report, G20, 15 November 2014) 2.

[12] Serious Fraud Office, 'Joint Guidance on Corporate Prosecutions' (Media Release, 12 November 2009) para 7 cited in Polly Sprenger, *Deferred Prosecution Agreements: the law and practice of negotiated criminal penalties* (Thomson Reuters, 2014).

extent that self-reporting provides law enforcement agencies with information and evidence on foreign bribery that they would not otherwise have obtained, it is to be regarded as a valuable tool in the detection of foreign bribery.

The importance of self-reporting by corporations was recognised by the OECD when it stated that "[i]n certain countries, a large number of [prosecution] cases have come about as a result of companies voluntarily self-reporting."[13] It is for that reason that the G20 has committed to "examining best practices for encouraging businesses to … self-report breaches of corruption laws."[14]

While we note that a number of Australian corporations have self-reported suspected foreign bribery to the AFP, and the AFP is known to have commenced a number of investigations in response to those self-reports,[15] we can only speculate as to whether these instances of self-reporting represent the majority of instances of where a corporation has uncovered suspected foreign bribery or whether they are merely the tip of the iceberg.

3.2. Self-reporting corporations do not receive guidance or support in Australia

Despite the detection benefits of self-reporting, corporations self-reporting to Australian authorities do so in the absence of any clear guidance on how to self-report and any indication that self-reporting can result in less harsh treatment by law enforcement agencies and prosecutors.

The AFP has previously informed the OECD that it does not investigate instances of self-reported foreign bribery differently from other instances: "the AFP stated that 'standard procedures' for investigations are followed when it receives reports of foreign bribery from companies, and that it expects the 'full co-operation of companies".[16]

The AFP's advice on reporting suspected foreign bribery does not contain specific directions for self-reporting corporations and states merely that "it is incumbent upon all Australian citizens to do their part to report foreign bribery when it is discovered".[17] The Attorney-General's Department states that "companies that discover evidence or strong suspicions of foreign bribery and do not report it may face increased liability for maintaining a corporate culture that tolerates bribery."[18] That liability would be determined by sentence in the event of conviction.

As an investigative agency, the AFP is unable to negotiate resolutions for self-reporting corporations,[19] but it may refer matters to the CDPP for prosecution. The CDPP has recognised that "[i]n cases of commercial fraud or white collar crime often the referring agency will be in a unique position to provide an insight into the regulatory effect of the proposed prosecution and how it will

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[13] G20 Anti-Corruption Working Group, 'Enforcement of Foreign Bribery Offences: G20 ACWG Note prepared by the OECD' (Note, G20, 23 October 2014) 4.
[14] G20 Anti-Corruption Working Group, '2015-2016 G20 Anti-Corruption Action Plan' (Report, G20, 15 November 2014).
[15] See Vanessa Rees, 'RE: Response to allegations in newspaper articles in Fairfax media' (Media Release, 3 October 2013). For example, Leighton Holdings self-reported certain conduct in Iraq to the AFP. Self-reports and investigations by the AFP are not generally a matter of public record. However, as a company listed on the ASX, Leighton Holdings publicly acknowledged a self-report and investigation in a formal market announcement:
[16] Phase 3 Australia Report at p.29.
[17] "Foreign Bribery", published July 2014 by the Australian Federal Police, last accessed online on 19 November 2014.
[18] Attorney-General's Department, 'Fact Sheet 3: How to Report Suspected Foreign Bribery' (Fact Sheet, Australian Government, 21 January 2013) 2.
[19] Herbert Smith Freehills, 'AFP gives insight into Australia's foreign bribery laws, including on gifts, hospitality and facilitation payments' (Media Release, 13 July 2012).

impact upon the market and its perception of the alleged conduct"[20] – but there is no formal guidance from the AFP on how self-reporting and co-operation by a corporation would affect the enforcement opinions it might express to the CDPP.

3.3. Prosecutors have viable alternatives to prosecution of self-reporting corporations

The OECD has previously stated that "[e]nforcement is only effective if sanctions are actually imposed on perpetrators" but also that sanctions "can be imposed in a variety of ways, including through the course of a court trial, or by agreements between the prosecution authorities and the defendants … negotiated settlements have permitted the imposition of serious monetary sanctions, especially against companies … Such mechanisms can be very effective for resolving foreign bribery enforcement actions."[21]

Consequently, some jurisdictions have provided prosecutors with enforcement mechanisms in addition to prosecution and provided corporations with clear guidelines on how they can access those mechanisms if they self-report. Examples of this include:

- In the **United States,** one of the few jurisdictions evidencing "active enforcement" of foreign bribery law,[22] corporations self-reporting suspected foreign bribery may benefit from prosecutorial and regulatory discretion in deciding whether charges should be brought, the seriousness of those charges and how those charges should be resolved.[23] In particular, the "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate" with prosecutors are factors to be considered by Department of Justice (DoJ) prosecutors in determining "the proper treatment of a corporate target",[24] including whether the corporation should be allowed to conclude a Non-Prosecution Agreement or Deferred Prosecution Agreement. A similar policy exists within the Securities and Exchange Commission (SEC) in respect of negotiated settlements. Prosecutors' and regulators' guidance on and encouragement of self-reporting is freely published.

- Similar policies and guidance exist in the **United Kingdom,** which also evidences "active enforcement" of foreign bribery law,[25] where self-reporting corporations may be better placed to resolve charges through Deferred Prosecution Agreements. The Serious Fraud Office (SFO) and the Director of Public Prosecutions (DPP) (as respective lead investigative and prosecutorial agencies for foreign bribery) have jointly adopted prosecutorial guidelines that identify "genuinely proactive … self-reporting"[26] as a public interest factor militating against prosecution of the corporation. This applies to corporate

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[20] D Bugg, 'Current issues in civil and criminal litigation arising from the regulation of commerce and public authorities in Australia: the interplay between civil penalties and criminal penalties in Australian regulation' (Speech delivered at the Law Summer School, The Law Society of Western Australia, 24 February 2006).

[21] G20 Anti-Corruption Working Group, 'Enforcement of Foreign Bribery Offences: G20 ACWG Note prepared by the OECD' (Note, G20, 23 October 2014) 8.

[22] Transparency International, 'Exporting Corruption: Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery' (Report, 23 October 2014) 5.

[23] Sion Richards, Sheila L Shadmand, Hank B Walther and Peter J Wang, 'International Investigations: Global Anti-Corruption Summary' (Jones Day, 26 November 2014) 4-5.

[24] Department of Justice, 'Principles of Federal Prosecution of Business Organizations' (Report, 28 August 2008) 9.28-300.

[25] Transparency International, 'Exporting Corruption: Progress Report 2014: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery' (Report, 23 October 2014) 5.

[26] Serious Fraud Office, 'Guidance on Corporate Prosecution' (Media Release, 12 November 2009.

prosecutions generally and specifically for foreign bribery offences.[27] The SFO publishes detailed guidance on self-reporting and how corporations should self-report.[28]

- In **Australia,** no formal alternatives to traditional enforcement exist for foreign bribery offences, but such a concept is not alien to regulatory enforcement proceedings: corporations self-reporting criminal cartel conduct (which carries broadly similar penalties to those for foreign bribery)[29] may be entitled to full civil and criminal immunity if they are the first member of the cartel to self-report, or leniency in enforcement and penalties if they are a second or subsequent member of the cartel to self-report. The Australian Competition and Consumer Commission's *Immunity and cooperation policy for cartel conduct*[30] details its policy and the conditionality of immunity and leniency on "full, frank and truthful disclosure" by the corporation. The CDPP makes provision for recognition of the ACCC's policy in its *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*[31] (the Commonwealth Prosecution Policy).

3.4. Corporations do not have clear guidance or encouragement to self report foreign bribery

In contrast to the practices detailed in 3.3, corporations do not have clear guidance or encouragement to self report suspected foreign bribery in Australia.

There is no official guidance to corporations as to how self-reporting of foreign bribery offences should be conducted. There are no published, formal guidelines as to how self-reporting of suspected foreign bribery should affect the investigation process or the use of prosecutorial discretion.

The Commonwealth Prosecution Policy applies to all federal criminal prosecutions: there is no specific discussion of foreign bribery offences aside from a note that refers to Article 5 of the Anti-Bribery Convention. Neither does the Commonwealth Prosecution Policy contain useful guidance on the prosecution of self-reporting persons or the prosecution of corporations.[32]

The Commonwealth Prosecution Policy anticipates that a prosecutor could decide prosecution of a corporation self-reporting criminal conduct might not be in the public interest, considering *inter alia* "the need to give effect to regulatory or punitive imperatives … the availability and efficacy of any alternatives to prosecution … [and] the adequacy in achieving any regulatory or punitive

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[27] Serious Fraud Office, 'Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions' (Media Release, 9 October 2014).

[28] Serious Fraud Office *Corporate self-reporting* (9October 2012).

[29] See Jones Day, 'Jones Day Commentary: Cartel Leniency in the Asia-Pacific Region' (Report, May 2012). Participation in a cartel is subject to both civil prohibition and criminal sanctions. Individuals can be punished by imprisonment of up to 10 years and/or fines of up to AUD 220 000 per contravention (c. USD 191 000). In addition, under the civil prohibition, individuals may be imposed a penalty of up to AUD 500 000 per contravention (c. USD 435 000). For corporations, the fine for each contravention (whether criminal or civil) may not exceed the greater of (i) AUD 10 million (c. USD 8.7 million), (ii) three times the total value of the benefits obtained as a result of the cartel, or (iii) where those benefits cannot be fully determined, 10 percent of the corporate group's annual turnover in the 12-month period when the offence/contravention applied.

[30] Australian Competition & Consumer Commission, 'ACCC immunity and cooperation policy for cartel conduct' (Policy Document, September 2014).

[31] Commonwealth Director of Public Prosecutions, 'Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process' (Policy Paper, 9 September 2014).http://www.cdpp.gov.au/wp-contenUuploads/Prosecution-Policy-of-the-Commonwealth.pdf

[32] Except for discrete aspects relating to the prosecution of corporations in the context of ACCC immunity discussed above.

imperatives, of relevant civil penalty proceedings".[33] However, unlike for cartel and workplace safety offences, there are no articulated formal alternative enforcement mechanisms for foreign bribery offences. In the light of a punitive imperative to enforcing foreign bribery law, it is by no means certain that a prosecutor would decline to prosecute a corporation as a result of its self-reporting.

Consequently, if the CDPP has sufficient evidence (perhaps voluntarily provided by the corporation itself) to justify a prosecution of the corporation, the prosecutor has a binary decision: commence a (potentially expensive, long and risky) prosecution or decline a prosecution (and miss an opportunity to achieve restitution, deterrence and enforcement of the law).

