



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

SOUTH AFRICA: PHASE 1

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

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SOUTH AFRICA

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A. IMPLEMENTATION OF THE CONVENTION

Formal issues

1. South Africa is the third country after Slovenia and Estonia¹ to accede to the 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the “Convention”)² in compliance with Article 13 of the Convention, which regulates accession.³ South Africa started to be a full participant in the OECD Working Group on Bribery in International Business Transactions (the Working Group) in April 2007, and deposited its instrument of accession on 19 June 2007. The Convention entered into force in South Africa on 18 August 2007.

The Convention and the South African legal system

2. Since 2004 and the entry into force of the Prevention and Combating of Corrupt Activities Act 2004 (Act No. 12 of 2004), South Africa has outlawed the bribery of foreign public officials.

3. Section 231(2) of the Constitution of the Republic of South Africa 1996, provides that an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces unless it is an agreement referred to in subsection 3.⁴ The South African Parliament approved the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in August 2006.

¹ Slovenia acceded to the Convention in 2001 and Estonia in 2004.

² South Africa is not an OECD member country. Five other countries, which were not OECD member countries, signed the Convention in 1997: Argentina, Brazil, Bulgaria, Chile, and the Slovak Republic (the latter became a member country in 2000).

³ Pursuant to Article 13 of the Convention, the Convention is “open to accession by any non signatory which is a member of the OECD or has become a full participant in the Working Group on Bribery in International Business Transactions”.

⁴ Subsection 3 refers to international agreements which do not require ratification or accession. Article 14 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions requires its ratification. Consequently, the Convention needed to be approved by the South African Parliament.

4. Section 233 of the South African Constitution further provides that “when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.” In certain areas, where the foreign bribery offence in the Prevention and Combating of Corrupt Activities Act 2004 (the PCCA) does not clearly implement a standard in the OECD Convention, the South African authorities explain that this section would supplement it. However, there is no jurisprudence supporting the broadening of unclear elements in a criminal offence to meet the standards under an international convention, in particular given the principle of “legal certainty” which ensures that any lack of clarity in a criminal offence should be resolved in favour of the accused.

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

5. Section 5 of the Prevention and Combating of Corrupt Activities Act 2004 (the PCCA) covers the offence of bribery of foreign public officials.

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

- (1) *Any person who, directly or indirectly gives or agrees or offers to give any gratification to a foreign public official, whether for the benefit of that foreign public official or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner—*
 - (a) *that amounts to the—*
 - (i) *illegal, dishonest, unauthorised, incomplete, or biased; or*
 - (ii) *misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;*
 - (b) *that amounts to—*
 - (i) *the abuse of a position of authority;*
 - (ii) *a breach of trust; or*
 - (iii) *the violation of a legal duty or a set of rules;*
 - (c) *designed to achieve an unjustified result; or*
 - (d) *that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of corrupt activities relating to foreign public officials.*
- (2) *Without derogating from the generality of section 2(4), “to act” in subsection (1) includes—*
 - (a) *the using of such foreign public official’s or such others person’s position to influence any acts or decisions of the foreign state or public international organisation concerned; or*
 - (b) *obtaining or retaining a contract, business or an advantage in the conduct of business of that foreign state or public international organisation.*

1.1 The elements of the offence

1.1.1 any person

6. Section 5(1) of the PCCA refers to acts committed by “any person”. As specified in section 2(5) of the PCCA, “any person includes a person in the private sector”. As regards the definition of “private sector”, section 1(xx) of the PCCA further specifies that:

- “private sector” means all persons or entities, including any—*
- (a) *natural person or group of two or more natural persons who carries on a business;*
 - (b) *syndicate, agency, trust, partnership, fund, association, organisation or institution;*

- (c) *company incorporated or registered as such;*
 - (d) *body of persons corporate or unincorporate; or*
 - (e) *other legal person,*
- but does not include—*
- (a) *public officers;*
 - (b) *public bodies;*
 - (c) *any legislative authority or any member thereof;*
 - (d) *the judicial authority or any judicial officer; or*
 - (e) *the prosecuting authority or any member thereof;".*

7. South Africa explains that the word “includes” in section 2(5) of the PCCA provides for the inclusion of persons other than “persons in the private sector”, South Africa refers to section 2 of the Interpretation Act 1957, which provides that a reference in any Act to “*person*’ includes— (a) *any divisional council, municipal council, village management board, or like authority;* (b) *any company incorporated or registered as such under any law;* (c) *any body of persons corporate or unincorporated”.*

1.1.2 *intentionally*

8. Article 1.1 of the Convention states that the foreign bribery offence must be committed “intentionally”. It does not require “strict “or “absolute liability” for the foreign bribery offence.⁵ Like most offences in countries Party to the Convention, the wording of section 5 of the PCCA does not specifically refer to an element of intent. It would therefore appear that what needs to be intended is that the offer, promise or gift of a benefit to a foreign public official is for the purpose of obtaining an improper advantage.

9. South Africa has provided several responses in its answers to the Phase 1 questionnaire, and in additional material and discussions, which have raised questions about the exact nature of the intent required under South African law. In particular, it is not clear whether the defendant must have known that foreign bribery was an offence under South African law. If this were the case, the effective enforcement of the foreign bribery offence would largely depend on the level of awareness in South Africa of the criminalisation of foreign bribery. For instance, the South African responses at 1.1.2 indicate that:

- “South African law requires that the perpetrator not only acted intentionally, but also with the knowledge that what he or she is doing is illegal.”
- “Proof that an accused person committed the prohibited act will create an inference that he or she acted with knowledge of the unlawfulness of his or her act.⁶ The inference will be dispelled by evidence that the accused person did not know that his or her act was contrary to the law or (what amounts to the same thing) was unaware that there was a statutory prohibition upon his or her conduct.”

⁵ “Strict” or “absolute” liability would result in the application of the foreign bribery offence, regardless if the perpetrator intended to obtain or retain business or other improper advantage in the conduct of international business by offering, promising or giving an advantage to a foreign public official.

⁶ *S v De Blom* 1977 (3) SA 513 (A) at 532.

- “An accused person will lack knowledge of unlawfulness where he acts under a *bona fide* ignorance of the law.⁷ Such ignorance may exist simply because the accused person has received incorrect advice as to the state of the law.⁸”

10. An additional memorandum prepared by South Africa to clarify the situation essentially concludes that, although the perpetrator must have been aware that he/she committed an offence under South African law, “where the perpetrator is active in a field that is regulated, then it is expected that the perpetrator should make the necessary enquiries about the applicable regulations.” Then, in discussions with South Africa, it was stated that an offence is committed if the perpetrator subjectively foresees that the transaction does not make economic sense.

11. In order to clarify how the element of intent will be applied in practice, this issue could be the subject of follow-up in Phase 2.

1.1.3 *to offer, promise or give*

12. Section 5(1) of the PCCA provides that an offence is committed where a person “*gives or agrees or offers to give*” a gratification. Section 2(3)(b) further explains that:

A reference in this Act to give or agree or offer to give any gratification includes to —

- (i) promise, lend, grant, confer or procure such gratification; or*
- (ii) agree to lend, grant, confer or procure such gratification; or*
- (iii) offer to lend, grant, confer or procure such gratification.*

13. This would cover the terms used under Article 1 of the Convention.

1.1.4 *any undue pecuniary or other advantage*

14. The South African foreign bribery offence refers to “*any gratification*”. Section 1(ix) of the PCCA defines “*gratification*” as including:

- (a) money, whether in cash or otherwise;*
- (b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;*
- (c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;*
- (d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;*
- (e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;*
- (f) any forbearance to demand any money or money’s worth or valuable thing;*
- (g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;*

⁷ *Attorney-General, Cape v Bestall* 1988 (3) SA 555 (A) at 567 D-E; *S v Potwane* 1983 (1) SA 868 (A) AT 871.

⁸ *S v Rabson* 1972 (4) SA 574; *S v Zemura* 1974 (1) SA 584 (RA); *S v Bezuidenhout* 1979 (3) SA 1325 (T); *S v Reids Transport (Pty) Ltd* 1982 (4) SA 197 (E); *S v Barketts Transport (Pty) Ltd* 1986 (1) SA 706 (C) AT 712; *S v Longdistance (Pty) Ltd* 1986 (3) SA 437 (N).

- (h) any right or privilege;
- (i) any real or pretended aid, vote, consent, influence or abstention from voting; or
- (j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage;

15. This definition appears to cover a very broad range of advantages.

16. In respect of the common law offence of bribery, the South African High Court held in *S v Deal Enterprises (Pty) Ltd and Others* that “the difference between legitimate entertainment and bribery lies in the intention with which the entertainment is provided, and that is something to be inferred from all the circumstances, including the relationship between giver and recipient, their respective financial and social positions and the nature and value of the entertainment.”⁹

17. The PCCA does not mention specific exclusions or defences to the foreign bribery offence. In particular, the PCCA does not foresee an exception for small facilitation payments, as mentioned under Commentary 9 to the Convention.¹⁰

1.1.5 whether directly or through intermediaries

18. Section 5 does not mention intermediaries but uses the terms “*directly or indirectly*”.

19. South Africa has submitted case law in support of their assertion that these terms would cover bribery through intermediaries. In the 2007 Supreme Court of Appeal decision in *Shaik and Other v. S*, the Court held that “the definition of ‘proceeds of unlawful activities’ in section 1(1) includes benefits received ‘directly or indirectly’, which in its ordinary meaning includes benefits obtained indirectly through another person or entity.”¹¹ This decision was confirmed by the Constitutional Court in 2008. It is worth noting that this case concerned the passive reception of benefits. South Africa points out that there is no indication in South African legislation to warrant a different interpretation in words contained in the active and passive bribery offence. Nevertheless, attention will need to be paid to ensure that a similar interpretation is relied on in the case of active bribery.

1.1.6 to a foreign public official

20. Section 1(v) of the PCCA defines a foreign public official as:

- (a) any person holding a legislative, administrative or judicial office of a foreign state;
- (b) any person performing public functions for a foreign state, including any person employed by a board, commission, corporation or other body or authority performing a function on behalf of the foreign state; or
- (c) an official or agent of a public international organisation;

⁹ See *S v Deal Enterprises (Pty) Ltd and Others* [1978] 3 All SA 483 (W).

