

**ADB/OECD Anti-Corruption Initiative
for Asia and the Pacific**



The Criminalisation of Bribery in Asia and the Pacific



THE CRIMINALISATION OF BRIBERY IN ASIA AND THE PACIFIC

Frameworks and Practices in 28 Jurisdictions

Thematic Review – Final Report

Australia – Bangladesh – Cambodia – P.R. China – Cook Islands – Fiji Islands – Hong Kong, China – India – Indonesia – Japan – Republic of Kazakhstan Republic of Korea – Kyrgyz Republic – Macao, China – Malaysia –Mongolia Nepal – Pakistan – Palau – Papua New Guinea – Philippines – Samoa – Singapore Sri Lanka – Thailand – Vanuatu – Viet Nam

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Foreword

Since 2006, the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific has conducted Thematic Reviews of specific areas of its members' anti-corruption efforts. Through the Reviews, the Initiative's Steering Group takes stock of each member's efforts, identifies challenges that have been encountered, and proposes recommendations for a way forward in order to overcome these difficulties. The reviews also identify cross-country trends and common obstacles, which in turn allow the Initiative to tailor its capacity building activities to address these challenges. The first Thematic Review in 2006 focused on members' anti-corruption efforts in public procurement. A second Review in 2007 looked at extradition, mutual legal assistance and asset recovery in corruption cases.

In 2008, the Initiative chose the criminalisation of bribery as the topic for its third Thematic Review. Criminalisation is a key component of all international anti-corruption instruments, such as the Initiative's Anti-Corruption Action Plan for Asia and the Pacific; the United Nations' Convention against Corruption (UNCAC); and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention). The Thematic Review aims to improve members' efforts in this area and thus strengthen their fight against corruption.

This Thematic Review Report was prepared by William Loo and Melissa Khemani, with comments by Christine Uriarte, at the Anti-Corruption Division, Directorate for Financial and Enterprises Affairs, OECD. The Report was then adopted by the Initiative's Steering Group in September 2010. The findings, interpretations, and conclusions expressed in this report do not necessarily represent the views of ADB's Board and members or those of the OECD and its member countries. ADB and OECD do not guarantee the accuracy of the data included in this publication and accept no responsibility whatsoever for the consequences of their use. The term "country" in this report refers also to territories and areas; the designations employed and the presentation of the material do not imply the expression of any opinion whatsoever concerning the legal status of any country or territory on the part of ADB's Board and members, and the OECD and its member countries. While all reasonable care has been taken in preparing the report, the information presented may not be complete or current.

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Main abbreviations and acronyms

ACN	OECD Anti-Corruption Network for Eastern Europe and Central Asia
ADB	Asian Development Bank
AML	anti-money laundering
APG	Asia/Pacific Group on Money Laundering
EUR	euro
FATF	Financial Action Task Force
MER	Mutual Evaluation Report (Financial Action Task Force)
MLA	mutual legal assistance in criminal matters
OECD	Organisation for Economic Co-operation and Development
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
USD	United States dollar

Executive Summary

Criminalisation is a key component of a comprehensive anti-corruption strategy and a vital complement to other efforts such as corruption-prevention and detection. Criminalisation thus figures prominently in international anti-corruption instruments such as the Initiative's Anti-Corruption Action Plan, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) and the UN Convention against Corruption. The purpose of this Thematic Review is to analyse the criminal legal and enforcement framework for fighting bribery among the Initiative's members and to provide suggestions for improvement. The exercise covers the offences of bribery of domestic and foreign public officials by natural and legal persons, as well as aspects of investigating, enforcing and sanctioning these offences.

All of the Initiative's members have criminalised bribery of its own officials (i.e. domestic bribery) to some degree, but these offences raise several issues. In some cases, the problem is over-criminalisation. Several jurisdictions have multiple and overlapping domestic bribery offences, often with inconsistent terminology, which could result in uncertain interpretation. Multiple offences might also cover a single act of bribery, casting doubt over which offence(s) should apply.

Other deficiencies found in domestic bribery offences are often more subtle. Many offences fail to cover the requisite modes of committing bribery ("giving", "offering", "promising", "accepting" and "soliciting" a bribe). Some do not expressly cover bribery through intermediaries or bribery for the benefit of third party beneficiaries, both of which are common *modus operandi*. There are also offences that do not clearly cover cases in which a person bribes an official in order that the official acts outside his/her official competence. These deficiencies could lead to significant loopholes in bribery offences.

An especially complex problem is the definition of a public official. International standards require a broad definition. Bribery offences must cover bribery of persons holding a legislative, executive, administrative or judicial office; persons exercising a public function or providing a public service; and persons defined as a "public official" in a jurisdiction's domestic law. Few members of the Initiative clearly meet these criteria through unambiguous legislative language. Some jurisdictions enumerate the specific officials that are

covered, which makes it difficult to ensure that all persons required under international standards are included. It is clear, however, that some jurisdictions fail to cover certain types of officials, such as legislators, judges, and officials in local governments. Another common deficiency is the omission of persons who perform public functions for a public agency or public enterprise.

An effective bribery offence must also cover a broad range of bribes. The legislation of the Initiative's members largely covers non-monetary bribes such as trips and memberships. It is less certain whether the definition of a bribe is affected by factors such as the value of the advantage, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best-qualified bidder. The bribery offences of the Initiative's members are usually silent on these matters. In some cases, courts have excluded some of these factors from the definition of a bribe. Nevertheless, there are also some jurisdictions that clearly allow bribes that are tolerated by social customs or bribes of small value in certain circumstances.

The Initiative's members also provide several defences to bribery, some of which might not be acceptable under international standards. In a few jurisdictions, coercion or extortion is a defence to active bribery. Facilitation payments is a more common defence for active foreign bribery than domestic bribery. Several jurisdictions provide a defence of "effective regret" which exonerates bribers who voluntarily report the crime to the authorities. The specific requirements of the defence, however, vary among jurisdictions. Some jurisdictions allow a public official to accept an advantage with the consent of his/her employer or principal, or if there is "lawful authority" or "reasonable excuse".

For bribery of foreign public officials, the problem is not over but under-criminalisation. Only 6 of 28 members of the Initiative have enacted specific foreign bribery offences. Three of these members are Parties to the OECD Anti-Bribery Convention, which focuses specifically on foreign bribery. Two additional members rely on an interpretation of a "corruption of agents" offence to cover foreign bribery. In dealing with foreign bribery, Asia-Pacific countries should bear in mind the experience under the OECD Anti-Bribery Convention. All 38 parties to the Convention have implemented the Convention by amending their domestic bribery offence to expressly cover foreign officials, or by creating new, standalone foreign bribery offences. Asia-Pacific countries would be well-advised to take the same approach rather than rely upon interpretations of pre-existing legislation.

Another area of significant deficiency is the liability of legal persons for domestic and foreign bribery. International standards now clearly require countries to impose adequate criminal, civil or administrative sanctions against legal persons for bribery. Just over half of the Initiative's members reported that they have, in theory, the legal means to do so. Even more problematic is the imposition of liability in practice. Asia-Pacific has seen few, if any, prosecutions or convictions of legal persons for bribery of public officials. The absence of cases is likely due to inadequate or outdated legal frameworks, insufficient expertise in corporate prosecutions, and/or a deliberate policy to prosecute only natural persons. Regardless of the cause, Asia-Pacific countries need to improve their track record of holding legal persons accountable for bribery.

The issue of jurisdiction is more satisfactory. All members exercise jurisdiction to prosecute bribery that occurs on their territory. Less clear is whether members will also exercise jurisdiction for bribery that takes place only partly in their territory. A fair number of the Initiative's members have jurisdiction to prosecute their nationals for bribery committed extraterritorially. Nationality jurisdiction to prosecute legal persons appears to be much rarer, however. A few jurisdictions even have universal jurisdiction to prosecute certain bribery offences.

The area of sanctions is also fairly satisfactory, save for some related issues. With a few exceptions, the maximum penalties available for punishing natural persons for bribery are generally effective, proportionate and dissuasive. However, the sanctions available against legal persons are inadequate in several jurisdictions. Another problematic area is confiscation. Most of the Initiative's members provide for the confiscation of the direct proceeds of bribery, but only about half of the members reported an ability to confiscate indirect proceeds. An even more underdeveloped area is administrative sanctions, particularly against a briber. Most members have laws to discipline or dismiss corrupt officials. Several also allow bribers to be banned from engaging in certain professional activities or from seeking public office. Far fewer have legislation debarring individuals and companies that have engaged in bribery from seeking government procurement contracts.

Asia-Pacific countries generally have a range of tools for investigating bribery offences, though improvements could be made to this arsenal. Search warrants are more widely available than simpler means of gathering financial information, such as production orders. Furthermore, bank and tax secrecy rules in some jurisdictions could impede the gathering of evidence. Even in jurisdictions that provide a mechanism for overriding secrecy rules, information may be available only if disclosure is in the public interest. All of the Initiative's members have legislation to freeze the proceeds of corruption. Many of these

laws could be strengthened by allowing freezing early on in an investigation and by simplifying the procedure for obtaining freezing orders. On the other hand, the legislative framework for seeking international assistance in bribery cases is generally satisfactory.

The use of special investigative techniques could also be improved. About half of the Initiative's members can use wiretapping to investigate bribery cases. The use of bugging devices, video recording, undercover operations and controlled deliveries is less common. Some jurisdictions also report that special investigative techniques are available, but that they are unable to identify the legislative basis for using such techniques. Another open question is whether members have the technical expertise and/or resources to deploy these special investigative techniques.

The use of plea bargaining and the assistance of co-operating offenders could also be further developed in jurisdictions whose legal systems so permit. Approximately half of the Initiative's members have enacted legislation on this issue but very few have additional guidelines to flesh out this framework. A clear, written set of rules and principles would add accountability. The legislation in some jurisdictions could also be improved by ensuring that an offender testifies at trial (in addition to merely assisting the authorities). In return for co-operation, the authorities should have the option of offering a reduced sentence and not only total immunity from prosecution.

One area that this Thematic Review did not fully examine is the actual enforcement of the bribery offences. With a few exceptions, the Initiative's members were unable to provide detailed enforcement statistics as requested. Furthermore, the Review was a desk exercise that did not include an opportunity for a visit to members in order to meet or interview relevant representatives in the Initiative's members. In the future, the Initiative could thus consider conducting a more in-depth examination of the issue of enforcement by considering the views and experience of the public sector, private sector, and civil society. The Initiative could also consider studying other issues related to criminalisation, for example additional offences like illicit enrichment, or investigative techniques such as financial investigations, information technology and forensic accounting.

Introduction, Scope and Methodology

Criminalisation is a key component of a comprehensive anti-corruption strategy. It deters individuals and officials from engaging in corrupt behaviour. It can also disgorge the profits of the crime and recompense the victim and the state. Criminalisation is thus a vital complement to other anti-corruption efforts such as prevention and detection.

International anti-corruption instruments reflect the importance of criminalisation. Pillar 2 of the Initiative's Action Plan commits countries that have endorsed the Plan to ensure "the existence of legislation with dissuasive sanctions which effectively and actively combat the offence of bribery of public officials". Criminalisation is the focus of international instruments such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention). It is also one of the three major pillars of the UN Convention against Corruption (UNCAC).

However, implementing an effective regime of criminalisation can be a challenging task, as seen with the parties to the OECD Anti-Bribery Convention. Effective bribery offences need to address the different means in which the crime can be committed. These offences must be supported with investigative tools. The offences must also be implemented and enforced. Deficiencies in these areas are not always obvious. With this in mind, the Steering Group decided in November 2008 to conduct a Thematic Review on the criminalisation of bribery offences under the UNCAC. The purpose of the review is to provide suggestions on how the Initiative's members can strengthen their criminal legal and enforcement framework for fighting bribery.

The Steering Group also decided that this Thematic Review should draw heavily from the methodology used to monitor the implementation of the OECD Anti-Bribery Convention. Because of similarities between the OECD and UN Conventions, the lessons learned by OECD countries can help the Initiative's members avoid pitfalls on the road to UNCAC implementation. Two particular features of this methodology are worth noting. First, the review involves a

detailed, element-by-element analysis of offences. The mere existence of a bribery offence is not adequate; there must be a closer examination to verify whether an offence meets international standards. Second, laws are meaningful only when they are adequately enforced. The review therefore attempts to analyze the enforcement of bribery laws and the investigation of bribery offences in practice.

Because of limited resources, this Thematic Review cannot cover all 28 articles in UNCAC on criminalisation. Instead, the review examines in depth how the Initiative's members implement Articles 15, 16 and 26 of UNCAC (bribery of domestic and foreign public officials by natural and legal persons). Where relevant, the review briefly touches upon other corruption offences such as trading in influence, and illicit enrichment. The review also considers the UNCAC provisions on enforcement, including Articles 30 (prosecution, adjudication and sanctions), 31 (freezing, seizure and confiscation), 37 (cooperation with law enforcement authorities), 40 (bank secrecy), 42 (jurisdiction) and 50 (special investigative techniques). While this study only covers a limited part of UNCAC, the length of this report demonstrates the amount of effort and resources that is nevertheless required. A thorough examination of how the Initiative's members implement the remaining articles of UNCAC falls outside the scope of this study.

This Thematic Review is meant to complement but not duplicate efforts in other forums. For the three members that are party to the OECD Anti-Bribery Convention,¹ this Thematic Review will refer to the monitoring reports of the OECD Working Group on Bribery in International Business Transactions whenever appropriate. The same applies to the two members that are part of the Anti-Corruption Network for Eastern Europe and Central Asia.² This report will also refer to the work of other bodies in the anti-money laundering field³ where relevant.

These exceptions aside, the bribery offences of most members of the Initiative had not been externally analyzed prior to this Thematic Review. A few members participated in the UNCAC Pilot Review Mechanism⁴ but the resulting reports are not publicly available. Some members have also conducted "gap analyses" on UNCAC implementation. These exercises generally cover all articles of the Convention; their breadth of coverage largely precludes in-depth examination of each UNCAC provision. The 20 members that are States Parties to UNCAC (as of September 2010) will be examined under the Mechanism for the Review of Implementation that was adopted in November 2009. Whether the reviews under the Mechanism will go into the same depth as this Thematic Review remains to be seen. In any event, this Thematic Review should provide useful information for the UNCAC review process.

Work on this Thematic Review took place in 2009 and 2010. In January 2009, the Secretariat sent a detailed questionnaire to each member of the Initiative to collect relevant information, legislation, case law and statistics. Ten of the Initiative's 28 members responded to the questionnaire (Australia; Bhutan; Hong Kong, China; Japan; Kyrgyzstan; Macao, China; Nepal; Philippines; Singapore; and Thailand). The Secretariat also conducted extensive independent research to gather further information. The Secretariat then spent the balance of 2009 and part of 2010 drafting this report.

As with previous Thematic Reviews, this report consists of two parts. The first is an overview of the trends and issues in criminalisation of bribery in Asia and the Pacific. This cross-country analysis allows comparison of the different approaches among different members on specific issues. By identifying common challenges across the membership, the Initiative can design its future capacity-building activities to address these matters. The second part consists of individual reports on each of the Initiative's 28 members. Each report analyses a member's approach to criminalising bribery, identifying both strengths and areas for improvement.

The accuracy of the reports relies on the Initiative's members. Each member of the Initiative was given the opportunity to comment on successive drafts of its country-specific report and the horizontal report. Each member ultimately agreed to the text and accuracy of its country report and the horizontal report. If a member agrees, its country report will also contain recommendations for a way forward. The Steering Group also discussed the entire draft report at its meeting in September 2010 and adopted the final report (including the recommendations) by consensus.

In line with previous Thematic Reviews, the Initiative will follow up developments in its members on the criminalisation of bribery after the finalisation of this report. Members are expected to provide regular updates during future Steering Group meetings on developments in their jurisdictions. Two years after this report's adoption, members will provide a follow-up report on the implementation of the report's recommendations that will be published. It is hoped that this process will encourage follow-up action to the review, including the enactment or amendment of relevant legislation, and the provision of technical assistance to members in need.

A brief explanation of terminology may assist those who are not specialists in this field. This review covers the crime of *bribery*; it does not cover other forms of *corruption*, such as embezzlement, illicit enrichment etc. The focus is on the bribery of *public officials*, not bribery of private individuals like company managers (which is often referred to as "private sector" or "private-to-

private” bribery). Bribery of public officials can in turn be subdivided into the offence of *active* bribery (the crime committed by a briber who gives, offers or promises a bribe to an official) and *passive* bribery (the crime committed by an official who solicits or receives a bribe). Bribery can also be subdivided into the offence of *domestic* bribery (when an individual bribes an official of his/her own country) and *foreign* bribery (when an individual bribes an official of a foreign country or a public international organisation). The OECD Anti-Bribery Convention and UNCAC also deal with bribery committed by a *natural person* (i.e. a human being) or a *legal person*, such as a corporation.

NOTES

- ¹ Australia, Japan and Korea.
- ² Kazakhstan and Kyrgyzstan.
- ³ The Financial Action Task Force (FATF) and the Asia/Pacific Group on Money Laundering.
- ⁴ Fiji, Indonesia, and the Philippines.

Part I Overview of the Criminalisation of Bribery in Asia-Pacific

There is some similarity in how jurisdictions in Asia and the Pacific have criminalised bribery. This stems in part from these jurisdictions' shared legal history dating back to British colonial rule. For instance, many of these jurisdictions have common law legal systems. Some of their bribery offences derive from the Indian Penal Code of 1860 and thus use similar statutory language. Others have bribery offences that can be traced back to English criminal statutes that were enacted in the late 19th and early 20th centuries. Several jurisdictions also impose corporate criminal liability through the common law approach of relying on judge-made rather than statutory law. Some similarities result from geographical proximity rather than legal history, however. Several Asia-Pacific jurisdictions may simply have used the legislation of other countries in the region as a model.

1. Elements of the Active and Passive Domestic Bribery Offences

This section will begin by looking at two general issues regarding domestic bribery offences, namely, the existence of multiple and overlapping bribery offences, and the treatment of active bribery as abetting an official to commit passive bribery. The section will then consider each essential element of the domestic bribery offence as defined in UNCAC.

(i) Overlapping and fragmented bribery offences

Quite surprisingly, a fair number of the Initiative's members have multiple bribery offences. Some have multiple general bribery offences, i.e. offences that are designed to cover bribery generally rather than in specific, narrow situations. This often arises when a jurisdiction has a penal code that contains general bribery offences but later enacts a specific anti-corruption statute that includes additional general bribery offences. Both sets of offences remain in force because, for some reason, the older general offences in the penal code were not repealed.

Table I.1: **The Initiative's members with overlapping general bribery offences**

Bangladesh	Pakistan
Bhutan	Philippines
Fiji	Singapore
Indonesia	Sri Lanka
Malaysia	

Multiple bribery offences may also result when a country has a general bribery offence and one or more specific bribery offences. Specific bribery offences usually deal with bribery of a specific type of public official, e.g. customs officers. When an official in this specific category is bribed, both the general and specific bribery offences may apply. The number of specific bribery offences in one jurisdiction can be quite high; one member of the Initiative has 12 specific bribery offences. The general and specific bribery offences are usually found in different statutes, though there are exceptions. Five Pacific Island members (Cook Islands; Fiji; Papua New Guinea; Samoa; and Vanuatu) have overlapping general and specific bribery offences.

Multiple and overlapping bribery offences can contain inconsistent language and thus cause interpretative issues. For example, in one jurisdiction, one offence may prohibit an official from soliciting a bribe "for him/herself". A second offence may prohibit an official from soliciting a bribe "for him/herself or *anyone else*". Because of the additional italicised words, the second offence clearly covers bribes that benefit a third party. The absence of these same words from the first offence arguably implies that this offence does not cover third party beneficiaries. Otherwise, the italicised words would not be necessary in the second offence. If this interpretation is adopted, then the first offence would contain a significant loophole.

Overlapping offences can also cause confusion because multiple offences (e.g. a general bribery offence and one specific to a type of public official) may apply to the same case. This could have significant consequences

since the maximum available penalty for the two offences sometimes differ greatly. In many jurisdictions, the prosecutor can choose which offence to proceed with, but there may be little or no guidance on how to exercise that discretion.

(ii) Active Bribery through the Offence of Abetment

The penal codes of Bangladesh; India; Malaysia; Pakistan; and Sri Lanka contain specific passive bribery offences but not corresponding active bribery offences. Instead, active bribery is considered a crime of abetting a public official to commit passive bribery. This phenomenon is not unique to countries that have adopted the Indian Penal Code 1870. Thailand, for instance, covers active bribery through an intermediary through the offence of instigating, assisting or facilitating bribery.

Framing active bribery as abetment falls short of international standards. International anti-corruption instruments require countries to enact specific anti-bribery offences that expressly cover the intentional offering, promising and giving of a bribe.¹ Furthermore, many jurisdictions consider inchoate offences such as abetment to be less serious and thus attract lesser penalties. The resulting sanctions for abetting passive bribery may thus be too low to be effective, proportionate and dissuasive. Some jurisdictions also require proof that the act of bribery was completed, or that the abettor knows of the main perpetrator's wrongful purpose.

(iii) The five modes of committing active and passive domestic bribery

International instruments define three modes of committing active bribery and two modes of committing passive bribery.

An active bribery offence must cover "giving", "offering" and "promising" an undue advantage. "Giving" refers to the actual, physical provision of the advantage to an official. "Offering" occurs when an individual presents an undue advantage to an official for acceptance. "Promising" arises when an individual undertakes to provide an undue advantage to an official at a future time. Crucially, the offence is complete when the undue advantage is given, offered or promised. The briber has committed a crime regardless of whether an official receives, accepts or rejects the undue advantage. There need not be an agreement or a "meeting of the minds" between the individual and the official.²

International standards also require a passive bribery offence to cover "accepting" and "soliciting" an undue advantage. "Accepting" refers to taking or

agreeing to take an undue advantage that has been given, offered or promised. “Soliciting” is the seeking of an undue advantage by an official. A solicitation is complete once the official seeks an undue advantage from an individual, irrespective of whether the individual agrees to give the advantage. “Soliciting” therefore mirrors “giving”, “offering” and “promising”: there is no requirement for an agreement between the individual and the official.

Several members of the Initiative have active and passive bribery offences that meet these requirements. Some use the same language of “giving, offering, promising, accepting and soliciting” (e.g. Japan). Others do so with synonyms, e.g. Australia uses “providing” and “asking” instead of “giving” and “soliciting”. Either way, express coverage of all five modes of bribery ensures compliance with international standards and is thus clearly best practice.

Quite frequently, however, one or more of the requisite modes are missing from the text of the offence. For instance, an offence may expressly cover “accepting” but not “soliciting” (e.g. Indonesia; Kazakhstan; Mongolia; Palau) or “giving” but not “promising” (e.g. Cook Islands; Nepal; Palau; Samoa; Thailand; Vanuatu). When the offence of abetment is used to cover active bribery, the statute does not refer to “giving, offering and promising” at all.

In the absence of express language, some courts may interpret the offence to fill in the gaps. Others may decline to do so by preferring to interpret criminal statutes strictly. In other cases, the missing modes are simply not an offence, e.g. offering, soliciting and promising a bribe are not crimes in Kyrgyzstan. For the majority of the cases in this Thematic Review, the Initiative’s members merely assert that the unlisted modes of bribery are covered without citing case law in support.

Special attention should be paid to using the crime of attempted bribery in lieu of expressly covering “offering”, “promising” and “soliciting” a bribe. Attempted bribery offences could arise in two situations. First, the reference to “attempt” may be found in the text of the bribery offence as one mode of committing the offence. For example, a passive bribery offence may explicitly provide that a crime occurs when an official “accepts or obtains, or agrees to accept, or *attempts to obtain* from any person” a bribe. This language is found in Bangladesh; Bhutan; Cook Islands; Fiji; India; Malaysia; Pakistan; Papua New Guinea; Samoa; Singapore; Sri Lanka; and Vanuatu. This approach is acceptable, since “attempting to obtain” is sufficiently similar in meaning to “soliciting a bribe”.

More problematic is when “attempt” is referred to not in the bribery offence but in a provision of general application elsewhere in the statute. The penal codes of most jurisdictions contain a provision specifying that it is a crime to attempt to commit a substantive offence. This provision applies to most or all offences in the penal code, not just bribery. Within the Initiative, Indonesia; Kazakhstan; Kyrgyzstan; Mongolia; and Nepal rely on such a provision to cover “offering”, “promising” and/or “soliciting” a bribe.

Using a general offence of attempt to cover “offering”, “promising” or “soliciting” a bribe may be incompatible with international standards. International anti-corruption instruments give equal status to the five modes of bribery. Each is considered a full, completed offence, regardless of whether an offer, promise or solicitation is accepted.³ These instruments also deal with the substantive bribery offences and “attempt” crimes in separate articles.⁴ This arguably suggests that “attempt” crimes are intended only to complement and not to replace the substantive bribery offences. Furthermore, many jurisdictions impose lighter punishments for inchoate offences like attempt crimes (*e.g.* in Nepal), resulting in sanctions that are not effective, proportionate and dissuasive. Countries should therefore expressly cover “offering”, “promising” and “soliciting” a bribe rather than rely on general attempt offences.

(iv) Bribery through intermediaries

Bribery through intermediaries refers to the use of a third party to channel or convey a bribe between the briber and an official. Intermediaries can also be used to transmit a bribe offer, promise, or solicitation between the briber and the official. Bribers and corrupt officials use intermediaries to distance themselves from each other and thus reduce the chances of being caught.

The use of intermediaries is an extremely prevalent *modus operandi* for bribing foreign public officials in international business transactions, according to a recent OECD report.⁵ In many cases, bribers hire fake “consultants” who do not provide any legitimate services. Instead, the consultants receive fees from the bribers and forward them to corrupt officials as bribes, less a charge for their assistance. Off-shore corporate vehicles are frequently used as intermediaries, since the opacity of these entities impedes detection and investigation. Intermediaries could be friends or family members of the briber or the official. They could also be related business entities, such as subsidiaries, members of a conglomerate or joint venture partners. To reduce the chances of detection even further, chains of intermediaries are used.

The prevalence of this phenomenon has led international instruments to cover bribery through intermediaries expressly. Two different methods are used.

The OECD Anti-Bribery Convention covers the giving, offering and promising of an undue advantage to a foreign official “whether directly or through intermediaries”. UNCAC uses slightly different language by referring to giving, offering and promising to a public official, “directly or indirectly”, of an undue advantage. Similar language is used in the passive bribery offence.

Table 1.2: **The Initiative’s members that cover bribery through intermediaries expressly or by case law**

Fiji	Mongolia (active only)
Hong Kong, China	Philippines
Japan (case law)	Singapore
Kazakhstan	Sri Lanka (Bribery Act)
Korea (case law)	Vanuatu
Kyrgyzstan	Viet Nam (passive only)
Macao, China	

Only a minority of the Initiative’s members use express statutory language to cover bribery through intermediaries. Most of these members use language similar to that found in UNCAC and the OECD Anti-Bribery Convention. One exception is Australia, whose active domestic bribery offence covers a person who “causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person”. Most of the remaining members of the Initiative assert that the use of intermediaries is covered, though only two members referred to specific supporting case law.

Four members of the Initiative have also enacted a specific offence of acting as an intermediary in a bribery transaction (P.R. China; Kazakhstan; Mongolia; Thailand). This goes beyond international standards, which require intermediaries to be criminally sanctioned but not necessarily under a separate, standalone offence targeting intermediaries.

(v) Bribes that benefit third parties

Another common *modus operandi* for committing bribery is providing bribes to third parties instead of the official. The purpose of this technique is to distance the official from the bribe in order to reduce the chances of detection. Frequently, the corrupt official would instruct the briber to transfer the bribe directly to the third party. In some cases, the official may receive the bribe from the briber before forwarding it to the third party. A third party may be the corrupt official’s friend, spouse or family member. It may be a company controlled by the official, often incorporated in offshore financial centres to increase secrecy. A third party may also be a political party or charity, with the bribe masked as a contribution or donation.

International instruments cover bribes that benefit third parties expressly. UNCAC covers the giving, acceptance etc. of an undue advantage “for the official himself or herself or another person or entity.” The OECD Anti-Bribery Convention covers the giving, offering and promising of an undue advantage “to a foreign public official, for that official or for a third party”.

This requirement is fairly well implemented in Asia-Pacific, mostly through overt statutory language. P.R. China does not use express language but have issued guidance clarifying that third party beneficiaries are covered. The remaining members whose general bribery offences are silent on this issue include: Bhutan (except the Penal Code); Indonesia; Kazakhstan; Malaysia; Mongolia; Palau; Philippines (Revised Penal Code); Thailand (active bribery only); Vanuatu (active bribery only); and Viet Nam.