3.5. Uncertainty over self-reporting decreases detection and enforcement of antibribery law

As is apparent from the discussion above, a corporation that discovers foreign bribery in its operations understands that if it self-reports that conduct to the AFP, the AFP will conduct an investigation in the same way as any other investigation. That investigation is likely to result in significant cost and disruption to the corporation. The corporation also knows, or should expect, that if it self-reports and fully cooperates, the AFP is likely to be able to collate a brief to the CDPP which can be expected to prosecute the corporation. The process will be long, disruptive, expensive and with an uncertain outcome. It will likely also result in significant reputational harm. All these factors might be expected to disincline even the most scrupulous of corporations from self-reporting.

The OECD has concluded that "uncertainty as to the benefits of self-reporting may cause corporations to question the value of voluntary disclosures".[34] We believe that corporations encounter serious uncertainty about the benefits of self-reporting, and that those inhibitions to self-reporting are a major obstacle to the detection of foreign bribery and the enforcement of foreign bribery law in Australia.

We further note that the AFP itself has stated it "supports exploring the adoption of a "negotiated settlement" regime similar to that which exists in the UK and the US whereby co-operative offenders will be subject to civil penalty action (rather than criminal prosecution) with lower pecuniary penalties where they self-report corruption. The introduction of negotiated settlements in the US has encouraged self reporting of corruption and over time reduced the incidence of foreign bribery."[35] Similarly, the OECD has previously concluded the likelihood of self-reporting is closely connected to the availability of alternative enforcement mechanisms: "voluntary disclosures can occur in countries where negotiated settlements are possible, and/or where such disclosure may impact the level and type of sanction imposed on the company."[36]

Finally, we note the recommendations of the Phase 3 Australia Report that Australia should "develop a clear framework" around prosecutorial discretion to facilitate self-reporting.

Recommendation 1: Phase 4 should examine whether there is sufficient guidance to facilitate self-reporting of foreign bribery law violations, particularly by corporations. Phase 4 should examine

[33] Commonwealth Director of Public Prosecutions, 'Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process' (Policy Paper, 9 September 2014) 2.10.
[34] G20 Anti-Corruption Working Group, 'Enforcement of Foreign Bribery Offences: G20 ACWGNote preparedby theOECD' (Note,G20, 23October 2014) 4.
[35] "Division 70 of the Criminal Code Act 1995: Foreign Bribery offence- AFP view", undated, last accessed online on 25 November 2014.
[36] G20 Anti-Corruption Working Group, 'Enforcement of Foreign Bribery Offences: G20 ACWGNotepreparedby theOECD' (Note, G20, 23 October 2014) 4.

whether prosecutors and regulators have sufficient alternative mechanisms for the enforcement of foreign bribery law beyond prosecution and, if not, consider whether Australia should implement such mechanisms.

3.6. Resolution of enforcement actions by multiple Australian agencies

As stated above, there is little scope for self-reporting corporations to achieve non-prosecution resolution of foreign bribery offences in Australia. Consequently, it is also difficult for self-reporting corporations to resolve foreign bribery law enforcement actions in parallel with enforcement actions of other government agencies in the same jurisdiction, even if those actions arise from substantively the same conduct. As noted above at 4, it is not uncommon for the same conduct to potentially be the subject of investigation and enforcement by law enforcement, the corporate regulator and tax authorities. We note that in the United States, the DoJ and SEC have a history of co-operating with self-reporting corporations to simultaneously resolve breaches of laws under the respective agencies' jurisdiction.

Recommendation 2: Phase 4 should examine whether enforcement actions by multiple government agencies within the same jurisdiction arising from substantively the same conduct can be resolved simultaneously and using enforcement mechanisms other than prosecution.

3.7. Enforcement actions by Australian and foreign agencies

As stated above, there is little scope for self-reporting corporations to achieve non-prosecution resolution of foreign bribery offences in Australia. Consequently, it is also difficult for self-reporting corporations to resolve Australian foreign bribery law enforcement actions in parallel with foreign bribery law enforcement actions in other jurisdictions, even if those actions arise from substantively the same conduct.

As noted above at 5, it is often feasible for foreign bribery to be prosecuted under the laws of several countries. We note that the OECD has previously stated "in case of multiple jurisdictions over the same alleged acts of foreign bribery, consultations should be carried out, when appropriate, between the relevant jurisdictions, during the investigation, prosecution and sanctioning phases of the case, and in conformity with the relevant countries' legal systems. Investigations should be coordinated as early in the process as is feasible".[37] We further note that where multiple states parties' jurisdiction is enlivened, article 4(3) of the Anti-Bribery Convention makes provision for consultation between the states parties to determine the most appropriate jurisdiction for prosecution. Those are useful tools for prosecutors, but they do not comprehensively:

a) address the use of enforcement measures other than prosecution; or

b) address issues that arise when a person engages in "a systematic practice of paying bribes to foreign government officials to obtain business"[38] across multiple jurisdictions, such that no one instance is subject to multiple jurisdiction but it would be desirable for a single global resolution.

[37] G20 Working Group, 'G20 Guiding Principles on Enforcement of the Foreign Bribery Offence' (Report, G20 Secretariat, 2013) 2.
[38] See "Complaint", US *Securities and Exchange Commission v Siemens Aktiengesellschaft*, 1:08-cv-02167, filed on 12 December 2008.

We note that multijurisdictional resolutions have taken place between countries that have a higher rate of enforcement of foreign bribery law than Australia. For example, in 2008, Siemens AG resolved parallel enforcement actions in the US and Germany arising from substantively the same conduct.[39] Similarly, in 2010 lnnospec Inc resolved parallel enforcement actions in the US and UK arising from substantively the same conduct;[40] we note that resolution occurred prior to the introduction of Deferred Prosecution Agreements in the UK, so the absence of such formal mechanisms does not mean multijurisdictional resolution is impossible.

Recommendation 3: Phase 4 should examine whether enforcement actions by agencies across multiple jurisdictions arising from substantively the same conduct or a pattern of conduct can be resolved simultaneously and using enforcement mechanisms other than prosecution.

4. Uncertainty around multi-agency reporting of suspected bribery inhibits detection of foreign bribery

Article IX of the 2009 Anti-Bribery Recommendation recommends parties have "easily accessible channels … for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities". These channels are generally in place and accessible for persons wishing to report suspected foreign bribery from within Australia. For example, the crime prevention website of the federal Attorney-General's Department provides basic information on foreign bribery law and explains how suspected foreign bribery can be reported to the AFP.[41] Reports may be made to the AFP via an online form, by telephone or by letter. Anonymous reports may be made to the AFP via Crimestoppers, an external organisation.

However, in practice, foreign bribery schemes often involve breaches of multiple laws administered by different government agencies within the same jurisdiction. For example, in the case of an Australian company director who misrepresents the nature of an agent's invoice so that a bribe can be paid to a foreign public official (a common corruption scenario):

a) the bribery of a foreign official could be investigated by the AFP[42] as a breach of section 70.2 of the federal *Criminal Code;*

b) the misrepresentation of the invoice could be an offence under state law, which is ordinary investigated by state police (cf. *R v Ellery*,[43] where a director who described an invoice relating to corrupt payments as actually being for "marketing and promotional expenses" pled guilty to a charge of false accounting under Victorian law);

c) the director's failure to discharge his or her duties with reasonable care and diligence could be investigated by the Australian Securities and Investments Commission as an offence under s180(1) of the *Corporations Act 2001* (cf. *ASIC v*

[39] The SEC alleged, and Siemens did not deny, that Siemens had bribed officials in Venezuela, Israel, Mexico, Bangladesh, Argentina, Vietnam, China, and Russia to obtain business on thousands of occasions. The misconduct allegedly involved "employees at all levels".
[40] See Serious Fraud Office, 'Four Sentenced for role in lnnospec corruption' (Media Release, 4 August 2014). The SEC alleged, and lnnospec did not deny, that lnnospec had bribed officials in Indonesia and Iraq to obtain business. Four individuals associated with lnnospec were subsequently found to have bribed officials in Indonesia and/or Iraq, and they received custodial sentences ranging from 16 months (suspended) to four years.
[41] See Attorney-General's Department, *Bribery of foreign public officials* (12 January 2014).
[42] "Foreign Bribery", published July 2014 by the Australian Federal Police, last accessed online on 19 November 2014.
[43] *R v Ellery* [2012] VSC 349.

Lindberg,[44] where a director failed to prevent his company paying bribes via sham contracts); and

d) the treatment of the invoice as a legitimate tax-deductible business outgoing could be investigated by the Australian Tax Office as a contravention of s26.52 of the *Income Tax Assessment Act 1997*.[45]

It is unclear whether the same conduct can or should be reported to all three of those agencies. Moreover, each agency receives reports in a different way and has a different focus. In the context of Australia, where there is a "plethora of regulatory agencies"[46] nominally engaged in antibribery work, this is a particular weakness. We note here the previous conclusion of the OECD that "inter-agency communication and cooperation has often been key to effective enforcement" of foreign bribery law.[47]

ASIC and the AFP have signed a Memorandum of Understanding[48] that foreshadows the AFP will generally take the lead in foreign bribery matters and that each agency may inform the other of a foreign bribery report "where it can reasonably be expected that the jurisdiction of both [agencies] will be engaged". However, this does not clarify whether a report of suspected foreign bribery to one agency competent to investigate the conduct serves as a report to all of those agencies, or whether a corporation that suspects its employees or officers have engaged in conduct that might contravene any number of legislative provisions (civil and criminal) should report the conduct to all relevant regulators and face a barrage of regulatory action – an undesirable outcome for a responsible corporation.

Recommendation 4: Phase 4 should examine whether there is clarity around how suspected foreign bribery should be reported to multiple agencies within the same jurisdiction, and whether it would be desirable for one agency within the jurisdiction to be formally nominated as a "single point of contact" for reports of suspected foreign bribery.

5. Uncertainty around interjurisdictional and multijurisdictional reporting inhibits detection of foreign bribery

Although law enforcement agencies in Australia make information available on how to report foreign bribery within Australia, and in principle reports can be made to AFP officers based outside Australia, there is little substantive guidance for persons wishing to make reports to the AFP from outside Australia or in languages other than English. To the extent that foreign bribery will almost always involve conduct outside Australia and persons who do not speak English, this may inhibit the AFP receiving reports of suspected breaches of Australian foreign bribery law.