¹⁰ Commentary 9 states that
Small "facilitation" payments do not constitute payments made "to obtain or retain business or other improper advantage" within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.

¹¹ *Shaik and Others v S* [2007] 2 All SA 150 (SCA).

21. This definition is quite broad and appears to cover all public officials exercising a public function for a foreign country, including for a public agency or public enterprise. It covers officials and agents of public international organisations. The definition also includes persons holding legislative, administrative or judicial offices, although it does not specify whether all such officials, whether appointed or elected, would be covered. South Africa points out that the definition refers to “*any person*”; therefore, there would be no need to specify whether that person is appointed or elected. South Africa is confident that all officials, whether appointed or elected, would be covered in practice.

1.1.7 for that official or for a third party

22. Section 5 does not refer to “a third party”, but covers gratifications given to a foreign public official, “*whether for the benefit of that foreign public official or for the benefit of another person*”. As noted earlier,¹² the term “person” includes both natural and legal persons.

23. It was discussed whether cases where the benefit is transferred directly to a third party with the agreement of the foreign public official would be covered by section 5 (e.g, where the gratification is received directly by a relative of the foreign public official, without the foreign public official him/herself receiving any gratification directly). South Africa is confident that such a situation would be covered in this given context. If reference to the terms “directly or indirectly” is also made, “the fact that the benefit was given directly to a third person, with the agreement of the foreign public official, would make it a gratification that was given indirectly to the foreign public official.”¹³ However, no case law is available to date covering this situation.

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

24. Section 5 does not specify that the bribe must be paid in order that the official “act or refrain from acting” in relation to his official duties. However, section 2(4) of the PCCA clarifies that “*a reference in this Act to any act, includes an omission*”.

25. The definition of the acts contained under sub-sections (a), (b) and (c) of section 5(1) cover acts that are “*illegal, dishonest, unauthorised, incomplete or biased*”,¹⁴ as well as acts that constitute a “*misuse or selling of information or material by the foreign public official in the course of carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation.*”¹⁵ Abuse of a position of authority, breach of trust and violation of legal duty or rules¹⁶ as well as any act that amounts to unauthorised or improper inducement to do or not to do something¹⁷ are also included under the definition of the acts that a foreign public official may perform in return for the bribe. These provisions would cover the improper use of functions by the foreign public official, as well as bribes paid in order for a foreign public official to perform his normal duties.

¹² See §§ 6 and 7.

¹³ See South Africa’s Supplementary Responses (hereinafter “the Supplementary Responses”) at 6.1.

¹⁴ Section 5(1)(a)(i) of the PCCA.

¹⁵ Section 5(1)(a)(ii) *ibid.*

¹⁶ Section 5(1)(b) *ibid.*

¹⁷ Section 5(1)(d) *ibid.*

1.1.9/10 in order to obtain or retain business or other improper advantage / in the conduct of international business

26. Section 5(2) provides additional specification as to how the terms “to act” can be interpreted. It states:

Without derogating from the generality of section 2(4), ‘to act’ in subsection (1) includes—

- (a) the using of such foreign public official’s or such others person’s position to influence any acts or decisions of the foreign state or public international organisation concerned; or*
- (b) obtaining or retaining a contract, business or an advantage in the conduct of business of that foreign state or public international organisation.*

27. This section appears to restrict the acts performed by the foreign public official to acts performed by “*the foreign state or public international organisation concerned*” [emphasis added],¹⁸ or in respect of the business of “*that foreign state or public international organisation*” [emphasis added].¹⁹ Whether this wording would imply that cases envisaged under Commentary 19 to the Convention²⁰ would not be covered under South African law will need to be assessed as practice develops.

1.2 Complicity

28. Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

29. Section 21(c) of the PCCA relates to “Attempt, conspiracy and inducing another person to commit offence”. It provides that “*Any person who — [...] (c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person, to commit an offence in terms of this Act, is guilty of an offence.*” Incitement, and aiding and abetting are specifically addressed under sub-section (c). The provision also addresses instructing, commanding, counselling or procuring another person to commit an offence, but authorisation of an act of bribery is not specifically covered. South Africa explains that a person who authorises or mandates another to commit an offence is not considered an accomplice but a perpetrator in his/her own right who complies with all the elements of the offence.²¹

30. Penalties for offences under section 21 are the same as those applicable to the offence for which the convicted person “*aided, abetted, induced, instigated, instructed, commanded, counselled or procured*”

¹⁸ Section 5(2)(a) of the PCCA.

¹⁹ Section 5(2)(a) *ibid.*

²⁰ Commentary 19 states that “one case of bribery which has been contemplated under the definition in paragraph 4.c is where an executive of a company gives a bribe to a senior official of a government, in order that this official use his office -- though acting outside his competence -- to make another official award a contract to that company.”

²¹ In *R v Koza* 1949 All SA (A) 390, the Appeal Court held that: “It is trite law that a person who gives a mandate to someone else to murder a third party is guilty of murder if the third party is killed as a result of the instruction he gave.”. See also *S v Nkombani* 1963 (4) SA 877 (A) and *S v Smith* 1984 (1) SA 583 (A).

another person to commit.”²² However, South Africa indicates that mitigating factors may be found in respect of accomplices.²³

31. Furthermore, the PCCA sanctions any person who is an accessory to or after the offence. Section 20 provides:

Any person who, knowing that property or any part thereof forms part of any gratification which is the subject of an offence in terms of Part 1, 2, 3 or 4, or section 21 (insofar as it relates to the aforementioned offences) of this Chapter, directly or indirectly, whether on behalf of himself or herself or on behalf of any other person—

(a) enters into or causes to be entered into any dealing in relation to such property or any part thereof; or

(b) uses or causes to be used, or holds, receives or conceals such property or any part thereof, is guilty of an offence.”

32. Offences under section 20 carry a maximum penalty of 10 years imprisonment or a fine (as opposed to a maximum sentence of life imprisonment or a fine for the perpetrator of a foreign bribery offence).²⁴

1.3 Attempt and conspiracy

33. Article 1.2 of the Convention requires that attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.

34. As noted above, section 21 of the PCCA relates to “Attempt, conspiracy and inducing another person to commit offence”.

Any person who —

(a) attempts;

(b) conspires with any other person; or

(c) aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,

to commit an offence in terms of this Act, is guilty of an offence.

35. This section applies equally to attempt and conspiracy in respect of the domestic bribery offence and attempt and conspiracy in respect of the foreign bribery offence.

36. With regard to sub-section (a), South Africa further explains that two classes of attempt have been distinguished by the Courts: “(i) those in which the wrongdoer, intending to commit a crime, has done everything which he or she set out to do but has failed in his or her purpose either through lack of skill, or of foresight, or through the existence of some unexpected obstacle, or otherwise; and (ii) those in which the wrongdoer has not completed all that he or she set out to do, because the completion of his or her unlawful

²² Section 26(2) of the PCCA.

²³ See the Supplementary Responses at 11.2.

²⁴ Section 26(1)(b) of the PCCA.

acts has been prevented by the intervention of some outside agency.”²⁵ In the latter instance, a distinction is drawn between purely preparation, which does not amount to attempt, and attempt.

37. As noted earlier, penalties for attempt and conspiracy under section 21 are the same as for the offence that the perpetrator attempted or conspired to commit, although mitigating factors may be found by the Courts.

2. Article 2: Responsibility of Legal Persons

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

Legal entities subject to liability

39. As a general rule, South African law is applicable to natural and legal persons alike. Section 2 of the Interpretation Act 1957 provides that a reference in any Act to:

“person” includes—

- “(a) any divisional council, municipal council, village management board, or like authority;*
- (b) any company incorporated or registered as such under any law;*
- (c) any body of persons corporate or unincorporated;”.*

40. “Private sector” is defined under section 1(xx) of the PCCA (see point 1.1.1 above on “any person”). These provisions appear to cover a broad range of legal persons in the private sector. They cover South African as well as foreign legal persons.

41. Furthermore, as regards coverage of state-owned and state-controlled companies, South Africa provides case law in support of their assertion that state owned and state controlled enterprises can be held liable for statutory offences. In the *Ex parte Minister van Justisie v Suid-Afrikaanse Uitsaaikorporasie (SABC)* of 1992,²⁶ the Appellate Division found the South African Broadcasting Corporation, a state-controlled enterprise, guilty of having negligently committed an offence. This case does not, however, pertain to an offence under the PCCA. No case law covering liability of state owned or state controlled companies in respect of bribery offences is available as of the time of this review.

Standard of liability

42. In the South African law, criminal liability of a legal person depends on a culpable act by a representative of the legal person.

43. Section 332 of the Criminal Procedure Act, 1977 (“the CPA”) provides for the prosecution of corporate bodies, their directors and servants, and members of associations. Section 332(1) states:

For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law —

- (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and*

²⁵ *R v Schoombie* 1945 AD 54 at 545-6; *S v Laurence* 1975 (4) SA 825 (A); *S v Du Plessis* 1981 (3) SA 382 (A).

²⁶ *Ex parte Minister van Justisie v Suid-Afrikaanse Uitsaaikorporasie (SABC)* 1992 SACR 618 (AD).

(b) *the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.*

44. Under section 332(10) of the CPA a “director” is defined as “any person who controls or governs that corporate body or is a member of a body or group of persons that controls or governs that corporate body, or, where there is no such body or group, who is a member of that corporate body”. South Africa explains that the purpose of this provision is to allow for the labelling of persons as “directors”, even where such persons are not officially registered as such in terms of the Companies Act, 1973.²⁷ South Africa further specifies that the identity of directors is a factual issue, which must be proved through evidence in the ordinary way.²⁸

45. The term “servant” in section 332 is not defined. The question is whether the definition of “servant” would be broad enough to trigger the liability of the legal person for acts committed by lower level employees. South Africa contends that the term “servant” would cover any person if he or she is regularly employed whether by contract or otherwise.²⁹ Supporting case law provided by South Africa includes the 1992 decision by the Appellate Division in *Ex parte Minister van Justisie v Suid-Afrikaanse Uitsaaikorporasie (SABC)* where the Court held that the actions and intentions of “directors, servants and other persons” [emphasis added] may be ascribed to a legal person. More recently, in 2007, the Supreme Court of Appeal considered, in *Minister of Finance and Others v Gore NO*,³⁰ that, where the fraudulent conduct was committed only partly for the employee’s own benefit, and resembled closely the duties performed in the course of his normal employment, then the employer should be visited with vicarious liability for the conduct of its employees. Doctrine also supports this approach and considers that “a corporation is liable for the wrongful acts of its employees committed in the course and scope of their employment”.³¹ Given the fairly recent entry into force of the foreign bribery offence, there is no case law available to date regarding liability of legal persons for acts of bribery committed by their employees.

