



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

SOUTH AFRICA: PHASE 2

**FOLLOW- UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2
RECOMMENDATIONS**

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

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 5 September 2012.

SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a) *Summary of Findings*

1. In June 2012, South Africa presented its written follow-up report, outlining its responses to the recommendations adopted by the Working Group on Bribery at the time of [South Africa's Phase 2 evaluation](#) in June 2010. Since Phase 2, South Africa has neither prosecuted nor adjudicated any case of bribery of a foreign public official. Therefore, the follow-up issues remain open.

2. The Working Group welcomed the information provided by the South African authorities in the course of this exercise and recognised South Africa's efforts to implement the Phase 2 recommendations. As concerns the Phase 2 evaluation, the Working Group considers that South Africa has satisfactorily implemented 13 out of the 28 recommendations, while 8 recommendations have been partially implemented, and 5 recommendations have not been implemented. 2 recommendations are considered to be no longer relevant.

3. With respect to raising awareness and providing training on foreign bribery, South Africa has undertaken significant awareness-raising efforts with a cross-section of South Africa's public administration, including within the relevant government departments and agencies most active in engaging with South African companies operating abroad (*recommendation 1a*). The South African government has also engaged with business organisations, companies and civil society to improve awareness of South Africa's foreign bribery legislation. Nevertheless, given the specific need to sensitise small and medium size enterprises in this area, efforts to advise and assist companies, in particular SMEs, will continue to be followed up in Phase 3 (*recommendation 1b*).

4. In relation to the detection and reporting of foreign bribery, South Africa has taken steps to raise awareness of the duty to report under the Prevention and Combating of Corrupt Activities Act (PRECCA), and to encourage and facilitate such reporting. These include dissemination of information and training in particular through the South African Revenue Service (SARS) Fraud and Anti-Corruption Hotline and website, the Export Credit Insurance Corporation's (ECIC) Tip-Offs Anonymous Campaign, BUSA-developed guidelines for South African foreign investors, continuous marketing of the National Anti-Corruption Hotline and Crime line, as well as training on detection and reporting for staff in diplomatic representations and in South Africa's official development agency (*recommendation 2a*). However, with regard to measures to enhance and promote whistleblower protection (*recommendation 2b*), no measures have been taken to render the Protected Disclosures Act, which affords whistleblower protection in the public and private sector, more effective in practice. Furthermore, the Working Group on Bribery will closely monitor the provisions in the Protection of State Information Bill, currently under discussion in the South African Parliament, to ensure that persons blowing the whistle in foreign bribery cases are adequately protected.

5. With respect to export credits (*recommendation 3*), ECIC has integrated in its policies all of the standards in the [2006 Recommendation on Bribery in Officially Supported Export Credits](#). As concerns the integration of measures to prevent foreign bribery in the context of official development assistance (ODA) (*recommendation 4*), South Africa now includes specific reference to the PRECCA foreign bribery provision in all ODA related contracts. Nevertheless, given that the receiving of bribes appears to be the main subject of attention, some further awareness-raising may be needed to highlight the active bribery aspects of the offence. Furthermore, the South African Development Agency (SADA), which will be in charge of disbursing ODA, is still in the process of being established, as are its internal controls.

6. In the area of accounting, auditing and internal controls measures to prevent and detect foreign bribery, significant steps have been taken to promote internal controls, ethics and compliance measures or programmes, but more efforts need to be carried out to address in particular foreign

bribery and to target SMEs (*recommendation 5b*). With respect to internal controls, and contrary to the Working Group's recommendation, measures have not been taken to extend existing requirements to establish and maintain systems of internal controls to companies (other than public and state-owned companies), including all publicly traded companies (*recommendation 5c*). At the time of the Phase 2, there were also concerns that the Companies Act 2008 would significantly restrict the categories of companies subject to statutory audit, with only public-interest companies subject to such a requirement. However, the Companies Act 2008 and the accompanying regulations which came into force in May 2011 did not, in the end, eliminate the auditing requirement for all non public-interest companies: state-owned companies, listed public companies, public companies not listed, as well as public-interest companies, are required to submit to an audit by a registered auditor. The recommendation made in this area by the Working Group was therefore considered no longer relevant (*recommendation 5a*).

7. Concerning the detection and reporting by accountants and auditors of suspected bribery of foreign public officials, awareness-raising efforts were directed at auditors on their money laundering reporting obligations. Information on the OECD Anti-Bribery instruments was also circulated on the professional associations' websites, but these initiatives did not address the reporting regime specifically for foreign bribery, or steps to protect auditors making disclosures (*recommendation 5d*). With respect to money laundering reporting, South Africa further indicated that general information has been provided to reporting entities on how to make suspicious transaction reports, but there has not been any awareness raising or training specifically relating to foreign bribery as a predicate offence (*recommendation 6*).

8. With respect to the investigation and prosecution of foreign bribery, the Working Group welcomed measures taken by South Africa to increase the resources allocated to fighting corruption, and to provide training on detection and investigation of foreign bribery to investigators and prosecutors (*recommendation 7a*), including on the use of plea agreements (*recommendation 7g*), and on liability of legal persons (*recommendation 10a*). Training was also provided to prosecutors on the provisions in the PRECCA governing territorial and nationality jurisdiction, but such training and awareness-raising was not extended to the judiciary (*recommendation 8*). South Africa has also undertaken reforms to increase the coordination between investigators and prosecutors in foreign bribery cases, in particular by establishing an Anti-Corruption Task Team (ACTT). The ACTT, which only handles specific cases of corruption, including foreign bribery, is intended to provide for better coordination, expedite the effective investigations and prosecutions of corruption cases, and work with other government departments (*recommendation 7b*). Regarding the Phase 2 recommendation to more proactively detect, investigate and prosecute foreign bribery, the Working Group welcomed the institutional measures put in place by South Africa to monitor and evaluate the performance of law enforcement agencies, but considered that, given the absence of foreign bribery cases opened to date, questions remain regarding proactivity (*recommendation 7c*). Similarly, the Working Group was encouraged by the South African law enforcement authorities' reliance on a broad range of investigative tools in domestic bribery cases, but noted that these tools, including special investigative techniques, have yet to be used in a foreign bribery investigation (*recommendation 7d*).

9. The Working Group reiterated its key concern that considerations of national economic interest, as well as other factors prohibited under Article 5 of the Anti-Bribery Convention, might still be taken into account in the investigation and prosecution of foreign bribery cases. The Working Group was encouraged that the South African Prosecution Policy had been modified in this respect, and was approved by the National Director of Public Prosecutions in October 2011, but noted that ministerial approval is still pending two years after the Phase 2 (*recommendation 7e*). The Working Group further notes that no specific measures have been taken to strengthen safeguards to ensure that the exercise of investigative and prosecutorial powers, in particular for the foreign bribery offence, is not influenced by considerations prohibited under Article 5, including with regard to decisions made by the National Director of Public Prosecutions (*recommendation 7f*).

10. In the area of mutual legal assistance (MLA), South Africa has undertaken reforms to render more efficient its execution of MLA, including by establishing a dedicated unit within the Ministry of Justice and Constitutional Development, and by conducting numerous training initiatives (*recommendation 9a*). Unfortunately, the Extradition Bill, which was already due to be presented to Parliament at the time of the Phase 2, has yet to be passed by Parliament and enacted into legislation (*recommendation 9b*). Provisions in the Extradition Bill would address a loophole identified in South Africa's Phase 1 and Phase 2 Reports by ensuring that South Africa can provide extradition for foreign bribery regardless of where the foreign bribery offence has been committed.

11. With a view to more effective enforcement of foreign bribery and related offences, South Africa has also developed statistical tools. Statistics are now maintained on the predicate offences to money laundering (*recommendation 11*), and a system is also in place to monitor sanctions imposed in foreign bribery cases (*recommendation 12a*). However, given that there have not been any foreign bribery cases, and that foreign bribery as a predicate to a money laundering offence has not yet been reported, these issues will continue to be followed up in Phase 3.

12. The Working Group welcomed the significant steps taken by South Africa in relation to Phase 2 recommendations on sanctions for foreign bribery. Draft legislative amendments have been introduced to increase the fines imposed on legal persons for foreign bribery, and the Working Group urged South Africa to proceed with the prompt adoption of these amendments (*recommendation 10b*). South Africa further indicated that confiscation measures under the Prevention of Organised Crime Act (POCA) have been relied on and litigated successfully in several cases (*recommendation 12c*). Nevertheless, given the absence of foreign bribery cases to date, the issue of the effectiveness of confiscation in foreign bribery cases will continue to be followed up attentively in Phase 3. Furthermore, as concerns debarment sanctions available under the PRECCA, training has been provided to prosecutors, resulting in the "endorsement" of two legal persons on the Register of debarred companies. Finally, concerning the recommendation to rely on Specialised Commercial Crime Courts in foreign bribery cases, it appears that it had always been intended that these courts would, in practice, hear foreign bribery cases. This recommendation was therefore considered no longer relevant (*recommendation 12b*).

b) Conclusions

11. Based on the findings of the Working Group on Bribery with respect to South Africa's implementation of its Phase 2 recommendations, the Working Group concluded that South Africa has satisfactorily implemented recommendations 1a, 1b, 2a, 3, 7a, 7b, 7g, 9a, 10a, 11, 12a, 12c and 12d; that South Africa has partially implemented recommendations 4, 5b, 5d, 6, 7c, 7d, 8 and 10b; and that South Africa has not implemented recommendations 2b, 5c, 7e, 7f and 9b. Recommendations 5a and 12b are considered no longer relevant.