(vi) Definition of domestic/national public officials

The UNCAC and the OECD Anti-Bribery Convention contain similar definitions of “public officials” that cover:⁶

- (a) Any person holding a legislative, executive (including the military),⁷ administrative or judicial office, whether appointed or elected, permanent or temporary, paid or unpaid, irrespective of that person’s seniority;
- (b) Any person exercising a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law; and
- (c) Any other person defined as a “public official” in the domestic law.

Two particular features of this definition should be noted. First, the definition takes a functional approach, i.e. whether someone is a “public official” depends on the functions that he/she performs, and not on his/her title or position (e.g. minister, department head, employee, judge).

Second, the definition covers a public agency or enterprise. This is vital in states that have devolved some public functions from the government to enterprises and agencies. The OECD Anti-Bribery Convention⁸ provides some additional guidance on these terms:

- (a) A “public function” includes any activity in the public interest delegated by a country, such as the performance of a task in connection with public procurement.

- (b) A “public agency” is an entity constituted under public law to carry out specific tasks in the public interest.
- (c) A “public enterprise” is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. This is deemed to be the case, *inter alia*, when the government or governments hold the majority of the enterprise’s subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise’s administrative or managerial body or supervisory board.
- (d) An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges.
- (e) In special circumstances, public authority may in fact be held by persons not formally designated as public officials (*e.g.*, political party officials in single party states). Under the legal principles of some countries, such persons may be considered public officials through their *de facto* performance of a public function.

The definition of a “public official” must further include officials of all levels and subdivisions of government, from national to local, and including sub-national governmental units of a self-governing nature. It must also encompass officials of any organised area or entity, such as an autonomous territory or a separate customs territory.⁹

Instead of taking a functional approach, many members of the Initiative define “public official” by listing at length the officials who are covered. This approach can sometimes lead to greater certainty, such as when bribery involves a listed official or someone clearly falling within a narrow listed category. However, it also has disadvantages. It is difficult to verify that the list covers all persons performing the functions described in the definition of “public officials” in international instruments. Nevertheless, there are clearly gaps in some cases. Members of the Initiative that use the list approach have variously omitted different types of officials such as certain officials of local governments (Samoa); judges in lower courts (Malaysia); persons performing legislative functions (Bangladesh; Nepal; Philippines; Sri Lanka) and judicial functions (Kyrgyzstan; Nepal; Philippines); and military personnel (Pakistan). Three

members (Bhutan; Korea; Palau) take the opposite extreme by not defining “public official” at all.

A second common deficiency is the coverage of persons who exercise a public function, including for a public agency or public enterprise. The bribery offences of most members do not address these individuals at all. Among those that do, Kazakhstan and Pakistan cover only managerial personnel of state-owned or controlled enterprises; lower level employees are not covered, even if they perform public functions. Sri Lanka and Thailand only cover enterprises in which the state holds a majority shareholding. This excludes enterprises that are state-controlled despite a minority shareholding, *e.g.* enterprises in which the government holds a “golden share”. Of the Initiative’s members, only Hong Kong, China; Macao, China; and Mongolia appear to cover adequately persons performing public functions for public agencies and enterprises.

(vii) Bribery in order that an official acts or refrains from acting outside official competence

Under international standards, the crime of bribery occurs only when the purpose of giving, soliciting etc. an undue advantage is to induce the official to act or refrain from acting in the exercise or performance of his or her official duties. The OECD Anti-Bribery Convention requires this concept to include any use of the public official’s position, whether or not within the official’s authorised competence.¹⁰

A key feature of this definition is the coverage of acts outside an official’s competence. Hence, an effective bribery offence should cover an executive of a company who gives, offers etc. an undue advantage to a senior government official, in order that this official use his/her office - though acting outside his/her competence - to make *another official* award a contract to that company.¹¹ A slight variation of this example that should also be covered is where a company executive bribes a senior government official in order that this official uses his/her office to make *a private company* award a contract to the briber’s company.¹² This is not an unlikely scenario. Senior officials such as heads of states or governments are often so powerful and influential that they can pressure private companies in their countries to do business with a particular company.

Many bribery offences in Asia-Pacific may not meet this aspect of international standards. Acts outside an official’s competence are expressly covered in the bribery offences of only a few members of the Initiative: Australia; Fiji (POBP only); Hong Kong, China; Kazakhstan; and Kyrgyzstan. Case law shows that the Philippines’ general bribery offence likely covers acts

outside an official's competence. The domestic bribery offences in the remaining members of the Initiative are either silent, or they expressly apply only to acts within an official's capacity or competence.

(viii) Definition of a bribe

Bribers often offer not money but non-pecuniary advantages such as trips, memberships in private clubs, or educational opportunities for the officials' children. Hence, an effective bribery offence must prohibit the giving, soliciting etc. of both monetary and non-monetary advantages.

Table I.3: The Initiative's members whose legislation expressly covers non-monetary bribes

Australia	Macao, China
Bhutan	Malaysia
Cook Islands	Pakistan
Fiji	Philippines (case law)
Hong Kong, China	Papua New Guinea
India (Penal Code)	Samoa (LAPPO)
Indonesia	Singapore
Japan (case law)	Sri Lanka
Korea (case law)	Thailand
	Vanuatu

Roughly half of the Initiative's members meet this requirement. The general bribery offences in many members expressly refer to the giving of non-monetary advantages. Others use broad terms such as "benefits". In some jurisdictions, courts have also confirmed that non-monetary bribes are covered.

At the other end of the spectrum, some members' bribery offences do not cover non-monetary bribes (Kazakhstan; Kyrgyzstan). The language used to define a bribe in some jurisdictions also leaves the situation unclear, *e.g.* "property"; "kickbacks" "service charges" (P.R. China); "valuable thing" (India); "something" and "payment or promise" (Indonesia); "anything of value" (Palau) or "valuable" (Samoa); and "money, property or other material interests" (Viet Nam). Mongolia's general bribery offence is silent and thus unclear on this issue. Nepal's offence, on its face, covers non-monetary bribes by referring to "any type of gain or benefit". However, Nepalese authorities state that this provision does not cover non-monetary bribes.

International standards also require that the giving of an undue advantage is an offence irrespective of the value of the advantage, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder.¹³ The

bribery offences of almost all of the Initiative's members are silent on these matters. Hong Kong, China stated that its legislation and case law do not allow these factors to play a role in determining whether an offence has taken place. Macao, China authorities cited case law to show that the definition of a bribe is not affected by factors such as the result of the bribe or whether the briber was the best qualified bidder. However, Macao, China courts have considered other factors such as value of the advantage, the perceptions of local custom towards bribery, the tolerance by local authorities, or the alleged necessity of the bribe. Malaysia asserted that their offences meet this aspect of international standards but did not provide supporting case law. To the contrary, Nepalese authorities stated that whether an act is bribery does depend on these factors.

In some members, giving, soliciting etc. small advantages is not a crime. In Kazakhstan, it is not a crime for a person empowered to exercise public functions (but not an official or a senior official) to accept a gift in exchange for an act or omission already performed. The defence only applies if the gift recipient is a first-time offender; there is no prior agreement between the giver and the official to provide the gift; the act or omission performed by the official in exchange for the bribe is lawful; and the value of the gift does not exceed "two monthly calculation indices". In Viet Nam, it is a crime to give an undue advantage valued at less than approximately EUR 20 or USD 28 only if the act causes "serious consequences". The passive bribery offence also applies only if the offender has not been subject to administrative disciplinary measures. P.R. China does not specify monetary thresholds. Instead, certain bribery offences only apply "in serious circumstances" or involves "relatively large amount of property". Both terms are undefined.

The value of the advantage may also trigger certain rules of evidence. In Bangladesh, once it is proven that a gratification was provided to an official, it is presumed that the gratification was a motive or reward for the official's act or omission. However, a Court may decline to apply this presumption if the gratification is "so trivial that no inference of corruption may fairly be drawn". Likewise in Indonesia, the onus is on the recipient official to prove that an advantage is not a bribe. However, if the gratification amounts to less than approximately USD 1 000 or EUR 7 000, the burden of proof reverts to the prosecution.

Some members have also addressed whether bribery is tolerated by custom. The legislation in Bhutan; Fiji; and Hong Kong, China expressly states that it is no defence that a gratification is customary in any profession, trade or vocation. Nepal asserts that there is also no such defence under its law. Singapore's legislation provides that evidence showing that any gratification is customary in a profession, trade, vocation or calling is inadmissible in court

proceedings. On the other hand, legislation and case law in Korea allow benefits that are given because of social customs, or necessity arising from a personal relationship. Whether an advantage is a bribe depends on factors such as the official's specific duties, the relationship between the public duties and the person providing the benefit, the background and timing when the benefit is given, and the type and amount of the benefit.¹⁴ Cambodia's new anti-corruption law prohibits gifts to officials in exchange for favours but allows gifts given in accordance with custom and tradition.

(ix) Mental element

This Thematic Review devotes limited effort to the requisite mental element of the members' bribery offences. The Initiative's members all require bribery offences to be committed intentionally, as required under international standards. What is less clear is whether the offences allow other forms of subjective *mens rea* such as recklessness, wilful blindness, and *dolus eventualis*. As noted above, companies or individuals sometimes pay intermediaries (e.g. consultants) huge fees without inquiring whether all or part of the funds would be used to bribe officials. It remains to be seen whether the Initiative's members would consider the payer in these circumstances to be reckless or wilfully blind and hence liable for bribery.

One issue that this Thematic Review did consider is the requirement in five members that an undue advantage be given, solicited etc. "corruptly": Cook Islands; Papua New Guinea; Samoa; Singapore; and Vanuatu. U.K. courts interpreting this term in English corruption statutes¹⁵ are unclear and in "impressive disarray". Some interpreted "corruptly" to mean "doing an act that the law forbids as tending to corrupt", while others required further proof that the accused acted dishonestly.¹⁶ The Cook Island courts have also given inconsistent interpretations to the term. Papua New Guinea courts have commented on the confusion in this area. Singapore states that it does not have problems with the concept of "corruptly". Courts there have interpreted the term to require a "corrupt element" in the transaction and a "corrupt intention" on the part of the briber giver or taker. Each case turns on its facts.

Law reform efforts have accordingly attempted to eliminate the use of "corruptly". Recent reform proposals in the U.K. by the Law Commission, the Government and a Parliamentary Joint Committee all favoured repealing the "corruptly" requirement.¹⁷ The new Bribery Act 2010 accordingly did not employ this concept. The OECD has also recommended that New Zealand replace the term "corruptly" in its foreign bribery offence with a clearer concept.¹⁸

2. Bribery of foreign public officials

While domestic bribery has long been recognised as a crime in almost all countries in the world, the crime of foreign bribery is of relatively recent vintage. The opportunity to commit foreign bribery has risen dramatically because globalisation has led to a significant increase in international economic activity. The crime is relevant to all members of the Initiative as foreign companies invest in these countries and thus may bribe their officials. It is also relevant as an increasing number of companies in Asia expand overseas and may therefore face risks of committing foreign bribery.

For these reasons, international standards now require countries to enact an offence of active foreign bribery. Passive foreign bribery is recommended but not mandatory. Foreign bribery in this context includes bribery of officials of not only foreign governments but also of public international organisations. The foreign bribery offence need only cover bribery in international business transactions, i.e. bribery in order to obtain or retain business or other improper advantage in the conduct of international business.¹⁹ Nothing, however, prevents countries from going further and prohibiting foreign bribery unrelated to business.

The implementation of the foreign bribery offence in Asia-Pacific is far from satisfactory. Only six members of the Initiative, three of which are Parties to the OECD Anti-Bribery Convention, have specific foreign bribery offences: Australia; Cambodia; Japan; Kazakhstan; Korea and Malaysia. Indonesia asserts that its Law No. 11/1980 on Anti-bribery Law or Bribery Offences covers active and passive foreign bribery. The law prohibits the giving, receiving etc. of “something [to/by] someone with the aim of persuading him/her ... to violate his/her authority or obligation related to the public interest.” However, there have not been any actual active or passive foreign bribery investigations or prosecutions under this provision. Whether this provision meets international standards is thus questionable. At the time of this report, Thailand had just withdrawn a Bill from its legislature that would have created a foreign bribery offence. A second Bill is under preparation. For major exporting economies such as China, India and Indonesia, foreign bribery is still not a crime.

Two members rely on an offence of corruption of agents to cover foreign bribery. In Hong Kong, China, the Court of Final Appeal recently held that this offence applies to bribery of foreign public officials. In an earlier case, a Hong Kong, China resident who had been employed by the consulate of a foreign government as an investigator to examine work visa applications was convicted of bribe-taking. Singapore states that its corruption of agents offence gives its authorities a mandate to investigate and prosecute bribery of foreign officials

committed overseas. The corruption of agents offence typically address the giving, soliciting etc. of an advantage to/by any agent as an inducement to or reward for acts or omissions by the agent in relation to his/her principal's affairs or business. The offence is not limited to corruption of public officials, but any agent *viz.* his/her principal. More importantly, the offence does not expressly refer to *foreign* officials or agents.

Absent confirmatory case law, whether the corruption of agents offence indeed covers foreign bribery is debatable. It is also useful to consider the United Kingdom's experience since the agent offences referred to above were based on the U.K. Prevention of Corruption Act 1906. Until it was amended in 2002, the U.K. Act also did not refer to foreign agents or foreign public officials. Despite initial assertions to the contrary, some U.K. officials ultimately acknowledged that the agents offence before 2002 may not have covered bribery of foreign public officials.²⁰

Even when the courts confirm that a corruption of agents offence applies to foreign bribery, there could still be questions over the scope of the offence. An agent is typically defined as a person who is employed or acts for another person. It is not apparent that this definition would cover officials such as heads of state, heads of government, judges and legislators. There may also be issues concerning a defence of "principal consent". Under the general principles of the law of agency, the informed consent of the principal to the agent's actions is a defence to the agent's liability for breach of trust. In the U.K., some officials and prosecutors have opined that such a defence exists.²¹ International standards, however, do not permit such a defence.

In general, members of the Initiative would be well advised to implement a foreign bribery offence by amending their legislation. All 38 parties to the OECD Anti-Bribery Convention have either amended their domestic bribery offence to cover foreign officials expressly, or created new, standalone foreign bribery offences. This is strong evidence that the better practice is to implement a foreign bribery offence through legislative action, rather than rely on debatable interpretations of dated legislation.

3. Defences

This Thematic Review does not consider defences that are applicable generally to all criminal offences in a member jurisdiction, unless a general defence is particularly relevant to the crime of bribery. The Review also does not look at prosecutorial immunities accorded to officials such as heads of state, legislators, judicial officials etc. The importance and complexity of the issue of immunities would justify a separate study.

Instead, this Review concentrates on defences that apply specifically to bribery, including solicitation/extortion, small facilitation payments, and “effective regret”. The emphasis is on full defences, i.e. those defences that exonerate an accused from criminal responsibility and not merely operate as mitigating factors at sentencing.

(i) Solicitation, coercion and extortion

Solicitation of a bribe should be distinguished from coercion and extortion. A solicitation is a mere request for a bribe by an official, while coercion involves compulsion, constraint or compelling by force, arms or threat.²² Extortion usually involves a threat, e.g. of violence, exposure of embarrassing information or reputational damage.²³

A mere solicitation should not provide a defence to bribery. Extortion and coercion, on the other hand, are generally accepted as full defences or mitigating factors at sentencing. In many jurisdictions, these are defences or sentencing factors of general application. However, two members of the Initiative (Kazakhstan and Kyrgyzstan) have enacted extortion defences that apply specifically to bribery. The Penal Codes of Bangladesh and Pakistan also provide coercion defences specific to bribery, exculpating a person who was “induced, compelled, coerced, or intimidated to offer or give” a bribe.

One danger of coercion and extortion defences is that they could be interpreted too broadly. For example, the defences should not succeed merely because a person feels that he/she has no choice but to pay a bribe in order to obtain or maintain business. Unfortunately, the Initiative’s members were unable to provide sufficient case law that would allow this Thematic Review to assess whether their courts’ interpretation of these defences are overbroad.

(ii) Facilitation payments

Facilitation payments are commonly referred to as “grease money”. There is no precise, legal definition of “facilitation payments” that is universally accepted. Some jurisdictions define “facilitation payments” as “any facilitating or expediting payment to [a public official] the purpose of which is to expedite or to secure the performance of a routine governmental action by [a public official].”²⁴ Other definitions add that such payments must be “small”²⁵ or “of a minor nature”.²⁶ Some believe that the definition should only cover payments used to induce lawful decisions by a public official in which no discretion is involved. Decisions that are discretionary or which result in a breach of official duties are excluded.²⁷

Some definitions also provide examples. Facilitation payments have thus been described as payments made to facilitate the issuance of licenses or permits; the processing of official documents such as visas and work permits; the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunication services and power and water supply; and the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration or the scheduling of inspections related to contract performance or transit of goods. Facilitation payments do not include, however, payments to induce an official to award new business or to continue business with a particular party, including a decision on the terms of that business, or encouraging another person to make any such decision.²⁸

International instruments do not give facilitation payments uniform treatment. The UNCAC does not refer to small facilitation payments.²⁹ The OECD Anti-Bribery Convention expressly allows such payments despite their “corrosive” nature.³⁰ However, the Parties to the Convention have since agreed to periodically review their policies and approach on this issue. They will also encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, and ethics and compliance programmes or measures. If such payments are used, companies should accurately account for the payments in their books and financial records.³¹

For domestic bribery, Kyrgyzstan may be the only jurisdiction that allows facilitation payments. The Kyrgyz Penal Code is silent on these payments. However, the Kyrgyz authorities indicate that it is a defence to bribery if an advantage was small and was given to induce officials to perform non-discretionary routine tasks such as issuing licenses or permits. The defence’s statutory basis is unclear.

For foreign bribery, Australia and Korea both provide express small facilitation payments defences. The OECD expressed concern over the breadth of these defences and has decided to follow up these defences’ operation as practice develops.³² Japan’s foreign bribery legislation does not provide for a small facilitation payment defence. However, the government published official Guidelines on the legislation with examples suggesting that such a defence might be available. Despite a January 2007 revision of the Guidelines, the OECD recommended that Japan further clarify in the Guidelines that facilitation payments are not permitted.³³

Small facilitation payments might also be inadvertently allowed under the guise of other defences. Jurisdictions that allow bribes of small value or customarily acceptable payments (see above) may well allow small facilitation

payments under those exceptions. The requirement that an advantage be given, solicited etc. “corruptly” could conceivably be interpreted to allow facilitation payments that are accepted or tolerated under local customs. Much would depend on how broadly courts interpret these defences and concepts. Unfortunately, little or no case law was made available to allow this Thematic Review to answer this question.

(iii) Effective regret

The defence of “effective regret” exonerates a person who commits bribery but voluntarily reports the crime to the authorities. The policy reason for the defence lies in the difficulty in detecting bribery, since the only persons with knowledge of the crime are often the guilty parties. The defence is seen as necessary in order to entice one of the guilty parties to come forward.³⁴

Some jurisdictions may impose additional requirements for the defence. For instance, the defence may be unavailable to officials. A person may be required to confess without delay after committing the crime, or before the crime was discovered by the authorities. Some countries allow the defence only if a bribe was solicited by an official, not if an individual offered a bribe of his/her own volition. In some jurisdictions, a person who effectively regrets is nevertheless subject to a small penalty and/or confiscation.³⁵

Table I.4: **The initiative’s members that provide a defence of “effective regret”**

P.R. China	Mongolia
Kazakhstan	Philippines
Kyrgyzstan	Viet Nam
Macao, China	

Several members of the Initiative provide “effective regret” defences, though the specific requirements for the defence vary (please see the respective country report for details). However, many of the defences share some common deficiencies, such as allowing a briber to delay reporting to the authorities. Another frequent deficiency is not requiring a person to help the authorities by testifying at trial, or to provide material or significant assistance to an investigation. Some jurisdictions may not require judicial approval of the defence to prevent abuse. Confiscation may also be unavailable to disgorge the proceeds of bribery accruing to the briber who effectively regrets.

(iv) Consent to accept an advantage

Two types of consent defences are found among members of the Initiative. First, certain Fijian public officials may solicit or accept an advantage if

he/she has written permission of the public body by which he/she is employed. The permission must either be granted before the advantage is solicited or accepted, or applied for and obtained as soon as reasonably possible after. The legislation in Hong Kong, China also provides a defence of written consent by the public body employing an official who solicits or accepts an advantage. Hong Kong, China authorities state that this defence applies to very limited public officials. The defence is not available to prescribed officers and as all civil servants are prescribed officers, they are therefore excluded from its operation. This leaves the defence available to employees of “public bodies” who are not also prescribed officers, as well as persons in “the wider public sector”, many of whom are employees of private companies but are nevertheless considered “public servants” under Hong Kong, China law.

Second, an implicit “principal consent” defence may exist for jurisdictions that rely on a “corruption of agents” offence to cover bribery of public officials. As noted above, the corruption of agents offence typically address the giving, soliciting etc. of an advantage to an agent as an inducement to or reward for acts or omissions by the agent in relation to his/her principal’s affairs or business. It has been argued that, under the general principles of the law of agency, the informed consent of the principal to the agent’s actions is a defence to the agent’s liability for breach of trust. In the United Kingdom, where there is a similar offence of bribery of agents, some officials and prosecutors have opined that such a defence exists.³⁶

Among the members of the Initiative, Fiji; Malaysia; and Singapore rely on a corruption of agents offence to cover bribery of public officials. Singapore states that principal consent is not a defence under its law. Hong Kong, China states that, in practice, it applies its corruption of agents offence only to cases of private sector corruption and bribery of foreign public officials, and not to bribery of Hong Kong, China public officials.

International standards, such as those embodied in UNCAC and the OECD Anti-Bribery Convention, do not permit a consent defence to bribery. Furthermore, the defence could result in a significant loophole. Agents of governments may often accept bribes with the knowledge or acquiescence of their supervisors or managers; the courts could possibly consider such individuals to be “principals” in some cases. An agent and his/her principal could thus collude and benefit from the defence.³⁷ On a policy level, consent defences can also raise problems of proof, such as what persons have the authority to provide the consent as the principal, and whether consent can be oral and thus less reliable.

(v) Lawful excuse, small gifts and for the benefit of relatives

A few members of the Initiative provide some additional defences to bribery that are not contemplated under international standards. In Fiji and Hong Kong, China, a person is not guilty of bribery if he/she acted with lawful authority or reasonable excuse. The onus of proof is on the accused. “Lawful authority” and “reasonable excuse” are not defined. The authorities of Hong Kong, China indicated that there are no concerns over the breadth of this defence. The defence only arises when it is proven beyond reasonable doubt that an advantage has been offered or solicited or accepted for a corrupt purpose. In this situation, “the principal’s consent” is the only defence that usually arises, and this defence is only raised occasionally in private sector corruption cases.

Kazakhstan provides an additional defence of small gifts. A person empowered to exercise public functions but who is not an official may accept a gift in exchange for an act or omission already performed. A number of other conditions must also be met, such as the gift recipient must be a first-time offender; the value of the gift cannot exceed “two monthly calculation indices”; there must also be no prior agreement between the giver and the official to provide the gift; and the act or omission performed by the official in exchange for the bribe must be lawful.

Finally, Macao, China provides that a person may be subject to less or no punishment for active bribery if he/she commits the crime so that a close relative avoids criminal sanctions.

4. Liability of legal persons for bribery

It is now settled that international standards require states to punish not only natural but also legal persons for bribery. The policy reason for this approach is clear. Bribes are very often given so that contracts and other advantages are awarded to companies. Put simply, individuals bribe, but companies benefit. A bribery offence must cover both aspects if it is to address the full mischief of the crime. Corporate liability is also necessary to encourage companies to adopt compliance policies that prevent natural persons who act on their behalf from committing bribery.

International standards allow not only *criminal* but also civil and administrative liability against legal persons for bribery. This is because the constitutions of some legal systems preclude criminal liability of legal persons. Thus, UNCAC Article 26(1) requires a State Party to establish liability of legal persons in a manner that is “consistent with its legal principles”. Article 26(2)

further states that, “[s]ubject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.” Article 3(2) of the OECD Anti-Bribery Convention states that, “In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.”

A fairly high number of the Initiative’s members have, in theory at least, the ability to impose criminal liability against legal persons for bribery. Three approaches are taken. First, many members have adopted the model of corporate liability that is largely based on judge-made English common law. Second, a few countries that do not have common law systems have enacted legislation that impose corporate liability. Third, Australia, though a common law jurisdiction, overhauled its law in 2001 and established a relatively novel system of corporate criminal liability.

Table I.5: **The initiative’s members that can (in theory) impose criminal liability against legal persons for bribery**

Australia	Indonesia
Bangladesh	Korea*
Bhutan	Malaysia
Cook Islands	Pakistan
Fiji	Papua New Guinea
Hong Kong, China	Singapore
India	Sri Lanka
	Vanuatu

A greater concern is the inability to impose corporate liability for bribery in practice. For the present Thematic Review, the Initiative’s members reported only a few convictions of companies for foreign bribery and none for domestic bribery. The almost complete absence of convictions suggests that the schemes of corporate liability for bribery are likely ineffective in practice.

There may be two causes to this problem. Some jurisdictions may lack a policy of pursuing companies for bribery. This could be a deliberate choice, *e.g.* because of insufficient resources or expertise to conduct investigations and prosecutions of this nature, or a belief that it is unimportant to go after companies. The absence of a corporate prosecution policy could also be an unconscious decision. Prosecutors may simply not think of pursuing companies because companies are rarely or never prosecuted for bribery, or even other intentional crimes.

A second reason for the absence of corporate bribery prosecutions may be due to defects in the legal framework. Only individuals, not companies, can physically commit a crime. To hold a company responsible for a crime, there must be rules to attribute the crime committed by an individual to the company. However, many of the Initiative's members that have enacted statutory provisions creating corporate liability have not established attribution rules. Corporate liability is thus theoretically available, but when and where it arises is wholly unclear.

There are also attribution problems for the Initiative's members whose systems of corporate liability are based on English common law. The courts in these jurisdictions may well apply U.K. case law on this issue, given the country's common law history. The leading case is the well-known U.K. House of Lords decision in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153. The principle is commonly known as the "identification" doctrine. Under *Tesco*, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company's "directing mind and will".³⁸

The limits of the identification doctrine in cases of complex corporate crimes such as bribery are now well documented. The problem is at least threefold. First, the identification theory requires guilty intent be attributed to a very senior person in the company. In reality, these persons rarely commit bribery directly. Instead, the crime is often committed by managers or employees who are lower in the corporate hierarchy. Second, a company is not liable even if senior management knowingly failed to prevent an employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, the identification theory requires the requisite criminal intent to be found in a single person with the directing mind and will; aggregating the states of mind of several persons in the company will not suffice. This ignores the realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.³⁹ For these reasons, prosecutors, law enforcement officials, and academics in the U.K. have denounced the *Tesco* regime as ineffective and unsatisfactory for bribery offences.

Even Australia, which has abandoned the common law identification theory, the success of its novel approach to corporate liability remains to be seen. At the time of Australia's Phase 2 Examination under the OECD Anti-Bribery Convention, prosecutions under the new provisions had essentially been limited to regulatory (e.g. environmental) offences. The OECD Working Group on Bribery therefore decided to follow up the provision's application as practice develops.⁴⁰ Fiji adopted a scheme similar to that in Australia in its Crimes Decree 2009 but has yet to see any prosecutions for bribery.

An effective regime of liability of legal persons for bribery must therefore address the problems of attribution. The problem is by no means unique to Asia-Pacific; parties to the OECD Anti-Bribery Convention have experienced similar difficulties. For this reason, the OECD Working Group on Bribery has provided practice guidance for implementing an effective regime of corporate liability for bribery:⁴¹

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Countries implementing the corporate liability provisions in UNCAC should consider this guidance, given the similarities between the OECD Anti-Bribery Convention and UNCAC in this respect.

5. Jurisdiction to prosecute bribery

A sufficiently broad jurisdictional base is important for prosecuting bribery offences effectively. UNCAC thus requires each State Party to provide jurisdiction over offences committed in its territory, on board vessels flying its flag, and on aircraft registered under it. A State Party must also prosecute an individual whom it refuses to extradite solely because the person is its national. Other jurisdictional bases are optional, such as offences committed by a State Party's national (active nationality jurisdiction), offences committed against a State Party's national (passive nationality jurisdiction), corruption-related money laundering, and offences committed against the State Party. By contrast, the OECD Convention only requires a Party to have territorial and national jurisdiction to prosecute foreign bribery.⁴²

A few members of the Initiative provide universal jurisdiction to prosecute bribery offences, i.e. jurisdiction to prosecute regardless of where the offence occurred. These include Australia (domestic bribery); Fiji; Hong Kong, China

(domestic bribery); Malaysia (natural person only); and Samoa. Universal jurisdiction not only meets but exceeds what international standards require.