46. To trigger the liability of the legal person, the offence must have been committed either “*in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body*” [emphasis added]. It should be underlined that these conditions are not cumulative. Consequently, even if a director or servant exceeds his/ her powers, liability of the legal person may still ensue, provided that the director or servant is acting in furthering or endeavouring to further the interests of the corporate body. Conversely, there is no systematic requirement that, in all cases, the offence be carried out for the benefit of the legal person.

²⁷ Section 215 of the Companies Act, 1973 provides for the keeping of a register of directors and officers.

²⁸ See the Responses at 2.1.9 and 2.1.10.

²⁹ See the Responses at 2.1.11.

³⁰ See *Minister of Finance and Others v Gore NO* 2007 (1) SA 111 (SCA) at paragraphs 29 and 30, as quoted in the Supplementary Responses at 14.3.

³¹ See Prof DJ McQuoid-Mason, in *Vicarious and Strict Liability*, at paragraph 263, as quoted in the Supplementary Responses at 13.1.

Proceedings against legal persons

47. South Africa indicates that, generally, proceedings against the legal person would be initiated and carried out simultaneously as the proceedings against the natural person. As provided by the Interpretation Act, a reference to “person” in any Act would include legal persons. Consequently, provisions in the CPA are applicable to legal persons.

48. The prosecutor, as provided under section 332(2) of the CPA, has discretion in choosing which director or servant is to represent the corporate body. While, in theory, any director or servant may be chosen, in practice, prosecutors will take into account such factors as whether the director or servant is also being charged in his/her personal capacity, or whether the director or servant lives close to the seat of the court.³²

49. To prosecute the corporate body, it must be proved that a director or servant has committed an offence. South Africa explains that this does not mean that a prosecution or conviction of a natural person is necessary to proceed against the legal person. It would seem, however, that the perpetrator of the offence would at least need to be identified. In the current context of increasingly complex corporate structures, often characterised by decentralised decision-making, it may prove difficult to identify an individual decision-maker within a management chain comprising several levels. There is some concern that this, in turn, may cause difficulties in effectively applying liability of legal persons for acts of foreign bribery in certain cases. South Africa holds the view that it is not the actual identity of the specific director or servant which needs to be established, and indicates that section 332 of the CPA only requires that proof be established that an act was committed by a director or servant. However, case law available to date does not provide such certainty in this regard. The requirement that an offence committed by a director or servant must be proved in order to prosecute the legal person continues to raise some concern in the Working Group. This could potentially result in certain difficulties with respect to prosecution and evidentiary issues. The Working Group considers that this issue merits follow-up in the context of future monitoring.

3. Article 3: Sanctions

50. The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are subject to “effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/ 3.2 Principal penalties for bribery of a domestic and foreign public official

51. The principal and supplementary penalties applicable under the PCCA are the same for bribery of a domestic and foreign public official.

52. As provided under section 26(1)(a) of the PCCA, corruption offences carry sanctions of imprisonment of up to 5 years or a fine at the Magistrate Court level, up to 18 years or a fine at the

³² See the Responses at 2.1.13.

Regional Court level, and up to life imprisonment or a fine if decided by the High Court. With regard to the level of fines, the High Court has an unlimited jurisdiction, the Regional Court may impose a fine not exceeding ZAR 360 000 (EUR 28 150; USD 44 425), and the Magistrate's Court may impose a fine not exceeding ZAR 100 000 (EUR 7 820; USD 12 340).³³ Section 1(1)(b) of the Adjustment of Fines Act 1991 specifies that imprisonment and fines can be imposed together.

53. There are no sentencing guidelines per se, but a large body of case law exists which provides guidelines on suitable sentences. For instance, the decision in *S. v. Zinn* (1969) specifies that the criminal, the crime, and the interests of society must be taken into consideration when a sentence is imposed.³⁴ Furthermore, minimum sentences for natural persons have been set out with regard to bribery offences (see paragraph 65 below).

54. With regard to jurisdiction of the courts, South Africa indicates that, although the PCCA refers to the possible jurisdiction of the Magistrate's Court, Part 11, paragraph 1 of the Policy Directives for Prosecutors provides that all contraventions of the PCCA must be prosecuted in the Regional Court.³⁵ In addition, South Africa explains that, "in terms of a recent amendment to the Criminal Law Amendment Act 1997, the Regional Court has the same jurisdiction in respect of certain serious offences (including corruption) as the High Court".³⁶ It would therefore not be relevant, in terms of the level of sanctions, whether an accused person is charged in the Regional Court or the High Court.

55. With regard to imprisonment sanctions which can be imposed on natural persons for acts of bribery, section 51 of the Criminal Law Amendment Act 1997, as amended in 2004, has increased the minimum sanctions applicable. For offences under Parts 1 to 4 of the PCCA (i.e. including the foreign bribery offence), if the amount involved is above ZAR 500 000 (EUR 39 100; USD 61 700), or if the amount involved is above ZAR 100 000 and the offence was committed by a person "acting in the execution or furtherance of a common purpose or conspiracy",³⁷ a Regional Court or High Court to which such a matter has been referred shall sentence the person to a minimum of 15 years imprisonment. It is unclear whether "the amount involved" refers to the amount of the gratification given or offered, or to the advantage received in exchange for the gratification. South Africa expresses the view that, given that section 5 of the PCCA addresses active bribery, the "amount involved" in this particular case would be the gratification given or offered. This minimum sanction can be waived if "substantial and compelling circumstances exist which justify the imposition of a lesser sentence".³⁸

56. In addition to fines imposable under section 26(1), section 26(3) provides for the possibility for the courts to "*impose a fine equal to five times the value of the gratification involved in the offence.*" This fine can be imposed in addition to an imprisonment sentence under section 26(1).³⁹ "*Gratification*" is defined under section 1(ix) of the PCCA (for the full text of section 1(ix), see under section 1.1.4. above on the definition of "any undue pecuniary or other advantage"). South Africa explains that the value of the

³³ As of 1 April 2008, 1 South African Rand (ZAR) = 0.08 EUR = 0.12 USD.

³⁴ See the Responses at 3.1.4.

³⁵ The Policy Directives for Prosecutors (or "Prosecution Directives") are required by section 179(5)(b) of the Constitution. In terms of this provision the National Director of Public Prosecutions must issue policy directives, which must be observed in the prosecution process. See also section 5.1 of this report on Rules and principles regarding investigations and prosecutions.

³⁶ See the Responses at 3.1.5.

³⁷ Schedule 2, Part II of the Criminal Law Amendment Act 1997 (Act No. 105 of 1997).

³⁸ Section 51(2)(a) and 51(3) *ibid.*

³⁹ See section 1(1)(b) of the Adjustment of Fines Act 1991.

gratification could only be quantified where it is possible to attach a monetary value to the gratification (i.e. if the gratification was in the form of money, goods, property, etc.). Thus, if the gratification was in a non tangible form (services, avoidance of loss, employment, or other non tangible favours or advantages), fines under section 26(3) would not be applicable.

57. The level of fines which can be imposed by a Regional Court or a Magistrate Court under section 26(1) may appear fairly low, especially where legal persons are concerned. This concern is somewhat alleviated by the recent amendment to the Criminal Law Amendment Act 1997, which allows foreign bribery cases to be systematically tried by a High Court, or a Regional Court acting with the same jurisdiction as the High Court. Interrogations remain, however, as to the fines which will be imposed in practice, and concern subsists that the High Court and Regional Courts may feel bound by the minimums indicated in the PCCA. Furthermore, the possibility of applying additional fines under section 26(3) appears uncertain. Consequently, it is questionable whether current penalties in South Africa are sufficiently effective proportionate and dissuasive, in particular with regard to legal persons. It will remain to be seen what sentences are imposed in practice, notably in respect of legal persons.

3.3 Penalties and mutual legal assistance

58. Mutual legal assistance in South African law does not depend on the type or degree of penalty. Rather, it depends on specific requirements being met under the International Cooperation in Criminal Matters Act 1996 or any specific treaty with another country.

3.4 Penalties and extradition

59. As provided under the South African Extradition Act 1962, extradition to countries with which South Africa has extradition agreements will be subject to the conditions specified under such agreements.⁴⁰

60. For countries with which South Africa does not have a specific extradition agreement, the Extradition Act 1962 defines an extraditable offence as any offence punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more.⁴¹

3.5 Seizure and confiscation

61. Article 3.3 of the Convention requires each Party to take necessary measures to provide that “the bribe and the proceeds of the bribery of a foreign public official, or property the value of which corresponds to that of such proceeds, are subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable”.

Seizure

62. Chapter 2 of the Criminal Procedure Act 1977 provides for the application and granting of search warrants, seizure, forfeiture and disposal of property connected with any offence. Section 20 covers the seizure of any article which is concerned or believed to be concerned in the commission or suspected commission of an offence. This provision could be relied on to seize the bribe payment, in situations where the bribe is still in the hands of the briber or, at least, on South African territory. Sections 30 to 34 provide for the disposal of the articles seized where such articles are not forfeited to the State. Section 35 provides

⁴⁰ Section 3 of the Extradition Act 1962.

⁴¹ Section 1, *ibid.*

for the possibility for the courts, upon conviction, to declare the articles seized forfeited to the State, if such articles were used in the commission of the offence.