12. The Working Group will follow up on the remaining recommendations and follow-up issues during the Phase 3 evaluation of South Africa, scheduled for December 2013.

WRITTEN FOLLOW UP TO PHASE 2 REPORT – SOUTH AFRICA

Name of country: SOUTH AFRICA

Date of approval of Phase 2 Report: 17 June 2010

Date of information:

Part I: Recommendations for Action

Text of recommendation 1(a):

Recommendations for ensuring effective prevention and detection of foreign bribery

1. With respect to prevention, awareness raising and training activities, the Working Group recommends that South Africa:
 - a) Provide further training to raise the level of awareness of the foreign bribery offence within the public administration and among those agencies that can play an important role in preventing and detecting foreign bribery by South African companies active in foreign markets, including diplomatic personnel, tax inspectors, and trade promotion, export credit and development aid agencies [2009 Recommendation, Section III(i)].

Actions taken by South Africa

Development of booklets, brochures, and leaflets (electronic and print) on the OECD Anti-Bribery Convention (the Convention), by government departments and agencies to raise awareness of the foreign bribery offence. The following material was developed:

1. The Department of Public Service and Administration (DPSA) published an article on the Convention, its requirements and the Working Group on Bribery (WGB) review mechanism on a government publication, which was circulated to all government departments.
2. The South African Revenue Services (SARS) published an article on International Tax Evasion Trends in its February 2012 News Letter. The article highlights to Tax Officials pertinent trends in tax evasion and other information relating to international tax offences. The SARS further acknowledges in the News Letter, the role and willingness of OECD member countries to assist developing countries to fight offshore tax abuse. The article provides a link to the OECD Forum on Tax Administration for officials to continuously update themselves on OECD initiatives.
3. The SARS has also published in the same News Letter information about the OECD Bribery Awareness Handbook for Tax Examiners, with a link provided for officials to download a full copy.
4. The Department of International Relations and Cooperation (DIRCO) published an electronic leaflet relating to anti-corruption, fraud and anti-bribery, which has been placed on the Department's website. The Department has also placed the copies of the Convention and obligations for reporting on its website. The Departmental Intranet contains the contact details for officials to report any allegation of bribery or corruption.

Training on the Convention for the public administration officials (including officials on Foreign Service). The following training initiatives have been undertaken by South Africa to

raise the level of awareness of the foreign bribery offence:

5. In 2010, the DPSA developed two training programmes targeting specific groups of public servants, namely, general employees and anti-corruption practitioners in the public service. Training for general employees commenced in August 2010. Training for anti-corruption practitioners commenced in June 2011. Both training programmes are still on-going. The content of both training programmes covers the Convention and learners are familiarised with the key aspects of the Convention, such as Article 1, which outlaws bribery of foreign public officials. Copies of SA's Phase 2 Report and the OECD Anti-bribery Convention are part of the resources provided to learners. Training programmes further cover information on the reporting of offences relating to the Convention as contemplated in the Prevention and Combating of Corrupt Activities Act, 2004 (PRECCA). So far a total of 1666 general employees and 474 anti-corruption practitioners have been trained respectively on the two programmes. These include 267 Immigration and Customs Officials in all ports of entry in South Africa.
6. With a view to raise awareness of the foreign bribery offence amongst diplomatic personnel, DIRCO has developed a standard presentation on foreign bribery offences, which has been presented to all managers within the Department and circulated to all Heads of Missions during November 2010.
7. The Convention has been included as part of the training for the Foreign Service. A training programme for Heads of Missions includes a presentation on all international treaties and Conventions and implications for South Africa and its Missions abroad.
8. Furthermore, DIRCO has also organised briefings with the business communities in Missions abroad, which work closely with the South African Chamber of Commerce. The Departmental officials abroad and Ambassadors continuously brief South African businesses about the Convention and its implications.
9. During 2010, the DIRCO held meetings with South African businesses conducting business in foreign countries and engaged them on, amongst other things, the Convention and the importance of good conduct of South African Companies in Foreign Countries.
10. The National Prosecuting Authority (NPA) and the South African Police Service (SAPS) have jointly undertaken the following training sessions on corruption, cyber crime, money laundering and banking crimes:
 - 10.1 On 26/08/2011: Section 105A (of the Criminal Procedure Act, 1977) plea and sentence agreements and charge sheets pertaining to corruption matters, attended by 14 members of the Specialised Commercial Crime Unit (SCCU) and 8 members of the Specialised Tax Component.
 - 10.2 On 18/11/2011: Section 28 of the NPA Act in corruption and related offences, attended by 13 members of the SCCU, 6 members of the Directorate of Priority Crime Investigations (DPCI), 4 members of the Special Investigating Unit (SIU) and 1 member of the Organised Crime Component (OCC)
 - 10.3 On 27/01/2012: Guidelines in the investigation and prosecution of corruption and procurement fraud, attended by 8 members of the SCCU, 3 members of the Asset Forfeiture Unit (AFU) and 2 members of the DPCI.
11. The foreign bribery offence falls within the ambit of corruption in South Africa. Within the NPA the Specialised Commercial Crime Unit (SCCU) and the Anti-Corruption Task Team (ACTT) will primarily deal with these cases.
12. The Export Insurance Corporation of South Africa SOC Limited (ECIC) has also conducted an awareness session for its employees on *Anti-Bribery Policy in ECIC Supported Transactions*.

Text of recommendation 1(b):

1. With respect to prevention, awareness raising and training activities, the Working Group recommends that South Africa:
 - b) Take further action, as appropriate in cooperation with business organisations and other civil society stakeholders, to improve awareness among companies, in particular small and medium sized companies active in foreign markets, of the legislation regarding foreign bribery, and the non tax-deductibility of bribes, and to advise and assist companies in their efforts to prevent foreign bribery [2009 Recommendation, Section III(i)].

Actions taken by South Africa:

The DPSA has undertaken several activities in partnership with Business Unity South Africa (BUSA), to implement a programme aimed at raising awareness of anti-corruption measures, including offences regarding bribery of foreign public officials in business transactions. These include the following:

1. Presentation of the Convention and related instruments to the BUSA Anti-Corruption Working Group. This presentation, together with the Phase 2 Report and Recommendations, and the Convention, has been uploaded on the BUSA website. In addition to the Convention, businesses in South Africa are made aware of laws in other countries which prohibit bribery e.g. the US Corrupt Practices Act, 1977, and the UK Bribery Act of 2010.
2. BUSA has also convened and hosted annual anti-corruption business forums in 2009, 2010 and 2011, respectively, in which the DPSA made a presentation on the Convention, with particular focus on Article 1 and the 2009 Recommendations. In addition, awareness material covering the Convention was developed and distributed at the Forum.
3. The anti-corruption booklet was launched at the 2010 Anti-Corruption Business Forum. Furthermore, awareness material covering the Prevention and Combating of Corrupt Activities Act, 2004, and the non-tax deductibility of bribes were distributed and copies are available on the BUSA website. Meanwhile additional reports, including the Convention, 2009 Recommendations and South Africa's Phase 2 Report were distributed to all participants.
4. An e-training programme on business anti-corruption was launched on 1 April 2011. E-learning material has also been developed covering the Convention and the Code of Good Practice Guide. The training programme is available on the BUSA website. By December 2011, 116 learners were enrolled on the programme.
5. From 27 July 2010 to 31 May 2011, 1372 delegates from the business sector received training on anti-corruption which covered also the Convention.
6. The Mentoring Programme on Business Integrity has been developed by BUSA in partnership with the DPSA. Hundred (100) young business professionals were enrolled in the mentorship programme from August 2011 to date. The mentorship programme covers business ethics; corporate governance and tools for promoting transparency and accountability. All mentees were provided with among others, a corruption information guide for foreign investors to South Africa, OECD guidelines for multi-national enterprises, business principles for countering bribery, organisational approaches to corruption, international conventions (including Anti-Bribery Convention), laws, treaties and guidelines against foreign bribery. The programme is also available through a video link for those young business professionals who cannot be enrolled on the programme.