This Thematic Review focused on territorial jurisdiction and active nationality jurisdiction to prosecute bribery offences in the Initiative's members.

(i) Territorial jurisdiction

International standards require countries to have territorial jurisdiction to prosecute bribery offences.⁴³ As an elementary exercise of their sovereignty, all states, including those in the Initiative, assert jurisdiction to prosecute crimes that take place in their territory. On its face, territorial jurisdiction is therefore not a controversial issue.

One issue, however, is whether there is jurisdiction to prosecute crimes that take place partly in the territory of a state. Without such jurisdiction, a criminal can easily evade prosecution for bribery, *e.g.* by committing one element of the offence, such as the giving or receiving of the bribe, outside the territory of the state. The OECD Anti-Bribery Convention thus expressly requires its Parties to cover foreign bribery committed partly in their territory.⁴⁴ It is understood that UNCAC implicitly contains a similar requirement.⁴⁵

Compliance with this aspect of international standards is not very clear. Only five members of the Initiative have legislation that expressly provides territorial jurisdiction to prosecute bribery offences taking place partly within its territory: Cambodia; Kazakhstan; Kyrgyzstan; Papua New Guinea, and Vanuatu. The remaining members of the Initiative were also unable to provide case law clarifying this point. Hong Kong, China has universal jurisdiction to prosecute active and passive bribery of its officials. For bribery of foreign public officials, it has jurisdiction to prosecute only if there is a substantial connection between the crime and Hong Kong, China. This requires the offer or acceptance of a bribe to take place in Hong Kong, China. According to Hong Kong, China authorities, as a result of the broad definitions of the words "offer" and "acceptance" in Hong Kong, China's legislation, the bribe transaction need not take place in Hong Kong, China. An agreement reached in Hong Kong, China to pay or receive a bribe at a future date outside of Hong Kong, China is still acceptance in Hong Kong, China.

(ii) Nationality jurisdiction

A fair number of the Initiative's members also have jurisdiction to prosecute bribery committed by their nationals outside of its territory. In some

cases, nationality jurisdiction can be invoked only if there is dual criminality, i.e. the act or omission in question must be an offence at the place where it occurs.

Table I.6: **The initiative's members that have nationality jurisdiction to prosecute natural persons for bribery**

Australia*	India	Mongolia
Bangladesh	Indonesia**	Pakistan
Bhutan	Japan*	Singapore
P.R. China	Kazakhstan**	Vanuatu**
Fiji	Korea	Viet Nam
	Kyrgyzstan	

* Foreign bribery only ** Dual criminality required

By contrast, few members of the Initiative have nationality jurisdiction to prosecute legal persons, *e.g.* legal persons that are incorporated in that country. Only Australia (for foreign bribery) and the Cook Islands contain legislation to this effect. In Bangladesh, India and Pakistan, nationality jurisdiction only applies to their “citizens”. The provision therefore covers only natural and not legal persons. The situation in the remaining members of the Initiative is unclear.

(iii) *Other jurisdictional bases*

Several members of the Initiative have jurisdiction to prosecute officials who commit extraterritorial bribery. This differs from nationality jurisdiction in two respects. First, it covers officials that are not nationals. Second, it does not provide jurisdiction to prosecute a briber who commits active bribery extraterritorially.

Table I.7: **The Initiative's members that have jurisdiction to prosecute its officials for extraterritorial bribery**

Bangladesh	Japan
Bhutan	Philippines
P.R. China	Singapore*
Fiji	Thailand
Hong Kong, China	Pakistan
Indonesia	

* *viz.* Singaporean citizens only

Two of the Initiative's members provide passive personality jurisdiction to prosecute bribery. Bhutan has jurisdiction to prosecute any crime committed against its nationals. Macao, China has jurisdiction to prosecute if the offender or a victim of the crime resides there, subject to the verification of some other legal requirements. Three members also

have protective jurisdiction. P.R. China can prosecute extraterritorial bribery if the effect of the crime is felt in the country, while Kazakhstan can do so if the crime is against the interests of the state.

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6. Sanctions for bribery

There is sometimes an imbalance in the sanctions between active and passive bribery. Over one-third of the Initiative's members prescribe heavier maximum penalties for passive bribery than active bribery. On the contrary, no member punishes active bribery heavier than passive bribery. This reflects the traditional view that an official's acceptance of a bribe is seen as a breach of trust and an abuse of power, and is thus more serious than bribe-giving. There is particular sympathy to this view in cases such as when a briber is a poor individual who must bribe to obtain basic public services. However, bribery is sometimes a crime of greed rather than need, such as when a business bribes an official to win a contract. It is questionable whether in these cases the briber is less culpable than the bribed official.

Table I.8: **The initiative's members that punish passive bribery more heavily than active bribery**

Bangladesh	Indonesia	Macao, China
P.R. China	Japan	Mongolia
Cook Islands	Korea	Thailand
	Kyrgyzstan	

(i) Sufficiency of sanctions

A standard on the adequacy of sanctions for bribery needs to account for country-specific factors such as the prevalence of the crime, cultural differences, and characteristics of particular legal systems. Hence, instead of specifying a quantitative threshold, UNCAC Article 30 requires bribery to be “liable to sanctions that take into account the gravity of that offence”, while Article 26 requires legal persons to be subject to “effective, proportionate and dissuasive criminal and non-criminal sanctions, including monetary sanctions”. Likewise, the OECD Convention Article 3 requires “effective, proportionate and dissuasive” sanctions against natural and legal persons for foreign bribery.

The maximum available penalty is one aspect of whether a country’s sanctions for bribery meet international standards. For example, it has been observed that the average penalty for domestic bribery among OECD countries is three to five years, and ten years in aggravated cases.⁴⁶ This is also largely true of Asia-Pacific. Bribery offences in the Initiative’s members are generally punishable by at least three years’ imprisonment.⁴⁷

Some of the bribery offences in specific circumstances, however, may not meet this threshold. For example, in Kazakhstan the non-aggravated offence of acting as an intermediary in a bribery transaction is only punishable by imprisonment of up to 2 years or a fine. In Mongolia, the maximum punishment for being an intermediary is 1-3 months and a fine. Given the prevalence of intermediaries in bribery, especially in international business transactions, the available sanctions are not effective, proportionate or dissuasive. Another example is the offence of active bribery to perform licit acts in Macao, China. The offence could apply to situations of significant gravity, *e.g.* paying a high-level official a bribe of millions of dollars in order that a construction permit or investment authorisation is issued for a multi-million dollar project. Nevertheless, this offence is punishable in Macao, China only by imprisonment of up to 6 months or a maximum fine of approximately EUR 60 000 or USD 77 000. In the Philippines, a mere offer or solicitation of bribery constitutes attempted bribery only, not the full offence, and is subject to a substantially lower maximum penalty.

Another problem is that the maximum punishment in some of the Initiative’s members is not easily ascertainable. In Bhutan and Nepal, the maximum punishment depends on “the amount involved in the crime”. It is not clear whether “the amount” refers to the bribe or the benefit derived by a briber, *e.g.* the value of a contract won because of bribery. In P.R. China and Viet Nam, the maximum penalty depends on the “seriousness” of the crime or consequences. There is no guidance on what this term means. The use of

these vague concepts renders it difficult to verify whether the available sanctions in these jurisdictions meet international standards.

In some members of the Initiative, the maximum fine for bribery is a function of the value of the bribe, which may pose problems for active bribery. In Malaysia, the maximum fine is approximately EUR 2 000 or USD 3 000, or at least five times the value of the gratification offered, promised or given, whichever is higher. In Palau, bribery is punishable by imprisonment and a fine amounting to three times the value of the bribe. In the Philippines, bribery is punishable by two or three times the value of the bribe. Fixing the maximum fine as three to five times of the bribe seems sensible for passive bribery, as it ensures that the fine would outsize the benefit accruing to the corrupt official. The same logic might not apply to active bribery, since the benefits accruing to the briber is often much higher, e.g. a multimillion contract.

There are also issues concerning the maximum fines available against legal persons for bribery. The maximum fine available is not clear in P.R. China; Cook Islands; India; and Papua New Guinea. In several other jurisdictions, the maximum fines against legal persons are not effective, proportionate and dissuasive: Hong Kong, China (USD 65 000 or EUR 46 000); Indonesia (USD 25 000 or EUR 17 500); Malaysia (USD 3 000 or EUR 2 000 or five times the gratification); and Singapore (USD 72 000 or EUR 50 000). These levels of fines may be acceptable for natural persons since imprisonment may be imposed concurrently, but they are inadequate for legal persons. Companies that bribe will frequently derive benefits from the crime that dwarf these fines in value.

A final word concerns the death penalty, which is available as a sanction for bribery in some members of the Initiative. As noted above, international standards require sanctions for bribery to “take into account the gravity of that offence” (UNCAC Article 30), and to be “effective, proportionate and dissuasive” (OECD Anti-Bribery Convention Article 3). Some international bodies have stated that, under international human rights law, the death penalty should be imposed only for the “most serious crimes” and not corruption, economic crimes, financial crimes, embezzlement by officials etc.⁴⁸ Imposing the death penalty for bribery could therefore be disproportionate and may exceed the gravity of the crime.

(ii) Confiscation

Confiscation is an essential sanction for bribery as it disgorges the profits of the crime. UNCAC Article 31 thus requires each State Party to take, to the greatest extent possible within its domestic legal system, such measures as

may be necessary to enable confiscation of proceeds of crime derived from bribery. Each State Party must also confiscate property, equipment or other instrumentalities used in or destined for use in bribery. “Confiscation” is defined as the permanent deprivation of property by order of a court or other competent authority (UNCAC Article 2(g)).

The OECD Anti-Bribery Convention also requires confiscation. Pursuant to Article 3(3), each Party must take such measures as may be necessary 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. Alternatively, monetary sanctions of comparable effect must be imposed.

This part of the Thematic Review drew on the work of other international bodies. Many members of the Initiative are also members of the Financial Action Task Force (FATF) and/or an FATF-style regional body, such as the Asia/Pacific Group on Money Laundering. These bodies have conducted extensive peer reviews of their members’ systems on anti-money laundering and terrorism financing, including the confiscation of proceeds of crime. In order to avoid duplication, this Thematic Review referred to this body of work whenever appropriate.

Table I.9: The initiative’s members that permit confiscation of indirect proceeds of bribery

Australia	Kazakhstan
Bangladesh	Korea
Cambodia	Macao, China
P.R. China	Malaysia
Cook Islands	Pakistan
Fiji	Papua New Guinea
Hong Kong, China	Samoa
India	Singapore
Japan*	

Almost all of the Initiative’s members provide for confiscation as a sanction for active and passive bribery. For domestic bribery, the only exceptions are Japan (active bribery), Kyrgyzstan (active bribery), Mongolia (active and passive bribery), Palau (active and passive bribery), Sri Lanka (active bribery), and Viet Nam (active and passive bribery). Among the members that have criminalised foreign bribery, Korea allows the confiscation of bribes but not the proceeds of bribery, though it does impose a fine of up to twice the profit earned from the offence if the profit exceeds approximately EUR 6 000 or USD 8 500 for a natural person, and approximately EUR 30 000 or USD 42 500 for a legal person. Japan also only allows confiscation of the

bribe and not the proceeds derived from active bribery because of concerns that profits with no or tenuous connection with bribery might also be confiscated.

The ability to confiscate must cover both the direct and indirect proceeds of bribery. Direct proceeds are the immediate benefits of the crime, e.g. the actual bribe money given to an official or a business license awarded to a briber. Direct proceeds are often transformed into indirect proceeds, e.g. bribe money may be used to purchase real estate, or a license may be used to operate a business that generates revenues. Direct proceeds could also be invested to generate more income. If confiscation does not extend to indirect proceeds, bribers and corrupt officials could easily retain the fruits of their crimes by transforming the direct proceeds of bribery.

International standards accordingly require confiscation of both direct and indirect proceeds. UNCAC Article 2(e) defines “proceeds of crime” as “any property derived from or obtained, directly or indirectly, through the commission of an offence”. UNCAC Article 31(4) states that if “proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to [confiscation] instead of the proceeds.” Article 31(5) further requires proceeds intermingled with other assets to be subject to confiscation. Article 31(6) states that “income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to [confiscation], in the same manner and to the same extent as proceeds of crime.” About half of the Initiative’s members meet this aspect of international standards.

Table I.10: **The initiative’s members that provide for confiscation of property or a monetary penalty of equivalent value**

Australia	Korea
Cambodia	Macao, China
Cook Islands*	Malaysia
Fiji	Papua New Guinea
Hong Kong, China	Samoa
Indonesia	Singapore
India	Sri Lanka**
Japan**	

When the property subject to confiscation cannot be found, such as because the property has been spent or destroyed, then a state must be able to confiscate other property or impose a monetary penalty of equivalent value. The failure to do so would encourage bribers and corrupt officials to spend their gains as quickly as possible. UNCAC Article 31(1)(a) thus requires States Parties to confiscate “property the value of which corresponds to that of such

proceeds". The OECD Anti-Bribery Convention Article 3(3) requires Parties to confiscate "property the value of which corresponds to that of [...] proceeds [is] subject to seizure and confiscation or that monetary sanctions of comparable effect are applicable". In this respect, just under half of the Initiative's members have legislation with express language to this effect.

(iii) Administrative sanctions

International instruments also encourage states to impose additional administrative and civil sanctions for bribery to complement traditional criminal sanctions such as imprisonment, fines and confiscation. For example, Article 3(4) of the OECD Anti-Bribery Convention requires Parties to "consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official."

Table I.11: **The initiative's members that may ban the holding of public or elected office as a sanction for bribery**

Bangladesh	Mongolia
Cook Islands	Pakistan
Fiji	Papua New Guinea
Hong Kong, China	Philippines
Kazakhstan	Singapore
Korea	Sri Lanka
Kyrgyzstan	Thailand
Malaysia	Viet Nam

The most common administrative sanctions against officials are disciplinary actions. UNCAC Article 30(8) notes that the criminal penalties that the Article requires are "without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants." These sanctions are commonly available among the members of the Initiative.

Many members of the Initiative also ban individuals convicted of bribery from holding public or elected office. This could apply to both corrupt officials and bribers. This is consistent with UNCAC Article 30(7), which requires States Parties to "consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from (a) holding public office and (b) holding office in an enterprise owned in whole or in part by the State."

The OECD has also recommended debarment as a sanction for foreign bribery. In 2009, it recommended that "countries' laws and regulations should permit authorities to suspend, to an appropriate degree, from competition for

public contracts or other public advantages, including public procurement contracts and contracts funded by official development assistance, enterprises determined to have bribed foreign public officials in contravention of that Member's national laws and, to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials, such sanctions should be applied equally in case of bribery of foreign public officials."⁴⁹

In some members of the Initiative, a conviction for bribery can result in bans from engaging in other types of activities. In Fiji and Hong Kong, China, a person convicted of bribery may also be banned from being a company director. Cambodia, Kazakhstan, Kyrgyzstan, Mongolia and the Philippines may also ban individuals from engaging in certain professional activities, though the statutes do not always clearly specify precisely what types of activities may be subject to the ban.

Administrative sanctions directed at bribers are much less common in Asia-Pacific. This is unfortunate, since sanctions such as bans on seeking public procurement contracts can have significant deterrent effect, given the size and number of such contracts in most countries. A ban on receiving state benefits and subsidies can also be effective. Among members of the Initiative, Australia may cancel or refuse contracts with an entity that has been convicted of a criminal offence. Its export credit and overseas development assistance agencies may also withhold support or contracts from persons convicted of bribery. Cambodia may prohibit bribers from seeking public procurement contracts. Korea may also do so for up to two years. Hong Kong, China may remove a company convicted of bribery from lists of pre-approved contractors for public works contracts. Pakistan may ban those convicted of bribery from receiving state "loans, advances or other financial accommodation". An official convicted in the Philippines is deprived of all retirement or gratuity benefits. The Singaporean authorities state that there are administrative measures to debar persons convicted of corruption from seeking government procurement contracts or from holding office. In sum, the Initiative's members should consider imposing such bans as a sanction for bribery.

7. Tools for investigating bribery

Effective criminalisation of bribery means more than just enacting bribery offences; there must also be tools for investigating and gathering evidence. UNCAC therefore contains many Articles on these matters. The monitoring process under the OECD Anti-Bribery Convention has also considered some of these issues. This Thematic Review therefore looked at the availability of some investigative tools that are of particular importance in bribery cases.

(i) Gathering financial information

As with many economic crimes, bribery investigators often need access to records from financial institutions. UNCAC therefore specifically requires States Parties to “empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized.”

A bribery investigation can require an enormous amount of financial information and documentation. For each account of interest, the relevant documentation could be voluminous, ranging from account opening documentation to transaction records, books and ledgers, wire transfers etc. Information over a long period of time may be needed. An investigation could also require documents involving multiple accounts at multiple financial institutions, thus multiplying the volume of evidence. The collection of financial information can thus be a lengthy and resource-intensive process.

Though widely available, search warrants may not be the best means for gathering documentation from financial institutions. A warrant allows law enforcement officials to enter premises and seize evidence physically. Such extraordinary powers are usually not necessary for financial institutions, since they are generally co-operative with the authorities. Search warrants also usually require more time and resources. Obtaining a search warrant may understandably require lengthy documentation and significant supporting evidence. Law enforcement officials may be required to be present while the warrant is executed. There may be additional reporting and administrative requirements after the warrant’s execution. Bribery investigations could consume much more time and resources if a search warrant is required each time evidence is sought from a financial institution.

Table I.12: The initiative’s members that provide for production orders, subpoenas, authorisations or summons for gathering evidence from financial institutions

Australia	Kyrgyzstan
Cambodia	Nepal
Bangladesh	Pakistan
Bhutan	Palau
Fiji	Papua New Guinea
Hong Kong, China	Philippines
India	Samoa
Indonesia	Singapore
Japan	Thailand
	Viet Nam

To improve efficiency, bribery investigators should therefore be allowed to collect documents from financial institutions through a production order, subpoena, summons or other similar orders issued by a judge or competent authority. Since these judicial orders are less intrusive than search warrants, the process for their issuance could be less burdensome. Once issued, a law enforcement official could serve the document on the financial institution and return later to collect the evidence. Failure to produce the documents could result in penalties and/or the issuance of a search warrant to seize the evidence. This method of gathering evidence is available in most but not all members of the Initiative.

Table I.13: **The initiative's members whose bank secrecy rules do not impede bribery investigations**

Australia	Japan
Bangladesh	Korea
Bhutan	Macao, China
Cambodia	Malaysia
Fiji	Mongolia
Hong Kong, China	Pakistan
India	Palau
Indonesia	Samoa
Kazakhstan	Singapore
	Thailand

One caveat concerning production orders is that they should be available from the outset of an investigation. In the Philippines, for example, production orders are only available when an individual is about to be charged. They therefore cannot be used to gather evidence to support a charge, which greatly limits their utility.

The gathering of evidence from financial institutions also raises the question of bank secrecy. In many jurisdictions, special rules exist to protect the confidentiality of bank information. Sometimes even judicial officials cannot order the disclosure of such information. UNCAC Article 40 thus requires States Parties to “ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its legal system to overcome obstacles that may arise out of the application of bank secrecy laws.” Only about half of the Initiative’s members confirm that bank secrecy rules do not hamper the disclosure of information in bribery cases.

(ii) Gathering tax information

Tax information and records are often useful in bribery investigations. Tax records will usually be necessary when investigating a taxpayer bribing a tax official. Even in other types of bribery cases, investigators may seek tax returns and associated documentation to obtain a more complete financial picture of a suspect. Furthermore, tax records may contain information about a transaction tainted by bribery. Bribers may also claim bribe payments as a tax-deductible business expense. Unfortunately, like bank records, tax information is subject to stringent secrecy rules in many jurisdictions and could be beyond the reach of bribery investigators.

Only a few members of the Initiative clearly provide bribery investigators with full access to tax information. Cook Islands; Japan; Macao, China; Nepal; Pakistan; Thailand have legislation that allow bribery investigators to demand any documents or information from any government department, regardless of secrecy rules. This would encompass information and records from the tax authorities.

A few members of the Initiative allow tax secrecy to be overridden in at least in some cases. In Australia, the Tax Commissioner may – but is not obliged to – release tax information to bribery investigators. In the Philippines, the Ombudsman can only obtain tax returns and not other potentially relevant documents, *e.g.* invoices, correspondence, written statements. Tax returns are also available only when the Ombudsman investigates a current or former public official, not a private individual. The same restriction is found in Singapore. In Fiji and Hong Kong, China, bribery investigators must apply to a court to obtain tax information. The Court may order the release of the information if it is satisfied, among other things, that disclosure is in the public interest. The Court must therefore engage in a balancing exercise; disclosure is not guaranteed even if the evidence sought is relevant to an investigation. In the remaining members of the Initiative, whether tax secrecy impedes the gathering of evidence is unclear.

(iii) Seizing and freezing assets

Confiscation would mean little if bribers and corrupt officials could quickly and easily move and hide the gains of their crimes. UNCAC Article 31(2) thus requires States Parties to “take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item [subject to confiscation] for the purpose of eventual confiscation.” “Freezing” or “seizure” means “temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of

an order issued by a court or other competent authority” (UNCAC Article 2(f)). Article 3(3) of the OECD Anti-Bribery Convention also requires Parties to ensure that property that may ultimately be confiscated is subject to seizure.

All members of the Initiative have legislative provisions for freezing proceeds of corruption, though there is room for improvement in many cases. In some instances, the scope of the relevant legislation could be improved. For example, the Philippines’ legislative provisions allow freezing for bribery offences under some statutes but not others. Sri Lanka’s legislation appears to allow freezing of real property but not bank accounts or a transfer of funds between two accounts held by the same person. The relevant legislation in Viet Nam has only been applied to credit institutions and not other financial institutions, thus raising questions about the legislation’s effectiveness and enforceability.

In other instances, the procedure for freezing assets could be improved. In Kyrgyzstan, concerns have been expressed over the ability to freeze and seize bank accounts and assets without notice to the asset owner or account holder. Macao, China lacks the ability to freeze a bank account quickly, i.e. without judicial intervention. Mongolia’s mechanism for freezing property is not clear, *e.g.* whether investigators can seek a freezing order on an *ex parte* basis. In Samoa, it does not appear possible to obtain a pre-charge freezing order. Investigators may thus have difficulty preventing the disappearance of assets in the early stages of an investigation.

(iv) Special investigative techniques

Effective investigations of bribery often require the use of special investigative techniques. The briber and the corrupt official are often the only persons with knowledge of the bribery transaction. Since they have an interest in keeping their criminal activities secret, the crime is unlikely to be revealed. Bribery investigators often need special investigative tools to penetrate this secrecy.

One particular special investigative technique is the use of controlled deliveries. A controlled delivery at the international level is “the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence” (UNCAC Article 2(i)). A controlled delivery could also be conducted without the illicit or suspect consignment crossing an international boundary. UNCAC Article 50(1)

requires each State Party to allow for the appropriate use by its competent authorities of controlled delivery.

Also useful in bribery investigations are techniques such as wiretapping, bugging devices, covert surveillance, and undercover operations. Hence, UNCAC Article 50(1) requires each State Party to allow for “other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory”.

In many countries, legislation may be needed to authorise the use of these special investigative techniques. Wiretapping, video recording, bugging and surveillance impinge on personal privacy. Many legal systems understandably require prior judicial authorisation before these techniques can be used lawfully in a criminal investigation. Controlled deliveries and undercover operations could also raise issues such as entrapment and state illegality. UNCAC Article 50(1) thus requires each State Party to provide for special investigative techniques only “to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law”. A State Party should also “allow for the admissibility in court of evidence derived therefrom.”

Special investigative techniques do not appear to be widely available in bribery cases in the Initiative’s members. Some members provide for these techniques in investigations of some but not all bribery offences, *e.g.* domestic but not foreign bribery, or passive but not active bribery. Several members state that certain techniques are available but the legal basis for these claims is unclear.

Table I.14: The availability of special investigative techniques in bribery cases in the initiative's members

	Wiretapping	Bugging	Video Recording	Undercover Operations	Controlled Delivery
Australia	✓ ¹	✓	✓	✓	✓
Bangladesh					
Bhutan					
Cambodia	✓	✓	✓		
P.R. China					
Cook Islands					
Fiji	✓ ²	✓	✓	✓ ²	
Hong Kong, China	✓	✓	✓	✓	✓
India	✓			✓	✓
Indonesia	✓	✓		✓	✓
Japan					
Kazakhstan	✓		✓		
Korea	✓ ³	✓	✓	✓	
Kyrgyzstan	✓	✓	✓	✓	✓
Macao, China	✓	✓ ²	✓ ²	✓ ²	
Malaysia	✓	✓ ²	✓ ²	✓ ²	✓ ²
Mongolia				✓ ²	✓ ²
Nepal	✓	✓	✓		✓
Pakistan					
Palau					
Papua New Guinea	✓				
Philippines			✓	✓	
Samoa					
Singapore	✓ ²	✓ ²	✓ ²	✓ ²	✓ ²
Sri Lanka					
Thailand					
Vanuatu					
Viet Nam				✓ ²	✓ ²

Notes:

1. Available for domestic but not foreign bribery.
2. The legal basis for using the technique is unclear.
3. Not available for active foreign bribery.

(v) Plea bargaining and co-operating offenders

Enlisting the help of those involved in the crime could also help overcome the difficulty in detecting and investigating bribery cases. UNCAC Article 37 thus requires each State Party to “take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.”

Encouragements to co-operate with the authorities could be in the form of lighter punishment or immunity from prosecution. UNCAC thus require States Parties to consider providing for the possibility of “mitigated punishment” or, “in accordance with fundamental principles of its domestic law, of granting immunity from prosecution” to offenders who provide “substantial co-operation in the investigation or prosecution of an offence” (Articles 37(2) and (3)). Encouragement could also take the form of the defence of “effective regret” (see above).

An effective scheme for plea bargaining and the treatment of co-operating offenders could comprise several elements. Legislation can be useful and, in some cases, necessary. Additional written rules or guidelines can reduce arbitrariness, enhance transparency and accountability, and ensure that a plea bargain is just and appropriate. Judicial approval or review of plea bargains or immunity agreements has a similar effect. Some jurisdictions also ensure that any benefits accruing to the co-operating offender are confiscated. This ensures that the offender, though not punished, also does not profit from the crime.

Table I.15: **The initiative’s members with legislative provisions or guidelines dealing with co-operating offenders**

Australia	Macao, China
Bangladesh	Mongolia
Bhutan	Nepal
Fiji	Pakistan
Hong Kong, China	Philippines
India	Singapore
Kazakhstan	Sri Lanka
Kyrgyzstan	

The use of plea bargaining, reduced punishment and immunity by the Initiative’s members is not entirely clear. Roughly half of the members have

specific legislation on one or more of these issues. Some, such as Australia and Hong Kong, China, have written guidelines.

The legislative provisions in several members may also be limited in flexibility. In Bangladesh; Kazakhstan; Kyrgyzstan; and Sri Lanka, immunity may be granted to an offender who alerts the authorities to the crime, but there is no further requirement that the offender testify at trial against other co-offenders. Bangladesh; Kazakhstan; Kyrgyzstan; and Sri Lanka have “all-or-nothing” legislative provisions: a co-operative offender may be given total immunity from prosecution but not a reduced sentence for his/her co-operation. Section 35 in Singapore’s Prevention of Corruption Act allows a court to require an offender to testify for the prosecution. If the person makes “true and full discovery” of all things as to which he/she is examined, he/she will receive immunity from prosecution for the matters to which the testimony relates. However, the provision only allows total immunity, not a reduced sentence, in return for testimony.

(vi) Seeking international assistance

Law enforcement officials increasingly need to seek assistance from foreign countries when investigating bribery cases. Both bribers and corrupt officials may channel bribes through foreign bank accounts, or may flee the country after committing the crime. In transnational bribery cases, the briber and the corrupt official are often nationals and residents of different countries. Investigators may thus need to gather evidence through mutual legal assistance (MLA) or to seek the extradition of fugitives. This Thematic Review thus examines whether there are legislative impediments to seeking MLA and extradition from foreign countries in bribery cases.⁵⁰

There are generally no legislative impediments for the Initiative’s members to seek international assistance in bribery cases, with a few exceptions. Because of a lack of a specific MLA law, only limited forms of assistance are available in countries such as Bangladesh; Bhutan; India; Mongolia; Nepal; and the Philippines. In addition, Bangladesh, Kyrgyzstan; the Philippines and Sri Lanka can only seek extradition and/or MLA from countries with which it has an applicable treaty. This could significantly limit the number of states from which it could seek assistance.