63. If the bribe can not be seized (typically, in a foreign bribery case, where the bribe has left the country), and provided a monetary value can be attributed to the bribe, monetary sanctions of comparable effect may be available under section 26(3) of the PCCA. This provision allows for the imposition of a fine equal to five times the value of the gratification involved in the offence. It can only be imposed if a conviction for a PCCA offence is pronounced.

64. Proceeds of an offence (including bribery), may also be subject to pre-trial seizure. Under Part 3 of Chapter 5 of the Prevention of Organised Crime Act 1998 (the POCA), a High Court may, on application of the public prosecutor, impose a restraint order on property belonging to a defendant where the defendant is being prosecuted or is to be charged with an offence, and a confiscation order has been made or there are reasonable grounds to believe that a confiscation order may be made against the defendant.⁴² In addition, under section 38 (Chapter 6, Part 2) of the POCA, the High Court may make a preservation order in respect of proceeds and instrumentalities of crime. This property can eventually be forfeited to the State if the Court finds, on the balance of probabilities, that the property concerned constitutes the proceeds of unlawful activities⁴³ (see also the discussion below on confiscation and the definition of “proceeds” under the POCA).

Confiscation

65. Part 1 of Chapter 5 of the POCA provides for the possibility of confiscating assets that constitute proceeds of unlawful activities or their financial equivalent. Section 1(xv) of the POCA specifies that ““proceeds of unlawful activities’ means any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived.”

66. Under section 18 of the POCA, whenever a defendant is convicted of an offence, the Court may, on application of the public prosecutor, order the defendant to pay any amount it considers appropriate, but not exceeding the value of the defendant’s proceeds of the offence. It should be pointed out that the Court will look not only at benefits derived from offences of which the defendant has been convicted, but also from “any criminal activity which the Court finds to be sufficiently related to those offences”.⁴⁴

67. Section 19 of the POCA specifies that the value of the proceeds is determined as “the sum of the values of the property, services, advantages, benefits or rewards received or derived by him or her at any time [...] in connection with the unlawful activity”.

68. The POCA also provides for the possibility of confiscating proceeds of crimes in the hands of third parties. Section 1(xv) provides that proceeds of unlawful activities means proceeds “derived, received or retained, directly or indirectly” [emphasis added]. In addition, section 14 provides for the confiscation of “any property held by the defendant concerned”, as well as “any property held by a person to whom that defendant has directly or indirectly made any affected gift.”⁴⁵ This would appear to offer the possibility to

⁴² Section 25 of the POCA

⁴³ Section 50(1) *ibid.*

⁴⁴ Section 18(1)(c) *ibid.*

⁴⁵ Section 12(1)(i) *ibid.* defines an “*affected gift*” as “*any gift—*
(a) *made by the defendant concerned not more than seven years before the fixed date*
(b) *made by the defendant concerned at any time, if it was a gift —*

confiscate proceeds of crime in the hand of third parties, be they natural or legal persons, which may not have been convicted. South Africa further explains that, in practice, these provisions have been successfully relied on and that restraint orders are regularly made against property of persons who will not be prosecuted. Case law relating to restraint orders against legal persons has been provided.⁴⁶

69. Proceedings on application for a confiscation order or a restraint order are civil proceedings. Consequently, the rules of evidence applicable in civil proceedings (i.e. “balance of probabilities”) apply to proceedings on application for a confiscation order, and not the stricter rules of evidence applicable in criminal proceedings (i.e. “beyond reasonable doubt”).⁴⁷

70. The confiscation provisions available under the POCA were recently applied in practice in the recent prominent case of *Shaik and Others v S* [2007]. The Supreme Court of Appeal agreed, on most counts, with the High Court in its interpretation of the POCA provisions relating to confiscation of proceeds of unlawful activities, and confirmed (i) that proceeds include benefits received directly or indirectly; (ii) that proceeds cover any advantage, benefit, or reward, including those which a shareholder may derive if a company is enriched by the crime; and (iii) that the same proceeds can be considered proceeds of criminal activity in the hands of each intermediary and there can therefore be a multiplicity of confiscation orders for the same proceeds. It is worth noting that the South African Constitutional Court has drawn attention, in several recent decisions, to the need to interpret legislation such as the POCA in a manner that is consistent with the Constitution, and notably the property clause enshrined in terms of Section 25.⁴⁸ A very recent, 29 May 2008 decision of the Constitutional Court however stressed the importance of going behind complex systems of camouflage to hide proceeds. It confirmed lower courts’ decisions in the matter of *Shaik and Others v S* [2007] to confiscate proceeds of crime in the amount of ZAR 34 million (EUR 2 734 000; USD 4 230 000).

3.6/ 3.7 Additional civil and administrative sanctions

71. Where the foreign bribery offence also constitutes an offence under section 12 (offences in respect of corrupt activities relating to contracts) or section 13 (offences in respect of corrupt activities relating to the procuring and withdrawal of tenders) of the PCCA, additional sanctions may be applicable to the natural and legal persons concerned.

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- (i) of property received by the defendant in connection with an offence committed by him or her or any other person; or
 - (ii) of property, or any part thereof, which directly or indirectly represented in that defendant’s hands property received by him or her in that connection.

Whether any such gift was made before or after the commencement of this Act;

Section 16(1) *ibid* provides that:

a defendant shall be deemed to have made a gift if he or she has transferred any property to any other person directly or indirectly for a consideration the value of which is significantly less than the value of the consideration supplied by the defendant.

⁴⁶ See *National Director of Public Prosecutions v Phillips and others* (WLD, 2000), *National Director of Public Prosecutions v Rautenbach and another* [2005] 1 All SA 412 (SCA).

⁴⁷ Section 13 *ibid*.

⁴⁸ See, for instance, *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* (CCT19/06) [2007] ZACC 4 (26 March 2007) and *S v Shaik* (CCT 86/06) [2007] ZACC (2 October 2007). Also note that Section 25 of the South African Constitution provides for the protection against the arbitrary deprivation of property.

72. Under section 28 of the PCCA, a Court may further issue an order to the effect that details of the conviction of the natural and/or the legal person are endorsed on a Register. This Register contains:

- For the natural person: particulars of the convicted person, conviction and sentence, and other consequent orders of the court, including particulars of enterprises owned or controlled by the convicted person;⁴⁹
- For the legal person: conviction and sentence, and particulars of the enterprises as well as of any partner, manager, director or other person, who wholly or partly exercises or may exercise control over the enterprise and was involved, knew or ought to have been aware of the bribery offence committed.⁵⁰

73. Whenever such endorsement in the Register is ordered by the court, this endorsement applies as well to any other enterprise established in the future and wholly or partially controlled by the person or enterprise convicted.⁵¹ A person or enterprise thus endorsed must in any subsequent agreement or tender process involving the State disclose such endorsement and related conviction and sentence.⁵²

74. As provided in section 28(3), the Court may further order that endorsement in the Register be accompanied by termination of any ongoing agreement with the National Treasury.⁵³ When such an order is pronounced by the court, the National Treasury must determine whether termination of the agreement is acceptable to the State, taking into account considerations such as the possibility and feasibility of contracting with another person or enterprise, the extent and duration of the appointment, etc., and may recover damages from the person or enterprise convicted.⁵⁴ The National Treasury is also responsible for determining the length of time, necessarily between five and ten years, during which the person or enterprise is barred from entering into any public contract.⁵⁵ Such restrictions can only be imposed once a final decision has been made by a court (after all appeals).

4. Article 4: Jurisdiction

4.1 Territorial jurisdiction

75. Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 to the Convention clarifies that “an extensive physical connection to the bribery act is not required”.

76. Neither the PCCA nor the CPA contains provisions relating to the application of territorial jurisdiction in South Africa. Consequently, it is not clear what type of territorial link would be necessary to

⁴⁹ Section 28(1)(a) and (c) of the PCCA.

⁵⁰ Section 28(1)(b) *ibid.*

⁵¹ Section 28(1)(d) *ibid.*

⁵² Section 28(6) *ibid.*

⁵³ The South African National Treasury co-ordinates inter-governmental financial and fiscal matters, controls implementation of the annual budget and enforces transparency and effective management of revenue, expenditure, assets and liabilities of government departments, public entities and constitutional institutions. It is notably responsible for managing the public finances, including tenders with the private sector.

⁵⁴ Section 28(3)(a)(i) and 28(c) of the PCCA.

⁵⁵ Section 28(3)(a)(ii) and (iii) *ibid.*

enable South Africa to exercise its territorial jurisdiction. For instance, where the only part of the bribery offence that took place in South Africa was a telephone call or e-mail regarding the payment of the bribe, would that be regarded as sufficient? South Africa expresses the view that such situations would be covered, as they would constitute an “*offer to give any gratification...*”. Further information and case law will be necessary to clarify the extent to which an offence must have taken place “in whole or in part in its territory” for South Africa to be able to exercise its territorial jurisdiction.

77. On the other hand, section 35(2) of the PCCA provides some form of territorial jurisdiction for offences committed by persons not covered under section 35(1) (i.e. persons that are not South African nationals. See discussion below on nationality jurisdiction). Section 35(2) provides that:

any act alleged to constitute an offence under this Act [...] shall, regardless of whether or not the act constitutes an offence or not at the place of its commission, be deemed to also have been committed in the Republic if that —

- (a) act affects or is intended to affect a public body, a business or any other person in the Republic*
- (b) person is found to be in South Africa; and*
- (c) person is for one or other reason not extradited by South Africa or if there is no application to extradite that person.*

78. The PCCA provisions do not give explanations as to the extent to which the bribery act must have “affected” the business or person. For instance, would the situation be covered under this provisions where the foreign bribery act was committed entirely abroad, but the benefits returned to a person in South Africa? South Africa expresses the view that this would depend on the specific circumstances of each case. South Africa also contends that Section 233 of the Constitution could be called upon to seek the intention expressed in the OECD Anti-Bribery Convention (see discussion above in paragraph 4).

4.2 Nationality jurisdiction

79. Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”.