7. The CEO Round Table discussion was held on 16 September 2011. The main issue for discussion was the role of business in promoting integrity.
8. The National Anti-corruption Forum (NACF), which comprises representatives from the government, civil society and the business sector, hosted the 4th National Anti-corruption Summit from 8 – 9 December 2011. Information regarding the Convention and related documents were distributed at the Summit as part of the public awareness campaign.
9. With regard to awareness for tax examiners, the South African Revenue Services has distributed the Bribery Awareness Handbook for tax examiners. The OECD Anti-bribery Convention and related material have also been placed on the SARS website. In addition, information regarding the non-deductibility of bribes to companies has been placed on the website.
10. The ECIC conducted a workshop for financial institutions, exporters, sponsors, and export promotion agencies on the new policy: *Anti-Bribery Policy in ECIC Supported Transactions*.

Text of recommendation 2(a):

2. With respect to the detection and reporting of suspected foreign bribery to the competent authorities, the Working Group recommends that South Africa:
 - (a) Regularly inform South African officials, particularly those in diplomatic representations, the tax administration, and in trade promotion, export credit development aid, and other agencies involved with South African companies operating abroad, and relevant private sector employees, of their obligations under the PRECCA to report instances of foreign bribery, and encourage and facilitate such reporting [2009 Recommendation, Sections III (iv) and IX].

Actions taken by South Africa:

1. The Department of International Relations and Cooperation (DIRCO) has developed a code of conduct for South African companies doing business in foreign countries and the document is being consulted upon internally and will be distributed once approved.
2. With regard to tax administration, acts of corruption including foreign bribery can be reported on the SARS Fraud and Anti-corruption Hotline (no. 0800002870) as well as on the website (Suspicious Activity Reporting). The Hotline and the website are accessible to both the public and SARS employees. Awareness in this regard is continuously being made to both the public and the SARS employees.
3. South African Ambassadors and officials work in partnership with the South African Chamber of Commerce to continuously brief South African businesses operating abroad about the Convention and its implications for the country. During 2010, DIRCO held meetings with South African businesses conducting business in foreign countries and engaged them on among other things, the Convention and the importance of good conduct in those foreign countries.
4. The BUSA has developed a specific guideline for foreign investors, which also addresses information about the reporting of foreign bribery.
5. The National Anti-Corruption Hotline and Crime line are continuously marketed to the public to report any acts of corruption, including foreign bribery.
6. The ECIC is running a Tips-Off Anonymous campaign on invoices to clients and internal banners. The tip-off can also be done on the web-site.
7. The National Treasury, together with the Reserve Bank of South Africa monitor the movement

of funds to and from South Africa.

8. The National Treasury keeps a Register of Tender Defaulters to endorse names of persons who have been convicted of offences relating to tenders or contracts.

Text of recommendation 2(b):

2. With respect to the detection and reporting of suspected foreign bribery to the competent authorities, the Working Group recommends that South Africa:
 - (b) take measures for enhancing and promoting its whistleblower protection mechanisms for public and private sector employees who report suspected acts of foreign bribery, in order to encourage them to report suspicions without fear of retaliation. [2009 Recommendation, Sections III(iv) and IX].

Actions taken by South Africa:

1. The Department of Justice and Constitutional Development initiated the review of the Protected Disclosures Act (PDA) in 2009. The South African Law Reform Commission submitted a Report in 2010 on the review of the PDA and the draft Amendment Bill to the Minister of Justice and Constitutional Development for consideration. It is envisaged that the proposed Bill will be tabled in Parliament after the consultation process which, will commence during 2012.

Text of recommendation 3:

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

Actions taken by South Africa:

1. The Export Credit Insurance Corporation of South Africa SOC Limited (ECIC), South Africa's export credit agency, has adopted and implemented the *Anti-Bribery Policy in ECIC Supported Transactions* since December 2011. The Policy seeks to ensure that the ECIC does not knowingly support transactions – particularly export contracts and investments contracts – that involve bribery, including bribery of foreign public officials. The Policy is benchmarked to the 2009 Recommendation and the *2006 Survey on Measures Taken to Combat Bribery in Officially Supported Export Credit (as amended in November 2010)* conducted by the OECD Working Party on Export Credit and Credit Guarantee (ECG).
2. In addition, the application forms have been refined to include undertaking / declaration by exporters and applicants against bribery in the Export Contracts and Investment Contracts. The application forms also include the legal consequences of bribery in international business that can be imposed under the *Prevention and Combating of Corrupt Activities Act 14 of 2004*

(PRECCA). Already, the Insurance Policies and Exporter's Undertaking Agreements contained anti-bribery clauses, whereby insured entities expressly undertake and warrant that they have not and will not engage in corrupt activities in connection with the transaction on which support is provided – particularly the export contracts and investment contracts.

3. The new forms are available on the ECIC website since 08 December 2011 (www.ecic.co.za/download_centre).
4. In terms of the Anti-Bribery Policy, ECIC has introduced measures to detect bribery in its transactions. Exporters and applicants are now required to sign undertakings and declarations in the application forms that neither they, nor anyone acting on their behalf, such as agents, have been engaged or will engage in bribery in the transaction.
5. The ECIC has also introduced an improved due diligence mechanisms for pre-screening of exporters and applicants as well as their agents in the transactions, through which underwriters verify the listing of exporters and applicants for bribery in the debarment lists published by international financial institutions such World Bank Group (WBG), the African Development Bank (AfDB), the Asian Development Bank (ADB), and the European Bank for Reconstruction and Development (EBRD), and the Inter-American Development Bank (IDB). Underwriters are also required to look into public sources for any indicators of bribery or allegations of bribery in connection with the transaction.
6. In the event (i) where there is credible evidence of bribery on the export contract to be supported, (ii) where exporter or applicant has been listed on the debarment list of international financial institutions, or (iii) where the exporter or applicant has been convicted of bribery in the five years preceding applications, the ECIC may decline to process applications. However, under exceptional circumstances, the ECIC may, at its own discretion still proceed with the application if it is satisfied that the exporter or applicant has implemented systems to deter future bribery, and that corrective measures have been taken to combat future bribery by the exporter or applicant. In doing so, the ECIC will also take into account factors such as: replacement of individuals who have been involved in the bribery, submission to audit and making the results of such audit available to the public, refund of tax deductions of amount of bribes paid or expenditure incurred in furtherance of such bribery to the relevant authority, and any other measure that may be considered appropriate.
7. In an event that credit evidence of bribery is discovered and proven in transactions already supported by the ECIC, the ECIC will promptly report same to law enforcement authorities and may take appropriate action against the exporter or insured applicant. The action may include the cancellation of the insurance cover.
8. Furthermore, the application process has been refined to ensure disclosure of identities of agents acting for or on behalf of the exporters or applicant as well as details of the commission or fees paid and purpose of the payments. The ECIC has also introduced disclosure procedure whereby suspicion of bribery is reported to law enforcement authorities by Management discovered during application and implementation stage of the transactions.
9. In March 2012, the ECIC conducted a client session to officially introduce the Policy to its customers. The session was attended by 40 persons, representing 23 financial institutions, exporters, sponsors and export promotion agencies as well as the ECIC staff dealing with customers. The aim was to create awareness amongst the customers and staff members on the Policy, the 2009 Recommendation and the OECD Convention. Almost 100% of all lending financial institutions involved in export credit finance attended the session.
10. During the course of 2012, the ECIC will continue to create awareness on the Policy to customers through face-to-face meetings and presentations to export promotion agencies and associations.
11. The ECIC is still continuing the Tips-Off Anonymous Campaign on the invoices to clients and internal banners. The Tip-Off can also be done on the web-site.

12. The Anti-Bribery Policy in ECIC Supported Transactions, the OECD Anti-Bribery Convention (including the 2006 Recommendation) as well as the PRECCA have been posted on the ECIC website in December 2011 (www.ecic.co.za/anti_corruption).

Text of recommendation 4:

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

Actions taken by South Africa

1. It is a standard practice that any ODA related contract includes an article emanating from section 5 of the PRECCA. According to this Article, the government of South Africa and the party concerned enter into a contract and declare, among others, that—
 - (a) they will combine efforts to fight corruption;
 - (b) any person or public officer involved in the project who, directly or indirectly, accepts or agrees or offers to accept any gratification in order to influence the awarding of any employment, financial benefit, contract or tender during the execution of such an agreement, shall be guilty of a corrupt activity; and
 - (c) failure to take necessary measures to prevent such activity or to take action against such activity may constitute sufficient grounds to justify the termination of such an agreement, the withdrawal of any consequent procurement, or resulting award, or take other corrective measures foreseen by applicable law.
2. The South African Development Agency (Agency) is being established, and all South Africa Developmental assistance will be facilitated through this Agency. The governance model and project management model are being designed in order to enhance internal controls related to developmental assistance projects and funds. Developed countries were approached in order to learn best practices that can be incorporated in all the Agency operations, governance and project management models.

Text of recommendation 5(a):

5. Regarding accounting and auditing, the Working Group recommends that South Africa:
- a) Consider any appropriate increased role for business organisations and professional associations in the promotion of internal control development for small and medium size enterprises, in the event that the new regulations to implement the Companies Act 2008 eliminate the need for statutory audit for non-public interest entities [2009 Recommendation, Sections X.B. and C.].