There may be additional obstacles. In Macao, China, the offence of active bribery to perform a legal act is punishable only by six months’ imprisonment. Such a low maximum punishment would disqualify this offence from extradition and MLA under many treaties and legislation of foreign countries. Kyrgyzstan may only seek extradition of its nationals; it cannot seek extradition of a non-

Kyrgyz national or a Kyrgyz national that has committed a crime extraterritorially.

8. Enforcement of bribery offences

Arguably, the most important aspect of the criminalisation of bribery is the enforcement of bribery offences. It is a vital first step for the Initiative's members to have criminal offences that captures the full range of conduct of bribers and bribed officials. However, even perfect, loophole-free laws would be meaningless unless they are actually enforced. It is therefore important to examine the actual number of cases that are investigated, prosecuted and sanctioned, and any obstacles facing the prosecutorial and investigative authorities. The actual use of the investigative tools described above is also important. Some of the Initiative's members may have laws authorising the use of certain investigative techniques but not the know-how or resources to deploy them in practice.

Unfortunately, this aspect of the Thematic Review was very unsatisfactory because of a lack of information. The Initiative's members were asked to provide statistics over the five previous years on the number of investigations, prosecutions, convictions and sanctions involving bribery of public officials. Members were also requested to break such data down into active and passive bribery, domestic and foreign bribery, and bribery committed by natural and legal persons. Only Australia; Bhutan; Hong Kong, China; Japan; and Macao, China provided statistics of some detail. Additional research by the Secretariat yielded additional but limited information.

The analysis on enforcement is also hampered by the fact that the Thematic Review is essentially a "desk exercise". There were no fact-finding visits to gather information on how bribery laws are implemented and enforced "on the ground", unlike in reviews under the monitoring mechanism of the OECD Anti-Bribery Convention. Statistical information and questionnaire responses do not adequately replace meetings with a broad range of participants during an on-site visit. Overall, this Thematic Review was able to consider many members' legislation on enforcement and investigation, but it provided a less comprehensive view on the actual enforcement and investigation of bribery cases.

The dearth of data nevertheless allows a few observations to be made. There is some information to suggest that the level of enforcement or prosecution may not be adequate in Bhutan; Kyrgyzstan; and Macao, China. In Kazakhstan, there appears to be more enforcement against officials who take bribes than against bribers. Enforcement against legal persons and companies

are generally non-existent. The actual sanctions imposed for foreign bribery in Korea may not be effective, proportionate and dissuasive. Confiscation may be underused as a sanction for bribery in Australia; Hong Kong, China; Japan; and Korea. Whether any of these deficiencies exist in other members of the Initiative is largely unclear, given the lack of information.

Table I.16: **The initiative's members with specialised agencies and bodies that have powers to investigate and prosecute bribery**

Agencies and Bodies with Investigative Powers	
Bangladesh	Malaysia
Cambodia	Mongolia
Fiji	Nepal
Hong Kong, China	Pakistan
India	Philippines
Indonesia	Singapore
Kazakhstan	Sri Lanka
Macao, China	Thailand
Agencies and Bodies with Prosecutorial Powers	
Fiji	Pakistan
India	Philippines
Indonesia	Thailand
Malaysia	

One interesting observation at an institutional level may also be made. It is generally perceived that specialised anti-corruption agencies or bodies are quite common in Asia and the Pacific. In fact, this may be an overstatement. Just over half of the Initiative's members use specialised agencies or bodies to investigate criminal bribery offences. Far fewer use such agencies or bodies to prosecute bribery. Put differently, specialised anti-corruption agencies in many members of the Initiative may play a role in the prevention or detection of bribery but not in criminal investigations or prosecutions.

9. Conclusion and recommendations

On the whole, the Initiative's members have taken significant steps towards meeting international standards on the criminalisation of bribery, though notable gaps remain. Several region-wide trends may be observed:

- (a) Domestic bribery offences: All of the Initiative's members have criminal domestic bribery offences. The problem in many jurisdictions is actually too many offences. Multiple general and specific bribery offences with inconsistent definitions could result in uncertain application of the law.

Aside from duplication, the other deficiencies are generally more subtle, such as the failure to cover the different modes of committing bribery, certain categories of public officials, bribery through intermediaries and bribery for the benefit of third party beneficiaries, and bribery in order that an official act outside his/her official competence. Judicial interpretation may ultimately confirm coverage of these scenarios. Nevertheless, in the absence of confirmatory case law, the Initiative's members should adopt legislation with clear, express language to ensure compliance with international standards.

- (b) Foreign bribery offences: The problem with foreign bribery is the opposite of domestic bribery: instead of too much legislation, most members of the Initiative have none. This is understandable, since international standards require the criminalisation of foreign bribery only recently. Nevertheless, the absence of a foreign bribery offence is a pressing concern, given the dramatic increase in international economic activity in recent years. Some of the Initiative's members have sought to reinterpret their existing bribery offences to cover foreign bribery. Having regard to the experience of OECD countries, these members should instead consider enacting a new, specific foreign bribery offence to ensure compliance with international standards.
- (c) Liability of legal persons: The inability to punish legal persons for domestic and foreign bribery is another major deficiency. Only about half of the Initiative's members have the ability to hold companies liable for bribery. More troublingly, corporate liability in these jurisdictions appears to exist only in theory. There have been no reported prosecution of companies for domestic bribery and only a handful of cases for foreign bribery. In most jurisdictions, it is unclear whether this is due to deficient legislation, a lack of expertise and capacity, or a deliberate prosecutorial policy. Regardless of the cause, this situation needs to be rectified.
- (d) Jurisdiction to prosecute bribery: All members of the Initiative unsurprisingly have territorial jurisdiction to prosecute bribery. Few members, however, articulate whether it can prosecute bribery that takes place only partly in one's territory. This issue may have to be resolved by the courts. Nationality jurisdiction is relatively uncommon, which may have negative ramifications in transnational bribery cases.

- (e) Sanctions for bribery: With a few exceptions, the maximum sanctions available against natural persons for bribery among the Initiative's members largely meet international standards. Fines against legal persons in some jurisdictions are inadequate, however. Confiscation is generally available but could be improved by confiscating indirect proceeds of bribery and imposing a pecuniary penalty in lieu when confiscation is not possible. An underdeveloped area is administrative sanctions, particularly against a briber. Very few members of the Initiative ban bribers from seeking public procurement contracts or receiving state benefits and subsidies.
- (f) Tools for investigating bribery: The Initiative's members largely have a range of useful tools for gathering evidence in bribery cases. However, clearer and more explicit rules overriding bank and tax secrecy rules could be helpful. The freezing of assets is widely available but could be improved by streamlining the procedure in some jurisdictions. There are no major legal impediments to seeking extradition and MLA in bribery cases. Special investigative techniques could be made more readily available. To the extent possible under their legal systems, members could consider using plea bargaining and the assistance of co-operating offenders in bribery cases. Those that do so already should consider formalising the process in writing to enhance accountability.
- (g) Enforcement of bribery offences: Most of the Initiative's members did not provide statistics on the enforcement of their bribery offences. Members need to maintain detailed statistics in order to evaluate the effectiveness of their anti-bribery efforts. Statistics should cover investigations, prosecutions, convictions and sanctions for bribery, and should be broken down into active, passive, domestic and foreign bribery. It would also be helpful to maintain information on the use of particular investigative techniques, such as wiretaps and other types of electronic surveillance, the seeking of international assistance, undercover operations and controlled deliveries.

Finally, the Initiative could benefit from additional analysis of issues that are related to criminalisation but were beyond the scope of this study. Looking at other criminal corruption offences other than bribery, such as illicit enrichment, could be useful. On a more practical level, the Initiative could engage in a more in-depth examination of the actual application and

enforcement of corruption laws by considering the experience of investigators, prosecutors, lawyers, companies and civil society. A proper, thorough study of this topic would require an on-site visit of a reviewed country by experts. Other potential issues of interest could include the availability of resources; training and expertise, *e.g.* in financial investigations, information technology and forensic accounting; political interference in investigations and prosecutions; interagency coordination; and detection of corruption, such as through anti-money laundering systems, tax authorities, accountants and auditors. As a multilateral body, the Initiative could also be an appropriate forum for considering issues such as transborder corruption cases and joint investigations.

NOTES

- ¹ For example, see Article 15 UNCAC and Article 1 OECD Anti-Bribery Convention.
- ² Article 15 UNCAC; Article 1 OECD Anti-Bribery Convention; UNODC (2006), *Legislative Guide for the Implementation of the UNCAC*, paras. 197-8; OECD (2008), *Corruption: A Glossary of International Standards in Criminal Law*, p. 26.
- ³ For example, OECD Convention Article 1 requires Parties to criminalise the offering, giving and promising of a bribe to a foreign official. All three modes of committing the offence have equal status. UNCAC Articles 15 and 16 take the same approach. See also ACN Report, p. 22; and ACN Monitoring Report, p. 24.
- ⁴ For example, attempt crimes are dealt with in UNCAC Article 27(2) and OECD Anti-Bribery Convention Article 1(2).
- ⁵ OECD (2009), *Typologies on the Role of Intermediaries in International Business Transactions* (www.oecd.org/daf/nocorruption).
- ⁶ UNCAC Article 2(a); OECD Anti-Bribery Convention, Article 1(4)(a).
- ⁷ *Legislative Guide for the Implementation of the UNCAC*, para. 28.
- ⁸ OECD Anti-Bribery Convention, Commentaries 12-16.
- ⁹ OECD Anti-Bribery Convention, Article 4(b); OECD Anti-Bribery Convention, Commentary 18; *Legislative Guide for the Implementation of the UNCAC*, para. 28.
- ¹⁰ UNCAC Article 15; OECD Anti-Bribery Convention Article 1(1) and 1(4)(c).
- ¹¹ OECD Anti-Bribery Convention, Commentary 19. This conduct could constitute trading in influence as defined in UNCAC Article 18.

- ¹² See OECD (2006), *Phase 2 Report: Czech Republic*, para. 149.
- ¹³ OECD Anti-Bribery Convention, Commentary 7.
- ¹⁴ Supreme Court Case 2005 Do 4737 (24 February 2006). See also OECD (2007), *Korea: Follow-Up Report on the Implementation of the Phase 2 Recommendations*.
- ¹⁵ Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Act 1906.
- ¹⁶ See OECD (1999), *Phase 1 Report: United Kingdom*, Section 1.1.2; U.K. Law Commission (2008), *Reforming Bribery*, para. 2.33; D. Lanham, “Bribery and Corruption”, *Essays in Honour of J C Smith* (1987) 92 at p. 104.
- ¹⁷ The U.K. Law Commission (2008), *Reforming Bribery* (Law Com No. 313); U.K. Ministry of Justice (March 2009), *Bribery: Draft Legislation*, Cm 7570; Joint Committee on the Draft Bribery Bill (July 2009), *Report on the Draft Bribery Bill*, HL Paper 115-1 / HC 430-1.
- ¹⁸ See OECD (2006), *Phase 2 Report: New Zealand* at paras. 156-161.
- ¹⁹ See OECD Anti-Bribery Convention Article 1 and UNCAC Article 16.
- ²⁰ OECD (2008), *Phase 2bis Report: United Kingdom*, paras. 20-22 and 44-46.
- ²¹ OECD (2008), *Phase 2bis Report: United Kingdom*, paras. 36-41.
- ²² See *General Motors Corp. v. Blevins*, D.C. Colo., 144 F. Supp. 381 at 384.
- ²³ OECD (2008), *Corruption: A Glossary of International Standards in Criminal Law*, p. 27.
- ²⁴ See the United States’ Foreign Corrupt Practices Act, U.S.C. Title 15, §§78DD-1(b), 78DD-2(b) and 78DD-3(b).
- ²⁵ OECD Anti-Bribery Convention, Commentary 9.
- ²⁶ See Australia’s Criminal Code Act 1995, Section 70.4.
- ²⁷ Zerbes (2007) in Pieth, Low and Cullen (eds.), *The OECD Convention on Bribery: A Commentary*, p. 139; Korea’s Preventing Bribery of Foreign Public Officials in International Business Transactions Act, Article 3(2)(b).
- ²⁸ See Canada’s Corruption of Foreign Public Officials Act, Sections 3(4) and (5); and Australia’s Criminal Code Act 1995, Section 70.4(2).
- ²⁹ However, “applicable legal defences and other legal principles controlling the lawfulness of conduct are reserved to the domestic law of a State Party” (UNCAC Article 30(10)).
- ³⁰ OECD Anti-Bribery Convention, Commentary 9.
- ³¹ OECD (2009), Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, para. VI.
- ³² OECD (2006), *Phase 2 Report: Australia*, paras. 142-147; OECD (2004), *Phase 2 Report: Korea*, paras. 91-92.
- ³³ OECD (2005), *Phase 2 Report: Japan*, paras. 139-145; OECD (2006), *Phase 2 bis Report: Japan*, para. 37; OECD (2007), *Follow-up Report on the Implementation of the Phase 2 Recommendations: Japan*, para. 12.

- ³⁴ See OECD (2007), *Phase 2 Report: Poland*, para. 138; *Phase 2 Report: Czech Republic*, paras. 158; *Phase 2 Report: Slovak Republic*, paras. 153.
- ³⁵ See OECD (2005), *Mid-Term Study of Phase 2 Reports*, paras. 78-80; OECD (2006), *Phase 2 Report: Czech Republic*, paras. 153-163; OECD (2007), *Phase 2 Report: Poland*, paras. 138-141.
- ³⁶ OECD (2008), *Phase 2bis Report: United Kingdom*, paras. 36-41.
- ³⁷ OECD (2005), *Phase 2 Report: United Kingdom*, para. 182.
- ³⁸ U.K. Law Commission (2008), *Reforming Bribery*, at para. 6.26.
- ³⁹ See U.K. Law Commission (2008), *Reforming Bribery*, at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ⁴⁰ OECD (2006), *Phase 2 Report: Australia*, paras. 151-153.
- ⁴¹ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ⁴² UNCAC Article 42; OECD Article 4.
- ⁴³ UNCAC Article 42(1); OECD Anti-Bribery Convention Article 4(1).
- ⁴⁴ OECD Anti-Bribery Convention Article 4(1).
- ⁴⁵ Interpretive Note A/58/422/Add.1, para. 41. See also UNODC (2006), *Legislative Guide for the Implementation of the UNCAC*, para. 504.
- ⁴⁶ Cullen (2007) in Pieth, Low and Cullen (eds.), *The OECD Convention on Bribery: A Commentary*, p. 212.
- ⁴⁷ See Annex II for a summary of the maximum sanctions for bribery in the Initiative's members.
- ⁴⁸ International Covenant on Civil and Political Rights, Article 6(2); Philip Alston, United Nations Human Rights Council (2007), *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions - Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions*, A/HRC/4/20, paras. 51 and 53. See also UN Economic and Social Council Resolution 1984/50 (25 May 1984); UN General Assembly Resolution 39/118 (14 December 1984); and *Concluding Observations of the Human Rights Committee: Iran (Islamic Republic of)*, CCPR/C/79/Add.25, para. 8.
- ⁴⁹ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, para. XI.
- ⁵⁰ An earlier Thematic Review in 2007 examined the ability of the members of the Initiative to provide extradition and MLA in corruption cases. See the Initiative's Web site at www.oecd.org/corruption/asiapacific.

Annexes

Annex 1 Excerpts from UNCAC (Articles 15 and 16); OECD Anti-Bribery Convention Articles 1-3

Bribery Offences

UNCAC Article 15 Bribery of national public officials

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
- (b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Article 16 Bribery of foreign public officials and officials of public international organizations

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.
2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

OECD Anti-Bribery Recommendation Convention Article 1 Offence of Bribery of Foreign Public Officials

1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

Liability of Legal Persons

UNCAC Article 26 Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

OECD Anti-Bribery Convention

Article 2 Responsibility of legal persons

Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.

Article 3 Sanctions

1. The bribery of a foreign public official shall be punishable by effective, proportionate and dissuasive criminal penalties. [...]
2. In the event that, under the legal system of a Party, criminal responsibility is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions, including monetary sanctions, for bribery of foreign public officials.
[...]
4. Each Party shall consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official.

Annex 2 Summary of Maximum Sanctions for Domestic Bribery in the Initiative's Members

Note: General bribery offences only; if multiple general offences, then the table reflects the one with the higher sanctions.

	Country	Australia	Bangladesh	Bhutan
Active Bribery	Natural Persons Imprisonment	10 years	3 years	1-9 years, depending on the "amount involved in the crime"
	Natural Persons Fine	EUR 40 000 USD 58 000	Unlimited	Available only if the amount involved in the crime is less than the daily national minimum wage for 15 years
	Legal Persons Fine	EUR 200 000 USD 290 000	Unlimited	N/A
	Confiscation	Mandatory confiscation of direct and indirect proceeds of bribery	Discretionary confiscation of direct and indirect proceeds of bribery	Mandatory confiscation of direct proceeds of bribery
	Pecuniary Penalty in Lieu of Confiscation	Available	Not available	Not available
Passive Bribery	Natural Persons Imprisonment	10 years	7 years	1-9 years, depending on the "amount involved in the crime"
	Natural Persons Fine	EUR 40 000 USD 58 000	Unlimited but not less than the gain from the offence	Available only if the amount involved in the crime is less than the daily national minimum wage for 15 years
	Confiscation	Available	Discretionary confiscation of direct and indirect proceeds of bribery	Mandatory confiscation of direct proceeds of bribery
	Pecuniary Penalty in Lieu of Confiscation	Available	Not Available	Not Available

	Country	Cambodia	P.R. China	Cook Islands
Active Bribery	Natural Persons Imprisonment	Domestic bribery: 7-15 years Foreign bribery: 5-10 years	5 years; 5-10 years “if serious”; 10 years to life if “especially serious”	3 years
	Natural Persons Fine	USD 250 to 1 500 depending on the type of offence	Not available	Not available
	Legal Persons Fine	USD 1 250 to 25 000 depending on the type of offence	Available (maximum unknown)	Unclear
	Confiscation	Discretionary confiscation of direct and indirect proceeds of bribery	Mandatory in serious cases; discretionary in less serious cases; not available in others; covers direct and indirect proceeds	Mandatory confiscation of bribe and indirect proceeds
	Pecuniary Penalty in Lieu of Confiscation	Not available	Not available	Available against natural persons
Passive Bribery	Natural Persons Imprisonment	7-15 years	2 years to death, depending on the value of the bribe	7 years
	Natural Persons Fine	USD 250 to 1 500 depending on the type of offence	Not available	Not available
	Confiscation	Mandatory when the offence is committed by a governor	Mandatory in serious cases; discretionary in less serious cases; not available in others; covers direct and indirect proceeds	Mandatory confiscation of bribe and indirect proceeds
	Pecuniary Penalty in Lieu of Confiscation	Not available	Not available	Available against natural persons

	Country	Fiji	Hong Kong, China	India
Active Bribery	Natural Persons Imprisonment	POBP: 7 years CD: 10 years	7 years	5 years
	Natural Persons Fine	POBP: EUR 180 000 USD 260 000 CD: Unlimited	USD 65 000 EUR 46 000	Unclear
	Legal Persons Fine	POBP: EUR 180 000 USD 260 000 CD: Unlimited	USD 65 000 EUR 46 000	Unclear
	Confiscation	Discretionary confiscation of direct and indirect proceeds	Discretionary confiscation of direct and indirect proceeds	Discretionary confiscation; unclear whether both direct and indirect proceeds covered
	Pecuniary Penalty in Lieu of Confiscation	Available	Not available	Available
Passive Bribery	Natural Persons Imprisonment	7 years	7 years	5 years
	Natural Persons Fine	POBP: EUR 180 000 USD 260 000 CD: Unlimited	USD 65 000 EUR 46 000	Unclear
	Confiscation	Discretionary confiscation of direct and indirect proceeds	Discretionary confiscation of direct and indirect proceeds	Discretionary confiscation; unclear whether both direct and indirect proceeds covered
	Pecuniary Penalty in Lieu of Confiscation	Available	Available	Available

	Country	Indonesia	Japan	Kazakhstan
Active Bribery	Natural Persons Imprisonment	5 years	3 years	3-7 years; 12 years for aggravated offence
	Natural Persons Fine	USD 25 000 EUR 17 500	EUR 18 000 USD 26 000	Not available
	Legal Persons Fine	USD 25 000 EUR 17 500	N/A	N/A
	Confiscation	Mandatory confiscation of bribe and direct proceeds	Not available	Discretionary confiscation of direct and indirect proceeds for some offences
	Pecuniary Penalty in Lieu of Confiscation	Not available	N/A	Not available
Passive Bribery	Natural Persons Imprisonment	Life	20 years	5-10 years; 12 years for aggravated offence
	Natural Persons Fine	USD 99 000 EUR 70 000	Not available	Not available
	Confiscation	Mandatory confiscation of bribe and direct proceeds	Mandatory confiscation of direct and indirect proceeds	Discretionary confiscation of direct and indirect proceeds for some offences
	Pecuniary Penalty in Lieu of Confiscation	Not available	Available	Not available

	Country	Korea	Kyrgyzstan	Macao, China
Active Bribery	Natural Persons Imprisonment	5 years	3 years; 8 years for aggravated offence	Licit acts: 6 months; Illicit acts: 3 years
	Natural Persons Fine	EUR 12 000 USD 17 000	Not available	Licit acts: EUR 60 000 USD 77 000 Illicit acts: EUR 358 000 USD 459 000
	Legal Persons Fine	N/A	N/A	N/A
	Confiscation	Discretionary confiscation of direct and indirect proceeds	Not available	Discretionary confiscation of direct and indirect proceeds
	Pecuniary Penalty in Lieu of Confiscation	Available in some cases	Not available	Available
Passive Bribery	Natural Persons Imprisonment	10 years or life	3-8 years; 12 years for aggravated offence	Licit acts: 2 years Illicit acts: 3-8 years depending on whether act performed
	Natural Persons Fine	EUR 30 000 USD 42 500	Not available	Licit acts: EUR 239 000 USD 306 000 Illicit acts: EUR 358 000 USD 459 000
	Confiscation	Discretionary confiscation of direct and indirect proceeds	Mandatory confiscation of bribe and direct proceeds	Discretionary confiscation of direct and indirect proceeds
	Pecuniary Penalty in Lieu of Confiscation	Available in some cases	Not available	Available

	Country	Malaysia	Mongolia	Nepal
Active Bribery	Natural Persons Imprisonment	20 years	3 years; 5-8 years for aggravated offence	3 months to 10 years depending on the “amount involved in the offence”
	Natural Persons Fine	EUR 2 000 or USD 3 000) or five times the value of the gratification whichever is higher	51 to 250 times the statutory minimum salary	Available but amount unclear
	Legal Persons Fine	EUR 2 000 or USD 3 000) or five times the value of the gratification whichever is higher	N/A	N/A
	Confiscation	Discretionary confiscation of bribe; unclear for direct and indirect proceeds	Not available	Mandatory confiscation of bribe and direct proceeds
	Pecuniary Penalty in Lieu of Confiscation	Available	N/A	Not available
Passive Bribery	Natural Persons Imprisonment	20 years	5 years	3 months to 10 years depending on the “amount involved in the offence”
	Natural Persons Fine	EUR 2 000 or USD 3 000) or five times the value of the gratification whichever is higher	51 to 250 times the statutory minimum salary	Available but amount unclear
	Confiscation	Discretionary confiscation of bribe; unclear for direct and indirect proceeds	Not available	Mandatory confiscation of bribe and direct proceeds
	Pecuniary Penalty in Lieu of Confiscation	Available	N/A	Not available

	Country	Pakistan	Palau	Papua New Guinea
Active Bribery	Natural Persons Imprisonment	14 years	5 years	14 years
	Natural Persons Fine	Unlimited maximum; not less than the gain derived	Three times the value of the bribe or, if this value cannot be determined, EUR 660 USD 1 000	Available but maximum amount unclear
	Legal Persons Fine	Unlimited maximum; not less than the gain derived	N/A	Available but maximum amount unclear
	Confiscation	Discretionary confiscation of direct and indirect proceeds	Not available	Mandatory confiscation of direct and indirect proceeds
	Pecuniary Penalty in Lieu of Confiscation	Not available	N/A	Available
Passive Bribery	Natural Persons Imprisonment	14 years	5 years	14 years
	Natural Persons Fine	Unlimited maximum; not less than the gain derived	Three times the value of the bribe or, if this value cannot be determined, EUR 660 USD 1 000	Available but maximum amount unclear
	Confiscation	Discretionary confiscation of direct and indirect proceeds	Not available	Mandatory confiscation of direct and indirect proceeds
	Pecuniary Penalty in Lieu of Confiscation	Not available	N/A	Available

	Country	Philippines	Samoa	Singapore
Active Bribery	Natural Persons Imprisonment	2-12 years; 6 months to 8 years if offer / solicitation not accepted	5 years	5 years
	Natural Persons Fine	At least 3 times the value of the bribe	Not available	EUR 50 000 USD 72 000
	Legal Persons Fine	N/A	N/A	EUR 50 000 USD 72 000
	Confiscation	Mandatory confiscation of bribe	Discretionary confiscation of direct and indirect proceeds	Mandatory confiscation of the benefits of the offence
	Pecuniary Penalty in Lieu of Confiscation	Not available	Available	Not available
Passive Bribery	Natural Persons Imprisonment	2-12 years; 6 months to 8 years if offer / solicitation not accepted	5 years	5 years
	Natural Persons Fine	At least 3 times the value of the bribe	Not available	EUR 50 000 USD 72 000
	Confiscation	Mandatory confiscation of bribe	Discretionary confiscation of direct and indirect proceeds	Mandatory confiscation of the benefits of the offence
	Pecuniary Penalty in Lieu of Confiscation	Not available	Available	Available

	Country	Sri Lanka	Thailand	Vanuatu
Active Bribery	Natural Persons Imprisonment	7 years	5 years	10 years
	Natural Persons Fine	USD 40 EUR 30	EUR 200 USD 300	USD 3 000 EUR 2 400
	Legal Persons Fine	Unlimited	N/A	USD 3 000 EUR 2 400
	Confiscation	Not available	Not available	Available
	Pecuniary Penalty in Lieu of Confiscation	N/A	Not available	Available
Passive Bribery	Natural Persons Imprisonment	7 years	Death, 5-20 years, or life	10 years
	Natural Persons Fine	USD 40 EUR 30	EUR 800 USD 1 200	USD 3 000 EUR 2 400
	Confiscation	Discretionary confiscation of direct proceeds	Mandatory confiscation of the bribe	Available
	Pecuniary Penalty in Lieu of Confiscation	Available	Not available	Available

	Country	Viet Nam
Active Bribery	Natural Persons Imprisonment	Death
	Natural Persons Fine	EUR 12 000 USD 16 800
	Legal Persons Fine	N/A
	Confiscation	Not available
	Pecuniary Penalty in Lieu of Confiscation	N/A
Passive Bribery	Natural Persons Imprisonment	Death
	Natural Persons Fine	One to five times the value of the bribe
	Confiscation	For crimes classified as “serious” or above, mandatory confiscation of direct proceeds
	Pecuniary Penalty in Lieu of Confiscation	Not available

Part II

Criminalisation of Bribery in the Initiative's 28 Member Jurisdictions

Criminalisation of Bribery in Australia

Criminal Code Act
(From Commonwealth of Australia Law –
www.comlaw.gov.au)

Division 141.1 Bribery of a Commonwealth public official

Giving a bribe

- (1) A person is guilty of an offence if:
- (a) the person dishonestly:
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a benefit to another person; or
 - (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
 - (b) the person does so with the intention of influencing a public official (who may be the other person) in the exercise of the official's duties as a public official; and
 - (c) the public official is a Commonwealth public official; and
 - (d) the duties are duties as a Commonwealth public official.
- (2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew:
- (a) that the official was a Commonwealth public official; or
 - (b) that the duties were duties as a Commonwealth public official.

Receiving a bribe

- (3) A Commonwealth public official is guilty of an offence if:
- (a) the official dishonestly:

- (i) asks for a benefit for himself, herself or another person; or
 - (ii) receives or obtains a benefit for himself, herself or another person; or
 - (iii) agrees to receive or obtain a benefit for himself, herself or another person; and
- (b) the official does so with the intention:
- (i) that the exercise of the official's duties as a Commonwealth public official will be influenced; or
 - (ii) of inducing, fostering or sustaining a belief that the exercise of the official's duties as a Commonwealth public official will be influenced.