80. Section 35(1) of the PCCA establishes the extra-territorial jurisdiction of South African courts for offences under the PCCA, “*regardless of whether or not the act constitutes an offence at the place of its commission [...] if the person to be charged—*

- (a) is a citizen of the Republic;*
- (b) is ordinarily resident in the Republic;*
- (c) was arrested in the territory of the Republic, or in its territorial waters or on board a ship or aircraft registered or required to be registered in the Republic at the time the offence was committed;*
- (d) is a company, incorporated or registered as such under any law, in the Republic; or*
- (e) any body of persons, corporate or unincorporated, in the Republic.*

This would appear to extend nationality jurisdiction to both natural and legal persons.

81. Overall, the provisions in section 35(1) and 35(2) seem to afford the South African Courts fairly broad nationality jurisdiction over foreign bribery offences (as well as other domestic bribery offences).

4.3 Consultation procedures

82. Article 4.3 of the Convention requires that when more than one Party has jurisdiction over an alleged offence described in the Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

83. It appears that South Africa does not currently have specific procedures in relation to the foreign bribery offence for the purpose of consulting with other Parties to the Convention, where South Africa and another country Party may have concurrent jurisdiction over a foreign bribery offence.

4.4 Review of basis of jurisdiction

84. Given that the legislation on nationality jurisdiction only came into force in 2004, South Africa considers it needs more time, as well as the development of case law to evaluate whether the current basis for jurisdiction is effective in the fight against foreign bribery.

5. Article 5: Enforcement

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

5.1 Rules and principles regarding investigations and prosecutions

86. In South Africa, rules and principles regarding investigation and prosecution of a foreign bribery offence are essentially contained in (i) the PCCA; (ii) the CPA; and (iii) the National Prosecuting Authority Act 1998. The Special Investigating Units and Special Tribunals Act 1996 may also be relevant in certain circumstances. Directives for the prosecution are included in the Policy Directives for Prosecutors.

Investigation

87. As explained by the South African authorities, a police investigation into a foreign bribery offence can be initiated (i) where the matter is formally reported to the South African Police Service (SAPS) as a criminal complaint; or (ii) where it is reported to the SAPS in terms of section 34 of the PCCA, which places a specific obligation to report on “any person who holds a position of authority”. South Africa indicates that the SAPS may open an investigation *ex officio* (i.e. of its own initiative, on the basis, for instance, of substantiated media reports). South Africa explains that there may be instances where the SAPS can be the complainant depending on information received and investigation required. Reasonable suspicion is all that is required for an investigation to be initiated.

88. The general public may also report suspected corruption to the National Anti-Corruption Hotline managed by the Public Service Commission. Depending on the information provided to this Hotline, a report may then be sent through to the SAPS for investigation. The Hotline is dedicated to the reporting of domestic as well as foreign bribery offences.

89. It should be pointed out that corruption, including foreign bribery, has been included as one of the four strategic priorities of the South African Police Service in its Strategic Plan for 2005 to 2010. The responsible unit within the SAPS for investigating all crime, including foreign bribery, is the Division: Detective Service.

90. Specific provisions under the PCCA also provide for the possibility of opening of investigations by the National Director of Public Prosecutions (NDPP) regarding property relating to corrupt activities. Under sections 22 and 23 of the PCCA, the NDPP may direct a prosecutor with the power to institute investigations relating to property either used to commit or facilitate a bribery offence, or which may be the proceeds of such an offence.⁵⁶ Furthermore, life style investigations can take place if the NDPP can show that a person is maintaining a standard of living not commensurate with his/her known income or assets.⁵⁷

91. The Special Investigating Units and Special Tribunals Act 1996 has set up a Special Investigating Unit (SIU), directly accountable to the President of the Republic of South Africa. The SIU is charged with the investigation of serious malpractices and maladministration in State institutions, State assets and public money, as well as any conduct which may seriously harm the interests of the public. Under section 2 of the Act, the President of the Republic may notably refer to the Unit matters arising from alleged corruption in connection with the affairs of any State institution, as well as from alleged unlawful or improper conduct by any person which may or has caused harm to the public interest. The SIU has been created essentially to deal with domestic corruption issues, and it is improbable that the SIU would be involved in investigations relating to foreign bribery. It is unclear whether the SIU may have competence for foreign bribery cases involving, for instance, corruption by state-owned or state-controlled companies, or foreign bribery offences by companies receiving public support (such as export credit guarantees). Other provisions in the Special Investigating Units and Special Tribunals Act further set out the functions of the SIU, which include the investigation of such allegations, and institution of civil proceedings before a Special Tribunal.

Prosecution

Prosecution authorities

92. The National Prosecuting Authority of South Africa (the NPA), established under section 179 of the Constitution and further regulated under the National Prosecuting Authority Act 1998 (the NPA Act), is the centralised prosecuting authority. Its functions and duties are to institute and conduct criminal proceedings on behalf of the State, and carry out any necessary function incidental to instituting such criminal proceedings.

93. The NDPP is responsible for determining, with the Minister of Justice, and after consultation with the Directors of Public Prosecution, prosecution policy, which must be observed in the prosecution process. The NDPP must issue Policy Directives, and may intervene in the prosecution process where such directives are not complied with, as well as review decisions to prosecute or not prosecute after consulting the relevant Director of Public Prosecutions and taking representations from listed persons, including the accused and the complainant.⁵⁸ The NDPP may also ask to be kept informed by any Director of Public Prosecution in respect of a case or prosecution process.⁵⁹ The NDPP's powers, duties and functions are set out in further detail in section 22 of the NPA Act 1998.

The Directorate of Special Operations

94. With specific regard to corruption cases, the NPA acts notably through its Directorate of Special Operations (DSO or "Scorpions"). The DSO was established by the NPA Amendment Act of 2000, and

⁵⁶ Section 22 of the PCCA.

⁵⁷ Section 23 *ibid*.

⁵⁸ Section 179(5) of the Constitution.

⁵⁹ Section 22(4) of the NPA Act.

has been operational since January 2001. It is headed by a Deputy NDPP who reports to the NDPP. As provided by the Preamble to the NPA Amendment Act, the DSO was established to “investigate particularly serious criminal or unlawful conduct committed in an organised fashion, or certain offences or unlawful conduct, with the object of prosecuting such offences and investigating unlawful conduct in the most efficient and effective manner”.

95. The DSO may investigate and institute criminal proceedings in respect of offences committed in an “organised fashion”. Under section 7(1)(b) *ibid*, “‘organised fashion’ includes the planned, ongoing, continuous or repeated participation, involvement or engagement in at least two incidents of criminal or unlawful conduct ...”. A foreign bribery offence would not necessarily amount to an offence committed in an organised fashion. The DSO also has competence for other offence or categories of offences determined by the President by proclamation in the *Gazette*.⁶⁰ This includes offences mentioned in Chapter 2 of the PCCA, in particular the foreign bribery offence.

96. As of the date of this report, it is probable that the DSO will not remain in operation. In February 2008, the South African Government announced to Parliament that the Scorpions would be dissolved, the organised crime unit of the police phased out, and a new Directorate for Priority Crime Investigation created within the SAPS, comprising of investigators of the Directorate of Special Operations and members of the SAPS’s Organised Crime and Commercial Crime Components. The Directorate for Priority Crime Investigation within the South African Police Service will aim to provide a coordinated and integrated mechanism to combat priority crimes, in particular organised crime. The Directorate for Priority Crime Investigation will also have competence over the foreign bribery offence. Close cooperation is planned with the National Prosecuting Service and the Asset Forfeiture Unit. On 9 May 2008, the Minister of Safety and Security issued notice of the intention to table a Bill to effect the Government’s decision in the National Assembly. The Working Group expresses serious concern in regard of this issue, and notes that it will monitor this further in the context of future evaluations, to ensure that the effective enforcement of the foreign bribery offence is not affected by this rearrangement of law enforcement responsibilities.

Prosecution principles

97. The NPA Act vests the prosecuting authority with the discretion to make any decision regarding the criminal process, including as regards decisions whether or not to institute, or to discontinue proceedings.⁶¹ Various provisions in the South African Constitution and in the NPA Act deal with general matters relating to prosecutorial discretion. For instance, section 179(4) of the Constitution provides that the prosecuting authority must exercise its function without fear, favour or prejudice, and section 32(1)(a) of the NPA Act specifies that a member of the prosecuting authority must “serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law.” The Policy Directives for Prosecutors also provide some direction, and prescribe that “once a prosecutor is satisfied that there is sufficient evidence to provide a reasonable prospect of a conviction, a prosecution should normally follow, unless public interest demands otherwise.” Factors to be taken into account when considering the public interest are further discussed below in section 5.2.

98. Once enrolled, a case may only be withdrawn on “compelling grounds”, as specified in the Policy Directives for Prosecutors. South Africa compares these “compelling grounds” to the “substantial and compelling circumstances” referred to in several South African Acts. The Courts have considered in their

⁶⁰ Section 7(1)(a)(bb) *ibid*.

⁶¹ Section 20 of the NPA Act.

decision that “substantial and compelling circumstances” would be constituted if, for instance, the evidence available is such that there is no longer a reasonable prospect of a successful prosecution.⁶²

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

99. South Africa’s legislation does not foresee the possibility of an investigation or prosecution being influenced by factors relating to the national economic interest, the potential effect upon relations with another state or the identity of the natural or legal person involved.

100. Investigations may only be suspended by the SAPS when there is no substantial evidence available to prove the offence, the final decision resting with the NPA. Article 5 considerations do not enter into play at this stage.

101. With regard to prosecutions, as noted above, South African prosecutors retain discretionary power to decide whether or not to initiate prosecution. Public interest is an essential factor to be taken into account by prosecutors in their decisions whether or not to prosecute, as provided in the Policy Directives for Prosecutors. In this respect, the Directives specify that, “when considering whether or not it will be in the public interest to prosecute, prosecutors must consider all relevant factors, including “the nature and seriousness of the offence”, and, notably, “the economic impact of the offence on the community, its threat to people or damage to public property, and its effect on the peace of mind and sense of security of the public” [emphasis added].⁶³ This factor is one among several, and the Directives also state that “the relevance of these factors and the weight to be attached to them will depend upon the particular circumstances of each case.” South Africa points out that the reference to “the economic impact of the offence” should be read in context as one of the factors relevant when considering “the nature and seriousness of the offence”, and that this factor of economic impact would only be considered as an aggravating factor, where corruption has a detrimental effect on the economy of the country. While this may be true in the context of a domestic bribery offence, which would clearly undermine the economy of South Africa, it is quite possible that a foreign bribery investigation could have a negative economic impact in South Africa, where the economic situation of an important South African company could be at risk. Consequently, this reference to “the economic impact of the offence on the community” raises serious concern that the prosecution of a foreign bribery offence in South Africa could be influenced by considerations of national economic interest, contrary to prescriptions under Article 5 of the Convention.⁶⁴ The Working Group is encouraged by South Africa’s expressed intention to carry out the necessary clarifications.