Actions taken by South Africa:

The Companies Act, 2008, and the Regulations have been implemented since 01 May 2011. Regulations under the Act require the following types of companies to have their financial statements audited (Regulation 28, which **covers recommendation 5(a)**):

- (a) Public companies.
- (b) State owned companies.
- (c) Any company that falls within any of the following categories in any particular financial year:
 - (i) any profit or non-profit company if, in the ordinary course of its primary activities, it holds assets in a fiduciary capacity for persons who are not related to the company, and the aggregate value of such assets held at any time during the financial year exceeds R5 million;
 - (ii) any non-profit company, if it was incorporated—
 - directly or indirectly by the state, an organ of state, a state-owned company, an international entity, a foreign state entity or a company; or
 - primarily to perform a statutory or regulatory function in terms of any legislation, or to carry out a public function at the direct or indirect initiation or direction of an organ of the state, a state-owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function; or
- (d) Any other company whose public interest score in that financial year is 350 or more; or at least 100, but less than 350, if it's annual financial statements for that year were internally compiled.

Text of recommendation 5(b):

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

Actions taken by South Africa:

1. Section 43 of the Companies Act, 2008, provides for the establishment of ethics committee and section 94 provides for the establishment of the Audit Committee in private companies.
2. In terms of section 43 of the Companies Act, 2008, the Ethics Committee has the responsibility to—
 - (a) monitor among other things the company's social and economic development activities, including its standing in terms of the goals and purposes of the OECD Convention and recommendations regarding foreign bribery (corruption); and
 - (b) ensure that the company is and remains a good corporate citizen by among other things reducing acts of corruption.
3. The audit committee's functions include—
 - (a) preparing a report to be included in the annual financial statements of the company relating to the accounting practices and the internal financial control of the company; and
 - (b) receiving and dealing appropriately with concerns and complaints relating to among other things—
 - (i) accounting practices and internal audit of the company;
 - (ii) the content or auditing of the company's financial statements; and
 - (iii) internal financial controls of the company.
4. Although there are no requirements in terms of the Act for companies to make public disclosure of their ethics and compliance programmes or measures contributing to preventing and detecting bribery, the King III Code of Good Governance, recommends integrated reporting to companies. Integrated reporting would include, among other things, management practices by the company. Listed companies are required to provide integrated reports in line with the Johannesburg Stock Exchange Listing Requirements.
5. Furthermore, public entities are required in terms of the Public Finance Management Act, 1999 (PFMA), to have and maintain effective, efficient and transparent systems of financial and risk management and internal control. See section 38(1)(a)(i) of the PFMA in this regard. In terms of Treasury Regulation 3.1.10 (a), Audit Committees should review the effectiveness of the internal control systems. Entities have to report information on the internal controls, ethics and compliance programmes or adopted measures in their Annual Reports and the Auditor-General expresses an opinion on the effectiveness of these measures.

Text of recommendation 5(c):

5. Regarding accounting and auditing, the Working Group recommends that South Africa:
 - c) Consider extending (i) to additional companies, including all publicly traded companies, existing requirements to establish and maintain systems of internal controls; and (ii) to non-publicly traded companies, where appropriate, the requirement to establish corporate monitoring bodies, such as audit committees [2009 Recommendation, Section X.C.].

Actions taken by South Africa:

See South Africa's responses in respect of recommendations 5(a) and 5(b) above.

Text of recommendation 5(d):

5. Regarding accounting and auditing, the Working Group recommends that South Africa:
 - d) In consultation with relevant professional associations: (i) encourage the detection and reporting of suspected bribery of foreign public officials by accountants and internal and external auditors, in particular through guidelines and training for these professionals and through raising the awareness of the management and supervisory boards of the companies about these issues; and (ii) ensure that auditors making reports on suspected acts of foreign bribery to the law enforcement or regulatory authorities, reasonably and in good faith, are protected from legal action [2009 Recommendation, Section X.B. and Annex II].

Actions taken by South Africa:

1. Section 214 of the Companies Act, 2008, deals with the criminalisation of false statements, reckless conduct and non compliance. A person will be found guilty if he/she falsifies an accounting record of a company; provides false and misleading information where the Act requires; and knowingly becomes part of the act or omission to defraud creditors, employees of the company and holders of the securities. If the matter comes to the attention of the Companies and Intellectual Property Commission (CIPC) that the above unlawful activities are taking place in a company, the CIPC can report this matter to the South African Revenue Service, Financial Services Board, Independent Regulatory Board of Auditors, or National Prosecuting Authority for further investigation and prosecution.
2. The Independent Regulatory Board for Auditors (IRBA) has developed and distributed guidelines regarding the PRECCA and issued a guide on “combating money laundering and financial terrorism” in January 2011, which is available on the IRBA website. The Board also creates awareness in the form of bulk emails that are sent to all members and through road shows. The OECD Anti-bribery Convention and the 2009 Recommendations have been included in the IRBA website.
3. In November 2011, the Financial Intelligence Centre (FIC) and IRBA jointly issued the anti-money laundering/suspicious transaction guidance note for auditors, which include foreign bribery offences.

Text of recommendation 6:

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

Actions taken by South Africa:

1. The Financial Intelligence Centre (FIC) has issued Guidance Note 4 on suspicious and unusual transactions to assist accountable institutions, reporting institutions and any other person as described in section 29 of the FIC Act (2001, in meeting their reporting obligations under the Act. This guidance is also available on the FIC website.

2. The FIC conducted compliance reviews with various supervisory bodies and accountable institutions where the matter of suspicious transactions was addressed. To reinforce public awareness, the FIC developed new guidance directed primarily to supervisory bodies, accountable institutions, and reporting institutions.

Text of recommendation 7(a):

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

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

Action taken by South Africa:

Annual Strategic Plan of National Prosecuting Authority

1. The most important factor driving the development of the NPA Strategic Plan is government priorities led by the Presidency. Government is committed to the five priorities of education, health, rural development and land reform, creating decent work and fighting crime. The broad strategic outcome for the Justice Crime Prevention Security (JCPS) Cluster is that “all people in South Africa are and feel safe”.
2. Since the on-site visit in February 2010, the JCPS Delivery Agreements of 2010, 2011 and 2012 inform the Strategic Plans of the NPA for the corresponding years. The JCPS Delivery Agreements combines the policies of the Cluster into eight expected outputs. The NPA will contribute to the achievement of, among others, the following outputs:
 - Addressing the overall levels of serious crime in particular contact and trio crimes.
 - Improving the effectiveness and ensuring the integration of the Criminal Justice System (CJS).
 - Combating corruption within the JCPS cluster to enhance its effectiveness and its ability to serve as deterrent against crime. Output 3 of the Agreement in particular aims at reducing corruption.
 - Managing and improving the perception of crime among the population.
3. In terms of the latest Agreement the descriptions of output 3 (reduced corruption) are—
 - reduced levels of corruption, thus improving investor perception, trust and willingness to invest in South Africa; and
 - reduced corruption within the JCPS Cluster to enhance its effectiveness and its ability to serve as deterrent against crime.
4. The targets are, among others, to—
 - successfully convict 100 people who have assets of more than R5 million obtained through illicit means;
 - by 2012 initiated investigations against at least 100 persons;
 - by 2013 initiated criminal proceeding against at least 75 people; and

- by 2014 convicted 100 persons.
5. The Annual Plan of the NPA is in line with the above outputs and targets of the Agreements. Within the NPA the Specialised Commercial Crime Unit (SCCU) will be responsible for the coordination of all prosecutions of JCPS officials for corruption (output 3) as well as all prosecutions in respect of output 5. Furthermore, a dedicated national capacity (the Anti-Corruption Task Team referred to hereunder) has been created to participate in the inter-departmental project to achieve output 5. The Asset Forfeiture Unit (AFU) will ensure that the powers in the Prevention of Organised Crime Act, 1998 (Act 121 of 1998), to seize criminal assets, are used effectively to remove the profits of crime. The AFU focuses on restraining and forfeiting the proceeds of crime or the property used to commit crime.
 6. In view of the fact that corruption is one of the main outputs of Government and the JCPS Cluster, sufficient resources have been available to law enforcement authorities, including the South African Police Service, Directorate for Priority Crime Investigation, and the National Prosecuting Authority, for the effective detection, investigation and prosecution of corruption and general and foreign corruption offences.
 7. The structure of the NPA was recently amended to improve performance and service delivery. These changes will ensure that the provision of specialised services is efficient and that the accountability level is enhanced. The proposed amendments included the re-establishment of the Specialised Commercial Crime Unit (SCCU) and the National Prosecutions Service (NPS).
 8. The SCCU is a small specialist prosecution unit residing under the National Specialised Services Division in the Office of the National Director. It embraces expertise in specific categories of complex commercial crimes. There is centralised coordination of corruption prosecutions irrespective of the regions where the offences were committed. During the reporting period, a total of 10 dedicated commercial crime courts finalised 824 cases with a conviction rate of 91.6%.
 9. The SCCU focuses its attention on the key output of prosecuting cases of corruption where there were assets of at least R5 million to be seized by participating in the ACTT dealing with these matters.
 10. The voted funds for the NPA as a whole for the year 2011/2012 were about R2, 8 billion, of which R1, 9 billion was allocated to Public Prosecutions Programme. The SCCU forms a Sub-programme of the Public Prosecutions Programme. During the financial year 2011/2012, 99.8% of the voted funds were spend. Therefore, sufficient funds were made available for the prosecution of corruption cases.
 11. The total expenditure for the 2010/11 financial year for the South African Police Service (SAPS) amounted to about R53, 5 billion, which represents a spending rate of 100%. The Department's estimates will increase to R66, 7 billion in 2013/14 over the medium term, at an average rate of 7, 6 % over the period.
 12. The SAPS has a Sub-programme: Specialised Investigations. This Programme provides for the prevention, combating and investigation of national priority crimes, including organised crime syndicates, commercial crime and corruption, by the DPCI. This Programme has a staff component of 2617 and a total budget of R848 million.
 13. Expenditure estimates are R985, 596 million (2011/12), R1 204,182 million (2012/13) and R1 284,138 million (2013/14) for specialised investigations.