Geographical jurisdiction

(4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1) or (3).

Penalty for individual

(5) An offence against subsection (1) or (3) committed by an individual is punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both.

Penalty for body corporate

(6) An offence against subsection (1) or (3) committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:

- (a) 100,000 penalty units;
- (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;
- (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

(7) For the purposes of this section, the annual turnover of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have

made, or are likely to make, during that period, other than the following supplies:

- (a) supplies made from any of those bodies corporate to any other of those bodies corporate;
- (b) supplies that are input taxed;
- (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*);
- (d) supplies that are not made in connection with an enterprise that the body corporate carries on.

(8) Expressions used in subsection (7) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning in that subsection as they have in that Act.

(9) The question whether 2 bodies corporate are related to each other is to be determined for the purposes of this section in the same way as for the purposes of the *Corporations Act 2001*.

Division 70.2 Bribing a foreign public official

- (1) A person is guilty of an offence if:
- (a) the person:
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a benefit to another person; or
 - (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
 - (b) the benefit is not legitimately due to the other person; and
 - (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:
 - (i) obtain or retain business; or
 - (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

Note: For defences see sections 70.3 and 70.4.

(1A) In a prosecution for an offence under subsection (1), it is not necessary to prove that business, or a business advantage, was actually obtained or retained.

Benefit that is not legitimately due

(2) For the purposes of this section, in working out if a benefit is not legitimately due to a person in a particular situation, disregard the following:

- (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;
- (b) the value of the benefit;
- (c) any official tolerance of the benefit.

Business advantage that is not legitimately due

(3) For the purposes of this section, in working out if a business advantage is not legitimately due to a person in a particular situation, disregard the following:

- (a) the fact that the business advantage may be customary, or perceived to be customary, in the situation;
- (b) the value of the business advantage;
- (c) any official tolerance of the business advantage.

Penalty for individual

(4) An offence against subsection (1) committed by an individual is punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both.

Penalty for body corporate

(5) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:

- (a) 100,000 penalty units;
- (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;
- (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the

conduct constituting the offence occurred.

(6) For the purposes of this section, the annual turnover of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than the following supplies:

- (a) supplies made from any of those bodies corporate to any other of those bodies corporate;
- (b) supplies that are input taxed;
- (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*);
- (d) supplies that are not made in connection with an enterprise that the body corporate carries on.

(7) Expressions used in subsection (6) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning in that subsection as they have in that Act.

(8) The question whether 2 bodies corporate are related to each other is to be determined for the purposes of this section in the same way as for the purposes of the *Corporations Act 2001*.

INTRODUCTION

Australia ratified the UNCAC and the OECD Anti-Bribery Convention in December 2005 and October 1999 respectively. It became a member of the FATF in 1990 and the APG in 1997. The Australian legal system is based on English common law. Its domestic bribery offences have not been externally reviewed. However, Australia's foreign bribery offence and related enforcement issues have been examined extensively under the OECD Convention's monitoring mechanism. To avoid duplication, this report will draw heavily on the OECD's monitoring reports. It will also refer to FATF evaluation reports where appropriate.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Australia's main domestic bribery offence at the federal level is in Division 141 of the Criminal Code Act (CCA). The offences of giving corrupting benefits

(Division 142) and abuse of public office may also be applicable to some cases of bribery (Division 143). This report will focus on Division 141 but may refer to these additional offences if necessary. Additional bribery offences exist at the State level, but an examination of these offences is beyond the scope of this report.

International standards require active bribery offences to cover giving, promising and offering a bribe, while passive bribery offences must cover soliciting and accepting a bribe. CCA Division 141(1) covers providing, offering and promising to provide a benefit to an official, while Division 141(3) covers asking and receiving a bribe. These offences therefore meet international standards.

International standards require coverage of bribes given to third party beneficiaries. CCA Division 141(1) deals with the giving etc. of a benefit to another person with the intention of influencing a public official, who may be the other person. The offence thus contemplates third party beneficiaries since the recipient of the benefit may be someone other than the official. CCA Division 141(3) covers an official who asks etc. for a benefit “for himself, herself or another person”. Third party beneficiaries are therefore also covered.

Bribery offences must cover bribes paid, solicited etc. through intermediaries. CCA Division 141(1) covers a person who “*causes* an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person”. This covers the giving etc. of a bribe via an intermediary.¹ The passive bribery offence is less clear since Division 141(3) does not contain comparable language. Australian authorities state that passive bribery through intermediaries is covered but did not provide supporting case law.

International standards require bribery offences to cover a broad range of public officials, namely any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.²

Australia is a federated nation with self-governing States and Territories that legislate independently of the federal Commonwealth Government. The areas of legislative responsibility for the Commonwealth Government are strictly defined by section 51 of the Constitution of Australia. The Constitution of Australia does not permit the Commonwealth Government to legislate with regard to “public officials” of States and self-governing Territories. This remains

the responsibility of the individual States and Territories. As noted above in paragraph 2, examination of State and Territory offences is beyond the scope of this report.

CCA Division 141 applies to bribery of “Commonwealth public officials”. The CCA Dictionary contains a lengthy list of officials that are considered Commonwealth public officials. Since the definition takes a list-based approach, it is difficult to say with certainty that it covers all of the officials as required under international standards. The definition does not include officials at the state or local levels of government due to the limits on the Commonwealth Government’s legislative competence discussed above.

The definition of Commonwealth public official expressly includes elected or judicial officials, public servants appointed under the Australian Constitution, individuals employed by the Commonwealth, and employees or officers of a “Commonwealth authority” or of a “contracted service provider”. The CCA defines a Commonwealth authority as any entity established under any federal legislation (except five specified Acts that relate to corporations and the self-governing territories) and a contracted service provider as any legal or natural person who is party to a contract with the Commonwealth Government and is responsible for the provision of services under that contract. These categories encompass officers performing functions of public office, functions for state-owned or controlled entities, such as the Export Finance and Insurance Corporation, and people performing functions for private companies under contract with the Commonwealth Government.

International standards for the criminalisation of bribery require broad coverage of acts or omissions in relation to the performance of official duties. This includes any use of the public official’s position or office, and acts or omissions outside the official’s scope of competence. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official or private individual award a contract to that company.³

The CCA domestic bribery offences meet this requirement. Division 141 deals with providing, receiving etc. a benefit with the intention of influencing a public official “in the exercise of the official’s duties as a public official”. “Duty” is defined in CCA Division 130 as “any authority, duty, function or power that is conferred on the official, or that which the official holds himself or herself out as having”. This covers acts or omissions outside an official’s scope of competence, according to Australian authorities.⁴

International standards require coverage of bribes of both a monetary and non-monetary nature. The CCA bribery offences cover the giving, receiving etc. of a “benefit”, a term which includes “any advantage and is not limited to property” (CCA Dictionary). This covers both pecuniary and non-pecuniary bribes.⁵

The CCA domestic bribery offence does not indicate whether the definition of a bribe is affected by its value, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder. The CCA domestic bribery offence thus differs from the foreign bribery offence, which expressly excludes most of these factors (CCA Division 70.2).

The CCA domestic bribery offence also requires that a benefit be given, accepted etc. “dishonestly”. The meaning of this term is undefined. Most international instruments do not restrict bribery offences to cover only “dishonest” acts or omissions. The CCA’s foreign bribery offence notably does not require the acts or omissions to be committed “dishonestly” (CCA Division 70.2).

The CCA domestic bribery offence does not contain specific defences. There are no defences of solicitation, small facilitation payments (i.e. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits), or “effective regret” (i.e. an offender who voluntarily reports his/her crime to the authorities).

BRIBERY OF FOREIGN PUBLIC OFFICIALS

The CCA criminalises active bribery of foreign public officials under Division 70. The provision has been extensively reviewed under the monitoring mechanism of the OECD Anti-Bribery Convention and thus need not be discussed in detail here. The 2006 Phase 2 and 2008 Follow-up Reports noted that Division 70.4 provides a defence of small facilitation payments. The OECD Working Group on Bribery recommended that Australia clarify the scope of the defence that had been set out in a publicly available guidance document. This document was revised by 2008, but questions remained over the definition of a small facilitation payment.⁶ The Working Group also decided to follow up the application of the defence as practice develops.⁷

Passive foreign bribery is not an offence in Australia.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Australia can impose criminal liability against legal persons (i.e. bodies corporate) for domestic and foreign bribery under CCA Division 12. As with the foreign bribery offence, the OECD Working Group on Bribery has extensively reviewed the CCA corporate liability provisions. This report will therefore discuss these provisions only briefly.

Before 2001, corporate liability in Australia was based on the “identification theory” that remains dominant in the rest of Asia and the Pacific region today. Under this theory, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company’s “directing mind and will”.⁸

In 2001, CCA Division 12 fundamentally changed Australia’s approach to corporate criminal liability. Under the new scheme a body corporate *must* be attributed with the physical elements of a bribery offence that is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority.

A body corporate also *must* be attributed with the fault elements of a bribery offence if it “expressly, tacitly or impliedly authorised or permitted the commission of the offence.” The means by which such an authorisation or permission may be established include:

- (a) proving that the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

The company has a defence in the case of a high managerial agent (paragraph (b) above) if the company proves that it used due diligence to prevent the offence. This is not intended to be an exhaustive list of the circumstances in which a body corporate can be held liable for offences committed by employees and agents and a court may apply a stricter basis of liability where it considers it appropriate, such as in cases where the degree of harm and difficulty of detection is a particular problem.

At the time of Australia's Phase 2 Evaluation under the OECD Anti-Bribery Convention, prosecutions under CCA Division 12 had essentially been limited to regulatory (*e.g.* environmental) offences. The Working Group on Bribery therefore decided to follow up the provision's application as practice develops.⁹

JURISDICTION TO PROSECUTE BRIBERY

Australia has extensive jurisdiction to prosecute CCA Division 141 domestic bribery offences. Jurisdiction arises whether or not the conduct constituting the alleged offence occurs in Australia and whether or not a result of the conduct constituting the alleged offence occurs in Australia (CCA Division 15.4).

Jurisdiction to prosecute foreign bribery is narrower. Australia may prosecute a natural or legal person for foreign bribery that occurs wholly or partly within its territory. For foreign bribery that is committed extraterritorially, Australia has jurisdiction to prosecute if the defendant is an Australian citizen or resident, or a body corporate incorporated by or under a law of the Commonwealth, State or territory (Division 70.5).

SANCTIONS FOR BRIBERY

For natural persons, the maximum punishment for active and passive domestic bribery and active foreign bribery under the CCA is imprisonment for 10 years and/or a fine of AUD 1.1 million (approx. EUR 755,000 or USD 962,000).¹⁰ For bodies corporate, the maximum punishment is AUD 11 million (approx EUR 7.55 million or USD 9.63 million) or three times the value of benefits derived from the act of bribery, whichever is greater. If the value of benefits obtained from bribery cannot be ascertained, then the maximum fine is AUD 11 million (approx EUR 7.55 million or USD 9.63 million) or 10% of the annual turnover of the body corporate and all related corporate entities, whichever is greater. These penalties came into force on 20 February 2010, to address a recommendation by the OECD Working Group on Bribery that Australia increase the fines for legal persons.¹¹

Confiscation is available under the Proceeds of Crime Act 2002 (POCA). Under POCA Section 48, if a person is convicted of a CCA bribery offence, then a court must forfeit the proceeds of the offence upon the application of the Commonwealth Director of Public Prosecutions (DPP). A court may also forfeit an instrument of the offence. “Proceeds” include property situated in or outside Australia that is wholly or partly derived or realised, whether directly or indirectly, from the commission of the offence. “Instrument” includes property used or intended to be used in, or in connection with, the commission of an offence (POCA Section 329).

POCA provides additional grounds of confiscation in the absence of a conviction against a person. A court must order forfeiture if it is satisfied, on a balance of probabilities, that a person committed bribery that results in either a benefit to the offender or another person, or a loss to another person or the Commonwealth, of AUD 10 000 or more (approx. EUR 6 863 or USD 8 750) (POCA Sections 47 and 338). A court must also confiscate property if it is satisfied, on a balance of probabilities, that property in question is proceeds of a bribery offence, regardless of whether the identity of the person who committed the action is known (POCA Section 49). This provision allows confiscation where a court is satisfied that property is the proceeds of a criminal offence and the DPP has taken reasonable steps to identify and notify persons with an interest in the property.

If property subject to confiscation is not available, or available property is insufficient to account for the full value of proceeds derived from crime, then the court can impose a pecuniary penalty order. The value of the order is generally equal to the value of the benefits derived by the person from the offence. Where the benefits exceed AUD 10 000 (approx. EUR 6 863 or USD 8 750), the value of the order may be increased to cover the benefits derived from other unlawful activity (POCA Sections 116 and 121).

On 19 February 2010, the Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 and Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2) 2010 came into force, amending the POCA to introduce “unexplained wealth” provisions to Australia’s confiscation regime. Once a court is satisfied that an “authorised officer” has reasonable grounds to suspect that a person’s total wealth exceeds the value of wealth that was lawfully acquired, the court can compel the person to attend court and prove, on a balance of probabilities, that his/her wealth was not derived from criminal offences. If the person cannot demonstrate this, the court may order him/her to pay to the Commonwealth the difference between his/her total wealth and legitimate wealth (the unexplained wealth amount). The new provisions target property that was derived from offences “with a connection to Commonwealth

power”, which excludes a range of State offences. The federal Government has the power to confiscate property derived from criminal offences that are connected with its legislative powers under the Constitution.

Some administrative sanctions for bribery are available. The Australian authorities state that the government may cancel or refuse contracts with an entity that has been convicted of a criminal offence. According to a 2005 OECD report, Australia’s export credit and overseas development assistance agencies may also withhold support or contracts from persons convicted of bribery.¹²

TOOLS FOR INVESTIGATING BRIBERY

The Crimes Act 1914 (CA) is the principal source of investigation powers for the Australian Federal Police. Section 3E permits a magistrate or other authorised office holder to issue a warrant for police to search premises and seize evidence relevant to bribery offences. Section 3ZQO provides additional powers for obtaining information and documents, including from financial institutions. A Magistrate may issue a notice to produce documents if he/she is satisfied that the documents are reasonably necessary, appropriate and adapted for the purpose of investigating an offence. The notice must relate to matters such as determining whether a specified person is a signatory or holds an account at a specified financial institution; asset transfers during a specified period; whether a financial institution has conducted a transaction on behalf of a specified person etc.

The POCA also provides means of obtaining information from financial institutions that is relevant to a confiscation action (POCA Section 213). According to Australian authorities, bribery investigators would generally use the powers under the CA instead of POCA Section 213. However, this power under POCA may be used during proceedings to confiscate the proceeds or instruments of bribery. Search warrants for proceeds of crime investigations are also available under POCA Part 3-5.

Under POCA, a magistrate may also order the production or inspection of “property-tracking documents” to identify and trace proceeds of bribery and other crimes (POCA Section 202). An order is available if a person has been convicted of or charged with an indictable offence, if it is proposed that he/she would be charged with an indictable offence, or if there are reasonable grounds to suspect the person committed a ‘serious offence’. An order can also be made in relation to a document that is relevant to identifying, locating or quantifying proceeds of an indictable offence or an instrument of a serious offence, regardless of whether the identity of the person who committed the offence is

known (POCA section 202(5)(ca)). This provision ensures information about proceeds of crime can be obtained if the identity of the offender is not known.

All CCA bribery offences constitute indictable offences under POCA. Bribery offences that cause, or are intended to cause, a benefit to the offender or another person, or a loss to another person or the Commonwealth, of AUD 10 000 or more (approx. EUR 6 863 or USD 8750), constitute serious offences under POCA.

The magistrate cannot order the production of any accounting records used in the ordinary business of a financial institution but certain financial information is obtainable via notices issued under section 213. Notices under section 213 may be issued by authorised, senior officers of Australian Government agencies and do not require involvement by a court.

POCA also allows a judge to issue an order to monitor the activity of a specified account over a particular period (POCA Section 219). An order may be issued if there are reasonable grounds to suspect that a person has committed, is about to commit, was involved in, or has benefited from a serious offence. "Serious offences" are, in the case of bribery, those in which the benefit deriving from the crime exceeds AUD 10 000 (approx. EUR 6 863 or USD 8 750).

Finally, National Privacy Principle 2.1 under the Privacy Act 1988 permits disclosure of personal information in certain circumstances. A financial institution may release information to law enforcement voluntarily if it reasonably believes that the disclosure is reasonably necessary to prevent, detect, investigate, prosecute or punish criminal offences, or other laws that impose sanctions (e.g. bribery offences). A financial institution may also use or disclose personal information if the use or disclosure is required or authorised by or under law.

Bank secrecy rules do not appear to impede the gathering of information under these provisions. Both the CA and POCA require mandatory production of information or documents by the respondent of a notice or order. They also provide that relevant confidentiality provisions do not apply, or that the respondent would not be subject to any action, proceeding or penalty as a result of the production (CA Section 3ZQR, and POCA Sections 206, 215, and 221).

The Australian Federal Police reports that it commonly uses CA search warrants and notices under section 3ZQO to obtain information from banks and other financial institutions. It takes generally one to four weeks to obtain the information, depending on factors such as the relationship with a bank, whether

the information is stored electronically, and whether the information is at a branch office. Some financial institutions are uncooperative on occasion, necessitating multiple orders or warrants to obtain all necessary information.

Bribery investigators may also obtain tax-related information, though it is not entirely clear whether tax secrecy rules present an obstacle. To gather information from the tax authorities, investigators may rely on search warrants or notices to produce under the CA described above, according to Australian authorities. However, the Income Tax Assessment Act 1936, Section 16 imposes a general duty of confidentiality on tax officials. The Act provides exceptions to non-disclosure, but they do not include divulging information for investigating and prosecuting crimes unrelated to tax. A separate provision, Section 3E of the Taxation Administration Act 1953, allows disclosure to law enforcement for the investigation of a serious offence, which includes CCA bribery offences. This provision permits but does not oblige the Tax Commissioner to disclose the information. For example, he/she may refuse disclosure if he/she believes that the information is not relevant to investigating a criminal offence.

Freezing of assets is available under POCA. A court may issue a restraining order if a person has been convicted of or is charged with bribery under the CCA, or if it is proposed that the person be charge with a bribery offence. The order may cover all or part of the property belonging to or under the effective control of the person (POCA Section 17). A court may also issue a restraining order where there are reasonable ground to suspect that a person has committed a CCA bribery offence and the benefit deriving from the crime, or the loss caused, exceeds AUD 10 000 (approx. EUR 6 863 or USD 8 750) (POCA section 18). A restraining order may also be issued to freeze property reasonably suspected to be proceeds of bribery (POCA Section 19). Applications for restraining orders may be made *ex parte* (POCA Section 26).

A number of special investigative techniques are available. Wiretapping (including interception of email) is available for serious offences, as defined by the (Telecommunications (Interception and Access) Act, which includes money laundering and any bribery of or committed by an Australian official (Telecommunications (Interception and Access) Act Sections 5D and 46). Other special techniques are available for both domestic and foreign bribery. Under the Surveillance Devices Act 2004, a court may issue a surveillance device warrant to authorise the use of video recording, listening and bugging devices. CA Part IAC allows undercover operations and controlled deliveries. An undercover officer is specifically exempted from criminal liability under specified circumstances (CA Section 15XC).

International co-operation is generally available in bribery cases. Australia may seek some types of mutual legal assistance (MLA) from a foreign country for all criminal offences. Extradition and more intrusive types of MLA are available for an offence punishable by death or imprisonment, or other deprivation of liberty, for a period of not less than 12 months.¹³ All CCA domestic and foreign bribery offences meet these requirements.¹⁴

The Australian authorities may use co-operative informants and witnesses in investigating any type of crime, including bribery. The AFP has a number of internal governance documents that provides the framework for the management of Human Sources and witnesses.

Charge negotiation is available for bribery and other crimes. The Prosecution Policy of the Commonwealth provides detailed guidance.¹⁵ Charge negotiations between the defence and prosecution may result in the defendant pleading guilty to fewer charges or a lesser charge or charges, and the remaining charges are either not proceeded with or are taken into account without recording a conviction. Negotiations between the defence and prosecution are to be encouraged, may occur at any stage of the progress of a matter thought the Courts and may be initiated by the prosecution or the defence. Under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiations. Negotiations between defence and the prosecution as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:

- (a) the charges to be proceeded with should bear a reasonable relationship to the nature of the criminal conduct of the defendant
- (b) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and
- (c) there is evidence to support the charges.

Any decision whether or not to agree to a charge negotiation proposal must take into account all the circumstances of the case and other relevant considerations including whether the defendant is willing to cooperate in the investigation or prosecution of others, or the extent to which the defendant has done so; the strength of the prosecution case; and the likelihood of adverse consequences to witnesses (para 6.18 of the Prosecution Policy contains further relevant considerations).

The prosecution should not agree to a charge negotiation proposal initiated by the defence if the defendant continues to assert his or her innocence with respect to a charge or charges to which the defendant has offered to plead guilty.

A charge negotiation may involve a proposal that charges be dealt with summarily rather than on indictment, if the relevant legislation permits. A charge negotiation may also include a request that the prosecution not oppose a defence submission to the Court at sentence that the penalty fall within a nominated range or that the defendant will plead guilty to an existing charge or charges. The prosecution may consider agreeing to such requests provided the penalty or range of sentence nominated is considered to be within acceptable limits to a proper exercise of the sentencing discretion.

The court is responsible for the sentence ultimately imposed, regardless of any agreement between prosecution and defence regarding a recommended sentence. The court retains the right to impose a penalty that it considers appropriate to the charges.

ENFORCEMENT OF BRIBERY OFFENCES

The Australian Federal Police is the principal agency for investigating CCA bribery offences, while the Commonwealth Director of Public Prosecutions prosecutes these cases. Prosecutions for domestic bribery require the Attorney-General's consent if the alleged offence occurs wholly in a foreign country and the defendant is neither an Australian citizen nor a body corporate incorporated in Australia at the time of the offence (CCA Division 16.1).

The Australian authorities have provided the following statistics on the enforcement of its CCA domestic and foreign bribery offences for 2004-2008. The statistics refer to investigations and prosecutions of natural persons. There have not been any cases against legal persons.

Investigations							
	Referrals Received	On-going	Evaluation	No offence disclosed	Did not meet criteria for investigation	Finalised	Referred Out
Active Foreign bribery*	13	2	2	5	4	-	-
Domestic bribery	7	3	1	-	-	2	1

* Since the entry into force of the foreign bribery offence in 1999

Prosecutions and Sanctions								
	Prosecutions	Convictions	Acquittals	Imprisonment	Periodic Detention	Community Service	Suspended sentence	Good Behaviour Bond
Active foreign bribery*	0	0	0	0	0	0	0	0
Active domestic bribery	13	10	0	2	2	1	2	3
Passive domestic bribery	8	8	0	2	2	2	2	0

* Since the entry into force of the foreign bribery offence in 1999

Fines and confiscation, though available, do not appear to be routinely imposed in bribery cases. The OECD Working Group on Bribery has noted that, among 60 convictions for domestic bribery from 1984 to 2005, neither a fine nor confiscation was ordered in a single case. The Group accordingly decided to follow up the issue of monetary sanctions as practice develops.¹⁶ A 2005 FATF report also noted that the amount forfeited at the Commonwealth level may be somewhat low, though this could be due to the federal nature of the government.¹⁷

No contracts have been cancelled or refused to legal persons as a result of bribery convictions, according to the Australian authorities.

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

Australia's active and passive domestic bribery offences already meet many requirements found in international standards. They could be strengthened if Australia considers the following issues:

- (a) Express language covering soliciting or accepting a bribe through an intermediary;

- (b) Whether the definition of bribes in the domestic bribery offence is affected by its value, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder; and
- (c) The meaning of giving, accepting etc. a benefit “dishonestly”.

Bribery of Foreign Public Officials

The OECD Working Group on Bribery has closely examined Australia’s foreign bribery offence and found that it meets many aspects of international standards. Nevertheless, the Working Group recommended that Australia clarify the scope of the defence of small facilitation payments, and decided to follow up the issue as practice develops.

Liability of Legal Persons for Bribery

CCA Division 12 is an innovative approach to corporate liability, though the provision has not been extensively used to prosecute legal persons for intentional criminal conduct. The OECD Working Group on Bribery has accordingly decided to follow up the application of this provision as practice develops.

Tools for Investigating Bribery

Australia has an array of investigative tools in bribery cases, ranging from production orders for obtaining documents and information, to special investigative techniques such as secret surveillance and undercover operations. To further improve this scheme, Australia could consider addressing the following matters:

- (a) Obtaining from the tax authorities information and documents about taxpayers, including those who are not public officials, and the impact of tax secrecy laws; and
- (b) Interception of telecommunications in foreign bribery investigations.

Enforcement of Bribery Offences

Australia maintains fairly detailed statistics on investigations, prosecutions, convictions, and sanctions for active and passive domestic and foreign bribery. These statistics show that there has been a level of

enforcement of domestic bribery, though Australia is still waiting for its first foreign bribery prosecution. Fines and confiscation may also need to be imposed more frequently in practice, as noted by the OECD Working Group on Bribery.

RELEVANT LAWS AND DOCUMENTATION

Commonwealth of Australia Statutes Online: www.comlaw.gov.au

Australia Attorney-General's Department: www.ag.gov.au

Australia Federal Police: www.afp.gov.au

NOTES

- ¹ OECD (1999), *Phase 1 Report: Australia*, Section 1.1.5.
- ² See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ³ See OECD Convention, Commentary 19.
- ⁴ See OECD (1999), *Phase 1 Report: Australia*, Section 1.1.8.
- ⁵ See OECD (1999), *Phase 1 Report: Australia*, Section 1.1.4.
- ⁶ OECD (2008), *Follow-Up Report on the Implementation of the Phase 2 Recommendations: Australia*, para. 9.
- ⁷ OECD (2006), *Phase 2 Report: Australia*, paras. 142-147.
- ⁸ U.K. Law Commission Report, *Reforming Bribery* (2008) at para. 6.26.
- ⁹ OECD (2006), *Phase 2 Report: Australia*, paras. 151-153.
- ¹⁰ CCA sections 70.2 and 141.1. The currency exchange rate used in this report was current as of 22 July 2010.
- ¹¹ OECD (2006), *Phase 2 Report: Australia*, paras. 154-155
- ¹² OECD (2006), *Phase 2 Report: Australia*, paras. 161-168.
- ¹³ Mutual Legal Assistance in Criminal Matters Act 1987 and Extradition Act 1988.
- ¹⁴ Additional conditions in Australian and foreign legislation, as well as an applicable treaty, may apply.
- ¹⁵ www.cdpp.gov.au/Publications/ProsecutionPolicy
- ¹⁶ OECD (2006), *Phase 2 Report: Australia*, paras. 157-160.
- ¹⁷ FATF (2005), *Mutual Evaluation Report: Australia*, para. 141.

Criminalisation of Bribery in Bangladesh

Penal Code

**(From the Web site of the Ministry of Law, Justice
and Parliamentary Affairs of Bangladesh:
bdlaws.gov.bd)**

Section 161 (Public servant taking gratification other than legal remuneration in respect of an official act)

Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Government or Legislature, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 165 Public servant obtaining valuable thing, without consideration, from person concerned in proceeding or business transacted by such public servant

Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate,

from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate,

or from any person whom he knows to be interested in or related to the person so concerned,

shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 165A (Punishment for abetment of offences defined in sections 161 and 165)

Whoever abets any offence punishable under section 161 or section 165 shall, whether the offence abetted is or is not committed in consequence of the abetment, be punished with the punishment provided for the offence.

Prevention of Corruption Act

Section 5 (Criminal misconduct)

- (1) A public servant is said to commit the offence of criminal misconduct -
- (a) if he accepts or obtains or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification (other than legal remuneration) as a motive or reward such as is mentioned in section 161 of the Penal Code.
 - (b) if he accepts or obtains or agrees to accept or attempts to obtain for himself or for any other person any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned.
 - ...
 - (d) if he, by corrupt or illegal means or by otherwise abusing his position as public servant, obtains or attempts to obtain for himself or for any other person any valuable thing or pecuniary advantage.

INTRODUCTION

Bangladesh acceded to the UNCAC in February 2007 and was a founding member of the APG in 1997. The Bangladeshi legal system is based on English common law. Bangladesh's criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Bangladesh's main bribery offences are in Sections 161, 165 and 165A of the Penal Code 1860, as complemented by the Criminal Law Amendment Act, 1958 (CLAA). Sections 5(1)(a)-(b) and (d) of the Prevention of Corruption Act 1947 (PCA) provide additional passive bribery offences. As seen below, there is considerable overlap and inconsistency between these three passive bribery offences. This report focuses on these bribery offences but will touch upon other corruption offences in the Penal Code and PCA where appropriate.