Equally, there is little guidance for persons located outside Australia who do not wish to report suspected foreign bribery via competent organs in their own jurisdiction because e.g. they do not expect their response to be effective or because they fear reprisal. To the extent that foreign

[44] *Australian Securities & Investments Commission v Lindberg* [2012] VSC 332.
[45] Australian Taxation Office, *Tax Office guidelines for understanding and dealing with the bribery of Australian and foreign public officials*, (2 July 2013).
[46] Simon Bronitt, 'Policing corruption and corporations in Australia: Towards a new national agenda' (2013) 37 Criminal Law Journal 283, 291.
[47] G20 Anti-Corruption Working Group, 'Enforcement of Foreign Bribery Offences: G20 ACWG Note prepared by the OECD' (Note, G20, 23 October 2014) 3.
[48] 'Memorandum of Understanding between the Australian Federal Police and Australian Securities and Investments Commission on collaborative working arrangements', signed in October 2013.

bribery often occurs in jurisdictions where the rule of law does not prevail or whistleblowers are poorly protected, this may inhibit the AFP receiving reports of suspected breaches of Australian foreign bribery law.

This dilemma applies a fortiori to reports of suspected foreign bribery where the same conduct may be an offence in multiple jurisdictions e.g. where a US corporation uses an Australian subsidiary to make corrupt payments to public officials in Mali.[49] Similarly, multiple jurisdictions will often be enlivened because "international business transactions are increasingly being conducted via joint ventures and consortiums" in which parties originate in different states.[50]

If a report is successfully made to the AFP, it is unclear whether the AFP can, will or should communicate that report to counterparts e.g. in the US and Mali. We note that the G20 recently underscored[51] the importance of a multilateral approach to foreign bribery and related issues.[52]

Recommendation 5: Phase 4 should examine whether persons seeking to report suspected foreign bribery (including persons located outside the jurisdiction of the agency receiving the report or a person who wishes to report suspected offences in multiple jurisdictions) have adequate guidance.

6. Inadequate whistleblower protection inhibits detection of foreign bribery

6.1. Whistleblowing is an important method of detecting foreign bribery

Promoting reporting from within corporations must be a core component of state parties' (and corporations) anticorruption strategy. While accurate long term figures for foreign bribery specifically are unavailable, it is estimated that c.42%[53] of occupational frauds (including foreign bribery)[54] of discovered by corporations are discovered following tips from employees, shareholders etc. Only in 2.2% of cases were corporations alerted to occupational frauds by law enforcement agencies acting independently. It is for these and other reasons that the OECD has previously concluded that "there is generally a correlation between high levels of enforcement and the existence and effectiveness of whistleblower legislation."[55]

However, prospective whistleblowers will be deterred[56] from reporting suspected foreign bribery if they fear retaliation, harassment or other adverse action from their employers.[57] We note that

[49] U.S. Securities and Exchange Commission, 'SEC Charges Texas-Based Laybe Christensen Company with FCPA Violations' (Media Release, 27 October 2014).
[50] G20 Anti-Corruption Working Group, 'Enforcement of Foreign Bribery Offences: G20 ACWG Note prepared by the OECD' (Note, G20, 23 October 2014) 5.
[51] G20, 'G20 Leaders' Communique Brisbane Summit, 15-16 November 2014' (Policy Paper, G20 Secretariat, 16 November 2014). "G20 Leaders' Communique Brisbane Summit, 15-16 November 2014", published by the G20 secretariat on 16 November 2014, last accessed online on 21 November 2014.
[52] David McNair, 'G20 leaders fail to deliver true transparency at Brisbane summit' *ONE* (17 November 2014).
[53] Association of Certified Fraud Examiners, 'Report to the Nations on Occupational Fraud and Abuse: 2014 Global Fraud Study' (Report, 2014).
[54] Association of Certified Fraud Examiners, 'Report to the Nations on Occupational Fraud and Abuse: 2014 Global Fraud Study' (Report, 2014) 71. The ACFE defines "occupational fraud" as "the use of one's occupation for personal enrichment through the deliberate misuse or misapplication of the employing organization's resources or assets".
[55] G20 Anti-Corruption Working Group, 'Enforcement of Foreign Bribery Offences: G20 ACWG Note prepared by the OECD' (Note, G20, 23 October 2014) 4.
[56] Simon Wolfe, Mark Worth, Suelette Dreyfus, AJ Brown, 'Whistleblower Protection Rules in G20 Countries: The Next Action Plan' (Public Consultation Draft, Blueprint for Free Speech and Transparency International, June 2014).
[57] Paul Latimer and AJ Brown, 'Whistleblower Laws: International Best Practice' *UNSW Law Journal* (2003) 31(3) 766, 788. Latimer and Brown canvass other relevant issues around whistleblowers e.g. the payment of rewards, indemnity from civil and criminal prosecution etc.

Article IX of the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Anti-Bribery Recommendation) recommends parties ensure "appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery of foreign public officials in international business transactions".[58]

6.2. Private sector whistleblowers are not adequately protected in Australia

While public sector whistleblowers are adequately protected from adverse action in Australia, private sector whistleblowers have "virtually no legislative [protection]".[59] There is no specific protection for foreign bribery whistleblowers and the relevant whistleblowing provisions of the *Corporations Act 2001*[60] protect only those who:

a) blow the whistle to the company, its auditors or the Australian Securities and Investments Commission;

b) have reasonable grounds to suspect the information they are providing indicates a breach of Australian corporations law;[61]

c) are officers or employees of an Australian company, or are suppliers to that company; and

d) disclose their identity at the time of first contact.

We agree with the finding in the Phase 3 Australia Report that these measures[62] are "insufficient or irrelevant to foreign bribery".[63] They would not cover, for example, bona fide whistleblowing:

a) to authorities apart from ASIC that are competent to investigate conduct involved in foreign bribery. Those authorities may be within Australia (AFP or state/territory police) or outside Australia (law enforcement agencies in the jurisdiction in which the foreign public official is located);

b) to entities that are not "competent authorities" in the classic sense but have a legitimate interest[64] in uncovering the corrupt conduct e.g. a head contractor on a project on which

[58] OECD Working Group on Bribery in International Business Transactions, 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions' (Report, OECD, 26 November 2009) 5.

[59] Peter Bowden, 'A Comparative Analysis of Whistleblower Protection' (Speech delivered at Australian Association for Professional and Applied Ethics 11th Annual Conference, Adelaide, 28-30 September 2005) 4, cited in Simon Bronitt, 'Policing corruption and corporations in Australia: Towards a new national agenda' (2013) 37 Criminal Law Journal 283, 292.

[60] See Part 9.4AAA. Some special protections exist for disclosures made in relation to holders of Australian Financial Services Licences (banks, insurance companies etc) or state/federal public agencies. While those schemes may provide a model for reform, we do not discuss them here because they do not cover most actual or prospective foreign bribery whistleblowers.

[61] A non-exhaustive list of corporations laws that ASIC administers can be read on ASIC's website.

[62] We note that the Australian Senate Economics References Committee published a report titled *Performance of the Australian Securities and Investments Commission* in June 2014. The committee made a number of recommendations in relation to strengthening whistleblower protections. These recommendations have not been fully enacted and neither would they resolve all the dilemmas we identify above, primarily because they retain the narrow focus on breaches of corporations law.

[63] Phase 3 Australia Report at p.45.

[64] See Richard Calland and Guy Dehn (eds) *Whistleblowing Around the World: Law, Culture & Practice* (ODAC, 2004) 9, cited in Paul Latimer and AJ Brown, 'Whistleblower Laws: International Best Practice' *UNSW Law Journal* (2003)

a subcontractor is behaving corruptly or a multilateral development bank that is financing a project. As such entities will often have a presence in the overseas jurisdiction and a right to audit subcontractors'/finance recipients' records, they may be better placed to investigate the conduct and effect action in the first instance than "competent authorities";

c) by officers or employees of non-Australian companies e.g. a director of a sister company that operates in another jurisdiction in which the Australian company is engaging in corrupt conduct;

d) whistleblowing on conduct that is a breach of law other than Australian corporations law (e.g. the foreign bribery offence under federal criminal law) or a breach of contractual terms (e.g. an anticorruption condition in a contract); or

e) whistleblowers that wish to report anonymously (at least initially) because they fear retribution, intimidation or violence.

More generally, the Attorney-General's office[65] and the AFP[66] publish guidance on how to report foreign bribery to the AFP, but neither adverts to any protection that may be in place for whistleblowers. The ASX Corporate Governance Council recommends[67] that companies listed on the leading Australian stock exchange have a whistleblowing policy in place, but neither the existence nor the content of such a policy is mandated.

The Phase 2 Australia Report identified the weakness of the protection of whistleblowers as a potential barrier to detection of foreign bribery offences and recommended "stronger whistleblower protection measures for private sector employees".[68]

Recommendation 6: Phase 4 should examine whether foreign bribery whistleblowers (including whistleblowers located outside the jurisdiction of the agency receiving the report) are adequately guided, encouraged and/or protected.

7. Guidance is needed on the concept of "high managerial agent" in foreign bribery law

The Phase 1 Australia Report concluded that "Australian legislation conforms to the standards set by the [Anti-Bribery] Convention". We agree; we do not perceive further antibribery legislation or amendments to existing antibribery legislation (except possibly to the extent necessary to transfer foreign bribery responsibility from the AFP to ASIC as discussed above) as a high priority. Further substantive legislation will create unnecessary additional confusion and uncertainty.

However, there is one aspect of the law around which corporations would benefit from further guidance from law enforcement agencies and/or prosecutors. Australia's obligation under Article 2 of the Anti-Bribery Convention to provide for corporate criminal liability for foreign

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31(3) 766, 788. We note Calland and Dehn's definition of whistleblowing as "the disclosure by organisation members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action" (emphasis added).

[65] Attorney-General's Department, 'Fact Sheet 3: How to Report Suspected Foreign Bribery' (Fact Sheet, Australian Government, 21 January 2013).

[66] "Foreign Bribery", published July 2014 by the Australian Federal Police, last accessed online on 19 November 2014.

[67] Australian Securities Commission Corporate Governance Council, 'Corporate Governance Principles and Recommendations' (Report, ASX, 27 March 2014) 20.

[68] Phase 2 Australia Report at p.43.

bribery offences is discharged by the "corporate criminal responsibility" provisions of Part 2.5 of the *Criminal Code.* This provides *inter alia* that a corporation may be found criminally responsible if one of its employees, officers or agents engages in foreign bribery and a "high managerial agent" of the corporation "intentionally, knowingly or recklessly engaged in the foreign bribery], or expressly, tacitly or impliedly authorised or permitted the [foreign bribery]".[69] "High managerial agent" is defined as "an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy".