Training

14. Soon after the Phase 2 on-site-visit to South Africa in February 2010, the NPA introduced various training interventions.

15. In the first instance, training sessions were conducted in respect of—
- (a) background information relating to the work of the OECD in general;
 - (b) the provisions of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention);
 - (c) the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the Recommendation)
 - (d) the work and mandate of the OECD Working Group on Bribery in International Business Transactions (the Working Group);
 - (e) the findings and recommendations in South Africa’s Phase 1 Report and draft Phase 2 Report (and on-site-visit);
 - (f) South Africa’s obligations in terms of the Convention;
 - (g) the relevant South African legislation applicable to the Convention and the offence of bribery of foreign public officials and, in particular—
 - the provisions of section 5 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004) (PRECCA), relating to the offence of corruption of foreign public officials;
 - other provisions in the PRECCA that are relevant to the offence, for example, attempts, conspiracy, penalties, international co-operation, extradition, etc;
 - the provisions of the Prevention of Organised Crime Act, 1998 (Act 121 of 1998), and in particular those provisions pertaining to asset recovery;
 - legislation pertaining to the newly established Directorate for Priority Crime Investigation (DPCI), and the provisions of Chapter 5 of the NPA Act in so far as these provisions may still be applied in respect of certain investigations in respect of corruption offences; and
 - (h) the necessity for specialisation.
16. The above training sessions were conducted in all the provinces and in Head Office, Pretoria. A total number of 228 senior prosecutors received training. In the first round the NPA concentrated on senior prosecutors involved in the prosecution of organised crime and serious commercial crime. These senior personnel and the Directors of Public Prosecutions were requested to provide the same training to junior prosecutors. The following regions and offices received the training:

DATE	PROVINCE/REGION	NUMBER OF PROSECUTORS
12 May 2010	North West Province	22
17 May 2010	Free State Province (including Northern Cape)	15
19 May 2010	KZN Province	29
24 May 2010	Eastern Province	17
26 May 2010	Western Province	27
28 May 2010	Transkei in Mthatha	35
2 June 2010	North Gauteng (including Limpopo)	23
4 June 2010	South Gauteng	47
4 to 6 August 2010	Head Office (Legal Affairs Division)	13
TOTAL		228

17. Furthermore, the Justice College presented training to prosecutors, which includes corruption as one of the topics in their module. All the offences in the Prevention and Combating of Corrupt Activities Act, 2004, including section 5 dealing with corruption of foreign public officials are covered.
18. During the financial year: 2010/2011, Justice College provided training to 50 prosecutors on the above course/module, namely, on 21/02/2011 - 25/02/2011.
19. For the financial year 2011/2012, Justice College presented four courses on the same topic to prosecutors as follows:

Number of prosecutors	Course date
50	12/09/2011 – 16/09/2011
45	10/10/2011 – 14/10/2011
45	31/10/2011 – 04/11/2011
50	27/02/2012 – 02/03/2012
Total: 190	

20. For the financial year 2012/2013, Justice College has schedule six courses of 25 delegates each to prosecutors to start in July 2012.
21. Furthermore, extensive training was provided in relation to mutual legal assistance (international co-operation) and extradition legislation and the challenges relating to these matters in all regions.
22. With respect to the mutual legal assistance (MLA) training, the officials are advised that—
- requests for MLA can be incoming, i.e. where South Africa is the Requested State, required to render assistance, or outgoing, i.e. where the South Africa is the Requesting State and in need of assistance from another country;
 - South Africa is a role-player on the international stage and that South Africa is signatory to various international legal instruments, as a result of which South Africa has a legal duty to assist fellow signatories should they require MLA;
 - the South Africa government views these international legal obligations in a serious light and that legislation has been put in place to govern the situation in respect of Mutual Legal Assistance in the absence of a specific bi-lateral treaty which would govern the situation; and
 - the relevant legislation is the International Co-Operation in Criminal Matters Act, 1996 (Act 75 of 1996). The Act does not prescribe a list of specific offences and applies to any crime, including corruption or bribery of foreign public officials.
 - Training in respect of MLA and Extradition was provided to 214 Prosecutors.
23. With respect to the Extradition training, the officials are similarly advised that—
- South Africa could be either a Requested State or a Requesting State;
 - various countries have entered into bi-lateral Extradition Treaties with South Africa, e.g. the United States of America;
 - South Africa is also a signatory to the European Convention on Extraditions and has enacted domestic legislation governing the situation in respect of Extraditions, i.e. the Extradition Act, 1962 (Act 67 of 1962).
24. Training in respect of MLA's and Extradition was provided by senior specialists to 214 senior prosecutors as indicated in the Table direct hereunder.

Date	Centre	Number attending
15 September 2010	DPP: Pretoria	38
27 September 2010	DPP: Johannesburg	32
3 December 2010	DPP: Cape Town	18
7 December 2010	DPP: Durban	27
13 December 2010	DPP: Bloemfontein & Kimberley (training conducted in Bloemfontein)	29
27 January 2011	DPP: Grahamstown, Port Elizabeth & Bisho (training conducted in Port Elizabeth)	14
3 March 2011	DPP: Pietermaritzburg & Durban (training conducted in Durban)	28
7 March 2011	DPP: Mmabatho	22
23 March 2011	DPP: Cape Town	20
25 March 2011	DPP: Mthatha	31
27 November 2011	DPP: Eastern Cape	14

December 2011	DPP: Kimberly	10
TOTAL		283

25. Training was also conducted in respect of mutual legal assistance and extradition for—
- officials of the DPCI on two occasions between July 2010 and December 2010;
 - the International Organisation for Migration on three occasions (in Cape Town, Durban and Midrand); and
 - members of the Legal Services Division in the Office of the National Director of Public Prosecutions.

26. On 13 April 2012 the SCCU, consisting of specialised prosecutors dealing with commercial crime and SAPS DPCI Commercial Crime (investigators dealing with commercial crime) agreed on a joint strategy to deal with commercial crime. The relevant parts of Strategy no 2 of the Joint Strategy reads as follows:

“STRATEGY 2

Increase the skills sets of prosecutors and investigators in focus areas in order to investigate and prosecute effectively and efficiently.

OBJECTIVE No 3

To increase investigative and prosecutorial efficiency by having joint training in focus areas of corruption, cyber crime, money laundering, AFU and banking crimes.

MEASURES AND TARGETS

At least 4 Joint training sessions per region (on corruption, cyber crime, money laundering, AFU and banking crimes) by 31 March 2013.

RATIONALE

Increase the knowledge of prosecutors and investigators on focus areas to increase the finalization of cases and successful prosecution of cases.”.