6. Article 6: Statute of Limitations

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

⁶² For further details on relevant case law, see the Responses at 5.1.18.

⁶³ See the Responses at 5.2.2.

⁶⁴ Article 5 of the Convention states that:
Investigation and prosecution of the bribery of a foreign public official [...] shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

103. Section 18 of the CPA provides that the right to institute a prosecution for any offence lapses after the expiration of a period of 20 years from the time when the offence was committed.⁶⁵

7. Article 7: Money Laundering

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

The money laundering offence

105. Section 4 of the Prevention of Organised Crime Act (the POCA) establishes the offence of money laundering:

Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and—

- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or*
 - (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect—*
 - (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or*
 - (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere—*
 - (aa) to avoid prosecution; or*
 - (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,*
- shall be guilty of an offence.*

106. Because the South African money laundering offence covers proceeds from all unlawful activities, it applies in the same manner where the predicate offence is domestic bribery or foreign bribery.

107. Section 1 of POCA defines “proceeds of unlawful activities” as “any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere [...] in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived”. “Unlawful activity” includes “any conduct which constitutes a crime [...] whether such conduct occurred in the Republic or elsewhere”. Consequently, it appears that the South African money laundering offence would be applicable “without regard to the place where the bribery occurred”, as prescribed by Article 7 of the Convention.

108. Penalties for money laundering are a fine not exceeding ZAR 100 million (EUR 7 820 000; USD 12 341 000), or imprisonment for a period not exceeding 30 years.⁶⁶ Criminal liability for money laundering extends to natural as well as legal persons.⁶⁷

⁶⁵ Certain types of offences, as listed under section 18(a) to (g) of the CPA, and including treason, genocide, as well as other very serious crimes, have a longer statute of limitations.

⁶⁶ Section 8 of the POCA.

109. The summary of the *2002-2003 Annual Report of the Financial Action Task Force on South Africa* (FATF Report) states that the offence of money laundering covers the laundering of one's own proceeds of crime as well as laundering another's proceeds.

Money laundering reporting

110. The Financial Intelligence Centre Act 2001 (the FICA) sets out money laundering reporting obligations.

111. Section 21 establishes the duty of "accountable institutions" to identify clients and other persons. Accountable institutions are defined in Schedule 1 to the FICA and include various financial institutions, as well as attorneys, and persons providing investment advice or investment brokering services, including public accountants where they carry on such a business. Accountable institutions are also required to keep records of business relationships and transactions, and provide information about clients and persons acting on behalf of clients to the Financial Intelligence Centre on request.⁶⁸

112. Pursuant to section 28 of the FICA, accountable institutions and reporting institutions must, within the prescribed period, report cash transactions above the prescribed limit to the Financial Intelligence Centre. Under Schedule 3 to the FICA, reporting institutions are persons dealing in motor vehicles, as well as persons dealing in South African Rands (ZAR).

113. The obligation to report suspicious and unusual transactions to the Financial Intelligence Centre is established in section 29 of the FICA. Pursuant thereto "a person who carries on a business or is in charge of or manages a business or who is employed by a business" is required to report to the Centre the grounds for the knowledge or suspicion that a transaction involves the proceeds of "unlawful activities" and prescribed particulars concerning the transaction or transactions in question. Section 29 also includes a prohibition in respect of "tipping off".

114. Failure to comply with any of these reporting obligations carries a fine not exceeding ZAR 10 million (EUR 782 000; USD1 234 000) or imprisonment for a period not exceeding 15 years.

8. Article 8: Accounting

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

⁶⁷ See discussions under Article 2 on legal persons which explain that a "person" under South African law includes a natural as well as legal person.

⁶⁸ Sections 22 and 27 of the FICA.

8.1/ 8.2 Accounting and auditing requirements / Companies subject to requirements

Books and records / Accounting standards

116. The Companies Act 1973 contains provisions relating to the keeping of accounts. In 2006, the Corporate Laws Amendment Act (the CLAA) introduced more detailed provisions on account keeping. This Act also established the Financial Reporting Standards Council (the Council), charged with establishing financial reporting standards.⁶⁹ The Securities Services Act 2004 includes additional regulations for companies listed on the JSE (the South African Stock Exchange).

117. Section 284 of the Companies Act requires all companies to maintain accounting records to ensure fair representation of their state of affairs and business. It includes requirements that the company keep records showing assets and liabilities of the company; a register of fixed assets; records containing entries from day to day in sufficient details; records of goods sold or purchased; and statements of the annual stocktaking.⁷⁰

118. In addition, public interest and widely-held companies are expected to comply with the more stringent financial reporting standards,⁷¹ issued by the Council in accordance with the International Financial Reporting Standards of the International Accounting Standards Board.⁷² Limited interest companies must comply with the accounting standards developed by the Council for limited interest companies, in consultation with representatives of such companies.⁷³

119. As concerns entities in the public sector, the Public Finance Management Act 1999 sets out requirements regarding accounting norms for national and provincial government institutions and the entities under their control, including a number of state-owned or state-controlled companies. An Accounting Standards Board has been established under Chapter XI of the Public Finance Management Act 1999, which sets accounting standards for the public sector, based on the International Public Sector Accounting Standards issued by the International Federation of Accountants. These standards do not permit off the book transactions or keeping off the book accounts and prescribe requirements for disclosure of material contingent liabilities.

External auditing requirements

120. Under section 286 of the Companies Act 1973, directors of all companies must present annual financial statements which fairly present the state of affairs of the company and its business. Section 286(2)(d) provides that such statements must include an auditor's report. Section 300 lays out the auditor's duties as to annual financial statements. They include (a) examining the annual financial statements; (b) satisfying himself that proper accounting records are kept; (f) obtaining all necessary information for the purpose of carrying out his duties; (g) satisfying himself that the company's financial statements are in accordance with its accounting records; (i) carrying out any other tests in respect of accounting records and auditing procedures as deemed necessary to satisfy himself that the financial statements fairly present the

⁶⁹ See section 53 of the CLAA, which introduces a new Chapter XVB on Financial Reporting Standards in the Companies Act 1973, and notably new section 440P establishing the new Financial Reporting Standards Council.

⁷⁰ Section 284(1) of the Companies Act 1973.

⁷¹ Section 285A(1) *ibid*, as introduced by section 36 of the CLAA.

⁷² Section 440S *ibid*, as introduced by section 53 of the CLAA.

⁷³ See section 285A(2) of the Companies Act 1973, as introduced by section 36 of the CLAA, and section 440S of the Companies Act 1973, as introduced by section 53 of the CLAA.

financial position of the company, or of the company and its subsidiaries; and generally (l) complying with any other applicable requirements under the Auditing Profession Act 2005.

121. Further audit requirements are provided in the relevant legislation governing a particular industry and are compulsory for all companies, listed and unlisted.

122. The Close Corporations Act provides another vehicle through which an entity may trade (close corporation). These corporations are not subject to an external audit but must have an accounting officer (who may or may not be a Chartered Accountant) to issue an accounting officer's report which, *inter alia*, confirms that the financial statements are in agreement with the accounting records.

123. In terms of the Public Finance Management Act 1999, entities in the public sector are required to set up internal audit, audit committees and other internal control measures. These entities are subject to an external audit by the Auditor-General of South Africa. The Auditor-General has adopted the entire suite of auditing pronouncements issued by the International Auditing and Assurance Standards Board of the International Federation of Accountants, for conducting audits. Each auditing standard includes a specific public sector perspective. These standards provide for consideration of fraud in the audit of financial statements (ISA 240) and reporting requirements on fraud and management integrity (ISA 260). The mandate of the Auditor-General includes reporting on significant non-compliance of legislation and any other aspects that come to his/her attention and which are considered to be in the public interest. These reports are subject to a quality management process, carried out annually by the Public Accountants' and Auditors' Board, and are tabled in the relevant legislature (national, provincial or local) for political and public scrutiny.

Reporting of offences

124. Auditors are subject to certain reporting obligation under the South African anti money laundering legislation.⁷⁴ They do not have specific obligations to report suspected acts of (domestic or foreign) bribery.

125. Notwithstanding, auditors must report reportable irregularities to the Independent Regulatory Board for Auditors (IRBA), as provided under section 45 of the Auditing Profession Act 2005. The IRBA must as soon as possible after receipt of a report notify any appropriate regulator in writing of the details of the reportable irregularity.⁷⁵ It does not appear that any penalty is applicable to auditors for failure to comply with their reporting obligation under section 45. South Africa points out that it is rather the IRBA which has the responsibility of furthering reports to the appropriate regulator.

126. In terms of section 1 of the Act, a "reportable irregularity" is an unlawful act or omission committed by a person responsible for the management of the audited company, which (a) has caused or is likely to cause material financial loss to the entity or to partners or shareholders; or (b) is fraudulent or amounts to theft; or (c) represents a material breach of any fiduciary duty. It is uncertain whether a foreign briber payment would fit under this definition of a "reportable irregularity", notably where the bribe has not contributed to any loss to the entity but to financial gain through, for instance, obtaining a public procurement contract. South Africa is of the view that foreign bribery would likely fit under the definition of a reportable irregularity, since the payment of a bribe would² amount to a fraudulent act or omission.

⁷⁴ See section 29 of the Financial Intelligence Centre Act 2001.

⁷⁵ Appropriate regulators are appointed by the IRBA and may include any national government department, registrar, regulator, agency, authority, centre, board or similar institution. Currently, the Department of Trade and Industry, and the Financial Services Board are among the "appropriate regulators".