Practitioners and academics have already noted with concern the ambiguity of the meaning of "high managerial agent" at general law. This is because Australian jurisprudence around the term (and, as both the Phase 2 Australia Report and Phase 3 Australia Report noted, around corporate criminal liability generally) is "scant".[70] Further, the Commonwealth Attorney-General's Department has suggested the term does little more than codify the Anglo-Australian common law on corporate criminal responsibility,[71] but the term and the surrounding legislation were "based almost exactly" on United States legislation[72] that differs sharply from the Anglo- Australian tradition. For its part, the Phase 3 Australia Report perceived the Part 2.5 provisions as being, a substantial extension of corporate criminal liability from the previous common law position.[73]

We believe that this ambiguity is particularly problematic in the field of foreign bribery law, which regulates international business transactions where the principal actors are often complex corporate groups. Corporate decisions are often taken collaboratively by multiple actors with varying levels of managerial authority. Under these circumstances, it may be unclear who took a decision and whether they should be considered a high managerial agent.

Legislative reform of the general corporate criminal liability provisions of the *Criminal Code* is probably unlikely and investigation of that issue is probably beyond the remit of the Working Group on Bribery. However, it would be within the remit of the CDPP to provide and publish guidance to prosecutors and corporations as to how it believes "high managerial agent" should be interpreted in practice. (As noted above, prosecutorial guidelines, guidance to business and hypothetical scenarios are published in the US and UK). Such guidance would not be determinative of the law, but would provide corporations with greater certainty as to whether Australian prosecutors would be minded to characterise a specific person's conduct as that of a "high managerial agent".

Recommendation 7: Phase 4 should examine whether there is sufficient prosecutorial guidance on key concepts of corporate criminal liability in the context of foreign bribery law.

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[69] See *Criminal Code 1995* (Cth) s 12.3.
[70] Phase 3 Australia Report at 12.
[71] "Chapter 2 [of the *Criminal Code,* which includes the "high managerial agent" concept] reiterates common law doctrine, which found its most significant expression in the House of Lords decision in Tesco Supermarkets v Nattrass. A high managerial agent may implicate the corporation in criminal activity if the agent personally engages in criminal conduct or authorises or gives permission to another to do so": *The Commonwealth Criminal Code: A Guide for Practitioners* at p.315, published by the Commonwealth Attorney-General's Department in March 2002, last accessed online on 26 November 2012. We have not seen any indication the publisher has superseded or withdrawn this advice, and it is referred to by other authoritative texts e.g. the *Criminal Trial Courts Bench Book* at 11-000, a text published by the Judicial Commission of New South Wales for use by Supreme Court and District Court judges of that state.
[72] Explanatory Memorandum, *Criminal Code Bi/11994* (Cth), 43.
[73] Phase 3 Australia Report at 12.

ANNEXURE 1: OVERVIEW OF AUSTRALIA'S FOREIGN BRIBERY LAW

Australia signed the Anti-Bribery Convention on 7 December 1998 and ratified it on 18 October 1999.[74]

The obligation in Article 1(1) to pass legislation that criminalised the bribery of foreign public officials was substantially discharged by the creation of the "Bribing a foreign public official" offence under section 70.2 of the federal *Criminal Code* in 1999.[75]

Ancillary legislation relevant to e.g. mutual criminal assistance (Article 9, Anti-Bribery Convention), extradition (Article 10, Anti-Bribery Convention) and tax deductibility of bribes (1997 OECD Revised Recommendation on Combating Bribery in International Business Transactions) was also passed.[76]

In respect of Article 2 of the Anti-Bribery Convention, corporate criminal responsibility for foreign bribery offences was already provided for by the overarching provisions of Part 2.5 of the *Criminal Code*.

In early 2012, the Attorney-General's Department concluded a public consultation[77] on section 70.4 of the *Criminal Code*, which provides that payment of certain bribes for routine government actions ("facilitation payments") are not an offence provided certain detailed records are kept. Although the AFP stated in July 2014 that the federal government was "assessing the possibility of repealing the facilitation payment defence"[78] there has to date been no substantive announcement to the abolition or retention of the facilitation payments defence.

Aside from the specific foreign bribery offence in the *Criminal Code*, conduct involved in or arising from bribery of foreign public officials may be criminalised by other federal and state/territory legislation that prohibits e.g. fraudulent conduct, the wrongful exercise of powers by the officers of a corporation, and misleading or deceptive conduct.[79]

ANNEXURE 2: CRIMINAL CODE, PART 2.5- CORPORATE CRIMINAL RESPONSIBILITY

12.1 General principles

1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

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[74] *Convention on Combating Bribery of Foreign Officials in International Business Transactions*, opened for signature 17 December 1997, [1999] ATS 21 (entered into force 17 December 1999).

[75] The *Criminal Code Amendment (Bribery of the Foreign Public Officials) Act 1999* (Cth) amended the Criminal Code that is contained within the Schedule to the *Criminal Code Act 1995* (Cth).

[76] See eg, *Extradition (Bribery of Foreign Public Officials) Regulations 1999* (Cth) and Schedules 4 and 5 to the *Taxation Laws Amendment Act (No.2) 2000* (Cth).

[77] Attorney-General's Department, 'Divisions 70 and 141 of the Criminal Code Act 1995: Assessing the "facilitation payments' defence to the Foreign Bribery offence and other measures' (Public Consultation Paper, Australian Government, 15 November 2011).

[78] "Foreign Bribery" at p.2, published July 2014 by the Australian Federal Police, last accessed online on 19 November 2014.

[79] Steven Fleming and Viv Jones, 'Anti-Corruption Regulation Survey of Select Countries 2013: Australia' (Jones Day, 8 January 2014) 8.

2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 48 of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

2) The means by which such an authorisation or permission may be established include:

    a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

    b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or

    c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or

    d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

4) Factors relevant to the application of paragraph (2)(c) or (d) include:

    a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and

    b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

6) In this section:

"board of directors" means the body (by whatever name called) exercising the executive authority of the body corporate.

"corporate culture" means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

"high managerial agent" means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

12.4 Negligence

1) The test of negligence for a body corporate is that set out in section 5.5.

2) If:

   a) negligence is a fault element in relation to a physical element of an offence; and

   b) no individual employee, agent or officer of the body corporate has that fault element;

that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

   a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

   b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

12.5 Mistake of fact (strict liability)

1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:

   a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and

   b) the body corporate proves that it exercised due diligence to prevent the conduct.

2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

   a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

12.6 Intervening conduct or event

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

Lexchange

Comments OECD Working Group on Bribery: Monitoring of country compliance under the Anti-Bribery Convention, Phase 4

1. Phase 4 will focus more closely on detection, enforcement, and corporate liability, and other major topics relevant to adequate implementation of the Convention's obligations. What in your view are the most relevant areas relating to bribery of foreign public officials which should be assessed?

If 'areas' is synonymous to 'sectors', then I would qualify transnational operating entities in the fields of Defense, Extractive Industries (Minerals & Mining) , Construction, Banking, Accountancy & Consultancy, Public Prosecution and the Judiciary as relevant areas relating to bribery of foreign public officials.

2. Phase 4 will take a more tailored approach, focusing more closely on the specific enforcement situation in each country. Are there any specific areas which, in your view, should be covered relating to the country's enforcement of its foreign bribery legislation under the Convention?

My point relates to all areas, but concerns an element on the specific enforcement situation.

Notably in the past two years in The Netherlands, an increasingly number of Foreign Bribery cases have been taken up by the Dutch Public Prosecution's Office. However, despite this recent upward trend in prosecutorial action (response to findings OECD Phase 3 Report?), all cases were concluded with a settlement. It is unclear what brought the DPPO to decide as they did, nor is it clear how the level of the (substantial) fines involved were established (2013: Rabo Libor € 70 mln; 2014: SBM Offshore € 192 mln). On balance, all cases were kept out of court, leaving the wider public unknowingly of the factual misconduct, as well as the considerations of the DPPO to offer a settlement.

In his farewell address, the recently (October 2014) retired President of the Dutch Supreme Court, Geert Corsten, pledged that 'major cases' should be dealt with in court. As for the settlements of the DPPO set at a level of 'tens of thousands of euros' or more: these decisions should be reviewed by the court. His pledge in short: bring out the facts of serious misconduct in the open and let justice take its course. Corsten referred to the Rabo Libor case in particular, thus clearly stating the application of his suggested 'new baseline' for jurisprudence also in Foreign Bribery cases.

In a broader perspective, the considerations and criteria of the National Prosecutors Office to decide for a settlement (evidently) differ across jurisdictions of the member states to the Convention. Phase 4 could well record what criteria are used, to what extent they are knowledgeable (public data) and to what extend they are (systematically) applied in Foreign Bribery cases.

Promising practices could be brought up in a comparative perspective and presented in future, enforcement recommendations for the member states to the Convention. 'Setting' a fine-limit for settlements, serving both justice and transparency, could serve as an example of such a practice.

3. What steps would you recommend that the WGB consider in the case of continued failure of a country to adequately implement its obligations under the Convention?

If the use of bi-lateral diplomatic channels have not resulted in visible progress, it would be recommended to submit a message of '(grave) concern' and build pressure in the appropriate OECD fora (WGB, G20, B20, other) on the undesired status quo of implementation, and its consequences.

Furthermore, the '(grave) concern' could be shared with selective stakeholder groups, in the country at hand, like employers associations and trade unions. They could be they consulted for advice and commitment.

Next, a targeted media campaign both nationally, and internationally could be conducted, reinforced by the strategic partnerships with well established advocacy groups that take anti-corruption at heart, such as Transparency International, EITI, others.

4. What would be the most beneficial and practical way for the private sector and civil society engagement in this next round of monitoring?

I would suggest a number of ways for engaging the private sector and civil society: involve national academia to pre-identify a relevant stakeholder network in the relevant areas (see under 1) in each member state to the Convention. Organize on-line campaigns for the broader public, conduct inquiries with the pre-identified stakeholders, face-to-face follow up and meetings with representatives of these organizations.

5. How would you suggest that the WGB increase the visibility of its work?

Internationally: link-pin with media initiatives of other IGOs, that take a stake in anti-corruption in general, and Foreign Bribery in particular Nationally: develop multi-lingual media toolkits for branch organizations of the pre-identified relevant areas (see under 1), but also for secondary and higher education.

Author: Chris Moll, Executive Director, Lexchange

SCCE (Society of Corporate Compliance and Ethics)

Comments Submitted as Input for the OECD Phase 4 Review of Adherence to the OECD Anti-Bribery Convention

The Society of Corporate Compliance and Ethics (the "SCCE")[1] is a non-profit organization comprised of more than 4700 members (individual professionals and companies), dedicated to improving the quality of corporate governance, compliance and ethics. The SCCE champions ethical practice and compliance standards in all organizations, and seeks to provide the necessary resources for compliance professionals and others who share these principles.