27. Since 1 April 2011, training was done at the six different SCCU Regional Offices. An example follows hereunder.

Cape Town

- On 26/08/2011: Section 105A plea and sentence agreements and charge sheets pertaining to corruption matters, presented by Adv B Downer SC and attended by 14 members of the SCCU and 8 members of the Specialised Tax Component.
- On 18/11/2011: Section 28 of the NPA Act in corruption and related offences, presented by Adv B Downer SC, attended by 13 members of the SCCU, 6 members of the DPCI (Directorate of Priority Crime Investigations), 4 members of the SIU (Specialised Investigation Unit) and 1 member of the OCC(Organised Crime Component).
- On 27/01/2012: Guidelines in the investigation and prosecution of corruption and procurement fraud, presented by Adv W Bouwer and attended by 8 members of the SCCU, 3 members of the AFU (Asset Forfeiture Unit) and 2 members of the DPCI

Text of recommendation 7(b):

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

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

Actions taken by South Africa:

Position of Directorate for Priority Crime Investigation

1. In paragraphs 112 to 188, South Africa's Phase 2 Report (Report) deals comprehensively with the position of the South African Police Service (SAPS), and in particular referred to the disbandment of the Directorate of Special Operations (DSO) and the establishment of the Directorate for Priority Crime Investigation (DPCI) within the SAPS.
2. The Report deals with the reasons for the disbandment of the DSO; the structure of the DPCI; objectives and mandate of the DPCI; independence of the DPCI; training and resources of the DPCI; and the need that corruption of foreign public officials be dealt with by specialised prosecutors within a specialised investigating unit.
3. In conclusion the Report, among others, provides as follows in paragraph 118:
"Given that it is still relatively early since the DPCI has become operational, and that South Africa has only very recently opened four preliminary investigations of cases of foreign bribery, the effect of this rearrangement of law enforcement on the investigation of foreign bribery is something that should continue to be closely monitored and followed-up upon." (Emphasis added)
4. It is important to note that a recent judgement of the Constitutional Court (CC) will drastically influence the position of the DPCI and provides for the establishment of an **independent investigation authority**. In *Hugh Glenister v President of the Republic of South Africa & Others* (Case No. CCT 48/10), the key question is whether the national legislation that created the DPCI and disbanded the DSO, is constitutionally valid.
5. The majority of the CC held that Chapter 6A of the South Africa Police Services Act, 1995 (Act 68 of 1995), is inconsistent with the Constitution and invalid to the extent that it fails to secure an adequate degree of independence for the DPCI. The CC makes the following two key findings:¹
 - (a) In the first instance the CC holds that the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. While the Constitution does not in express terms command that a corruption-fighting unit should be established, its scheme taken as a whole imposes a pressing duty on the state to set up a concrete, effective and independent mechanism to prevent and root out corruption. This obligation is sourced in the Constitution and the international law agreements which are binding on the state. The Court points out that corruption undermines the rights in the Bill of Rights, and imperils our democracy. Section 7(2) of the Constitution imposes a duty on the state to "*respect, protect, promote and fulfil*" the rights in the Bill of Rights. When read with section 8(1) (which provides that the rights in

¹ As provided in the *Media Summary* to the case.

the Bill of Rights bind all branches of government), section 39(1)(b) (which provides that Courts must consider international law when interpreting the Bill of Rights) and section 231 (which provides that an international agreement that Parliament approves “binds the Republic”), this provision places an obligation on the state to create an independent corruption-fighting unit.

A number of international agreements on combating corruption have been approved by Parliament and are binding on the Republic. These agreements require that the state create independent anti-corruption entities. Implicit in section 7(2) of the Constitution is the obligation that the steps the state must take to protect and fulfil constitutional rights, must be reasonable. To create an anti-corruption unit that is not adequately independent, thereby ignoring binding international law, is not a reasonable constitutional measure.

- (b) Secondly, the Court finds that the DPCI does not meet the constitutional requirement of adequate independence. Consequently the impugned legislation does not pass constitutional muster. The main reason for this conclusion is that the DPCI is insufficiently insulated from political influence in its structure and functioning. This is because the DPCI’s activities must be coordinated by Cabinet. The relevant Act provides that a Ministerial Committee may determine policy guidelines in respect of the functioning of the DPCI, as well as for the selection of national priority offences. This form of oversight makes the DPCI vulnerable to political interference. Further, the CC holds that the safeguards that the provisions create are inadequate to save the DPCI from a significant risk of political influence and interference. In addition, the conditions of service of the unit’s members and in particular those applying to its head make it insufficiently independent. Members of the DPCI thus have inadequate employment security to carry out their duties vigorously; the appointment of members is not sufficiently shielded from political influence; and remuneration levels are flexible and not secured. These aspects make the unit vulnerable to an undue measure of political influence.
6. In view of the above, the CC declares the offending legislative provisions establishing the DPCI constitutionally invalid to the extent that they do not secure adequate independence. The CC consequently suspends the declaration of constitutional invalidity for a period of 18 months so as to give Parliament the opportunity to remedy the defect.
 7. Both the majority and the minority judgments further conclude that the Constitution does not oblige Parliament to locate a specialised corruption-fighting unit solely within the National Prosecuting Authority and nowhere else.
 8. Soon after the judgement, the Minister of Police appointed a Task Team consisting of members of the South African Police and the Department of Justice and Constitutional Development to study and consider the judgement and prepare draft legislation to comply with the principles set out in the judgement with a view to submit same to Cabinet and Parliament for consideration.
 9. On 24 February 2012 the Minister of Police introduced the South African Police Service Amendment Act, 2012. A copy of the Bill is attached hereto. This Bill envisages giving effect to the decision of the Constitutional Court. The Bill was published in Government Gazette No. 35070 of 24 February 2012.
 10. The Bill seeks to amend the South African Police Service Act, 1995, in order to provide for an adequate measure of independence of the Directorate for Priority Crime Investigation. The Directorate is responsible for the investigation of priority crimes, including international crimes such as terrorism, mercenary crimes, crimes relating to the proliferation of weapons of mass destruction, organised crime and corruption.
 11. The Bill was approved by the National Assembly on 23 May 2012 and will be referred to the National Council of Provinces for consideration.

Establishment of Anti-Corruption Task Team (ACTT)

12. Soon after the January-2010 Cabinet *Lekgotla* (a meeting called by government to discuss strategy planning), the President established the Inter-Ministerial Committee of Anti-Corruption. Furthermore, in July 2010, the President mandated the JCPS Cluster to create an Anti-Corruption Task Team (ACTT), to fast track the investigation and prosecutions of cases of corruption.
13. The process of establishing the ACTT has been informed by the need to institutionalise a more collaborative way for the Police and the prosecuting authority to work with each other in the combat, prevention, investigation and prosecution of priority crime and in particular corruption cases. Therefore, the purpose of the ACTT is to provide for the better co-ordination of governmental functions within the JCPS Cluster, with the aim of reducing corruption in South Africa.
14. The primary mandate of the ACTT is to expedite the effective investigation and prosecution of priority corruption cases. The secondary mandate of the ACTT is to work together with other government departments and initiatives to strengthen governance systems, reduce risks and to prevent the incidence of corruption.
15. The execution of the ACTT mandate is the responsibility of a Principal Committee, comprising—
 - (a) the Head of the DPCI, who is also the Chairperson of the Principle Committee;
 - (b) the National Director of Public Prosecutions;
 - (c) the Head of the Special Investigating Unit (SIU); and
 - (d) representatives from any of the secondary member institutions that wish to nominate a representative.
16. The Principal Committee seeks to take all decisions on a consensus basis. The Principal Committee is supported in the performance of its responsibilities by a Management Committee (Manco), consisting of representatives of the DPCI, the SCCU of the NPA, the Asset Forfeiture Unit of the NPA, the SIU, the Office of the Accountant-General, the South African Revenue Service, and the Financial Intelligence Service.
17. The ACTT is a specialised Unit and all members designated to the ACTT are driven by the values enshrined in the Constitution and will be required to—
 - exhibit the highest form of personal and professional integrity;
 - exhibit inter-agency co-operation and teamwork, based on mutual respect;
 - seek to obtain consensus and deliberations will take place in the spirit of a multi-agency project with a single purpose, mandate and set of objectives.
18. The Principal Committee must develop policies and operating procedures, which must at least deal with the following—
 - (a) an objective case assessment procedure to govern the manner in which individual cases come to be investigated by members of the ACTT;
 - (b) an integrated and multi-disciplinary methodology to be employed by the ACTT;
 - (c) security and integrity management;
 - (d) the nature and frequency of reporting within and by the ACTT.
19. The ACTT is different to the DPCI. The ACTT **only deals with specific cases of corruption.** These cases include—
 - corruption cases involving specific amounts (i.e at least R5 million);
 - tender cases;
 - **corruption of foreign public officials;**

- corruption involving procurement agreements in the public sector.
20. While the bulk of operations are conducted from Pretoria and will be centrally managed, a certain component will be located in the regions, namely, Kwazulu-Natal, the Western Cape and the Eastern Cape. Premises to co-locate the above operational capacity have been secured and already occupied in Pretoria.
 21. The ACTT is dealing with a number of serious domestic corruption cases. In total, it is investigating 57 cases involving 414 persons. Of these, 22 cases are in court with 15 people convicted and another 167 accused. The other 232 persons are still being investigated as suspects. The total value of all assets frozen to date in cases dealt with by the ACTT is R791 million.