Penal Code Section 165A covers active domestic bribery indirectly through the act of abetment; there is no specific offence of active bribery.¹ Framing active bribery through the act of abetment falls short of international standards, which require more specific language criminalising the intentional offering, promising or giving of a bribe. The NAO contains passive bribery offences but not corresponding active bribery offences.

International standards also require active bribery offences to expressly cover giving, offering or promising a bribe. The Penal Code abetment offence does not do so expressly, though its explanatory notes indicate that offering a bribe is an offence, regardless of whether the official accepts the offer.² The notes do not refer to giving or promising a bribe, however. Finally, it is unclear whether a bribe that is offered but not received by a public servant is an offence under the Penal Code.

Penal Code Sections 161 and 165 both may cover passive domestic bribery. Section 161 covers a public servant who "accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person any gratification whatever, other than legal remuneration, as a *motive or reward*" for a certain act of the recipient official. This act, however, does not in fact have to be performed; it is sufficient if the official represents that the act has been or will be performed.³

Section 165 applies in different circumstances. It covers a public servant who accepts, obtains, agrees to accept, or attempts to obtain any valuable thing without consideration or for inadequate consideration from a person concerned in any proceeding or business transacted by the public servant. Mere acceptance of the valuable thing suffices; there is no further requirement that the thing was a motive or reward for the recipient official's acts. Section 165 is broader than Section 161 in this regard. But from another perspective, it is narrower as it only applies to bribers who have proceedings or business involving the bribed official. There is no such limitation to Section 161.

PCA Sections 5(1)(a) and (b) also covers passive bribery. It establishes the offence of criminal misconduct which covers the same conduct as Penal Code Sections 161 and 165 but provides a heavier penalty.

International standards require passive bribery offences to cover accepting and soliciting a bribe. Sections 161 and 165 contain the words “accept or obtains, agrees to accept, or attempts to obtain”. Soliciting is not expressly covered, but may be considered an attempt to obtain. PCA Sections 5(1)(a) and (b) contain similar language.

International standards also demand coverage of bribery through intermediaries. The active bribery abetment offence is silent on this issue, as are the passive bribery offence under PCA Sections 5(1)(a) and (d). The Penal Code passive bribery offences refer to bribes accepted, obtained etc. “from any person”, which does not clearly cover bribes given through an intermediary. NAO Section 9(a)(ii) may cover some intermediaries, as it includes bribes provided by a person “interested in or related to the [briber]”.

As for third party beneficiaries, Penal Code Sections 161 and 165 expressly cover a public servant who asks or takes a bribe or valuable thing “for himself or for any other person”. The PCA passive bribery offences employ the same language. The situation for active domestic bribery is unclear, as the Section 165A abetment offence is silent on this matter.

Penal Code Section 21 defines a “public servant” by enumerating several categories of officials. The broadest category (category 12) includes (a) every person in the service or pay of the Government or remunerated by the Government by fees or commissions for the performance of any public duty; and (b) every person in the service or pay of a local authority or of a corporation, body or authority established by or under any law or of a firm or company in which any part of the interest or share capital is held by, or vested in, the Government. The remaining categories cover officials with more specific functions, such as judges and other persons empowered by law to perform an adjudicatory function; an officer of a Court of Justice responsible for investigating or reporting on any matter of law or fact, for making, authenticating or keeping a document, for administering or disposing property, or for preserving order in Court; and a person who is empowered to prepare, publish, maintain or revise an electoral roll, or to conduct an election or part of an election.

The Penal Code’s approach for defining domestic public officials is thus somewhat different from most international instruments. The Penal Code enumerates specific officials in some cases, while describing relatively narrow

functional categories in others. International standards, on the other hand, take mainly a functional approach. Bribery offences generally must cover any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.⁴

The Penal Code’s approach has both advantages and disadvantages. The list of enumerated officials is lengthy and can sometimes lead to greater certainty, such as when bribery involves a listed official or someone clearly falling within a narrow listed category. However, it could also result in gaps. Ostensibly missing from the Penal Code are persons performing legislative functions. By referring to persons “in the service or pay of the Government or remunerated by the Government by fees or commissions”, it is unclear whether persons holding unpaid or temporary office is covered. A list approach also leaves unclear whether the Penal Code covers all persons who perform a public function (including for a public agency or public enterprise) or who provide a public service. The Penal Code definition also appears to exclude a person who performs a public function as an employee of a private corporation in which the Government holds no shares. In sum, the Penal Code definition of “public servant” may fall short of international standards in some respects.

International standards for the criminalisation of bribery also require broad coverage of acts or omissions in relation to the performance of official duties. This includes any use of a public official’s position or office, and acts or omissions outside the official’s scope of competence. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official or private individual award a contract to that company.⁵

The Penal Code Section 161 offence may be narrower. It deals with bribery whereby a public servant (a) does or forbears from doing any *official act*; (b) shows favour or disfavour to any person in the exercise of his/her *official functions*; or (c) renders or attempts to render any service or disservice to any person with the Central or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company or with any public servant. Categories (a) and (b) do not cover acts or omissions outside the official’s scope of competence. Category (c) may also fall short of international standards in two respects. First, it is unclear whether “rendering a service or disservice” to another official includes making another official perform the act for which the bribe was intended. Second, the definition

does not seem to cover an official who acts outside his/her competence and uses his/her office to influence a private individual.⁶

The PCA also allows certain inferences to be drawn when proving some elements of the bribery offences. For the bribery offences under Penal Code Sections 161, 165 and 165A, the mere giving, accepting etc. of a gratification raises a rebuttable presumption that the gratification was a motive or reward for the official's act or omission.⁷ Also, an accused is presumed to be guilty of passive domestic bribery if he/she possesses unexplained pecuniary resources or property that is disproportionate to his/her income.⁸

The Penal Code bribery offences cover bribes of both a monetary and non-monetary nature. An explanatory note to Section 161 states that "The word 'gratification' is not restricted to pecuniary gratifications, or to gratifications estimable in money." The Penal Code provides no further information on whether the definition of "gratification" is affected by its value, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder. The PCA, however, suggests that bribes of small value are less likely to attract liability, if at all. As noted above, once it is proven that a gratification was provided to an official, it is presumed that the gratification was a motive or reward for the official's act or omission. However, a Court may decline to apply this presumption if the gratification is "so trivial that no inference of corruption may fairly be drawn".⁹

There is one specific defence to domestic bribery. Under the Penal Code Section 165B, a person is not guilty of bribing a domestic official if he/she was "induced, compelled, coerced, or intimidated to offer or give any such gratification". There are no express defences of small facilitation payments, i.e. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits. But as noted above, bribes of a small value may not be an offence.

In 2008, Bangladesh also granted amnesty to those who confessed to committing corruption and returned illegal gains:

Truth and Accountability Commissions were set up under the Voluntary Disclosure Ordinance 2008, to give amnesty to corruption suspects. Suspects are called on to disclose information to the Commission about any corruption they have committed and declare the amount of assets and money earned through illegal means. These assets are then handed over to the

State and the Commission issues a certificate which acts as an exemption from any future criminal prosecution or punishment for these acts. Such persons are barred from contesting elections and holding public or corporate offices for five years. The process is confidential. The establishment of a Truth and Accountability Commission allows citizens to report abuses of police power and return illegal gifts in order to avoid prosecution.¹⁰

BRIBERY OF FOREIGN PUBLIC OFFICIALS

There are no express active or passive foreign bribery offences in the Penal Code. Foreign public officials are not included in the Penal Code's definition of "public servant"; therefore, the active bribery offence (abetment to bribe under Section 165A) and the passive bribery offences under Sections 161 and 165, do not extend to officials of foreign governments or public international organisations in the conduct of international business.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

In theory, Bangladesh can impose criminal liability against legal persons for bribery. Section 2 of the Penal Code provides that every person shall be liable to punishment under the Code. Section 11 defines "person" as including "any Company or Association or body of persons, whether incorporated or not".

Whether corporate criminal liability for bribery is actually imposed in practice is wholly unclear. There are no reported cases in which a company has been prosecuted for a criminal offence. One source indicates that "legal persons are hardly prosecuted, let alone convicted, for any corruption offences", and that corporate liability under the Penal Code "practically remains nugatory".¹¹

One reason for the absence of cases may be because the Penal Code does not indicate when a company is considered to have committed a crime. There is no guidance on when the acts or omissions of a natural person may be attributed to a legal person, whose acts or omissions may trigger liability, or whether the conviction of a natural person is a prerequisite to convicting a legal person. According to the source noted above, the absence of attribution rules is the reason why corporate liability has not been enforced in Bangladesh.¹²

Should Bangladeshi courts be confronted with the issue of liability of legal persons, they may well apply U.K. case law, given the country's common law history. The leading case is the well-known U.K. House of Lords decision in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153. The principle is commonly known as the "identification" doctrine. Under *Tesco*, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company's "directing mind and will".¹³

The limits of the identification doctrine in cases of complex corporate crimes such as bribery are now well-documented. Prosecutors, law enforcement officials, and academics in the U.K. have denounced the *Tesco* regime as ineffective and unsatisfactory for bribery offences. The problem is at least three-fold. First, the identification theory requires guilty intent be attributed to a very senior person in the company. Liability is unlikely to arise when bribery is committed by a regional manager or even relatively senior management, let alone a salesperson or agent, even if the company benefitted from the crime. Second, there is also no liability even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, the identification theory requires the requisite criminal intent to be found in a single person with the directing mind and will; aggregating the states of mind of several persons in the company will not suffice. This ignores the realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.¹⁴

An effective regime of liability of legal persons for bribery must address these limitations. The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.¹⁵ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to

supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

Bangladesh has jurisdiction to prosecute bribery committed in its territory. Section 1 of the Penal Code states that the Code “shall take effect throughout Bangladesh”. Similarly, PCA Section 1(2) provides that the Act “extends to the whole of Bangladesh”. However, it is unclear whether territorial jurisdiction is extended to offences that take place partly in Bangladesh.

The Penal Code and PCA also provide for nationality jurisdiction. Penal Code Section 4 states that the Code applies to any offence committed by any Bangladeshi citizen in any place beyond Bangladesh. PCA Section 1(2) states that the Act “applies to all citizens of Bangladesh”. There is no requirement of dual criminality, i.e. the act or omission in question need not be an offence in the place where it occurs.

The PCA further provides that the Act applies to “persons in the service of the Republic, wherever they may be.” This would provide extraterritorial jurisdiction to prosecute non-Bangladeshi nationals in the service of the Bangladeshi Government who commit bribery.

Nationality jurisdiction to prosecute bribery does not extend legal persons. The term “citizens” in the Penal Code and PCA covers natural but not legal persons.

SANCTIONS FOR BRIBERY

Active and domestic bribery in the Penal Code under Sections 161, 165 and 165A are punishable by imprisonment of up to three years and/or a fine. The offence of criminal misconduct (passive bribery) under PCA Section 5(1)(a) is punishable by imprisonment of up to seven years and/or a fine. There is no maximum limit to the fine that may be imposed, as long as the fine is not excessive (Penal Code Section 63). A fine must also be not less than the gain derived by the offender from the offence (CLAA, 1958, Section 9).

Confiscation is also available under a myriad of provisions. For the offence of criminal misconduct under the PCA (passive bribery), a court may confiscate from an official “the pecuniary resources or property to which the criminal misconduct relates” (PCA Section 5). It is unclear whether this would allow the confiscation of indirect proceeds of bribery (i.e. the proceeds of proceeds). Under the Anti-Corruption Commission Act Section 27(1),

possession of unexplained wealth by an official is an independent offence, conviction of which results in mandatory confiscation. The provision does not apply to instruments of crime. In practice, it may have been used to confiscate not only direct but also indirect proceeds of bribery.¹⁶ Finally, Section 17 of the Money Laundering Prevention Ordinance 2008 allows confiscation of instruments and proceeds of bribery and corruption upon a conviction for money laundering. However, forfeiture under this provision may be limited to property that was previous public funds.¹⁷

Additional provisions on confiscation are found in the general criminal statutes. For the Penal Code offences, a court may confiscate “the whole or any part of the property of the accused to the Government” (Criminal Law Amendment Act, 1958 Section 9). This provision appears to allow confiscation of any property of an accused, and not only the proceeds of bribery. However, there is no guidance on what or how much property should be confiscated. Finally, under Code of Criminal Procedure Section 517, a court may confiscate any property “regarding which any offence appears to have been committed, or which has been used for the commission of any offence”. An explanatory note to the section states that the provision covers property “originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.” The provision thus appears to cover both direct and indirect proceeds.¹⁸

The relationships between a fine and confiscation, and among the many confiscation provisions themselves, are not entirely clear. As well, with the exception of the Money Laundering Prevention Ordinance, none of the confiscation provisions mentioned above allow a court to impose a fine when confiscation is not available, *e.g.* when the property in question has been spent.

Administrative sanctions may be available in addition to criminal sanctions. A public servant who engages in bribery may be subject to disciplinary measures under the Government Servants (Discipline and Appeal) Rules, 1985. In practice, public servants are dismissed if they are convicted of corruption and sentenced to imprisonment of six months and/or fines of BDT 1 000 (USD 14 or EUR 10). A person convicted of bribery and sentenced to more than two years’ imprisonment is disqualified from participating in Parliamentary elections for five years. Similar provisions apply to elections to local government bodies. Information was not available on whether a convicted briber may be debarred from seeking public procurement contracts.

TOOLS FOR INVESTIGATING BRIBERY

Bangladeshi bribery investigators may access documents and information possessed by private individuals or companies, including banks and financial institutions. Under Section 94 of the Code of Criminal Procedure, 1898 (CCP), a Court may issue a summons requiring a person to produce specified documents. For documents or things in the custody of a bank or banker, the prior written permission of the High Court Division is required. The permission of the Court overrides any bank secrecy rules. The Anti-Corruption Commission has additional powers to compel a person to furnish information (Section 19, Anti-Corruption Commission Act, 2004 (ACCA)). But unlike the CCP, the Act does not specifically address – and hence may not override – bank secrecy.

There are no provisions that specifically address the gathering of information and documents held by the tax authorities. Bribery investigators presumably will need to rely on the general provisions on summoning documents in the CCP and ACCA described above. But since these provisions do not address the issue of tax secrecy, it is unclear whether documents and information subject to such secrecy will be available.

Search and seizure is also available to gather other evidence. If there are reasonable grounds to believe that a person named in a summons would not produce the requested information, a court may issue a warrant to search and seize relevant evidence. A court may also issue a search warrant if it (a) does not know whether relevant information, document or thing is in the possession of any person, or (b) considers that a general search or inspection will serve the purposes of any inquiry, trial or other proceeding (CCP Section 96).

Freezing of property is also available in bribery cases. Under Sections 3-6 of the Criminal Law Amendment Ordinance, 1944, Bangladeshi authorities may apply *ex parte* for an order from a District Judge to attach money or other property that has been procured by means of an offence. If such money or property cannot be attached, then the Judge may order the attachment of other property of equivalent value. If the money or property has been transferred in bad faith, a judge may order the attachment of the transferee's property. The Money Laundering Prevention Ordinance also provides for freezing, though there are concerns that the provision only applies to state property.¹⁹

Special investigative techniques are largely not available in bribery investigations in Bangladesh. The CCP only provides for general search and seizure powers (Sections 96-99). There are no provisions on wiretapping, listening and bugging devices, secret surveillance, video recording, email

interception, undercover police operations (e.g. “sting” operations), or controlled deliveries.

International assistance is available in bribery cases. Bribery is an extradition offence under the Extradition Act, 1974.²⁰ Bangladesh has very limited legislation concerning mutual legal assistance (MLA). Under Sections 503-508A CCP, a Court hearing any criminal offence may issue a commission to take witness testimony from abroad. The availability and procedure for obtaining other types of MLA (e.g. search warrants) is unclear, especially from foreign states that do not have MLA treaty relationships with Bangladesh. Furthermore, while it is possible to gather documents through an evidence commission, it is much more cumbersome and time-consuming than through other means such as a summons or production order requested through MLA. An evidence commission may also only be available during a trial, not an investigation.

An offender may receive immunity from prosecution if he/she co-operates with the authorities. Under CLAA Section 6(2), a Judge may pardon a co-operating offender on the condition that he/she makes “full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor.” The Judge may grant the pardon at any stage of an investigation, enquiry, or trial. He/she is required to record the reasons for the pardon in writing. Two points should be noted. First, the provision requires the offender to make full disclosure of the offence, but falls short of requiring the offender to testify in court against another accused. Second, this is an “all-or-nothing” provision. There flexibility to allow an offender to assist the authorities in return for a reduced sentence, for example.

ENFORCEMENT OF BRIBERY OFFENCES

The Bangladesh Anti-Corruption Commission has exclusive jurisdiction to conduct criminal bribery investigations (Anti-Corruption Commission Act Section 20(1)). Although the Act does not specifically address this issue, the Commission’s Legal and Prosecution Department prosecutes bribery cases.²¹ PCA Section 5A further states that an officer below the rank of Inspector of Police may investigate the bribery offences in the Penal Code and PCA only with an order of a Magistrate of the first class. On 26 April 2010, the government amended the relevant legislation to require the Commission to seek the government’s approval before initiating a case against any government official.

Statistics on investigations, prosecutions, convictions, and sanctions for passive and active domestic bribery in Bangladesh are not available. The Web site of the Anti-Corruption Commission Corruption lists the convictions of some notable officials.

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

Bangladesh's active and passive domestic bribery offences meet many requirements found in international standards, *e.g.* the different modes of committing the passive bribery offences, and third party beneficiaries. Bangladesh could strengthen these offences by addressing the following issues:

- (a) A specific offence criminalising active domestic bribery that expressly covers giving, offering and promising a bribe, and bribery through an intermediary;
- (b) Express language covering active and passive domestic bribery through an intermediary;
- (c) Definition of "public servant" that expressly covers persons performing legislative functions; persons holding unpaid or temporary office; and all persons who perform a public function, including for a public agency or public enterprise, or provide a public service;
- (d) More specific language covering the situation where a bribe is given or taken in order that a public servant use his/her position outside his/her authorised competence;
- (e) "Gratifications" of a small value; and
- (f) Incomplete offences, such as when a bribe is offered to but not received by an official.

Bribery of Foreign Public Officials

To bring its criminal bribery offences in line with international standards, Bangladesh should criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

International standards require that legal persons be held liable for bribery. Bangladesh's Penal Code broadly includes "any Company or Association or body of persons, whether incorporated or not" in its definition of "persons". However, it is unclear whether legal persons have been held criminally liable for bribery in Bangladesh. To improve the effectiveness of this regime, Bangladesh could consider whether its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Bangladesh could also consider addressing the following issues:

- (a) Whether corporate liability depends on the conviction of a natural person for the crime; and
- (b) The lack of prosecutions of legal persons in practice.

Jurisdiction for Prosecuting Bribery

In addition to territorial jurisdiction, Bangladesh also has nationality jurisdiction to prosecute natural persons for bribery. This is in line with international standards. To ensure its overall jurisdictional basis for prosecuting bribery is sufficiently broad, Bangladesh could address the follow matters:

- (a) Providing nationality jurisdiction to prosecute legal persons for bribery; and
- (b) Jurisdiction to prosecute bribery offences that take place partly in Bangladesh.

Sanctions for Bribery

The maximum available punishment against natural persons for bribery offences in Bangladesh is largely in line with international standards. To ensure an effective regime in practice, Bangladesh could consider addressing:

- (a) The relationship between fines and the various provisions on confiscation;
- (b) Confiscation of both the direct and indirect proceeds of bribery, and the availability of fines of equivalent value to the property subject to confiscation if, for example, the bribe or proceeds thereof have disappeared;
- (c) The use of confiscation in practice, especially against bribers; and
- (d) Additional administrative sanctions for bribery, such as blacklisting and debarment from public procurement.

Tools for Investigating Bribery

Bangladesh has some useful investigative tools for bribery cases, such as the power to obtain documents and information from financial institutions through a summons. Bangladesh could consider some additional matters:

- (a) Ability to obtain from the tax authorities information and documents subject to tax secrecy;
- (b) Special investigative techniques in bribery investigations, such as wiretapping, email interception, secret surveillance, video recording, listening and bugging devices, undercover police operations, and controlled deliveries;
- (c) The ability to seek a full range of MLA, particularly from countries with which Bangladesh does not have MLA treaty relations;
- (d) Pardoning an offender on the condition that he/she testifies at the trial of another accused; and
- (e) Plea bargaining for a reduced sentence when an offender cooperates with the authorities.

Enforcement of Bribery Offences

To properly measure the effectiveness of its criminalisation of bribery, Bangladesh should maintain statistics on investigations, prosecutions, convictions, and sanctions for passive and active domestic bribery.

RELEVANT LAWS AND DOCUMENTATION

The Penal Code, PCA and other Bangladeshi legislation: Ministry of Law, Justice and Parliamentary Affairs of Bangladesh: bdlaws.gov.bd

Bangladesh Anti-Corruption Commission: acc.org.bd

APG (2009), *Evaluation Report: Bangladesh*: www.apgml.org

NOTES

¹ See also Penal Code Section 109 and Illustration (a) under that Section.

² Illustrations (a) of Penal Code Sections 109 and 116.

³ Penal Code Section 161, Illustration (c).

⁴ See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.

⁵ See OECD Convention, Commentary 19.

⁶ It is unclear whether this would be covered by a broad interpretation of Penal Code Section 162 (Taking gratification, in order, by corrupt or illegal means, to influence public servant) and Section 163 (Taking gratification, for exercise of personal influence with public servant).

⁷ PCA Section 4 and CLAA Sections 7(2) and (3).

⁸ PCA Section 5(2) and CLAA Section 7(1).

⁹ PCA Section 4 and CLAA Section 7(4).

¹⁰ APG (2009), *Mutual Evaluation Report: Bangladesh*, para. 104.

¹¹ Government of Bangladesh (2008), *UNCAC: A Bangladesh Compliance and Gap Analysis*, 2nd ed., p. 79.

¹² *Ibid.*

¹³ U.K. Law Commission Report, *Reforming Bribery* (2008) at para. 6.26.

¹⁴ See U.K. Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.

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- ¹⁵ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ¹⁶ APG (2009), *Mutual Evaluation Report: Bangladesh*, para. 213.
- ¹⁷ APG (2009), *Mutual Evaluation Report: Bangladesh*, para. 210.
- ¹⁸ APG (2009), *Mutual Evaluation Report: Bangladesh*, paras. 214-6.
- ¹⁹ APG (2009), *Mutual Evaluation Report: Bangladesh*, para. 223.
- ²⁰ An applicable treaty or foreign legislation may impose additional conditions.
- ²¹ See the Commission's Web site (acc.org.bd).

Criminalisation of Bribery in Bhutan

Penal Code of Bhutan 2004 (Provided by the Anti-Corruption Commission Bhutan)

289. A defendant shall be guilty of the offence of bribery, if the defendant is a public official and accepts money, property, or other gratification for oneself or another person in exchange for doing an act or omitting to do an act that is related to the defendant's public duties.

290. A defendant shall be guilty of the offence of bribery, if the defendant offers money, property, or other gratification to a public official in exchange for the public official doing an act or omitting to do an act that is related to the public official's duties.

Anti-Corruption Act of Bhutan 2006 (Provided by the Anti-Corruption Commission Bhutan)

106. Any person who has committed an offence of corruption or who fails to comply with any provision of this Act or any other law shall be guilty of an offence.

138. In this Act unless the context otherwise requires:

(h) "Corruption" means:

- (i) Any person with a corrupt intention accepts or obtains or agrees to accept or attempts to obtain; gives or agrees to give or offers any gratification to any person or entity as an inducement or reward for doing or forbearing to do an act relating to the exercise or non-exercise of power in office or in the course of official duty, rendering the gratification an undue gratification. "Corrupt intention" includes any action motivated by or resulting inter alia in the following:
 - (1) Unethical and dishonest act;
 - (2) Abuse of authority;
 - (3) Use of position of trust for dishonest gain;
 - (4) Giving or enabling a person to receive preferential treatment; or

(5) Abuse and misuse of public resources.

- (ii) The commission or an attempt to commit, conniving in or acquiescing to commit, aiding or abetting to commit any act in the Schedule.

INTRODUCTION

Bhutan signed UNCAC in 2005 but has not yet ratified the Convention as of April 2010. It is not a member of the APG. Bhutan's legal system is based on British common law and Indian law. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE BRIBERY OFFENCES

In Bhutan, active and passive domestic bribery is covered by two sets of overlapping legislative provisions. This creates some lack of clarity. The principal provisions are the offence of "corruption" under Sections 106 and 138(h) Anti-Corruption Act (ACA), according to the Bhutanese authorities. The second set of provisions is Sections 289 and 290 of the Penal Code, which contain general active and passive bribery offences. This report will focus on these two sets of general bribery offences. A third offence, bribery in tendering under Sections 109-111 ACA, does not directly deal with bribery of public officials, but will be referred to when interpreting the two general bribery offences.

International standards generally require coverage of three modes of committing active bribery, namely offering, giving, and promising an advantage. Section 138(h) ACA only covers a person who "gives or agrees to give or offers" a gratification; a promise to bribe is not mentioned. However, the definition of a gratification covers "offer, undertaking or promise" (Section 138(k)(5) ACA). Section 290 Penal Code is more limited as it expressly refers to only an offer to bribe. There is no case law to confirm whether the two offences cover the additional modes of active bribery. There is also no case law on bribes that are made but not received, or bribes that are rejected by an official.

As for passive domestic bribery, international standards generally demand coverage of solicitation or acceptance of a bribe. Section 138(h) ACA speaks of a person who "accepts, obtains, agrees to accept, attempts to obtain" a bribe. This likely covers both solicitation and acceptance. On the other hand, Section 289 Penal Code only covers acceptance of a bribe and may thus fall

short. An attempt to accept a bribe is a crime under the Penal Code, but it is unclear whether this would necessarily include all bribe solicitations.

It is not totally clear whether the general bribery offences adequately address bribes given, solicited, etc. through an intermediary. Sections 289 and 290 Penal Code and Section 138(h) ACA do not contain express language to this effect. Bhutan believes Section 138(h)(i) likely covers intermediaries since the provision includes gratifications given or offered “to any person or entity”, but no supporting case law was provided. The conclusion that intermediaries may not be covered is strengthened when one considers the bribery in tendering offence (Section 109 ACA) which expressly covers the giving of advantages “directly or indirectly”.

The treatment of bribes provided to a third party beneficiary (i.e. someone other than the official) is uneven. Section 289 Penal Code (passive domestic bribery) explicitly covers a public official who accepts a benefit “for oneself or another person”. Third party beneficiaries are thus clearly covered. Unfortunately, none of the other general bribery offences does so expressly. Case law is not available to clarify whether these offences implicitly cover third party beneficiaries.

The definition of a public official is also uneven. International standards broadly define “public official” to include legislative, administrative and judicial officials at all levels of government, as well as persons exercising a public function for a public authority, agency or enterprise, and persons providing a public service. Sections 289-290 Penal Code do not define a public official at all, thus raising questions over whether it meets the requirements of international standards. Section 138(t) ACA defines a “public servant”, but it is unclear whether this definition applies to the PC offences. By contrast, the offence in Section 138(h) ACA applies to bribery of “any person or entity”; the provision is not limited to public officials.

International standards also require broad coverage of the act or omission performed by an official in return for a bribe. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official award a contract to that company.¹ In this regard, Sections 289-290 Penal Code covers acts or omissions that are “related to the public official’s duties”. Similarly, Section 138(h) ACA covers “exercise or non-exercise of power in office or in the course of official duty”. The language in these provisions should cover acts or omissions in relation to the performance of official duties. But it is

unclear whether it also covers any use of the public official's position or office, including acts or omissions outside the official's competence.

The nature of a bribe under the ACA is broad. Section 138(k) states that "gratification" means any "pecuniary or material benefit estimable generally in money". The term also includes non-pecuniary benefits such as protection from legal proceedings, exercise or refraining from exercising any rights or official duty etc. Furthermore, it is no defence that a gratification is customary in any profession, trade or vocation (Section 93 ACA). By contrast, Sections 289-290 Penal Code do not define the nature of a "gratification"; the breadth of these offences in this regard is therefore unclear. It is unclear whether Section 93 ACA (customary gratification is no defence) applies to the Penal Code bribery offences. The Bhutanese authorities could not indicate whether the definition of a bribe may be affected by factors such as the value of the bribe, its results, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber was the best-qualified bidder. The Bhutanese authorities state that facilitation payments are prohibited by reason of Section 138 ACA.