SCCE supports the mission of the Organization for Economic Cooperation and Development ("OECD") Working Group on Bribery in International Business Transactions (the "Working Group"), and believes that corporate and other organizations' effective compliance and ethics programs, including anti-corruption programs, are essential to the success of this mission. We also believe that governments play an indispensable role in promoting the types of programs that can truly prevent and detect corrupt practices in all corners of the world.

The OECD has requested comments on the parameters for the Phase 4 review of adherence by signatory nations to the Anti-bribery Convention. The SCCE wishes to provide comments, relating to the role of the private sector, and how governments can more effectively recruit the private sector into the fight against corruption.

The OECD's Working Group in November 2009 issued Recommendations applicable to all of the OECD Anti-bribery Convention signatory countries (the "member countries") as part of the mission to prevent foreign bribery. (Working Group on Bribery in International Business Transactions, Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions)[2] One of these key recommendations calls for governments to promote adequate compliance and ethics programs. We urge the Working Group to examine what each signatory nation has done to implement these recommendations.

The applicable language is as follows:

The OECD Working Group:

III. "RECOMMENDS that each Member country take concrete and meaningful steps … "

The overview reminds the member countries that mere rhetoric will not meet the minimum standards of the Recommendations. "*Concrete and meaningful steps*" reflects the seriousness of the challenge represented by corruption and foreign bribery, and the need for tangible action. Just as this was true for governmental efforts to criminalize (or otherwise severely punish) foreign bribery and then to investigate and prosecute violations, so it is equally true for the next step of enlisting the private sector in this battle. Governments are to encourage companies to institute compliance and ethics programs through "*concrete and meaningful steps."*

[1] www.corporatecompliance.org.
[2] http://www.oecd.org/dataoecd/11/40/44176910.pdf.

"Accounting Requirements, External Audit, and Internal Controls, Ethics and Compliance

X. RECOMMENDS that Member countries take the steps necessary, taking into account where appropriate the individual circumstances of a company, including its size, type, legal structure and geographical and industrial sector of operation, so that laws, rules or practices with respect to accounting requirements, external audits, and internal controls, ethics and compliance are in line with the following principles and are fully used in order to prevent and detect bribery of foreign public officials in international business, according to their jurisdictional and other basic legal principles."

Originally, the Working Group had looked only at audit and "internal controls." Those in the Working Group's Consultative Partners group, including SCCE, pointed out that audit is not the first line of defense; auditors check systems, they do not prevent misconduct. Regarding "internal controls" SCCE made it clear that this is typically a financial concept, and lacks the depth and impact of compliance and ethics programs. These programs do include both auditing and internal controls, but go much beyond that. In the end, the Working Group adopted our recommendations, recognizing that internal controls and auditing need to operate in the context of an adequate compliance and ethics program. To meet the minimum standards of these Recommendations, therefore, governments need to encourage compliance and ethics programs, including efforts to reach foreign bribery. Neither internal audit nor internal controls alone can meet this threshold or be effective in preventing bribery.

Included in this paragraph is an acknowledgement that companies vary in many ways by their "*individual circumstances*," so that the compliance and ethics programs should match each company's circumstances. Behind this language is the awareness that no company should be excluded based on any such type of circumstance. There is no legitimate excuse for a company's failure to take steps to prevent corruption, and thus no country can be considered to meet the Recommendations if it ignores the role of small and medium-sized companies. Small and medium companies can, in fact, undertake this commitment in ways that may actually be easier than is the case for far-flung multinational companies. For these companies to implement programs it is not a matter of money or resources; rather, it is a matter of making a real commitment.[3]

The reference to the nations' "*laws, rules or practices*" regarding ethics and compliance is a central element in meeting the Recommendations. It means that governments must do more than talk about compliance and ethics programs. The words "*laws, rules or practices*" cover a broad range of governmental actions. So if laws inhibit effective programs, or prosecutorial practices do not take programs into account, this would appear to violate the Recommendations, and should show up as a negative finding in the Phase 4 reviews. Thus, for example, if privacy laws are invoked to hamstring companies' ability to operate robust reporting systems, this would directly violate the Recommendations and would call for revision of such privacy laws.

[3] See Murphy, A Compliance & Ethics Program on a Dollar a Day: How Small Companies Can Have Effective Programs (SCCE; 2010) http://www.corporatecompliance.org/Portals/0/PDFs/Resources/ResourceOverview/CEProgramDollarADay-Murphy.pdf , explaining the practical and inexpensive ways small companies can have effective programs.

X. C.

"Member countries should encourage:

i. companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery;"

There are many ways that governments can encourage companies to have adequate ethics and compliance programs. One best practice is for governments to offer companies guidance on what should be in a compliance program; this should draw on the Working Group's own Good Practice Guidance.

There are many opportunities for governments to promote adequate and truly effective programs. The attached Appendix A is a list of numerous steps a government could take.

"ii. business associations and professional organisations, where appropriate, in their efforts to encourage and assist companies, in particular small and medium size enterprises, in developing internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery;"

One tool governments can use to reach small and medium-sized enterprises would be to bring into the process trade and professional organizations. SCCE, representing compliance and ethics professionals, is ready to work with governments on this initiative to reach these smaller companies. Other professional groups, including bar, accounting and internal audit organizations could also be recruited in this effort. There should also be outreach to those business groups and associations that have small businesses as members. The compliance and ethics program outreach could be integrated into all efforts by governments to promote export trade.

"iii. company management to make statements in their annual reports or otherwise publicly disclose their internal controls, ethics and compliance programmes or measures, including those which contribute to preventing and detecting bribery;"

Key information about a company's compliance program could be required as part of securities law disclosure. That is the type of step that could address the OECD Recommendations. Certainly it would be spectacularly unwise to pressure companies to disclose details about such sensitive matters as investigations, discipline, program evaluations, risk assessments and auditing (forced disclosure would lead to suppression of these activities in companies). But beyond these sensitive details there is much that could be said about company programs. As a threshold item a government could call for simply disclosing in the annual report how the chief ethics and compliance officer is positioned, empowered and given the resources to function effectively, and whether the function is professionally independent or buried in an existing department; this would shed useful light on a company's commitment to fighting bribery and other misconduct. The experience of the compliance and ethics profession is that programs are often undermined by companies creating anemic compliance and ethics officer positions[4]; disclosure could help curb this "worst practice" approach.

Moreover, neither typical government disclosure standards nor the stock exchanges deal with non-publicly traded small and medium-sized enterprises. While government may lack the authority to

[4]See Leading Corporate Integrity: Defining the Role of the Chief Ethics and Compliance Officer (August 2007) http://www.corporatecompliance.org/Content/NavigationMenu/Resources/Surveys/CECO_Definition_8-13-072.pdf; Perspectives of Chief Ethics and Compliance Officers on the Detection and Prevention of Corporate Misdeeds (RAND 2009) http://www.rand.org/pubs/conf_proceedings/CF258/

require private companies to make such disclosures generally, there may be more flexibility when such disclosure is considered as a condition for export business. Nor would there be a need for the same level of disclosure in all cases. Smaller companies could, for example, be expected to provide certain basic information on their web sites about whether they have an anti-corruption program.

"iv. the creation of monitoring bodies, independent of management, such as audit committees of boards of directors or of supervisory boards;"

This element calls for companies to have an independent body, presumably to monitor the compliance and ethics effort. When companies are serious about preventing and detecting misconduct they will have their chief ethics and compliance officer report to such an independent monitoring body without interference by any other managers or officers; the preferred practice is to have this independent body control any personnel action involving this officer. The existence of such bodies is already a well established phenomenon for public companies. However, this is not a universal requirement or even an expectation for many corporations; those that are privately owned (some of these are huge companies) would rarely have such an element in their governing bodies.

How could this element of independent monitoring bodies be adapted to deal with the many companies that may engage in export activities but, because they are not publicly listed, do not have any independent board members? Should such independent monitoring bodies be encouraged for all companies seeking to conduct export activity? Or should there be an alternative form of shared outside, independent bodies that would be available to groups of companies to help protect the independence and empowerment of compliance and ethics officers? There is certainly much to consider in this area, and government could take the initiative to open this up for discussion with the business community.

"v. companies to provide channels for communication by, and protection of, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for persons willing to report breaches of the law or professional standards or ethics occurring within the company in good faith and on reasonable grounds, and should encourage companies to take appropriate action based on such reporting;"

This provision tells governments to promote whistleblower systems in the companies in their countries, including protection for those who resist or protest misconduct.

The Working Group's language here is not limited to merely resisting or reporting bribery. Rather, it is quite broad, covering refusals to violate *"professional standards or ethics".* Although whistleblower systems may be common, company codes of conduct generally do not appear to address refusal to violate professional standards.[5]

There is another striking dimension to this. The SCCE has established exactly just such a professional standard for compliance and ethics professionals: The "Code of Professional Ethics for Ethics and Compliance Professionals."[6] Under this standard compliance and ethics professionals are

[5] For more on this element and other aspects of compliance and ethics programs as set out in the Good Practice Guidance, see Murphy & Boehme, "Commentary on the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance," 9 Rutgers Journal of Law & Public Policy 581 (Spring 2012), http://www.rutgerspolicyjournal.org/sites/rutgerspolicyjournal.org/files/issues/9_4/9-4_Murphy_RTPv2.pdf

[6] http://www.corporatecompliance.org/Content/NavigationMenu/Resources/ProfessionalCode/SCCECodeOfEthics_English.pdf

obligated to take such steps as escalating threatened misconduct, exercising diligence in implementing a program, and reporting on the program to senior management and the highest governing authority. For the first time there is now an authority saying that companies should protect compliance and ethics professionals in doing their jobs. This has not existed before, but is sorely needed. Governments should be exploring the full dimensions of this "professional standards" element.

The scope of protection is another element to be considered by the signatory nations. The Recommendations' protection is open-ended, covering any "*person*." Under the Recommendations, not only those employed by the company would be protected, but also third parties with a relationship with the company would appear to fit this standard.

Those who report breaches of law or professional standards "*in good faith and on reasonable grounds"* are to be protected. The best protection from unfounded claims is to require companies to take a professional approach to conducting investigations, which includes protecting the reputation of the accused unless and until allegations are factually validated.

"vi. their government agencies to consider, where international business transactions are concerned, and as appropriate, internal controls, ethics, and compliance programmes or measures in their decisions to grant public advantages, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits."

Here OECD calls for governments to show whether they are really serious about preventing foreign bribery. Whenever a domestic company approaches government about conducting foreign business, that government needs to promote adequate compliance and ethics programs. This provision recognizes that more than hopeful words are necessary. It also implicitly recognizes that while reduction of penalties for violations is a useful incentive, there is nothing that appeals to business people like the opportunity to make money and win business. Factoring compliance efforts into the granting of government business advantages is an incredibly powerful force for the development of strong programs.