Regional information

22. In the **Western Cape**, the relevant Director of Public Prosecutions (DPP) has directed that all corruption cases be centralised under his personal supervision and control. In this sense, the prosecution of all foreign bribery matters, should they be reported to the DPP, will receive his special attention.
23. Ongoing training in commercial matters falls within the **strategic plan of the Specialized Commercial Crime Component** of the DPP's office. Training on corruption and fraud charge sheets was provided to the SCCU prosecutors and SAPS on 28 August 2011.
24. Regarding stakeholder management in corruption matters, the Regional Head of the SCCU and Adv Downer SC, of the relevant Office are members of the **Western Cape Anti-Corruption Forum (WCACF)**. The founding summit of the WCACF was held in November 2011 at which the Premier of the Western Cape and the Mayor of Cape Town were keynote speakers.
25. Regarding outreach to foreign jurisdictions and international training, the DPP concerned indicated that Adv Downer of his Office is a member of the **Corruption Hunters Network** under the aegis of the Norwegian Department of Foreign Affairs and its aid agency (NORAD). He attends **twice yearly meetings** at which strategies, successes and problems relating to international corruption are discussed and shared with the other approximately 20 members from around the globe. The last meeting of the Network was held in **Cape Town in December 2011**.
26. All the benefit from these foreign interactions and training are rolled out to local prosecutors by means of reports and training.
27. The Director of Public Prosecutions: **Northern Cape**, has indicated that although no specific training regarding foreign bribery has been provided, corruption awareness training in general has been provided to several prosecutors. She further reported that no specialisation have taken place regarding the prosecution of foreign corruption cases. However, a branch of the SCCU has now been established in the region, which will give attention to corruption of foreign official.
28. The Director of Public Prosecutions: **South Gauteng** indicated that in his Region various prosecutors received corruption training on 28 October 2011, presented by Adv William Coetzer, who is an expert on corruption cases.

Independence of National Prosecuting Authority (NPA)

29. It is further important to inform the OECD Working Group on Bribery regarding new

developments relating to the introduction of amendments with a view to even further enhance the independence of the prosecuting authority.

30. Currently, the Constitution² and the provisions of the National Prosecuting Authority Act, 1998 (Act 32 of 1998) (the NPA Act), guarantee the independence of the prosecuting authority in so far as it relates to the institution of criminal proceedings.³ Furthermore, the independence of the prosecuting authority has been confirmed by the Supreme Court of Appeal and the Constitutional Court.⁴
31. However, at present section 36 of the NPA Act provides that the Department of Justice and Constitutional Development (the Department) must, in consultation with the National Director of Public Prosecutions, prepare the necessary estimate of revenue and expenditure of the NPA. It also provides that the Director-General of the Department is, subject to the Public Finance Management Act, 1999 (Act 1 of 1999) (the PFMA), the accounting officer of the NPA.
32. The abovementioned arrangement gives rise to certain practical challenges. Accordingly, in the beginning of 2011 the Minister of Justice and Constitutional Development requested the Department to prepare draft amendments to the NPA Act so as to provide for an independent administration of the prosecuting authority; to further regulate the executive authority of the prosecuting authority; and to provide for the appointment of a Chief Executive Officer as accounting officer for the prosecuting authority.
33. On 17 April 2012, the Minister submitted the draft Amendment Bill to the Acting National Director for comment.

Text of recommendation 7(c):

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

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

Actions taken by South Africa:

See the responses in respect of recommendations 7(a) and (b) above. Further, to ensure that all corruption cases and, in particular, corruption of foreign public officials are reported and monitored on a daily basis, the attached template (Tag 1) has been developed.

Text of recommendation 7(d):

² See section 179(4) of the Constitution.

³ See, for example, section 32(1)(a) and (b) of the NPA Act.

⁴ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (10) BCLR 1253 (CC).

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

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

Actions taken by South Africa:

See the responses in respect of recommendations 7(a) and (b) above.

Text of recommendation 7(e):

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

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

1. On 24 October 2011 the National Director approved a revised Prosecution Policy. The amendments, among others, proposed the following addition to the Policy:

“D. Prosecution of corruption of foreign public officials

The prosecution of offences in respect of corrupt activities relating to foreign public officials shall be subject to the abovementioned principles and considerations: Provided that the decision-making process shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”.

2. The above wording is line with Article 5 of the Convention.
3. South African legislation requires that any amendments to the Prosecutions Policy by the National Director must be done in concurrence with the Minister of Justice and Constitutional Development and the Directors of Public Prosecutions.⁵The consultation process with the various Directors of Public Prosecutions was finalised. The National Director is in the process of consulting with the Minister so as to table the amended Policy in Parliament.
4. It is also important to note that for the time being, the National Director’s directives issued prior to the OECD’s on-site visit in February 2010 are still applicable.⁶ This Circular explained the OECD Convention, South Africa’s obligations and the importance of Article 5 of the Convention. Accordingly, among others, the following instruction was issued:
“In order to give effect to this undertaking, all prosecutors are hereby instructed to refer all decisions whether or not to prosecute a person for committing an offence in terms of section 5 of the Prevention and Combating of Corrupt Activities Act, 2004 (corruption of a foreign public official), to the Director of Public Prosecutions concerned or a Deputy Director of Public Prosecutions authorised thereto by him or her and in exercising his or her discretion,

⁵ See section 179(5)(a) of the Constitution and section 21 of the NPA Act.

⁶ See paragraph 149 of South Africa’s Phase 2 Report.

such Director or authorised Deputy Director may not take the economic impact of the offence on the community into account, unless such economic impact may constitute an aggravating circumstance.” (Emphasis added)

Text of recommendation 7(f):

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

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

Actions taken by South Africa:

See the responses in respect of recommendation 7(e) above. Apart from the above amendment to the Prosecution Policy, the Office the National Director is currently considering amendments to the Policy Directives so as to bring it in line with the amendment proposed above.

Text of recommendation 7(g):

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

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

Actions taken by South Africa:

1. The new Directives (Plea and Sentence Agreements) issued by the National Director in terms of section 105A (11) of the Criminal Procedure Act, 1977 (Act 51 of 1977) was tabled in Parliament on 11 October 2010.
2. On 20 July 2011, the National Director also issued guidelines relating to the application of plea and sentence agreements.
3. The objectives of these guidelines are, among others, to eliminate perceptions and inconsistencies and to enhance the credibility of plea and sentence agreements. Only certain (more senior) prosecutors are authorised to accept plea and sentence agreements.

Text of recommendation 8:

8. With respect to jurisdiction over the foreign bribery offence, the Working Group recommends that, South Africa take steps to ensure that Law enforcement authorities and the judiciary are aware of the full range of jurisdiction introduced by sections 35 of the PRECCA, in particular as

regards legal persons [Convention, Articles 2 and 4].

Actions taken by South Africa:

See the responses in respect of recommendation 7(a) above. The provisions of section 35 of the PRECCA were included in the training referred to in these paragraphs.

Text of recommendation 9(a):

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

Actions taken by South Africa:

1. The Department of Justice and Constitutional Development recently took a measure to ensure the provision of MLA without undue delay. Therefore, at the end of 2010, the Minister of Justice and Constitutional Development decided that a dedicated Unit within the Department is to be established to process requests for MLA and Extradition. Accordingly, in January 2011, the Chief Directorate: International Legal Relations was established.
2. Since its establishment requests are processed by the Department without delay. The coordination of the execution of request has also improved and the turnaround times have been drastically reduced.
3. It should however be noted that this intervention applies to all request and not necessarily to foreign bribery cases. Hence, from the Central Authority's point of view, recommendation 9(a) been complied with.
4. With respect to the MLA training, the officials are advised of the fact that requests for MLA can be incoming, i.e. where the Republic of South Africa is the Requested State, required to render assistance, or outgoing, i.e. where the RSA is the Requesting State and in need of assistance from another country. They are also advised of the fact that South Africa is a role-player on the international stage and that the RSA is a signatory to various international legal instruments, as a result of which we have a legal duty to assist fellow signatories should they require MLA. They are also advised that the South Africa government views these international legal obligations in a serious light and that legislation has been put in place to govern the situation in respect of Mutual Legal Assistance in the absence of a specific bi-lateral treaty which would govern the situation. The relevant legislation is the International Co-Operation in Criminal Matters Act, 1996 (Act 75 of 1996). The Act does not prescribe a list of specific offences and applies to any crime, including corruption of foreign public officials.
5. With respect to the Extradition training, the officials are similarly advised of the fact that South Africa could be either a Requested State or a Requesting State. Various countries have entered into bi-lateral Extradition Treaties with South Africa, e.g. the United States of America. South Africa is also a signatory to the European Convention on Extraditions and has enacted domestic

legislation governing the situation in respect of Extraditions, i.e. the Extradition Act, 1962 (Act 67 of 1962). [It should be borne in mind that the Extradition Act is currently under review as a Draft Extradition Bill is, at present, under consideration.] Whereas Extradition Agreements in days of old often contained a list of offences for which extradition could be requested and granted, the modern trend is to move away from such a list towards a wider consideration of that which is deemed to be an extraditable offence. Different Treaties attach slightly different meanings to this term (specifically with reference to the relevant period of imprisonment required) but it is safe to say that, considering the legislative definition, it includes offences which meet the requirements of dual criminality and are punishable with a sentence of 6 months imprisonment or more. (Some treaties increase the period of imprisonment to one of 12 months or more. This is, however, neither here nor there as extradition is usually requested in more serious matters and the standard of 12 months is easily met.) Given the period of imprisonment possible in respect of corruption of a foreign public official, extradition for offences of this nature, is possible.