8.3 Penalties

127. Section 284(4) of the Companies Act 1973 provides that failure to comply with accounting requirements under section 284 constitutes an offence by the company, and by the director or officer.⁷⁶ Under section 441(d) of the Act, such an offence is punished with a fine and/or imprisonment for up to two years.

128. Section 287 of the Companies Act 1973 makes it an offence for any company to issue incomplete financial statements and circulars. The penalty for such an offence is imprisonment for up to three months and/or a fine.

129. Section 287A of the Act, inserted by section 39 of the CLAA, relates to false and misleading reports. Under this provision, where a person is a party to the preparation, approval, publication, issue or supply of a report that is false or misleading, and knew or ought to have known that the report was false or misleading, that person is guilty of an offence. Such person will be liable for penalties in the form of a fine and/or imprisonment for up to two years.⁷⁷

130. If the Department of Trade and Industry (DTI) detects non-compliance with requirements under the Companies Act 1973, it may make adverse findings against the company concerned or its directors. If the DTI picks up fraudulent conduct or reckless conduct of business, the matter is referred to the National Prosecuting Authority, for possible prosecution. The DTI has investigation powers only. The completion of its enforcement efforts depends on other agencies like the NPA, SAPS etc.

9. Article 9: Mutual Legal Assistance

9.1 Laws, treaties and arrangements enabling mutual legal assistance

131. Article 9.1 of the Convention mandates that each Party co-operate with the others to the fullest extent possible in providing “prompt and effective legal assistance” with respect to criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

9.1.1 Criminal matters

132. South Africa reports that it provides mutual legal assistance (MLA) in criminal matters on the basis of bilateral and multilateral treaties, and the principle of international comity.

133. South Africa has bilateral MLA treaties with the following member countries Party to the Convention: Argentina, Canada, France, and the United States. South Africa, as a member of the Commonwealth, is also a member of the Harare Scheme relating to MLA in criminal matters of which the following countries Party to the Convention are also members: Australia, Canada, New Zealand and the United Kingdom.⁷⁸

⁷⁶ Under section 284(4)(b) of the Companies Act 1973, directors or officers who are able to prove that they had reasonable grounds to believe that a competent and reliable person was charged with the duty of overseeing compliance with section 284 requirements, may rely on this as a defence.

⁷⁷ Section 441(d) of the Companies Act 1973.

⁷⁸ South Africa has also negotiated treaties with the following countries not Party to the Convention: Algeria, China, Egypt, Hungary, India, Iran, Lesotho, Namibia, Nigeria, and Zambia.

134. Notwithstanding bilateral and multilateral MLA treaties, South Africa enacted in 1996 the International Cooperation in Criminal Matters Act (the ICCM Act) to facilitate the execution of MLA requests, including with countries with which South Africa does not have a treaty. The purpose of the ICCM Act is to facilitate the provision of evidence and the execution of sentences in criminal cases, as well as the confiscation and transfer of the proceeds of crime.

135. Under sections 2 and 7 of the ICCM Act, MLA requests must be submitted to the Director-General in the Department of Justice and Constitutional Development. The Director-General acts as the central authority for both outgoing and incoming requests. In terms of section 7 relating to incoming requests, the Director-General shall submit the request to the Minister of Justice for approval where he/she is satisfied that (i) proceedings have been instituted in a court or tribunal exercising jurisdiction in the requesting State; (ii) there are reasonable grounds for believing that an offence has been committed in the requesting State, or the evidence is necessary to determine whether an offence has been so committed and that an investigation in respect thereof is being conducted in the requesting State. Once the Minister has approved the request, it is transferred to the magistrate within whose area of jurisdiction the witness (or evidence or documents necessary to satisfy the MLA request) resides. Under the ICCM Act, there are no provisions regulating the discretionary power of the Minister when considering an MLA request.

136. South Africa indicated that there is a growing trend to refuse assistance based on fundamental constitutional considerations such as the likelihood of the use of required evidence to prosecute or torture a person against whom the evidence is to be used. South Africa further points out that the Minister may also be bound by grounds of refusal as provided for in the provisions of bi-lateral and multi-lateral MLA agreements where these exist. These could for instance exclude the provision of MLA where the request relates to a political offence, where the request may prejudice the national security, if there are grounds to believe that the request relates to proceedings against a person on account of that person's race, religion, opinions, etc, and other reasons relating to human rights.

137. Sections 8 to 11 provide for the examination of witnesses and the production of documents. Chapter 3 of the ICCM Act provides for the mutual execution of sentences and compensatory orders, and Chapter 4 of the ICCM Act provides for the confiscation and transfer of proceeds of crime. The ICCM Act does not regulate the coercive and non-coercive measures that may or may not be undertaken in response to an MLA request. Provisions relating to coercive and non-coercive measures which may be used in rendering mutual legal assistance can notably be found in the Police Service Act 1995 (enquiries to be carried out, and documents and affidavits), the CPA 1977 (statements to be obtained, subpoena of witnesses, search and seizure), and the POCA 1998 (coercive measures relating to confiscation or forfeiture of property derived from crime).

138. Given the definition of "person" under section 2 of the Interpretation Act 1957, which covers both individuals and corporate and incorporate bodies, it is assumed that the provisions in the ICCM Act are applicable in respect of both natural and legal persons.

9.1.2 *Non-criminal matters*

139. South Africa is unable to provide mutual legal assistance in requests concerned with administrative and not criminal liability. South Africa can only provide assistance within its legal framework, and the only Act in terms whereof such assistance can be provided is the International Cooperation in Criminal Matters Act 1996.

140. This implies that South Africa would notably not be able to provide mutual legal assistance to foreign countries in the context of administrative proceedings against legal persons.

9.2 *Dual criminality*

141. Under Article 9.2 of the Convention, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence in respect of which assistance is sought is within the scope of the Convention.

142. South Africa states that dual criminality is generally not a pre-requisite for the rendering of mutual legal assistance by South Africa. There is no provision in the International Cooperation in Criminal Matters Act 1996 dealing with the requirement of dual criminality, nor do its bilateral treaties usually include any such provision. However, under the Harare agreement, mutual legal assistance may be refused on the ground of lack of dual criminality.

9.3 *Bank secrecy*

143. Pursuant to Article 9.3 of the Convention, a Party shall not decline to provide mutual legal assistance on the grounds of bank secrecy.

144. South Africa states that it would not be able to decline to render mutual legal assistance for criminal matters on the ground of bank secrecy. South Africa explains that neither the ICCM Act, nor its bilateral treaties provide for the possibility of refusing MLA on the basis of bank secrecy. It should be pointed out, however, that the ICCM does not detail which coercive measures may or may not be undertaken in the execution of an MLA request.

10. **Article 10: Extradition**

10.1/ 10.2 Extradition for bribery of a foreign public official / Legal basis for extradition

145. Article 10.1 of the Convention provides that bribery of a foreign public official shall be deemed to be an extraditable offence under the laws of the Parties and the treaties between them. Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

146. Pursuant to the Extradition Act 1962, South Africa has the authority to extradite persons accused or convicted of an “extraditable offence” with or without an extradition agreement, subject to certain criteria. Under section 1 of the Act, “extraditable offences” are those punishable by a deprivation of liberty of six months or more, and thus include the foreign bribery offence in South Africa. The Extradition Act also provides the authority for the President to enter into, amend and revoke extradition agreements with any foreign State concerning “extraditable offences or offences specified in such agreements”,⁷⁹ or to “designate any foreign State for the purposes of section 3(3)”.⁸⁰

147. Under section 3 of the Extradition Act relating to “*persons liable to be extradited*”:

- (1) *Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the*

⁷⁹ South Africa has extradition treaties with Algeria, Australia, Botswana, Canada, China, Egypt, Israel, Lesotho, Malawi, Nigeria, Swaziland, and the United States. Treaties have been negotiated but not yet signed with Argentina, Hungary, Namibia, Hong Kong and Zambia.

⁸⁰ Section 2(1) of the Extradition Act 1962.

terms of such agreement, whether or the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence.

- (2) *Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being surrendered.*
- (3) *Any person accused or convicted of an extraditable offence committed within the jurisdiction of a designated State shall be liable to be surrendered to such designated State, whether or not the offence was committed before or after the designation of such State and whether or not a court in the Republic has jurisdiction to try such person for such offence.*

148. Whether or not an extradition agreement is in place, there is always a requirement that the offence for which extradition is requested has been “committed within the jurisdiction” [emphasis added] of the foreign State requesting extradition. This raises concern concerns about the inability for South Africa to provide extradition for an offence which took place in South Africa or in a foreign state other than the state making the request (e.g. where the requesting state is exercising nationality jurisdiction). Given that the bribery of foreign public officials will most likely be committed abroad, restricting the availability of extradition to offences committed in the requesting State represents a significant obstacle to the application of nationality jurisdiction by foreign States. In cases where the offence was committed in South Africa, even if South Africa were willing to exercise jurisdiction, the requesting State might be the most appropriate jurisdiction for prosecution, due to, for instance, the availability of evidence, including witnesses and financial records. As of the time of this review, South Africa indicates that the Extradition Act 1962 is being revised, and that the proposed Extradition Bill would remove the requirement that the offence be committed within the jurisdiction of the requesting state.

149. Sections 4 to 12 of the Extradition Act set out the different steps for processing extradition requests. Under these provisions, once a magistrate been sent notification from the Minister of Justice to the effect that a request for the extradition of a person to a foreign State has been received, an enquiry shall be held as soon as possible with a view to the surrender of the person to the requesting State. Where the magistrate finds that there is “sufficient evidence to warrant a prosecution for the offence” in the requesting State, the magistrate shall issue an order committing such person to prison to await the decision of the Minister of Justice regarding his/her surrender. The Minister may refuse extradition on different grounds, including where proceedings against the person are pending or where the person is serving or about to serve a prison sentence in South Africa, where he/she is concerned that the extradition request is not being made in good faith, or that the person may be prosecuted, punished or prejudiced by reason of his or her gender, race, religion, nationality or political opinion.⁸¹

10.3 Extradition of nationals

150. Article 10.4 of the Convention provides that each Party shall take necessary measures either to allow for the possibility of extraditing its nationals or prosecuting them for a foreign bribery offence. Where a Party refuses to extradite a person solely on the basis that such person is a national, it shall submit the case to its own authorities for prosecution.