In this respect, OECD appears to have stepped beyond the approach of a number of jurisdictions that recognize compliance programs for purposes of reducing penalties, but not for positive rewards. OECD's approach calls for actual benefits that would be reflected in a company's bottom line.

This is very broad and is not limited simply to agencies that deal with anti-corruption enforcement. The list refers to public advantages "including" (and thus presumably not limited to) "*public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits;"* this is a very significant list that calls for careful examination of all the opportunities the international business context may present.

Governments should be examining each element in the list of activities, plus any others that may relate to international business. The question should then be asked, what does the government do with respect to each item?

Conclusion

The world is recognizing that the powerful management tools available in companies need to be harnessed in the battle against corruption. This is what the concept of a compliance and ethics program is about. But, as was the case with encouraging member countries to adopt strong laws and then enforce them, this initiative will not happen on its own. Through the Phase 4 review the OECD

can give this initiative an important boost, and take an enormous step toward effectively moving companies forward in the battle against bribery.

Author: Joe Murphy JD CCEP, Director of Public Policy, Society of Corporate Compliance and Ethics

APPENDIX A – HOW GOVERNMENTS CAN ENCOURAGE EFFECTIVE COMPLIANCE AND ETHICS PROGRAMS

Here is a list of things governments can do to promote effective compliance and ethics programs. There is simply no question: when governments become serious about this they can make it happen:

1. **Take effective programs into account in decisions to prosecute and take other enforcement action.**
2. **Offer a reduction in penalties for those with effective programs.**
3. **Publicize the actual benefits given to companies with strong programs.**
4. **Use practical, flexible standards in assessing programs.**
5. **Publish a strong governmental policy favoring effective compliance and ethics programs as in the public interest.**
6. **Offer a benefit for effective programs in government procurement.**
7. **Include compliance programs in settlement agreements/enforceable undertakings.**
8. **Encourage stock exchanges to include effective programs in listing standards.**
9. **Have effective programs be a factor in voluntary disclosure programs.**
10. **Offer reduced regulatory requirements for those with effective programs.**
11. **Provide that programs may be a defence to related civil liability.**
12. **Provide that programs may also be a due diligence defence for directors' liability**
13. **Encourage larger companies to promote programs in their supply chains.**
14. **Offer tax credits for initial program costs. .**
15. **Make this a condition for government bailout and loan money.**
16. **Have government officials actively participate in the compliance and ethics field, including conferences and seminars.**
17. **Get training on compliance and ethics for government officials.**
18. **Make the growth of compliance and ethics programs a measure of government success.**

19. **Work against other governmental actions and court rulings that hurt compliance and ethics program efforts.**

20. **Offer legal protection for compliance and ethics program efforts.**

21. **Provide a role model of a robust compliance and ethics approach through government agency compliance and ethics programs. See The Rutgers Center for Government Compliance and Ethics, http://rcgce.camlaw.rutgers.edu/**

22. **Make very specific commitments to reward compliance and ethics efforts.**

23. **Have an internal governmental official as compliance and ethics liaison.**

24. **Have a system for credible program assessment by the government.**

Transparency International

Transparency International's comments for the Public Consultation on Phase 4 monitoring of the OECD Anti-Bribery Convention

Transparency International (TI) in response to *Call for comment: OECD Working Group on Bribery Monitoring of country compliance under the Anti-Bribery Convention* provides recommendations in five areas. The following comments are based on the work TI has been conducting in monitoring the OECD Anti-Bribery Convention, including TI's annual Exporting Corruption reports.

Questions in bold were formulated by OECD WGB.

1. Phase 4 will focus more closely on detection, enforcement, and corporate liability, and other major topics relevant to adequate implementation of the Convention's obligations. What in your view are the most relevant areas relating to bribery of foreign public officials which should be assessed?

Most importantly the OECD Working Group on Bribery should continue the rigorous review of the implementation of the Convention on country by country basis.

TI also suggests that in the following areas horizontal assessments of all of the Convention countries are needed so as to achieve significant improvement in enforcement of the Convention.

- **Mutual legal assistance** (MLA) is a crucial cross-cutting issue concerning all of the Convention countries. Phase 3 reports often emphasise that insufficient cooperation in providing MLAs are major obstacles in the way of effective enforcement. Lack of detailed or any information on MLAs often makes it impossible to assess how much Convention countries support each other's detections, investigations and prosecutions. A horizontal study, that, at the least, matches national statistics, would provide a clear picture concerning the efforts that states parties make in assisting each other's enforcement work, which are almost as important their own enforcement actions. (Article 9)

- Several countries fail to collect and publish good quality **enforcement statistics,**[1] or enforcement statistics at all. A horizontal study of the Convention countries' criminal statistics systems would enable better comparison of their enforcement efforts. As a further issue it is very challenging to access **case information, including information on settlements,** in several Convention countries. The practice of anonymization contributes to this and should be reduced to the minimum under the relevant national laws. The lack of transparency of criminal penalties makes sanctions less dissuasive and thereby also fails to serve the cause of prevention. (Article 12)

- **Sector-specific studies** should be prepared by OECD WGB on sectors where risks of foreign bribery are the highest (such as construction, defence, extractive and manufacturing), so as to identify corruption patterns. These studies could support detection and investigation efforts of law enforcement bodies.

[1] In several cases there is no centralised criminal statistics system available; statistical data on corruption offences cannot be disaggregated.

- OECD WGB should study and issue recommendations on **settlements,** regarding their transparency (including their proactive publication), deterrent effect, requirement of court approval and effects on prosecutions in other jurisdictions.

2. Phase 4 will take a more tailored approach, focusing more closely on the specific enforcement situation in each country. Are there any specific areas which, in your view, should be covered relating to the country's enforcement of its foreign bribery legislation under the Convention?

The OECD WGB should continue following up on all the outstanding recommendations from all of the previous review phases.

The main findings of the Exporting Corruption reports suggest that most enforcement authorities perform worse in the field of investigating and prosecuting foreign bribery than the level of development of the country would indicate. In order to compare States Parties by whether or not in practice they live up to their commitments under the Convention, it would be necessary to examine two areas: the **availability of sufficient resources** and the **presence of independence/professional autonomy of the enforcement bodies**.

The analysis of personnel and financial resources earmarked for foreign bribery enforcement should rely on a common methodology that includes the assessment of the number and experience of the staff (policemen, prosecutors, judges, tax officials, etc.) dedicated fully or partly to foreign bribery enforcement, the financial, technical resources available for their work (e.g. expert fees, equipment, travel costs), the cooperation among various national authorities and the form of prioritisation of foreign bribery with other criminal offences, such as fraud, violent crimes, drug offences, etc. The assessment of independence/professional autonomy of the enforcement bodies could build on the standards of UNCAC and the methodology of TI's National Integrity System studies. (Article 5)

3. What steps would you recommend that the WGB consider in the case of continued failure of a country to adequately implement its obligations under the Convention?

TI recommends a gradual approach. Transparency in the work of the OECD WGB and strategic promotion of the findings of the WGB to the public could provide a solution in these cases. However OECD has more drastic means that can be applied. The OECD WGB:

- Should translate each report into the official language(s) of the reviewed country and share the report with public as well as with the members of the parliamentary committee(s) in charge of foreign bribery issue. The Chair of the OECD WGB should request an invitation from the responsible committees of the national parliaments to discuss the findings of the review in an open session;

- Feed the content of review reports into indices and comparable instruments of OECD where corruption offences of the Convention can be included as an indicator, such as OECD FDI Regulatory Restrictiveness Index;

- Set up an easily accessible section on OECD's website on outstanding recommendations of each Convention country from all review phases, indicating the date of the recommendation given, the text of the recommendation and the dates when the WGB already followed up on them and include an easy to understand explanation of the issue;

- Define rules of procedure to assess when the "continued failure to adequately implement its obligations under the Convention" can be considered as definite and in such event first refer

the case to the Council of the OECD. If it is of no avail then the WGB/OECD should call for the State Party's withdrawal from the Convention. (Article 17)

4-5. What would be the most beneficial and practical way for private sector and civil society engagement in this next round of monitoring? How would you suggest that the WGB increase the visibility of its work?

Participation (engagement) and access to information issues are so closely related that the following recommendations are relevant for both issues.

- Continue the rigorous monitoring and the involvement of CSOs in the on-site visit panels. Provide for an open call advertised online on government websites, as well as on OECD's website to reach out to a broad range CSOs;

- Publish the agenda for on-site visits, not only the evaluation schedule.

- Provide access to the *Reply to questionnaires provided by evaluated country* and adequate time for civil society and business sector to comment on the document before the on-site visit takes place. This possibility should be available also for those organisations that are not taking part in the on-site visit panels;

- On international level distinguish between business sector and civil society and provide them equal access to the public consultations organised by OECD WGB and as observers to the meetings of the OECD WGB (see further details below);

- Invite business sector and civil society representatives from bribe recipient countries to public consultations and also to OECD WGB meetings to share their experiences on the effects of cross-border corruption so as to inform the work of the OECD WGB. Also convene meetings in countries where there has been substantial foreign bribery to discuss how affected countries' and their communities' interests can be better represented in foreign bribery proceedings.

The terms of reference of the OECD WGB should be amended to make it explicit that access is provided to the CSO, business sector representatives and media as observers. Comparable rules of the UNCAC Conference of States Parties should be taken as absolute minimum.

- Civil society organisations, media and other stakeholders should be allowed to attend the meetings of the WGB. Open meetings should be the main rule and closed ones the exception.

- WGB should publish the agenda, list of participants and minutes of its meetings, not only the Phase 4 reports adopted. The WGB should provide access to CSOs to draft reports under embargo not later than when journalists can gain access to them.

- The Secretariat of the WGB should revamp its website in order to make all foreign bribery related information more accessible.

- The OECD WGB should regularly disclose information on recipients of foreign bribery including country, sector, public body of which official was bribed (in case of ongoing procedure with details on the status of the case and for concluded ones with full case details).

UNODC (United Nations Office on Drugs and Crime)

Call for Comment – Working Group on bribery in International Business Transactions: Monitoring of country compliance under the Anti-Bribery Convention

1. Phase 4 will focus more closely on detection, enforcement, and corporate liability, and other major topics relevant to adequate implementation of the Convention's obligations. What in your view are the most relevant areas relating to bribery of foreign public officials which should be assessed?

Bearing in mind that issues of detection, enforcement and corporate liability have been discussed in the past as well (Phase 2 and Phase 3), it is recommended that a more focused approach is followed to allow for a more in-depth analysis of the measures taken by the country under review to effectively implement the Convention. The following issues may be considered:

- Institutional coordination mechanisms among domestic anti-corruption law enforcement authorities – ways and means to achieve better coordination among the law enforcement authorities domestically.