Text of recommendation 9(b):

9. With respect to mutual legal assistance and extradition, the Working Group recommends that, South Africa:
 - b) Promptly proceed with the adoption of its Extradition Bill, with a view to ensuring that South Africa can provide extradition for foreign bribery, regardless of where the foreign bribery has been committed [Convention, Article 10].

Actions taken by South Africa:

1. Due to competing and urgent priorities in terms of legislation to be promulgated, the Extradition Bill has not yet been passed into legislation. Nonetheless, it is on the programme for the first quarter of the year. Therefore, it is expected that it will be passed before the end of June 2012.
2. In terms of the proposed legislation (the Bill), section 5 thereof provides for extradition to a requesting state, irrespective of whether the offence was committed “within the jurisdiction of the requesting state or the law of the Republic provides for jurisdiction over the same type of offence when committed outside the territory of the Republic” (section 5 (i) (a) and (b), as it currently stands).

Text of recommendation 10(a):

10. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that South Africa take steps to ensure that:
 - a) Police and prosecutors are adequately trained and made aware of the importance of effectively enforcing liability of legal persons for acts of foreign bribery, so that they will be better equipped and more proactive in investigating and prosecuting legal persons for foreign bribery offences, and in responding to credible allegations [Convention, Article 2, and 2009 Recommendation, Sections II, III.(ii), V. and IX].

Actions taken by South Africa:

See the responses in respect of recommendation 7(a) above. The liability of legal persons was included in the training referred to in these paragraphs. Furthermore, as indicated above, cases of corruption of foreign public officials will be prosecuted by members of the ACTT or the SCCU who are experienced and specialised prosecutors. In the ACTT the police, prosecutors and other law enforcement agencies will work in terms of an integrated methodology.

Text of recommendation 10(b):

10. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that South Africa take steps to ensure that:
 - b) The penalties applied in practice are sufficiently effective, proportionate and dissuasive [Convention, Article 2 and 3, and 2009 Recommendation, Sections II, III(ii) and V].

Actions taken by South Africa:

1. Though not specific to foreign bribery as such, the Prevention of Organised Crime Act, (Act No.121 of 1998) (POCA), has the effect of amending the International Co-operation in Criminal Matters Act (Act No. 75 of 1996) (ICCMA). In essence the penalties (i.e. the “confiscation order” and “restraint order”) under the ICCMA include such orders made under the POCA Act. Section 1 (1) (v) of the POCA defines “enterprise to include any legal entity.
2. Furthermore, POCA under section 1(xv) defines “proceeds of unlawful activities” to mean “any property or part thereof or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in connection with or as a result of any unlawful activity carried on by any person, whether in the Republic or elsewhere”. This definition includes acts of foreign bribery. The penalties prescribed by the Act under section 8 are a “fine not exceeding R100 million or imprisonment for a period not exceeding 30 years”. (See section 8(i)).
3. Similarly, failure to report suspicion regarding proceeds of unlawful activities attracts a fine or imprisonment for a period not exceeding 15 years (section 8(2)).
4. Furthermore, the Criminal Law (sentencing) Amendment Act, 2007 (Act No. 38 of 2007), amends the POCA, and makes provision for discretionary minimum sentences for certain serious offences (of which bribery is one, Part II of schedule 2). The consequential effect of this amendment is for the courts to impose even harsh penalties which are sufficiently effective, proportionate and dissuasive in line with’ the Convention and 2009 Recommendation.

Section 92(1)(b) of Magistrates’ Court Act

5. Section 92(1) of the Magistrates' Courts Act, 1944, sets out the jurisdictional limits of magistrates' courts in respect of criminal matters. Section 92(1)(a) provides that when a district court convicts a person of an offence it may impose a term of imprisonment not exceeding three years and when a regional court convicts a person of an offence it may impose a term of imprisonment not exceeding 15 years. (There are exceptions to this general rule which are not dealt with for purposes of this memorandum.) Section 92(1)(b) provides that when a court convicts a person of an offence it may impose a fine not exceeding the amount determined by the Minister from time to time by notice in the *Gazette* in respect of a district or regional court.

In terms of Government Notice No. R. 1411 of 30 October 1998, an amount of R60 000 was last determined if the court is not a court of a regional division, and R300 000 where the court is a court of a regional division.

6. The Department of Justice submitted proposals to the Minister of Justice and Constitutional Development to increase the above amounts to R100 000, 00 where the court is not a court of a regional division and R500 000, 00 where the court is a court of a regional division.
7. The Department received comments to increase these amounts to be more or less in accordance with the Consumer Price Index. It is therefore proposed that an amount of R120 000, 00 should be determined in respect of magistrates' courts and an amount of R600 000, 00 in respect of regional courts for purposes of section 92(1)(b) of the Magistrates' Courts Act.
8. The Legal Services Division within the Office of the National Director is also busy preparing a Prevention and Combating of Corrupt Activities Amendment Bill. This Bill, among others, proposes drastic increases in respect of corruption offences, which will include the corruption of foreign public officials. Fines not exceeding R50 million for the Regional Courts and R10 million for the district courts are proposed. It is expected that these amendments will be introduced towards the second session of Parliament in 2012.

Text of recommendation 11:

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

Actions taken by South Africa:

1. The Directors of Public Prosecutions have been requested to report statistics in respect of corruption of foreign public officials as well as all money laundering cases. Therefore, South Africa has a system in place to maintain statistics on the predicate offences for money laundering, with a view to identifying cases where foreign bribery is a predicate offence. Thus far no such case has been reported.
2. The Organised Crime Component within the Office of the National Director is responsible for the prosecution of money laundering cases and this Component also keeps statistics of these cases.
3. The Organised Crime Component is currently dealing with 29 Money Laundering cases, which were reported to National Office. However, not one of these cases relates to corruption or foreign public officials.

Text of recommendation 12(a):

12. Regarding sanctions for foreign bribery, the Working Group recommends that South Africa:
 - a) Maintain statistics in respect of sanctions for foreign bribery offences, to allow for an assessment of the effectiveness of sanctions in practice [Convention, Article 3].

Actions taken by South Africa:

See the response in respect of recommendation 11 above.

Text of recommendation 12(b):

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

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

Actions taken by South Africa:

See the responses in respect of recommendation 7(b) *supra*.

Text of recommendation 12(c):

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

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

Actions taken by South Africa:

1. South Africa continues to make full use of the confiscation provisions available under the Prevention of Organised Crime Act, 1998, to freeze the actual bribes and/or property representing the proceeds of corruption, which will include corruption of foreign bribery. It has continued to litigate extensively and with success to ensure that the evidentiary threshold necessary to apply for freezing orders under the POCA is not too high in practice.

Text of recommendation 12(d):

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

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

Actions taken by South Africa:

1. See the responses in respect of recommendation 7(a) above. The provisions of section 28 of the PRECCA were included in the training referred to in these paragraphs. As of December 2010, 2 accused persons are included on the Register for Tender Defaulters, but these cases do not

relate to foreign bribery.

2. In the mean time, National Treasury which is responsible for the Register for Tender Defaulters has issued a Circular explaining the application of the Register and providing contact details where to report these offences.

Part II: Issues for Follow-up by the Working Group

Text of issue for follow-up:

13. The Working Group will follow up the issues below as case law develops:
 - a) The effect of the institutional rearrangement of law enforcement authorities on the investigation and prosecution of foreign bribery cases.

There is no new case.

Text of issue for follow-up:

13. The Working Group will follow up the issues below as case law develops:
 - b) The issue of intent, to ensure that ignorance of the foreign bribery legislation cannot be relied on as a defence in a foreign bribery case.

There is no new case.

Text of issue for follow-up:

13. The Working Group will follow up the issues below as case law develops:
 - c) The application of section 5(2) of the PRECCA, to ensure that it does not restrict the foreign bribery offence to acts performed only in the state of the foreign public official receiving the bribe.

There is no new case.

Text of issue for follow-up:

13. The Working Group will follow up the issues below as case law develops:
 - d) The performance of law enforcement authorities, including the SAPS, the NPA, and other relevant agencies, with regard to foreign bribery allegations, and in particular with regard to decisions not to open or to discontinue investigations and, as appropriate prosecutions; [Convention, Article 5, and 2009 Recommendation, Sections II, III.(ii)]

and V].

There is no new case.

Text of issue for follow-up:

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

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

There is no new case.

Text of issue for follow-up:

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

- f) The application in practice of the foreign bribery offence with respect to legal persons, including as concerns (i) the liability of parent companies for acts of bribery by intermediaries, including related legal persons, including subsidiaries abroad, (ii) the implications of the requirement that the foreign bribery offence be committed “in furthering or endeavouring to further the interests of that corporate body”, and (iii) the application of corporate liability to state owned and state controlled companies [Convention, Article 2, and 2009 Recommendation, Annex I, Paragraph C.].

There is no new case.

Text of issue for follow-up:

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

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

There is no new case.