151. South Africa indicates that it does not impose a bar on the extradition of its nationals, whether in the Extradition Act or in extradition agreements with designated States.

⁸¹ Section 11 of the Extradition Act 1962.

10.4 Dual criminality

152. Under Article 10.4 of the Convention, where dual criminality is necessary for a Party to be able to extradite a person, it shall be deemed to exist if the offence in respect of which extradition is sought is within the scope of the Convention.

153. As noted above, section 1 of the Extradition Act reflects the principle of dual criminality in that it requires an offence in terms of South African law and the law of the foreign State, which is punishable with a sentence of imprisonment for a period of six months or more. If the provisions of section 1 are complied with, the requirement of dual criminality would have been satisfied. Given that foreign bribery carries a penalty of 5 years or more in the case of a District Court, 18 years or more in the case of a Regional Court, and life imprisonment in the case of a High Court, foreign bribery can be considered an extraditable offence for the purpose of this Act.

154. South Africa indicates that its extradition treaties with Australia, Canada and the United States also reflect the principle of dual criminality.

11. Article 11: Responsible Authorities

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

156. The Director-General of the Department of Justice and Constitutional Development is the designated Responsible Authority in terms of Article 11.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. Tax Deductibility

157. Since 1 January 2006, the Income Tax Act 1962 has been amended to provide for the express non deductibility of bribe payments. In terms of section 23(o) of the Act no deductions shall in any case be made in respect of any expenditure incurred—

(i) where the payment of that expenditure or the agreement or offer to make that payment constitutes an activity contemplated in Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004); or

(ii) which constitutes a fine charged or penalty imposed as a result of an unlawful activity carried out in the Republic."

[emphasis added]

158. Section 5 on the foreign bribery offence, as well as related offences in respect of corrupt activities relating contracts and the procuring and withdrawal of tenders all fall under Chapter 2 of the PCCA. South Africa points out that "payment of that expenditure" should be interpreted in the widest possible manner, as this provision clearly refers to "an activity contemplated in Chapter 2 of the PCCA". Chapter 2 of the PCCA deals with offences in respect of corrupt activities, including the foreign bribery

offence (section 5) and refers to the giving of a “gratification”. Gratification is broadly defined, and includes bribes in the form of services or other intangible benefits. Notwithstanding, South Africa acknowledges that, where the bribe is in the form of a service or other intangible benefit, it may be more difficult to quantify it and/or refuse its deduction.

159. South Africa indicates that, in their view, no conviction is required to deny a tax deduction for a bribe to a foreign public official, as reference is made in the provision only to disallowing a deduction in relation to specific activities, including the payment of bribes. The provision is not aimed at a criminal conviction for bribery but simply the disallowance of expenditure related to such activities. However, because of the general rule applicable under South African law that “he who alleges must prove”, the onus of proving that a payment constitutes a PCCA offence and is therefore not deductible will be on the State.

160. With regard to cooperation and communication between the tax administration and law enforcement authorities, the South African tax laws contain general provisions on the preservation of secrecy, which precludes the South African Revenue Service from disclosing information on the affairs of taxpayers to other persons. However, specific exceptions exist for disclosing information to the SAPS or the NDPP on condition that a judge issues an order allowing the South African Revenue Service to disclose certain information. The type of information which may be disclosed is limited to information which may reveal evidence of an offence or where such information may be relevant to the investigation or prosecution of such an offence, and such offence is a serious offence in respect of which a court may impose a sentence of imprisonment exceeding five years. This would allow information to be sought from the South African Revenue Service on the basis of a court order in respect of investigations into a foreign bribery offence.⁸²

161. Furthermore, specific acts also provide for the possibility to override statutory secrecy imposed on the South African Revenue Service, without the necessity of a court order. Notably, section 71 of the POCA provides for this possibility.⁸³ South Africa explained that, consequently, if information from the South African Revenue Service were sought with the purpose of confiscating or restraining property under the POCA in relation to criminal acts of foreign bribery, the evidence could also be used in the prosecution of the foreign bribery offence.

162. As regards exchange of information with tax authorities at the international level, the South African Revenue Service may only exchange information with a foreign tax authority if there is an exchange of information article in the tax treaty with the foreign country. South Africa indicates that, although there may be deviations in some of the treaties, it generally follows the wording of the exchange of information article of the Model Tax Convention on Income and on Capital of the OECD.

⁸² Foreign bribery carries a maximum sanction of 5 years imprisonment at the Magistrate Court level, 18 years at the Regional Court level, and life imprisonment at the High Court level.

⁸³ Other acts which provide for the possibility of overriding the South African Revenue Service’s statutory secrecy are the Drugs and Drug Trafficking Act 1992 and the Financial Intelligence Centre Act 2001.

EVALUATION OF SOUTH AFRICA

General Comments

163. The Working Group commends the South African authorities for their high level of co-operation and openness during the examination process. In addition, the Working Group appreciates that South Africa liaised regularly with the Secretariat while preparing the responses to the Phase 1 Questionnaire to ensure a comprehensive and effective basis for the examination.

164. Section 5 of the Prevention and Combating of Corrupt Activities Act 2004 (the PCCA) criminalises bribery of foreign public officials. The Working Group considers that overall South Africa's legislation conforms to the standards of the Convention, subject to the issues noted below. In addition, some aspects of the South African legislation would benefit from follow-up during the Phase 2 evaluation process.

Specific issues

1. The offence of active bribery of foreign public officials

Requirement of intent

165. The foreign bribery offence in the PCCA does not specifically refer to an element of intent. It would therefore appear that what needs to be intended is that the offer, promise or gift of a benefit to a foreign public official is for the purpose of obtaining an improper advantage. However, South Africa has provided several responses in its answers to the Phase 1 questionnaire, and in additional material and discussions, which have raised questions about the exact nature of the intent required under South African law. Therefore, this issue will be the subject of follow-up in Phase 2.

2. Responsibility of legal persons

Identification of the natural person to prosecute the legal person

166. To prosecute a legal person under South African law, it must be proven that that a "director" or "servant" has committed an offence. South Africa expresses the view that it would not be necessary to identify that a specific director or servant committed the act to trigger the liability of a legal person, but that it would suffice to show that a director or servant committed an act. However, due to the absence of case law, and the practical difficulties in identifying conduct by one individual in a complex and decentralised corporate structure, the Working Group considers that this issue should be followed-up in Phase 2.

3. Sanctions

167. Article 3.1 of the Convention requires that sanctions in place for foreign bribery be effective, proportionate and dissuasive; Article 3.2 makes similar requirements in respect of legal persons. Article 3.3 calls for effective confiscation measures in respect of the bribe and its proceeds.

168. The Working Group is encouraged by steps taken by South Africa in the Policy Directives for Prosecutors and in recent amendments to the Criminal Law Amendment Act 1997 to ensure that foreign bribery is always tried at the highest level, with the possibility of imposing unlimited fines. It is also encouraged by recent decisions by the Constitutional court confirming fines and important confiscation penalties on legal persons. However, the Working Group questions whether the lower sanctions mentioned in the PCCA in respect of jurisdiction by lower courts [i.e. a maximum fine of ZAR 360 000 (EUR 28 150 or USD 44 425) in Regional Court and ZAR 100 000 (EUR 7 820 or USD 12 340) in the Magistrate's Court] may have an influence on sanctions pronounced by the South African courts in respect of foreign bribery, especially where legal persons are involved. The Working Group is concerned that, if this were the case, sanctions in respect of legal persons may not be sufficiently effective, proportionate and dissuasive. The Working Group is of the view that this issue will benefit from further discussions in Phase 2 and as case law develops.

4. Jurisdiction

169. Articles 4.1 and 4.2 of the Convention refer to the application of territorial and nationality jurisdiction over foreign bribery offences. Section 35(1) of the PCCA is quite clear on the application of nationality jurisdiction. However, there is no specific mention of the criteria for establishing territoriality jurisdiction in the PCCA and case law on this issue has not been provided. The Working Group therefore recommends that the issue of territorial jurisdiction be the subject of further analysis and discussions in the context of South Africa's Phase 2 evaluation. However, the Working Group acknowledges that provisions on nationality jurisdiction appear very strong under the South African law.

5. Enforcement

(i) Special law enforcement body with specific responsibility for serious crime, including foreign bribery

170. As of the time of this review, it has been decided by South Africa that the Directorate for Special Operations, which had responsibility for investigating and prosecuting serious criminal or unlawful conduct, including foreign bribery in certain circumstances, would be disbanded. A new Directorate for Priority Crime Investigation is due to be created in its place. South Africa explains that this modification in the institutional framework is part of the review of the criminal justice system, and will allow improved coordination. The Working Group expresses serious concern in regard of this issue, and will monitor this further in the context of a Phase 2 evaluation, to ensure that the effective enforcement of the foreign bribery offence is not affected by this rearrangement of law enforcement responsibilities.

(ii) Consideration of the economic impact of the offence

171. The South African Policy Directives for Prosecutors state that, when considering the "public interest" in decisions to prosecute, "the economic impact of the offence on the community" should be taken into account. South Africa contends that this factor is one among several, and would only constitute an aggravating factor. Consideration of such a factor in investigating and prosecuting foreign bribery cases is prohibited by Article 5 of the Convention, and the Policy Directives do not specifically state that it would only be considered an aggravating circumstance. The Working Group is encouraged by South

Africa's expressed intention to carry out the necessary clarifications, and urges South Africa to proceed expeditiously with such clarifications.

6. Extradition

172. South Africa's laws on extradition, as well as extradition agreements to which South Africa is a party, always require that the offence for which extradition is sought has been committed "within the jurisdiction" (i.e. within the territorial jurisdiction of the requesting country). The Working Group is therefore concerned that South Africa will not be able under the current system to provide extradition for a foreign bribery offence when the requesting country is exercising nationality jurisdiction (i.e. the offence took place outside the requesting country's territory) which will normally be the case for foreign bribery offences.

173. The Working Group welcomes the statements made by South Africa that a proposed Extradition Bill would remove this requirement, and encourages South Africa to proceed expeditiously with the adoption of these amendments to answer the concerns of the Working Group.