- Special investigative techniques and admissibility of evidence derived therefrom.

- Freezing/seizure and confiscation measures: enforcement statistics; measures related to the management of frozen/seized/confiscates assets.

- Liability of legal persons, including criminal liability where foreseen: enforcement/sanctions/statistics; access by law enforcement authorities to beneficial ownership information domestically and internationally.

- Homogeneity of penalties (criminal, administrative, civil) or related disciplinary measures, in particular the level of monetary or other sanctions against legal persons.

- Practical implementation of measures on the protection of witnesses and whistle-blowers.

- Role of Financial Intelligence Units (FIUs) in the detection of foreign bribery, in particular their powers to proactively obtain information from financial institutions and proactively share information with other FIUs.

- International cooperation in criminal matters: practical aspects of joint investigations, cooperation for purposes of confiscation and law enforcement cooperation (non-mutual legal assistance related) and use of networks (e.g., CARIN, Egmont).

- International cooperation to cover assistance in relation to civil and administrative proceedings which are related to foreign bribery.

- Ways and means to achieve better coordination between private sector entities and law enforcement authorities.

- Practical impediments related to immunities of foreign public officials.

- Length of the statute of limitations and reasons for its suspension or interruption.

- Quantification of corruption proceeds.

- The specialization of law enforcement, prosecutorial and judicial authorities and progress made in addressing training needs. Similar assessment in relation to the needs of central authorities in the field of international cooperation in criminal matters.

- If not already covered in previous phases, competences and functions of prosecutorial and judicial authorities – challenges faced in the investigation stage, prosecution and/or related to the adjudication of cases before the courts.

As a general principle, it is also recommended that Phase 4 include a component that would allow for taking stock of the findings on the pertinent issues made within the context of other monitoring mechanisms (UNCAC, FATF, Moneyval, GRECO, CoE…), as well as the progress made by the countries under review in improving anti-corruption standards in line with those findings.

2. Phase 4 will take a more tailored approach, focusing more closely on the specific enforcement situation in each country. Are there any specific areas which, in your view, should be covered relating to the country's enforcement of its foreign bribery legislation under the Convention?

Bearing in mind that issues of detection, enforcement and corporate liability have been discussed in the past as well (Phase 2 and Phase 3), it is recommended that a more focused approach is followed to allow for a more in-depth analysis of the measures taken by the country under review to effectively implement the Convention. The following issues may be considered:

- Progress made by the country under review in addressing weaknesses identified in previous Phase: There is a precedent for this (it was done in Phase 3 for pending issues of Phase 2). There may be a thematic overlap, but continuity of the process will be ensured (noting that many of the issues under discussion are a "carry over").

- Statistical data covering enforcement throughout the criminal process (investigations; prosecutions; convictions; acquittals; settlements and plea-bargaining agreements, if any).

- Related administrative or civil proceedings.

- Adjudication of cases.

- Extent to which the jurisdiction whose public official has been bribed is involved in the enforcement or judicial proceeding.

- Statistical data on sanctions against legal persons.

- Methods of data collection, sources of information, and allegations received.

- Systematized information on requests for international cooperation, including information on timeframes required to provide assistance.

- Disaggregated data on enforcement of foreign bribery in specific sectors, e.g. the defense sector, healthcare, etc.

- Guidelines for prosecutors in relation to foreign bribery matters for purposes of regulating prosecutorial discretion.

- Measures to allow the Financial Intelligence Unit (FIU) to proactively obtain information on financial transactions carried out/accounts held for intelligence gathering purposes and ability of law enforcement to ask FIU to conduct such inquiries (both domestically as well as internationally).

3. What steps would you recommend that the WGB consider in the case of continued failure of a country to adequately implement its obligations under the Convention?

Currently, and with regard to Phase 3, there is a structured framework providing options – in an escalated manner – for further action in cases where there is continued failure to adequately implement the Convention. This framework is of relevance at the stage after Phase 3 Bis, which is activated where inadequate implementation of the Convention has been confirmed. The steps foreseen in this framework may be retained, possibly with certain adjustments to streamline even further the process as follows:

- Enhanced scrutiny: requiring the country to provide regular reports on an expedited basis of its progress in implementing the Convention. The country could thus be asked to report to each meeting of the Working Group on its progress and it would be expected to be significantly in compliance within a fixed timeframe. What can additionally be done here is that the Working Group may wish to adopt a "timetable of compliance" with strict deadlines, subject to the nature of the requirement in question and the progress made by the national authorities.

- Exploring the possibility of involving non-State actors in the country under review in exercising pressure.

- Issuing a formal public statement that a participating country is insufficiently in compliance with the Convention, and requesting expeditious implementation of the Convention.

- Consideration of exclusion from the working group and possible consequences regarding OECD membership, including exclusion from conducting other reviews.

4. What would be the most beneficial and practical way for the private sector and civil society engagement in this next round of monitoring?

- Ensure active participation in the compilation of national feedback by the country under review (reply to the evaluation questionnaire), as well as in written follow-up reports within the next round of monitoring.

- Enrich information on "Steps taken by State Parties to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" (http://www.oecd.org/daf/anti-bribery/stepstakenbystatepartiestoimplementandenforcetheoecdconventiononcombatingbriberyofforeignpublicofficialsininternationalbusinesstransactions.htm) to include private sector and civil society "landmark developments" in the anti-corruption field.

- Enable, in consultation with the authorities of the country under review, the participation of representatives from the private sector, civil society and academia in discussions held during

the on-site visits. Formulate carefully a well-articulated agenda for the on-site visit to allow sufficient time to be devoted to such discussions.

- Consideration of reports and other sources of information provided by representatives from the private sector, civil society and academia – coordination with national authorities may be needed in this regard.

5. How would you suggest that the WGB increase the visibility of its work?

- Enhanced promotion/wider availability/further dissemination of the Annual Report of the OECD Working Group on Bribery; and more emphasis and prominent place in this report of the Working Group Data on Enforcement of the Anti-Bribery Convention.

- Pursue more streamlined cooperation with other organizations supporting anti-corruption monitoring mechanisms, such as the Council of Europe (GRECO and MONEYVAL), OAS, FATF, UNODC and the UNCAC Implementation Review Mechanism, in particular as these mechanisms adopt follow on review cycles. This would allow better coordination in review phases, including through regular communication among the Secretariats and joint on-site visits, and could prevent the fragmentation of related efforts.

- Continue to ensure compliance with the 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions, which calls on the Working Group to provide regular information to the public on its work and activities and on implementation of the Recommendation. This general responsibility must be balanced against the need for confidentiality which facilitates frank evaluation of performance. If the country being evaluated makes available to the evaluation team information it considers confidential, confidentiality of this information will be respected. Information contained in reports on country performance would remain confidential until it has been declassified. A country concerned could, however, take whatever steps it felt appropriate to release information concerning its report, or to make it publicly available.

- Further development of a publicly available database of statistical information that would complement the country review and Working Group reports, which could be updated on a rolling basis based on data obtained in previous phases.

US Chamber Institute for Legal Reform

Comments of the US Chamber Institute for Legal Reform to the OECD Working Group on Bribery

The U.S. Chamber Institute for Legal Reform ("ILR") is a not-for-profit public advocacy organization affiliated with the U.S. Chamber of Commerce—the world's largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, many of which are based or conduct business internationally. As an affiliate of the U.S. Chamber, ILR's mission is to make the legal system simpler, fairer, and faster for all participants. We welcome the opportunity to submit these comments in response to the Call for Comment issued by the OECD Working Group on Bribery in connection with its upcoming Phase 4 of country monitoring under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention").

We encourage the Working Group to seek greater international consistency and clarity of anti-corruption laws. The varying and sometimes conflicting anti-corruption laws of the signatories to the Convention present significant challenges to companies operating in multiple jurisdictions. We believe that consistent, well-defined anti-corruption standards across jurisdictions—including all Convention signatories—will better prevent corruption by enhancing businesses' compliance with international anti-bribery laws. By encouraging all OECD member countries to adopt clear, specific definitions and bright-line rules, the Working Group can help businesses to prevent, identify and remediate violations of anti-corruption laws.

Comment 1: We respectfully request that the Working Group encourage the Convention's signatory countries to communicate their enforcement policies clearly and thoroughly.

In many countries that are signatories to the Convention, businesses seeking in good faith to comply with applicable anti-corruption laws find only limited guidance in the text of the laws themselves. The policies and practices of prosecutors and regulators charged with the enforcement of such laws provide crucial additional guidance to the regulated community, including with regard to developing and maintaining effective compliance programs, identifying and mitigating areas of legal risk, and responding to potential risks when they arise. However, such policies and practices are not always communicated clearly or effectively to the business community. More transparent, detailed communication from the relevant government agencies regarding their approaches to anti-corruption enforcement would further the cause of compliance by providing better guidance to companies seeking to keep their compliance programs current and effective. For example, when there have been crucial developments in case law, meaningful enforcement activities in a particular area, or changes in the government's approach to enforcement, clear and timely communication of those developments would be beneficial. We therefore respectfully request that the Working Group strongly encourage all signatory counties to communicate openly and thoroughly their anti-corruption enforcement policies and procedures.

Comment 2: We respectfully request that the Working Group encourage uniform adoption of a compliance defense by the Convention's signatory countries.

While enforcement serves an important purpose, a move towards preventing corrupt conduct from happening in the first instance is a critical initiative that the business community is best situated to advance. Advancing such an initiative starts with creating proper incentives for companies, including through the adoption of a compliance defense by signatory countries. The consistent adoption of a compliance defense—that is, a defense that would permit a company to limit liability if

the person or people responsible for bribery or related corrupt conduct circumvented compliance measures that were otherwise reasonably designed to identify and prevent such violations—would enhance compliance and better prevent corruption. Unfortunately to date, anti-corruption initiatives, especially in the United States, have focused more heavily towards enforcement rather than compliance.

Twelve of the Convention's signatory countries have adopted a compliance defense to their anti-corruption statutes. For example, the U.K. Bribery Act provides a specific defense to liability if a corporate entity can show that it has "adequate procedures" in place to detect and deter improper conduct. Similarly, Italy proscribes foreign bribery but affords companies a compliance defense. The relevant Italian statute permits a company to limit liability if it can demonstrate that, before employees of the company engaged in a specific crime (such as bribery), it: (1) adopted and implemented a model of organization, management and control designed to prevent that crime; (2) engaged an autonomous body to supervise and approve the model; and (3) the autonomous body adequately exercised its duties. By contrast, for example, the U.S. Foreign Corrupt Practices Act does not provide a compliance defense to criminal liability for a company that had a strong compliance program but nevertheless experienced a violation by an employee or agent.