Regarding the mental element, Section 138(h) ACA requires an offender (whether the briber or the official) to act with a "corrupt intention". This is defined as any action motivated by or resulting in an unethical and dishonest act; abuse of authority; use of position of trust for dishonest gain; preferential treatment; or abuse and misuse of public resources. This mental element of the offence is not found in relevant international standards and could thus restrict the applicability of the offence. By contrast, Sections 289-290 Penal Code do not contain such a limitation.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

It is unclear whether it is an offence in Bhutan to bribe officials of foreign governments or public international organisations in the conduct of international business. As mentioned above, Sections 289-290 Penal Code do not define a public official at all. Section 138(h) applies to bribery of "any person or entity"; the provision is not limited to public officials, domestic or foreign.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Bhutan has taken the commendable step of establishing the liability of legal persons for bribery. Liability for bribery under the ACA may be imposed against corporations, partnerships, organisations, enterprises, agencies, and other legal entities whether public or private. Liability can also be imposed against a legal person's successor, representative or agent (Section 138(p) ACA). The Penal Code is narrower. Only corporations and business

associations may be held liable (Section 508 Penal Code). However, members of the board of directors and “high managerial agents” may be prosecuted along with the legal person.

While its coverage of legal persons is broad, the ACA is unclear on when liability would be imposed against the legal person. The Act does not specify any rules for attributing the acts of a natural person to a legal person. The Penal Code is much clearer in this respect. Section 508(c) states that a company is liable only for crimes committed by the Board of Directors or a high managerial agent acting on behalf of the corporation and within the scope of their office or employment. Accordingly, a company cannot be liable for the acts of outside agents, contractors, or mid- and low-level employees.

The restriction of corporate liability to only crimes committed by the most senior officers of the company is problematic for at least three reasons. First, liability is unlikely to arise when bribery is committed by a regional manager or even relatively senior management, let alone a salesperson or agent, even if the company benefitted from the crime. Second, there is also no liability even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, it is unclear whether the requisite criminal intent for the crime must be found in a single person, and that aggregating the states of mind of several persons in the company will not suffice. If so, this ignores the realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.²

An effective regime of liability of legal persons for bribery must address these limitations. The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.³ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer,

promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

There are two additional issues concerning liability of legal persons. First, the legislation does not clarify whether corporate liability depends on the conviction of the natural person who committed bribery. Second, it is also unclear whether corporate compliance programmes affect liability, since courts have yet to grapple with this issue.

JURISDICTION TO PROSECUTE BRIBERY

Bhutan has jurisdiction over bribery committed in its territory. The Penal Code and the ACA apply to the whole of the Bhutan (Section 1(c) Penal Code and Section 1(c) ACA). However, these two statutes do not specifically address acts committed only partly in Bhutan, *e.g.* when some elements of a bribery offence are committed outside Bhutan.

As for extraterritorial jurisdiction to prosecute bribery, the bribery offence in Section 130(h) ACA applies extraterritorially to all public servants (Section 119 ACA). There is no such corresponding provision for bribers under the ACA, or for offenders under the Penal Code.

Concerning nationality jurisdiction, Section 20 of the Civil and Criminal Procedure Code states that the Supreme and High Courts may exercise jurisdiction on the basis of nationality. This presumably allows the Courts to try Bhutanese nationals for bribery committed outside of Bhutan. The provision also recognises “passive personality” jurisdiction, thus giving courts jurisdiction to try crimes committed against Bhutanese nationals. Whether these principles apply to legal persons is unclear. Bhutan states that it has nationality jurisdiction to prosecute legal persons but did not provide case law in support of its position.

SANCTIONS FOR BRIBERY

The bribery offences in Section 289-290 Penal Code are subject to “value-based sentencing”. Depending on the “amounts involved in the crime”, four ranges of sentences are available.

Amount involved in the crime	Classification of offence	Sentence available
Less than the sum of the daily national minimum wage for a period of <u>7 years</u>	Petty misdemeanour	Imprisonment of 1 month to less than 1 year or a fine in lieu of imprisonment
Between the sum of the daily national minimum wage for a period of <u>7 years</u> and <u>15 years</u>	Misdemeanour	Imprisonment of 1 to less than 3 years or a fine in lieu of imprisonment
Between the sum of the daily national minimum wage for a period of <u>15 years</u> and <u>30 years</u>	Fourth degree felony	Imprisonment of 3 to less than 5 years
Greater than the sum of the daily national minimum wage for a period of <u>30 years</u>	Third degree felony	Imprisonment of 5 to less than 9 years

However, it is not entirely clear what “amounts involved” in a bribery offence refers to, *e.g.* the amount of a bribe, or the value of a contract obtained through bribery. It is also unclear how an offence would be classified when a monetary value cannot be assigned to a bribe. Bhutan intends to amend the ACA to abolish this system of “value-based” sentencing. However, the ACA Bill 2010 if passed would retain value-based sentencing for bribery of foreign public servants. The maximum penalty for this offence in the Bill is “imprisonment for a term equivalent to a third degree felony or value based sentence, whichever is higher”.

In addition, Section 47 Penal Code requires a court to confiscate the proceeds, instrumentalities, and benefits of an offence upon conviction. This should allow confiscation of the bribe and the proceeds of bribery. In the absence of a conviction, a separate provision (Section 48) allows a Court to confiscate any property or assets acquired by the commission of a crime such as corruption. Confiscation under this provision is discretionary, unlike post-conviction confiscation under Section 47. It is not entirely clear whether Sections 47 and 48 allow confiscation of property obtained indirectly from bribery.

The bribery offence under Section 138(h) ACA is punishable by a fine, imprisonment, or both (section 122 ACA). The maximum punishment available is not apparent in the statute. Upon conviction, a Court may order confiscation of the proceeds, articles used in the offence (which presumably covers a bribe), and any benefit derived from the offence. Unlike the Penal Code, the ACA allows for the blacklisting or debarment any national or foreign firm from

participating in government tender. A contract or license may also be revoked (Sections 45(i) and (j) ACA).

Neither the ACA nor the Penal Code specifically allows a Court to impose a fine equivalent in value to property that is subject to confiscation. It is thus unclear whether any additional sanctions are available when confiscation is not possible, *e.g.* when the property that is subject to confiscation has been spent or converted.

TOOLS FOR INVESTIGATING BRIBERY

Bhutan has a range of tools for investigating bribery. The Anti-Corruption Commission may issue a summons to obtain information and records, including from banks and other financial institutions. Bank secrecy laws do not apply (Section 70(b) ACA). It takes on average three days to obtain records and information from financial institutions, according to Bhutanese authorities. In addition, investigators can apply to a Court for a warrant to search and seize documents if necessary (Section 168 Civil and Criminal Procedure Code). Bank accounts may also be frozen during an investigation (section 49 ACA).

Bhutan does not have specific provisions for seeking tax records in bribery investigations. The Anti-Corruption Commission may invoke all investigative powers under the Civil and Criminal Procedure Code. In addition, the ACA authorises the Commission to demand the production of information and documents. However, whether tax secrecy rules impede these powers is unclear, though Bhutanese authorities state that access to information is unimpeded upon the production of a court order. The Commission can also access asset declarations of public officials. The ACA Bill 2010, if passed, would expressly provide for the co-operation between the Anti-Corruption Commission and various government agencies including the Royal Monetary Authority and the Department of Revenue and Customs.

The Bhutanese authorities state that interception of communications is available in bribery investigations. The Civil and Criminal Procedure Code contemplates wiretapping only in investigations of a “heinous crime”, a term that is undefined. Courts have interpreted this provision to allow the Anti-Corruption Commission to conduct wiretaps in bribery cases. The opening of mail is only available if there are reasonable grounds to believe narcotics or contraband will be found, which is unlikely to arise in bribery cases.

Some covert investigative techniques are also available in bribery cases. The ACA allows the Anti-Corruption Commission to authorise a person to give or receive bribes during an investigation. Secret surveillance, video recording,

listening and bugging devices, and controlled deliveries are not described in the ACA or CCPC. The Bhutanese authorities state that the Anti-Corruption Commission has used covert investigative techniques – except for controlled deliveries – in practice. Listening and bugging devices are legally available but not used in practice because of the lack of technology.

There is limited international assistance in bribery cases. Bhutan may seek extradition from a foreign country only if there is an applicable treaty, convention or agreement (Section 164.6 CCPC). However, it may extradite a person to a state with which it has no treaty relations (Extradition Act, Section 1). As for mutual legal assistance (MLA), Section 55 ACA authorises the Anti-Corruption Commission to collaborate with other countries, and international and regional organisations, including in investigations, asset recovery and information sharing. On its face, this should allow the Commission to seek MLA, though the Bhutanese authorities would prefer more elaborate legislative provisions. They hope that the ACA Bill 2010, if passed, would rectify this situation.

The ACA and CCPC set out a procedure for plea bargaining. With the prosecution's consent, an accused may plead guilty to a lesser offence. The prosecution has sole discretion in accepting a plea bargain, having regard to the nature and circumstances of the offence and the accused's criminal record. The plea bargain may also involve the exchange of evidence deemed critical for the prosecution of other individuals. The legislation does not require a Court to approve a plea bargain, though a Court has a residual discretion to order an accused to make restitution or pay compensation. There are also no provisions dealing with immunity from prosecution for persons who co-operate in corruption investigations or prosecutions.

ENFORCEMENT OF BRIBERY OFFENCES

The Anti-Corruption Commission of Bhutan (ACC) conducts criminal investigations in corruption cases, though its constituting statute does not vest it with exclusive jurisdiction over such cases. The Attorney General and other prosecuting agencies generally prosecute cases. However, the Commission, "when it deems necessary and expedient, may prosecute a person charged with corruption or take over a prosecution process from the prosecuting agency or police when the case is delayed without a valid reason, manipulated or hampered by interference" (Anti-Corruption Act Sections 45-46 and 89-93).

The Commission's website contains fairly extensive information and statistics on criminal corruption cases. From 2006 to September 2008, the ACC received 1 576 corruption complaints and opened 33 investigations involving

196 persons. However, bribery offences were involved in only a small fraction of these cases (57 complaints and 3 investigations).⁴

Only one bribery case reached the courts during this period, however. An official who received a BTN 65 000 (approximately EUR 1 100 or USD 1 500) bribe for tampering with procurement-related documents was given a BTN 3 000 (approximately EUR 50 or USD 70) fine plus a fine of BTN 36 000 (approximately EUR 600 or USD 800) in lieu of imprisonment for one year. On appeal, the sentence was eliminated on grounds that the administrative sanctions imposed on the official (reprimand and transfer) were adequate.⁵ The briber was not prosecuted.

Data on other cases not involving bribery suggest that Bhutanese courts might impose fairly significant sanctions for corruption. In a series of cases involving illegal misappropriation or transfer of land, corrupt officials received significant jail sentences of up to almost ten years. For offences involving property of lower value, courts impose fines in lieu of imprisonment fairly frequently. Administrative sanctions (*e.g.* license suspension) were also imposed in some cases.⁶

RECOMMENDATIONS FOR A WAY FORWARD

Bhutan's scheme for criminalising bribery meets many aspects of international standards on the criminalisation of bribery. To strengthen this scheme, Bhutan could consider addressing the following issues. At the time of this report, Bhutan was in the process of amending its Anti-Corruption Act. The Bhutanese authorities expected the amended Act to address many of these issues.

Elements of the Active and Passive Bribery Offences

Bhutan's bribery offences in the ACA and the Penal Code already meet many requirements found in international standards, *e.g.* coverage of pecuniary and non-pecuniary bribes, and several modes of active and passive bribery. To improve the bribery offences, Bhutan could consider addressing the following areas:

- (a) The overlap between the bribery offences in the Penal Code and the Anti-Corruption Act, and the application of the inconsistent features in those provisions;

- (b) Express inclusion of additional modes of committing bribery in the Penal Code, such as promising a bribe, giving a bribe (for Section 290 Penal Code) and soliciting a bribe;
- (c) Incomplete offences, such as when a bribe is offered but not received by an official, or when an official rejects a bribe;
- (d) Express coverage of bribery through intermediaries and bribes paid to third party beneficiaries;
- (e) Express definition of a public official that covers legislative, administrative and judicial officials at all levels of government, as well as persons exercising a public function for a public authority, agency or enterprise;
- (f) Bribery in order that an official uses his/her position outside his/her authorised competence;
- (g) Definition of a “gratification” in the Penal Code;
- (h) Whether the definition of a bribe may be affected by factors such as the value of the bribe, its results, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber was the best-qualified bidder; and
- (i) The definition of “corrupt intention” in the ACA.

Bribery of Foreign Public Officials

To bring its bribery legislation in line with international standards, Bhutan should enact an offence to criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Bhutan may hold corporations criminally liable for bribery. This is commendable and responds to requirements under international standards. To improve the effectiveness of this regime, Bhutan could consider whether its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Bhutan could also consider addressing the following issues:

- (a) Expanding the types of legal persons that could be held liable for bribery under the Penal Code; and
- (b) Whether corporate liability depends on the conviction of a natural person for the crime.

Jurisdiction for Prosecuting Bribery

The ACA, Penal Code, and the Civil and Criminal Procedure Code provide a wide jurisdictional base for prosecuting bribery. To enhance this scheme, Bhutan could consider addressing or clarifying:

- (a) Jurisdiction to prosecute bribery that is committed partly in Bhutan; and
- (b) Nationality jurisdiction to prosecute legal persons for bribery.

Sanctions for Bribery

Bribery offences under the Penal Code are punishable by imprisonment of one month to nine years, depending on the “amount involved in the crime”. A fine may be imposed in lieu of imprisonment in less serious cases. The maximum punishment for bribery under the Penal Code appears in line with international standards. Although the number of bribery cases may be too few for drawing definitive conclusions, judicial decisions in other cases show that serious corruption offences can attract custodial sentences.

To further ensure that sanctions for bribery are effective, proportionate and dissuasive, Bhutan could clarify the following issues:

- (a) Whether the “amount involved in the crime” relates to the value of a bribe or the value of fruits of bribery (*e.g.* contract awarded);
- (b) The availability of blacklisting and debarment from public procurement as sanctions for bribery under the Penal Code;
- (c) The maximum punishment available for the general bribery offence in the ACA;
- (d) Confiscation of property obtained indirectly from a bribery offence; and
- (e) The availability of fines equivalent in value to property that is subject to confiscation.

Tools for Investigating Bribery

The basic tools for investigating bribery are available in Bhutan. This includes a summons procedure for obtaining documents from financial institutions that is fairly efficient in practice. The express legislative provision overriding bank secrecy is commendable. To enhance the ability of law enforcement to investigate bribery, Bhutan could address the following matters in the context of bribery investigations:

- (a) Codifying the use of covert investigative techniques such as surveillance, video recording, listening and bugging devices, and controlled deliveries;
- (b) Granting immunity from prosecution to a person who co-operates in a corruption investigation or prosecution;
- (c) Enacting more detailed legislative provisions on mutual legal assistance; and
- (d) Allowing extradition from countries to Bhutan in the absence of a treaty, in the same manner as Article 1D of the Extradition Act, which currently allows extradition from Bhutan to a foreign country without a treaty.

Enforcement of Bribery Offences

Bhutan could consider the reasons for its relatively low rate of prosecutions and conviction for bribery.

RELEVANT LAWS AND DOCUMENTATION

Anti-Corruption Act of Bhutan 2006: www.anti-corruption.org.bt/pdf/accacte.pdf

Penal Code, and Criminal and Civil Procedure Code: www.judiciary.gov.bt/html/act/act.php

Anti-Corruption Commission of Bhutan: www.anti-corruption.org.bt

NOTES

- ¹ See OECD Convention, Commentary 19.
- ² See U.K. Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ³ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ⁴ Data taken from Anti-Corruption Commission Annual Report 2008 and the Compilation of Cases Investigated by Anti-Corruption Commission. See also the ACC's Annual Report 2007. All documents are available on the ACC's website (www.anti-corruption.org.bt).
- ⁵ Information taken from the Compilation of Cases Investigated by Anti-Corruption Commission (www.anti-corruption.org.bt).
- ⁶ *Ibid.*

Criminalisation of Bribery in Cambodia

Penal Code 2009 (Unofficial Translation)

Article 594 Accepting Bribes

It is punishable by an imprisonment from 7 (seven) years to 15 (fifteen) years for any act committed by a civil servant or a citizen entrusted with public mandates through an election to directly or indirectly solicit or accept without authorization the donation, gift, promise, or any interest in order:

1. To perform any act of his/her functions to facilitate anything using his/her functions;
2. Not to perform any act of his/her functions to facilitate anything using his/her functions.

Article 595 Definition of Influential Deal

Passive influential deal is an act committed by a civil servant or a citizen entrusted with public mandates through an election to directly or indirectly solicit or accept without authorization the donation, gift, promise, or any interest in order to obtain from a State Institution due to real or assumed influence a job, public procurement, an insignia or other preferences.

Article 596 Penalties to be Imposed

Passive influential deal is punishable by an imprisonment from 5 (five) years to 10 (ten) years.

Article 605 Delivery of Bribes

It is punishable by an imprisonment from 7 (seven) years to 15 (fifteen) years for an unauthorized person who directly or indirectly delivers present or gift, make promise or give interests to a civil servant or a citizen entrusted with public mandates through an election so that the latter:

1. Perform any act of his/her functions or facilitate anything using his/her functions;
2. Not to perform any act of his/her functions or facilitate anything using

his/her functions.

Article 631
Active Influential Deal

It is punishable by an imprisonment from 2 (two) years to 5 (five) years and a fine from 4,000,000.00 (four million) Riels to 10,000,000.00 (ten million) Riels for an unauthorized person who directly or indirectly delivers present or gift, makes promise or give interests to a civil servant or a citizen or a citizen entrusted with public mandates through an election in order to obtain from a State Institution, due to real or assumed influence of that civil servant or citizen, a job, public procurement, a distinction or other preferences.

Law on Anti-Corruption (Unofficial Translation)

Article 33
Bribe-taking by Foreign Public Officials or
Officials of Public International Organizations

Foreign public officials or officials of public international organizations shall be sentenced from 7 years to 15 years for unrightfully asking for, demanding or accepting, directly or indirectly, gift, donation, promise or any benefit in order to:

1. Either perform his/her duty or be facilitated by his or her function; or
2. Refrain from performing his or her duty or being facilitated by his or her function.

Article 34
Bribes offered to Foreign Public Officials or
Officials of Public International Organization

Any person shall be sentenced from five (5) to ten (10) years if he/she unrightfully, directly or indirectly, offers gift or giving or promise or any benefit to foreign public officials or officials of public international organization, in order that the officials:

1. Either perform his/her duty or be facilitated by his or her function; or
2. Refrain from performing his or her duty or being facilitated by his or her function.

INTRODUCTION

In 2007, Cambodia acceded to the UNCAC and signed the ASEAN Memorandum of Understanding for Preventing and Combating Corruption

(SEA-PAC). It has been a member of the APG since 2004. The Cambodian legal system consists of mainly continental civil law elements but also includes legislative acts, royal decrees, sub-decrees, circulars, orders and customary law elements. Cambodia's criminal bribery offences have not been externally reviewed.

ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Cambodia's main domestic bribery offences are found in Articles 594 and 605 of the Penal Code 2009. Additional Penal Code provisions may also apply to bribery, *e.g.* Article 280 (Bribe-taking by an Individual such as a Governor), 517-518 (bribery of judges), 595 and 631 (active and passive influential deal), 597 (unlawful exploitation), 599 (favouritism), and 639 and 640 (bribes committed by a member of a health organisation to issue a forged certificate). This Report will focus on the main offences in Articles 594 and 605 but refer to the additional offences where relevant.

International standards generally require coverage of three modes of committing active domestic bribery, namely offering, giving, and promising a bribe. Penal Code Article 605 expressly covers a person who "delivers", "promise" and "give" an advantage to an official. An "offer" of an advantage is not expressly covered.

As for passive domestic bribery, international standards generally demand coverage of solicitation and acceptance of a bribe. Penal Code Article 594 expressly covers both modes of the offence and thus meets international standards.

International standards also require coverage of the giving, soliciting etc. of bribes through intermediaries. Cambodia's domestic bribery offences meet this requirement by covering bribes that are given, solicited etc. "directly or indirectly". Less clear is whether these offences cover bribes given to a third party beneficiary instead of directly to an official. The offences in Penal Code Articles 594 and 605 do not expressly address this situation.

International standards require bribery offences to cover any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a "public official" under domestic law.¹ International standards thus take essentially a functional approach, *i.e.* by referring to persons who perform specified functions.

Whether the Penal Code offences meet this requirement is not completely clear. The main bribery offences in Articles 594 and 605 cover bribery of a “civil servant”. This term is undefined and it is therefore unclear whether it covers persons performing a public function, including for a public agency or public enterprise, or provides a public service. The offences also cover bribery of “a citizen entrusted with public mandates through an election”, which should cover officials performing legislative functions. Articles 517 and 518 cover active and passive bribery of judges.

International standards also require broad coverage of acts or omissions in relation to the performance of official duties, including any use of the public official's position or office, and acts or omissions outside the official's competence. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official award a contract to that company.²

Cambodia largely meets this aspect of international standards through several Penal Code offences. The main bribery offences in Articles 594 and 605 concern bribery in order that an official performs or omits to perform “any act of his/her functions to facilitate anything using his/her functions”. These offences therefore cover bribery in order that an official acts within his/her competence. Bribery in order that an official acts outside his/her competence is mostly covered by the offence of “influential deal” in Articles 595 and 631. These offences prohibit an official from accepting an advantage in return for using his/her “real or assumed influence” in order to allow a briber to obtain “a job, public procurement, an insignia or other preferences.” However, these offences are limited to a briber who seeks a job, public procurement etc. “from a State institution”. Articles 595 and 631 thus do not appear to cover bribery in order that a public official uses his/her office and influences a *private company* to award a contract to the briber.

International standards also require a broad definition of a bribe. Thus, bribery offences must cover both pecuniary and non-pecuniary bribes. Cambodia's bribery offences expressly cover “donation, gift, promise, or any interest”. It is not totally clear that non-pecuniary bribes are included. International standards also require that the definition of a bribe not be influenced by factors such as the value of the bribe, its results, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber was the best qualified bidder. Cambodia's bribery offences are silent in this respect.

Information was not available on whether specific defences (*e.g.* effective regret, solicitation, and facilitation payments) apply to the domestic bribery offences.

ACTIVE AND PASSIVE FOREIGN BRIBERY OFFENCES

The ACL created new offences of bribing foreign public officials. Article 34 deals with active foreign bribery. The offence covers the offering of a gift or giving or promising any benefit to a foreign public official. The language is sufficiently broad to meet international standards. Article 33 on passive foreign bribery covers a foreign public official “asking for, demanding or accepting” a bribe. The offence thus includes solicitation and acceptance of bribes. Both offences also cover bribery through intermediaries by expressly referring to bribes given, accepted etc. “directly or indirectly”. Less clear is the coverage of bribes given to third party beneficiaries, since the offences are silent on this issue.

International standards require the definition of a “foreign public official” to include a person holding legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise. Article 4(3) of the ACL tracks this language. However, the ACL does not clarify whether “foreign country” includes all levels and subdivisions of government (from national to local) and any organised foreign area or entity, such as an autonomous territory or a separate customs territory. Commensurate with international standards, the ACL also covers bribery of officials of a public international organisation, defined as an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation.

International standards also require broad coverage of acts or omissions in relation to the performance of official duties, including any use of the public official’s position or office, and acts or omissions outside the official’s competence.³ The ACL foreign bribery offences cover bribery in order that a foreign official perform or refrain from performing “his/her duty or being facilitated by his/her function.” It is not completely certain that this covers bribery of a foreign official in order that he/she uses his/her position outside his/her authorised competence as required by international standards.

The ACL contains a broad definition of a bribe. Article 4(9) defines a “benefit” to cover any gift, loan, reward, job or position, service or favour etc. Both pecuniary and non-pecuniary bribes are thus covered. There is no information on whether the definition of a bribe is affected by the value of the

bribe, its results, the perceptions of local custom towards bribery, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber was the best-qualified bidder.

Regarding the mental element, the active and passive foreign bribery offences cover the giving, accepting etc. of bribes “unrightfully”. The term “unrightfully” is not defined and could thus introduce uncertainty into the offences.

The ACL does not contain some defences to bribery that are found in certain jurisdictions. There are no defences of small facilitation payments, solicitation or “effective regret”. The absence of these defences could enhance the effectiveness of the foreign bribery offences.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Legal persons cannot be held liable for domestic bribery except in a limited number of cases. The Penal Code expressly provides for liability of legal persons for specific offences such as bribery of employees (Article 283), judges (Article 519) and members of a health organisation (Article 670). However, there are no corresponding provisions that would allow liability to be imposed against legal persons for the general domestic active bribery offence in Penal Code Article 605.

Legal persons also cannot be held liable for foreign bribery. The ACL foreign bribery offences apply to “persons”, an undefined term. The ACL does not expressly extend the foreign bribery offence to legal persons, unlike the corruption-related money laundering offence in ACL Articles 37 and 46.

JURISDICTION TO PROSECUTE BRIBERY

Cambodia has territorial jurisdiction to prosecute bribery offences. The ACL applies “throughout the Kingdom of Cambodia” (Article 3). Penal Code Article 12 similarly provides for jurisdiction over offences committed in Cambodian territory. An offence is deemed to have been committed in the territory of Kingdom of Cambodia if taken of the constituent acts of the offence takes place in Cambodian territory (Penal Code Article 13).

Nationality jurisdiction is less clear. Neither the Penal Code nor the ACL provides nationality jurisdiction to prosecute natural or legal persons for bribery.

SANCTIONS FOR BRIBERY

Active and passive domestic bribery under PC Articles 594 and 605 are punishable by imprisonment of 7-15 years. Active and passive foreign bribery is punishable by imprisonment of 5-10 years and 7-15 years respectively. According to Cambodian authorities, natural and legal persons may also be fined USD 250 to 1 500 and USD 1 250 to 25 000 respectively, depending on the type of offence. These levels of sanctions would appear to be effective, proportionate and dissuasive. ACL Article 45 provides additional “accessory penalties” which include deprivation of certain civic rights (permanently or up to five years), exclusion from Cambodia (for foreigners) and debarment from public procurement. According to Cambodian authorities, Penal Code Article 53 provides additional sanctions for bribery, such as debarment from public procurement and prohibition on operating a business that is open to or used by the public.

Several ACL provisions deal with confiscation. Article 45 allows confiscation of instruments of crime; the subject of an offence; capital or property that derived from an offence; proceeds, material and furniture in a building where an offence was committed; and vehicles. The term “proceeds” is defined in Article 4(15) as “any property derived from or obtained, directly or indirectly, through the commission of a corruption act”. Article 48 further allows confiscation of the proceeds of corruption, including property, material, and instruments derived from corrupt acts. The provision also covers assets transferred or changed into different property, as well as benefits and other advantages derived from proceeds. Taken together, these provisions should allow confiscation of a bribe and the direct and indirect proceeds of bribery. Article 48 also allows a court to “order the settlement of the proceeds” if the proceeds disappear or lose their value. This presumably would allow a court to impose a pecuniary penalty or confiscation of equivalent value. Penal Code Section 53 also provides for the confiscation of the instrumentalities of an offence.

TOOLS FOR INVESTIGATING BRIBERY AND ENFORCEMENT

ACL Articles 25 and 30 incorporate by reference the provisions in the Criminal Procedure Code dealing with search and seizure, issuance of subpoenas, and the powers of the judicial police in investigating a “flagrant” offence. The Criminal Procedure Code in turn contains various provisions for the issuance of search warrants and seizure of evidence.

The ACL provides additional tools for gathering financial and bank evidence in corruption cases. Article 27 allows bribery investigators to monitor

bank accounts and to obtain bank, financial and commercial documents. The provision overrides bank and professional secrecy rules. Pursuant to Article 47, financial institutions cannot be held liable for releasing information and documents in such investigations.

Bribery investigators can also compel individuals to cooperate and produce information. Article 29 authorises the Chairman of the Anti-Corruption Unit to order public authorities, government officials, citizens who hold public office through election, as well as units concerned in the private sector, namely financial institutions, to co-operate with investigators. The Cambodian authorities assert that this provision would override tax secrecy rules and allow bribery investigators to obtain information and documents from the tax authorities.

The ACL provides some special investigative techniques. Article 27 allows the Anti-Corruption Unit to “monitor, oversee, eavesdrop, records sound and take photos, and engage in phone tapping.” Criminal Procedure Code Article 172 allows a judge to order wiretaps and the interception of communications via facsimile or the Internet. There are no provisions concerning other tools such as undercover operations and controlled deliveries.