Companies cannot guarantee that all of their thousands or even hundreds of thousands of employees worldwide will comply with applicable anti-corruption laws at all times. Responsible companies implement and enforce strong compliance measures designed to avoid and promptly address any violations. A company that has a strong pre-existing anti-corruption compliance program that is effective in identifying and preventing violations therefore should be permitted to present that program as an affirmative defense where employees or agents have circumvented the compliance program. Consistent adoption of a compliance defense by all signatories to the Convention will provide businesses with a powerful incentive to ensure the optimal allocation of finite compliance resources and to implement and maintain compliance programs that effectively prevent and identify violations.

Comment 3: We respectfully request that the Working Group encourage more consistent treatment of hospitality and business gifts across jurisdictions.

Compliance personnel at companies operating internationally regularly encounter situations involving routine hospitality—a business lunch, a site visit that includes transportation for guests, a pitch meeting that includes gifts of company souvenirs—and must determine how much can be spent on a meal, how many meals in a year an official may be invited to attend, and the like, all with reference to laws that vary and conflict across jurisdictions. Companies consequently must devote disproportionate resources to investigating, analyzing and attempting to resolve such situations—resources that could otherwise be devoted to bribery prevention.

Consistent, reasonable international standards for business gifts and hospitality would facilitate compliance while simultaneously enabling companies to better allocate their resources by focusing less on internal investigations of what may be technical but inconsequential breaches (e.g., a taxi ride or business lunch involving a government official) and more on the prevention, detection and investigation of egregious instances of corruption.

Comment 4: We respectfully request that the Working Group encourage Convention signatories to follow the Convention's definitions of foreign official and government instrumentality.

It is far from clear under many nations' anti-corruption laws who qualifies as a government official (or foreign official). As a result, it is often difficult for companies to determine when they are

dealing with government officials for purposes of such laws, particularly in markets in which companies often are partially or wholly state-owned. Compliance personnel struggle to determine whether every employee of a state-owned company should be considered a government official, and what level of ownership or control is sufficient for a company to be considered state-owned under the applicable anti-corruption laws. The result has been a costly misallocation of compliance resources (as companies dedicate substantial resources to policing and investigating such situations) and in some instances a chilling effect on legitimate business activity (as companies perceive a real risk of liability even in circumstances involving only the most attenuated connection to governments).

The Convention itself defines "foreign public official" as "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization."[1] The Convention goes on to define "public enterprise" as "any enterprise, regardless of its legal form, over which a government or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, inter alia, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board."

The Convention's welcome clarity on this issue—defining a corporation as an instrumentality of a government only if that government has majority ownership or control of a voting majority of outstanding shares of the company—should serve as a template for the statutes of the OECD's member countries. We hope that the Working Group will encourage all Convention signatories to adopt such definitions.

Comment 5: We respectfully request that the Working Group encourage greater clarity with regard to successor liability.

Significant uncertainty with regard to the risk of successor liability and the appropriate scale of diligence has had a chilling effect on international transactions and has needlessly complicated the good-faith efforts of companies to comply with the laws of the OECD's member countries. In some but not all jurisdictions, a company may be held liable for the actions of a company that it acquires or merges with – even if those actions took place prior to the acquisition or merger and were unknown to the acquiring company. Further complicating matters, standards vary with regard to the level of pre-transaction or post-transaction diligence that is expected of the acquiring company and the degree to which such diligence may mitigate the liability of the acquirer for the acquiree's liabilities, if any. We respectfully request that the Working Group encourage all Convention signatories to provide clear, precise standards for when successor liability will apply (if at all) and what level of diligence is expected from an acquiring company.

Comment 6: We respectfully encourage the Working Group to advocate for increased cooperation and coordination among enforcement authorities globally.

It has become increasingly common for anti-corruption investigations and enforcement proceedings to span multiple countries and therefore involve multiple government authorities. However, the coordination of such investigations has not kept pace with the increased level of cross-border enforcement activity. Companies may face an array of separate, overlapping proceedings, including in some circumstances multiple successive investigations or enforcement proceedings

[1] 1997 OECD Convention on Combating Bribery of Foreign Public Officials, Article I, Paragraph 4(a) & Commentary.

involving the same conduct. Such proceedings may recur for years, with little prospect of finality for the companies involved.

While each country clearly has the authority to enforce its own laws, an increased level of cooperation and coordination among enforcement authorities examining the same conduct would enhance both the effectiveness and the fairness of multijurisdictional investigations and enforcement actions. Enforcement authorities would be able to better allocate their resources, reduce duplication of effort, and develop evidence more quickly and thoroughly. Companies would be less likely to face perpetual investigations of the same underlying conduct. Instead, a company could work with all relevant enforcement authorities to achieve a global resolution of any potential liabilities arising from particular conduct, rather than facing a series of separate resolutions or sanctions. We therefore respectfully request that the Working Group encourage all Convention signatories to pursue greater cooperation and coordination regarding anti-corruption investigations and enforcement actions.

Comment 7: We welcome the Working Group's call for public comment and respectfully encourage the Working Group to continue to seek and consider the views of the regulated business community and other stakeholders.

Much commentary on the global anti-corruption legal regime has come from those responsible for the enforcement of such laws, but the Working Group would be well-served to consider a broader range of views. The Working Group's call for public comment on the upcoming Phase 4 of country monitoring is a particularly welcome step in this direction. Businesses, trade associations, and other private-sector parties involved in ensuring compliance with anti-corruption laws will have comments and advice on how anti-corruption laws might be made more efficient and effective. Most businesses never become involved, directly or indirectly, in any anti-corruption enforcement proceedings, but devote substantial time, effort, and resources to ensuring their organizations' compliance with anti-corruption laws. The Working Group should have the benefit of that compliance-related experience, not merely the enforcement experience of government agencies, as it prepares for Phase 4 and considers the application of the Convention.

* * *

The varying and sometimes conflicting anti-corruption laws of Convention signatory countries present significant compliance challenges to companies operating in multiple jurisdictions. Accordingly, we strongly encourage the Working Group to seek greater international consistency and clarity of countries' anti-corruption laws. By designing the Phase 4 peer-review evaluations to be more of a policy-based, comparative assessment of countries' anti-corruption laws, we believe the Working Group can encourage proactive involvement by the regulated community, thereby better strengthening compliance. Indeed, these steps will ultimately lead to a better model aimed at preventing bribery at its inception. We appreciate your consideration of these comments, and we look forward to supporting the Working Group's ongoing efforts.

Author: Lisa A. Rickard, President US Chamber Institute for legal Reform

World Bank

Working Group on Bribery in International Business Transactions: Monitoring of Country Compliance under the Anti-Bribery Convention

1. Phase 4 will focus more closely on detection, enforcement, and corporate liability, and other major topics relevant to adequate implementation of the Convention's obligations. What in your view are the most relevant areas relating to bribery of foreign public officials which should be assessed?

To address more specifically detection, enforcement and corporate liability, the following issues may be considered:

a) Detection:

Various institutions, agencies and mechanisms are involved in the detection of suspicious transactions and activities. In particular, grand corruption cases, foreign bribery, and the laundering of proceeds of crime are often detected by the private sector and reported to Financial intelligence units (FIUs) and authorities in charge of supervising banks and financial institutions, insurance companies, securities markets, and various professions including notaries, lawyers, accountants and auditors (including government auditors). In addition, the role of specific agencies, including tax and customs administrations is often key to the detection of grand corruption and bribery. Assessing more in depth the role and the powers of all these institutions, agencies and supervisory authorities as well as the mechanisms they can use to obtain information from financial or other institutions may ensure more adequate, systematic, and timely reporting to Law Enforcement agencies. Other mechanisms to assess may involve legislation on disclosure of income and assets by officials, preventive measures for political exposed persons in line with FATF recommendations, and the role of external and internal auditors in businesses as well as government agencies.

More generally, the coordination between FATF and OECD assessments can be developed. A system by which the WGB provides input to FATF on foreign bribery and corruption risks may be an interesting step to ensure this coordination in the context of the risk analysis undertaken in FATF assessments.

b) Enforcement

Effective Enforcement mechanisms often result from the existence and the capacity of specialized units, agencies and courts. Ensuring that these specialized units and courts can play their role depends on the human and financial resources they are provided and on the legal and investigative tools (including special investigative techniques) they can use. Finally, institutional coordination mechanisms among domestic anti-corruption law enforcement agencies and systematic national risk assessments are also key elements of an effective enforcement of the convention. Specific emphasis may also be put on mechanisms to facilitate access to beneficial ownership information, value based confiscation systems, non-conviction based confiscation, and, whenever possible, the return of proceeds of corruption to victim countries and/or compensation for damages it suffered.

c) Corporate liability

The effectiveness of corporate criminal, civil or administrative provisions may be assessed more in depth to ensure that companies found guilty of foreign bribery have to pay more than the amount of bribes paid to foreign officials. In an ideal world, a systematic assessment of profits gained from

corrupt transactions and contracts should lead to the confiscation or the recovery of amounts equivalent to these profits, as was shown in the StAR-OECD study on the quantification of proceeds of bribery. Moreover, it may be interesting to consider civil lawsuits brought by States as a tool to ensure corporate liability.

2. Phase 4 will take a more tailored approach, focusing more closely on the specific enforcement situation in each country. Are there any specific areas which, in your view, should be covered relating to the country's enforcement of its foreign bribery legislation under the Convention?

A key issue to consider is the capacity of each country to develop a specific risk based approach based on specific weaknesses identified in previous phases, new developments related to the economic and political context of the country, and lessons learned from past corrupt and enforcement activities. This may also include reinforced sectorial analysis throughout the criminal process, and administrative or civil proceedings.

3. What steps would you recommend that the WGB consider in the case of continued failure of a country to adequately implement its obligations under the Convention?

Most mechanisms in similar organizations, including FATF, provide for enhanced scrutiny and follow up reports in case of continued failure and until weaknesses are corrected. The country could thus be asked to report to each meeting of the Working Group on its progress and why non-compliant legislations or practices are not corrected.

4. What would be the most beneficial and practical way for the private sector and civil society engagement in this next round of monitoring?

A way to ensure private sector and civil society participation would be to systematically consult and compile feedback from these organizations in the context of follow up mechanisms and progress reports mentioned in question 3. This could be reinforced by enabling, in consultation with the authorities of the country, the participation of these organizations in preparatory meetings. The development of a risk approach would be an opportunity and a great method to include the private sector and NGOs.

5. How would you suggest that the WGB increase the visibility of its work?

Ensuring the participation of NGOs and Civil Society in some of the discussions or consultations related to progress and follow up reports, as well as in the context of a risk approach may represent a possibility.