Article 28 ACL allows the freezing of assets. The Chairman of the Anti-Corruption Unit may order the General Prosecutor of the Appeals Court or the Prosecutor of the Municipal or Provincial Court to freeze the assets of an individual who has committed an offence under the ACL. The procedure prescribed in the Criminal Procedure Code applies.

International co-operation is available for investigating bribery cases. ACL Article 26 permits the Chairman of the Anti-Corruption Unit to ask the competent authority to seek extradition. Article 51 authorises the seeking of a wide range of mutual legal assistance (MLA), while Article 49 allows the recovery of assets from foreign countries. MLA requests must be executed in accordance with applicable treaties and domestic law (ACL Article 53).

The ACL does not deal with plea bargaining or co-operating offenders. The availability of these tools in Cambodia is unclear.

ENFORCEMENT OF BRIBERY OFFENCES

The Anti-Corruption Unit is responsible for investigating bribery offences under the ACL (ACL Section 2). The National Council against Corruption oversees the Unit (ACL Article 10). The Council consists of 11 members selected from various constituencies, *e.g.* the legislature, government and

judiciary (ACL Article 6). Officials of the Anti-Corruption Unit have the powers of the judicial police during bribery investigations (ACL Article 22). The Prosecutors' office is responsible for prosecuting ACL and Penal Code bribery offences.

Statistics were not available on the actual enforcement and sanctioning of bribery offences.

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

Cambodia's active and passive domestic bribery offences in the Penal Code already meet many requirements found in international standards, *e.g.* the different modes of committing the two offences and bribery through intermediaries. To strengthen these offences, Cambodia could consider the following:

- (a) Adopting a clearer definition of "civil servant" that would ensure that the bribery offences cover all persons holding an executive or administrative office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a "public official" under domestic law;
- (b) Ensuring that the bribery offences cover all instances of bribery in order that an official uses his/her position or office outside his/her official's competence; and
- (c) Ensuring the definition of a bribe covers non-pecuniary bribes, and that the definition is not affected by factors such as the value of the bribe, its results, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber was the best qualified bidder.

Elements of the Active and Passive Foreign Bribery Offences

Cambodia is commended for enacting active and passive foreign bribery offences in the ACL. To strengthen its ability to fight foreign bribery, Cambodia could consider addressing the following issues:

- (a) Bribes given, offered etc. to third party beneficiaries;

- (b) Definition of a “foreign public official” that covers all levels and subdivisions of government, from national to local, and any organised foreign area or entity, such as an autonomous territory or a separate customs territory;
- (c) Bribery of a foreign public official in order that he/she uses his/her position outside his/her authorised competence;
- (d) Whether the definition of a bribe is affected by the value of the bribe, its results, the perceptions of local custom towards bribery, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber was the best qualified bidder; and
- (e) The meaning of “unrightfully”.

Liability of Legal Persons for Bribery

To meet international standards, Cambodia should ensure that it can impose liability against legal persons for active domestic and foreign bribery, and ensure that legal persons are subject to effective, proportionate and dissuasive sanctions.

Jurisdiction to Prosecute Bribery

As in other countries, Cambodia has jurisdiction to prosecute bribery that takes place within its territory. However, Cambodia may wish to provide for nationality jurisdiction to prosecute natural and legal persons for foreign and domestic bribery.

Sanctions for Bribery

Domestic and foreign bribery are punishable by imprisonment in Cambodia. To strengthen its sanctions regime, Cambodia could consider enacting legislative provisions to provide for the confiscation of bribes and the proceeds of bribery in domestic bribery cases.

Tools for Investigating Bribery and enforcement

The ACL provides a range of tools for investigating bribery offences. To further improve the tools available to bribery investigators, Cambodia could consider addressing the following issues:

- (a) Clearly provide for the availability of information and documents governed by tax secrecy rules; and
- (b) Undercover operations, controlled deliveries, plea bargaining and co-operating offenders.

Enforcement of Bribery Offences

To properly measure the effectiveness of its criminalisation of bribery, Cambodia should maintain statistics on investigations, prosecutions, convictions, and sanctions for passive and active domestic and foreign bribery.

RELEVANT LAWS AND DOCUMENTATION

Asia-Pacific Group on Money Laundering: www.apgml.org

NOTES

- ¹ See UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and African Union Convention on Preventing and Combating Corruption Article 1. But compare with Council of Europe Criminal Law Convention on Corruption Articles 1 and 4.
- ² See OECD Anti-Bribery Convention Article 1(4)(d) and Commentary 19.
- ³ See OECD Anti-Bribery Convention Article 1(4)(d) and Commentary 19.

Criminalisation of Bribery in P.R. China

**Criminal Law of the People's Republic of China
1979 (as amended 1997)**

**(From the Ministry of Commerce of the People's
Republic of China:
english.mofcom.gov.cn/aarticle/lawsdata/chinese/aw/200211/20021100050381.html)**

Chapter VIII Crimes of Embezzlement and Bribery

Article 385

Any State functionary who, by taking advantage of his position, demands property from another person, or illegally accepts another person's property in return for securing benefits for the person shall be guilty of acceptance of bribes.

Any State functionary who, in economic activities, violates State regulations by accepting kickbacks or service charges of various descriptions and taking them into his own possession shall be regarded as guilty of acceptance of bribes and punished for it.

Article 387

Where a State organ, State-owned company, enterprise, institution or people's organization demands from another person or illegally accepts another person's property in return for securing benefits for the person, if the circumstances are serious, it shall be fined, and the persons who are directly in charge and other persons who are directly responsible shall be sentenced to fixed-term imprisonment of not more than five years.

Any of the units mentioned in the preceding paragraph that, in economic activities, secretly accept kickbacks or service charges of various descriptions shall be regarded as guilty of acceptance of bribes and punished in accordance with the provisions of the preceding paragraph.

Article 388

Any State functionary who, by taking advantage of his own functions and powers or position, secures illegitimate benefits for an entrusting person through another State functionary's performance of his duties and demands from the entrusting person or accepts the entrusting person's property shall be

regarded as guilty of acceptance of bribes and punished for it.

Article 389

Whoever, for the purpose of securing illegitimate benefits, gives property to a State functionary shall be guilty of offering bribes.

Whoever, in economic activities, violates State regulations by giving a relatively large amount of property to a State functionary or by giving him kickbacks or service charges of various descriptions shall be regarded as guilty of offering bribes and punished for it.

Article 390

Whoever commits the crime of offering bribes is to be sentenced to not more than five years of fixed-term imprisonment or to criminal detention; whoever offers bribes to seek illegitimate gain, when the circumstances are serious, or causes great damage to state interests, is to be sentenced to not less than five years and not more than 10 years of fixed-term imprisonment, or to not less than 10 years of fixed-term imprisonment or life imprisonment when the circumstances are extremely serious, and may in addition be sentenced to confiscation of property. Before prosecution, offenders in offering bribes who take the initiative to admit their crime may receive a lighter punishment or be exempted from punishment.

Article 391

Whoever, for the purpose of securing illegitimate benefits, gives property to a State organ, State-owned company, enterprise, institution or people's organization or, in economic activities, violates State regulations by giving kickbacks or service charges of various descriptions shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention.

Where a unit commits the crime mentioned in the preceding paragraph, it shall be fined, and the persons who are directly in charge and other persons who are directly responsible shall be punished in accordance with the provisions of the preceding paragraph.

Article 392

Whoever introduces a bribe to a State functionary, if the circumstances are serious, shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention.

Article 393

Where a unit gives bribes for the purpose of securing illegitimate benefits or, in violation of State regulations, gives kickbacks or service charges to a State functionary, if the circumstances are serious, it shall be fined, and the persons who are directly in charge and other persons who are directly responsible shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention. Any person who takes into his own possession the illegal gains derived from bribing shall be convicted and punished in accordance with the provisions of Articles 389 and 390 of this Law.

INTRODUCTION

The People's Republic of China's (P.R. China) legal system is based on civil law. P.R. China ratified the UNCAC in January 2006. It has been a member of the APG since 1997. China's criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

China's active and passive domestic bribery offences are found under Articles 385, 387, 388, 389, 391, 392 and 393 of the Criminal Law of the People's Republic of China 1979 (amended 1997) (CLPRC). Articles 394 and 395 respectively cover the separate but related offences of the taking of gifts and illicit enrichment.

Articles 389, 391, 392 and 393 of the CLPRC cover active domestic bribery. Article 389 criminalises the "giving" of property; the "giving" of a relatively large amount of property, and; the "giving" of kickbacks or service charges, to a State functionary. Article 391 covers the "giving" of property, or kickbacks or service charges, to a State organ, State-owned company, enterprise, institution or people's organisation. Article 392 criminalises the "introduction" of a bribe to a State functionary, and Article 393 criminalises the "offering of bribes" or the "giving of kickbacks or service charges" to a State functionary by a unit.

Active domestic bribery offences must punish the "promise, offering or giving" of a bribe to a public official in order to meet international standards. The active bribery offences under the CLPRC apply different wording for each offence; Articles 389 and 391 apply "giving", Article 392 applies "introducing", and Article 393 applies "offering". All three methods of committing active domestic bribery are therefore not covered by each offence. It is also unclear whether the "introduction" of a bribe under Article 392 covers the "offering" or

“giving” of a bribe. In this regard, there is a possible overlap between Articles 392 and 389, and it is unclear which Article applies for an act that falls under both provisions. It is also unclear whether incomplete offences, such as when a bribe is offered but not received by a public servant, or when a public servant rejects a bribe, are covered by the CLPRC.

International standards for the criminalisation of passive domestic bribery cover the “requesting, soliciting, receiving or accepting” of a bribe by a public official. Articles 385, 387 and 388 of the CLPRC deal with passive domestic bribery. Articles 385 and 387 cover a State functionary or State organ, State-owned company, enterprise, institution or people’s organization who/which, “demands” property from another person, or “illegally accepts” money or property in return for securing benefits. Article 388 covers a State functionary who “secures” illegitimate benefits for an entrusting person through another State functionary’s performance of his duties and “demands” or “accepts” the entrusting person’s property. All three modes of committing passive domestic bribery are therefore not covered by the CLPRC, and it is unclear why paragraphs 1 of Articles 385 and 387 cover “demand” while paragraphs 2 of Articles 385 and 387 only cover “accepts”. It is also unclear what is meant by the term “illegally accepts” under Articles 385 and 387 and whether there are circumstances under which the acceptance of bribes may be legal.

The bribery offences under the CLPRC cover bribes taken from “any person” and given by “whomever”. It is unclear whether this covers indirect forms of active and passive bribery through the use of intermediaries. Article 392 expressly criminalises “whoever introduces a bribe to a State functionary”. It has been asserted that this establishes the crime of serving as an intermediary in the commission of an illegal bribe¹ but it is unclear whether the initial briber who gives the bribe to the intermediary is also covered under Article 392, or whether he/she would be covered by the other active bribery offences.

Under international standards, bribery is committed if the bribe is provided to a public official or a third party beneficiary. Accordingly, bribery offences should cover cases where the bribe is transmitted to a third party with the agreement or awareness of the public official. While the CLPRC does not expressly cover third party beneficiaries of bribes, the Supreme People’s Court and the Supreme People’s Procuratorate jointly issued an “Opinion on Several Issues in the Application of the Law in the Handling of Criminal Cases Involving the Acceptance of Bribes” which clarifies the criminalisation of the acceptance of bribes through “specific concerned persons”. This covers a “State functionary who secures the benefits for an entrusting person by taking advantage of his or her position, and then instructs the entrusting person to give the relevant money or property to the specific concerned person(s)”.² The scope of the specific

concerned person(s) includes the State functionary's "relatives, lovers or other persons who have common interest with the State functionary".³ This appears to cover a public official who takes bribes for third party beneficiaries, but it is unclear whether this provision is limited to those "with a common interest with the State functionary", and if so, how "common interest" is defined.

Bribery offences should also cover any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and, any person defined as a "public official" under domestic law.⁴ The bribery offences under the CLPRC cover a range of public officials, including: State functionaries, State organs, State-owned companies, enterprises, institutions and people's organizations. Article 93 of the CLPRC broadly defines "State functionaries" as persons who perform public service in State organs, State-owned companies, enterprises, institutions or people's organizations; persons who are assigned by State organs, State-owned companies, enterprises or institutions to companies, enterprises or institutions that are not owned by the State or people's organizations to perform public service, and; other persons who perform public service according to law. "State organs" include the State administrative organ, judicial organ, prosecution organ, military services, and those working in the governing party and the Chinese People's Political Consultative Conference.⁵ It is unclear whether the bribery offences extend to persons employed on a temporary basis, companies receiving State aid or persons who are not assigned by the State but who are performing a public service for a privately held company.

International standards for the criminalisation of bribery require a broad coverage of acts or omissions performed by an official in return for a bribe. The bribery offences under the CLPRC do not specify the acts or omissions of the State functionary and frame bribery within the context of "securing of benefits" or "securing of illegitimate benefits". Articles 385 and 387 criminalise the acceptance of bribes "in return for securing benefits". Article 388 covers the acceptance of bribes by a State functionary who, by "taking advantage of his own functions and powers or position secures illegitimate benefits" for the briber "through another State functionary's performance of his duties". It is unclear whether the securing of "benefits" and "illegitimate benefits" is intended to cover both bribery where the State functionary performs his/her duties and provides an advantage for which the briber is entitled, and bribery where the State functionary breaches his/her duty and provides an advantage to which the briber is not entitled. Article 388 appears to cover the situation where a State functionary uses his/her position to make another State functionary provide the advantage to which the briber is not entitled; however, it does not appear to

cover an official who acts outside his/her competence to influence a private individual, or to engage in acts such as divulging confidential information or State secrets.

To meet international standards, the definition of a bribe should cover any undue advantage of a pecuniary or non-pecuniary nature, irrespective of the value of the advantage, its results, perception of local custom, the tolerance of such payments by local authorities or the alleged necessity of the payment. The bribery offences under the CLPRC refer to the giving or accepting of “property”. This term is undefined and it is therefore unclear whether this covers non-pecuniary bribes, such as services rendered.⁶ The bribery offences also refer to “kickbacks or service charges” given to a State functionary or to a State organ, State-owned company, enterprise, institution or people’s organization, in the context of economic activities. Kickbacks refer to the sum of money discounted by the seller from the total price which is given to the purchaser. Service charges refer to the sum of money charged for introduction, information, payment and costs of activities.⁷ These appear to be limited to bribes of a pecuniary nature. Furthermore, the offences under Articles 387, 389, 392 and 393 only take place if “the circumstances are serious” or where the property given or accepted is “relatively large”. The CLPRC does not explain what is meant by “serious circumstances” or what is a “relatively large” amount; it therefore appears that the value or the results of the bribe affect whether the offence has been committed. Furthermore, it has been reported that courts will only accept bribery cases involving bribes of high value.⁸ These features are inconsistent with international standards.

The CLPRC expressly provides for the defence of “effective regret”. Under Articles 390 and 392, any briber who voluntarily confesses his/her act of offering bribes before he/she is investigated for criminal responsibility may be given a mitigated punishment or exempted from punishment. The availability of the defence does not appear to require the briber to voluntarily come forward and report his/her acts to the authorities, nor does it require the briber to testify. The CLPRC does not expressly provide for the defence of “small facilitation payments” (e.g. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits); however, this defence may apply given that the offences under Articles 387, 389, 392 and 393 only take place where the property given or accepted is “relatively large” or if the “circumstances are serious”.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

China has not criminalised the bribery of officials of foreign countries or public international organisations in the conduct of international business; the

CLPRC does not include foreign officials in its definition of “State functionary”. This does not meet the mandatory requirement for such criminalisation under Article 16(1) of the UNCAC.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

P.R. China can impose criminal liability against legal persons, including for bribery. Section 4 of the CLPRC covers “Crimes Committed by a Unit”, in which Article 30 states that “any company, enterprise, institution, State organ, or organization that commits an act that endangers society, which is prescribed by law as a crime committed by a unit, shall bear criminal responsibility”. Article 31 further states that “where a unit commits a crime, it shall be fined, and the persons who are directly in charge and the persons who are directly responsible shall bear criminal responsibility”. Articles 391 and 393 of the CLPRC respectively criminalise the giving and offering of bribes by a unit.

It has been proposed that a unit crime is committed as a result of a decision made by the unit collectively or by a person in a position of responsibility, and reflects the will of the unit.⁹ The criminal acts of ordinary employees will therefore not amount to a unit crime, which is confined to the acts of senior and relatively senior management, such as the chairman of the board, general manager, or factory director.¹⁰ Article 31 of the CLPRC also refers to the dual punishment system of the offence, in which the unit shall be fined and the persons in charge or directly responsible be held criminally liable. In this regard, it has been asserted that “if a unit, as an independent subject of a crime and of its own will, commits a crime which seriously endangers society, the unit ought to receive criminal punishment. At the same time, the intention of committing the crime and the act of endangering society shall be deemed to be conscious actions by the person who is responsible within the unit. If no person is responsible, there is no crime committed by a unit.”¹¹ The proposition that a unit crime can also be committed as a result of a decision made by the unit collectively is different and appears to be an aggregate form of identification in which the acts of a number of individuals can be found to have a collective *mens rea* imputable to the unit.¹²

An effective regime of liability of legal persons for bribery must address these limitations. The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.¹³ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

The liability of legal persons in P.R. China meets the minimum standards outlined above by including senior management and relatively senior management as persons in positions of responsibility. However, it is unclear whether P.R. China's corporate liability regime would also cover situations where persons in a position of responsibility knowingly failed to prevent an employee from committing bribery, or if the lack of supervision or control by such persons made the commission of the crime possible. It is also unclear whether corporate liability depends on the conviction of a natural person for the crime.

JURISDICTION TO PROSECUTE BRIBERY

Under Article 6 of CLPRC, P.R. China has jurisdiction over bribery offences committed within its territory. Article 6 further states that "if a criminal act or its consequence takes place within the territory or territorial waters or space of P.R. China, the crime shall be deemed to have been committed within the territory and territorial waters and space of P.R. China". It is unclear whether territorial jurisdiction is extended to offences which only partly take place in P.R. China.

P.R. China's penal provisions also provide for nationality jurisdiction. Under Article 7, the CLPRC shall be applicable to any citizen of P.R. China who commits a prescribed crime outside of P.R. China. However, if the maximum punishment to be imposed is a fixed-term imprisonment of not more than three years, he/she may be exempted from investigation for criminal responsibility. Article 7 also expressly refers to jurisdiction over criminal acts committed by State functionaries and servicemen. The term "citizen" is undefined in the CLPRC and it is therefore unclear whether nationality jurisdiction is extended to cover legal persons for bribery.

SANCTIONS FOR BRIBERY

There are a number of sanctions for the passive bribery offence under Article 385 of the CLPRC, ranging from a minimum term of imprisonment of one year or criminal detention, to the death penalty. The level of punishment depends on the amount of money or property accepted and the seriousness of the circumstances. The following table outlines the sanctions for the offences under Article 385. The same sanctions apply for the passive bribery offence under Article 388.

Amount of money or property accepted as bribes	Term of imprisonment	Confiscation of property	Administrative (disciplinary sanctions)
Less than CNY 5 000 (approx. USD 730 or EUR 500)	Not more than two years or criminal detention, if circumstances are relatively serious.	n/a	Yes, if circumstances are relatively minor, only subject to administrative sanctions at discretion of work unit or competent authorities.
At least CNY 5 000 (approx. USD 730 or EUR 500) but less than CNY 50 000 (approx. USD 7 000 or EUR 5 000)	Not less than one year but not more than seven years; not less than seven years but no more than ten years if circumstances are serious.	n/a	Yes, possibility of exemption from criminal punishment but subject to administrative sanctions.
At least CNY 50 000 (approx. USD 7 000 or EUR 5 000) but less than CNY 100 000 (approx. USD 14 600 or EUR 10 200)	Not less than five years; life imprisonment if circumstances are especially serious.	Mandatory if circumstances are serious; otherwise discretionary.	n/a

At least CNY 100 000 (approx. USD 14 600 or EUR 10 200)	Not less than ten years or life imprisonment; death penalty if circumstances are especially serious.	Mandatory if circumstances are serious; otherwise discretionary.	n/a
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The passive bribery offence committed by a State organ, State-owned company, enterprise, institution or people's organization under Article 387 is punishable by a fixed-term imprisonment of not more than five years or criminal detention for those persons directly in charge and directly responsible.

Article 390 of the CLPRC prescribes the punishment for the active bribery offence under Article 389 as a fixed-term imprisonment of not more than five years or criminal detention; if the circumstances are serious or if heavy losses are caused to the interests of the State, the punishment is a minimum fixed-term imprisonment of five years and a maximum of ten years. If the circumstances are "especially serious", the punishment is a minimum fixed-term imprisonment of ten years or life imprisonment, and the offender may also be subject to confiscation of property. The active bribery offences under Article 391 and 392 are punishable by a fixed-term imprisonment of not more than three years or criminal detention. The natural persons responsible for the offence under Article 393, where a unit or legal person offers bribes, are punishable by a fixed-term imprisonment of not more than five years or criminal detention. As discussed earlier, the legal person is subject to a fine.

Confiscation is provided for under Articles 64 and 191 of the CLPRC, which allow for confiscation of illegal proceeds, property or interest derived from illegal proceeds, laundered assets, and the instrumentalities for committing an offence. The confiscation of property is framed as a discretionary sanction unless the circumstances are "especially serious". As noted earlier, the CLPRC does not outline what factors are taken into consideration in determining whether the circumstances are "serious" or "especially serious". It is also unclear whether fines of equivalent value to the property subject to confiscation are imposed if, for example, the bribe or the proceeds thereof have disappeared.

The sanctions under Articles 385 and 388 also make provision for administrative sanctions but it is unclear what forms of administrative sanctions are imposed and whether they include, for example, debarment from public procurement. A blacklisting system aimed at business and individuals convicted of bribery and corruption has reportedly been established in Zhejiang province,

but it is unclear whether similar systems are in place in other regions.¹⁴ The Ministry of Supervision is the main body responsible for the discipline of officials. In general, government officials are subject to the disciplinary provisions of the Administrative Supervision Law (ASL),¹⁵ which lists a number of administrative (disciplinary) sanctions ranging from a warning to a discharge from employment. Article 24 of the ASL also provides that money and goods obtained through the violation of administrative discipline should be confiscated, recovered, or ordered to return or compensate. Members of the Communist Party of China (CPC) are also subject to specific disciplinary sanctions, which are enforced by the CPC Central Commission for Discipline Inspection. As a part of the 2008-2012 *Work Plan to Establish and Complete A System of Punishing and Preventing Corruption*, P.R. China supplemented the rules in the *Regulations on Disciplinary Punishment for Members of the Communist Party of China* and the *Regulations on Punishment for Public Servants in Administrative Agencies* to improve the system of punishment for cases of violation of discipline, but the *Work Plan* does not specify the nature of these supplemented sanctions and the circumstances under which they will be imposed.¹⁶ Potentially, the CPC Central Commission for Discipline Inspection could impose severe penalties on state-owned and controlled companies for commercial bribery.¹⁷

TOOLS FOR INVESTIGATING BRIBERY

The General Bureau Against Corruption within the Supreme People's Procuratorate is the main body charged with investigating and prosecuting acts of corruption in P.R. China. The Ministry of Public Security provides assistance to the General Bureau Against Corruption and is responsible for the investigation of commercial bribery. In addition to the Supreme People's Procuratorate, there are also provincial, municipal and county procuratorates. The responsibility of the procuratorates for the investigation of corruption cases is an exception to the rule that criminal investigations in China are conducted by the police under the Ministry of Public Security. However, for technically difficult investigations, the anti-corruption bureaus of the procuratorates are supported by the Ministry of Public Security's specialised Economic Crime Investigation Department.¹⁸

The tools available for criminal investigations (including bribery) are set out under the Criminal Procedure Law of P.R. China (CPL). Sections 5 and 6 provide for general powers of search and seizure. Articles 114 and 158 of the CPL allow seizure of evidence that may be required to prove guilt or innocence of an individual. Article 114 broadly provides for the seizure of "all articles and documents found in the course of an inquest and search" which are relevant to

the case. Article 116 provides for the seizure of mail and telegrams of a suspect.

Article 117 of the CPL empowers the procuratorates to inquire into or freeze the deposit savings or money order of a suspect. It is unclear whether this allows investigators to inquire into all relevant banking information, such as account-opening information, client correspondence and instructions, account statements, etc. It is also unclear whether investigators can freeze real property or company shares. Financial sector secrecy provisions under the Law on Commercial Banks are overruled for law enforcement investigations and prosecutorial actions.¹⁹

There are no express provisions in the CPL for special investigative techniques, such as wiretapping, secret surveillance, or undercover police operations. It is also uncertain whether the procuratorates can engage in other forms of covert operations, such as “sting operations”, where members of law enforcement offer the suspect an opportunity to commit a crime in order to gather evidence, or the use of “controlled deliveries”, in which a pre-arranged delivery of money is delivered to the suspect in a monitored setting in order to identify the persons involved in the commission of an offence. There are also no express provisions on plea negotiations, immunity and sentence reduction mechanisms or the use of co-operative informants, and it is not clear whether such tools are used in practice.

International assistance is available for investigating bribery. According to Article 17 of the CPL, China can provide mutual legal assistance (MLA) on the basis of bilateral MLA treaties and international conventions that China is a party to or, in the absence of a treaty, on the basis of reciprocity. The following types of judicial assistance in criminal matters are covered under the MLA regime:

- (a) serving documents;
- (b) taking testimony or statements of persons;
- (c) providing originals, certified copies or photocopies of documents, records or articles of evidence;
- (d) obtaining and providing expert evaluations;
- (e) making persons available to give evidence or assist in investigations;
- (f) locating or identifying persons;

- (g) executing requests for inquiry, searches, freezing and seizures of evidence;
- (h) assisting in forfeiture proceedings;
- (i) transferring persons in custody for giving evidence or assisting in investigations; and
- (j) any other form of assistance which is not contrary to the laws in the territory of the requested party.

The provisions in the CPL on proceeds of crime in domestic investigations apply equally to incoming MLA requests.

P.R. China can provide extradition for bribery offences. However, P.R. China does not extradite its nationals and dual criminality is required to provide assistance in response to an extradition request. The offence is extraditable only if the conduct amounts to a criminal offence that is punishable by at least one year's imprisonment in both P.R. China and the requesting state. Most of the bribery offences in P.R. China meet this minimum penalty threshold.²⁰ There are no express provisions on P.R. China's ability to seek extradition, but it appears to be possible on the basis of reciprocity and the imposition of the same conditions (subject to any legal preconditions or restrictions in any applicable treaty or foreign legislation).

ENFORCEMENT OF BRIBERY OFFENCES

In addition to the investigative powers of its General Bureau Against Corruption, the Supreme People's Procuratorate is also responsible for the prosecution of bribery offences. As noted above, the Ministry of Supervision and the CPC Central Commission for Discipline Inspection are responsible for the enforcement of administrative discipline.

Specific statistics on the number of bribery investigations, prosecutions, convictions and sanctions (including confiscation) are not available.

RECOMMENDATIONS FOR A WAY FORWARD

P.R. China's scheme for criminalising bribery is rigorous and meets many aspects of international standards. To further strengthen its bribery laws and enhance compatibility with international standards, P.R. China could consider addressing the following issues.

Elements of the Active and Passive Bribery Offences

The CLPRC importantly covers both active and passive domestic bribery, and provides a broad definition of “State functionary”, which also includes State organs, State-owned companies, enterprises, institutions and people’s organisations.

To improve its bribery offences, P.R. China could consider addressing the following issues:

- (a) Specific language covering all three forms of committing active domestic bribery – namely, the offering, giving and promising of a bribe;
- (b) Specific language covering the requesting, soliciting and receiving of a bribe under the passive domestic bribery offence;
- (c) Express language covering additional modes of committing bribery, such as bribery through an intermediary, and third party beneficiaries;
- (d) More specific language defining the nature of the bribe and covering both pecuniary and non-pecuniary bribes, and removing any preconditions on the value or results of the bribe;
- (e) Express language covering a broad range of acts and omissions performed by a public official in return for a bribe;
- (f) Incomplete offences, such as when a bribe is offered to but not received by an official, or when an official rejects a bribe.

Bribery of Foreign Public Officials

P.R. China does not currently criminalise active or passive foreign bribery. To meet international standards, P.R. China should consider adopting a specific offence criminalising bribery of officials of foreign countries and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Commensurate with international standards, the CLPRC provides for corporate liability for bribery. However, it is unclear how the “persons directly in charge or responsible for the crime” are identified. To improve the effectiveness

of its liability of legal persons regime, P.R. China could consider clarifying the following issues:

- (a) Whether its system for imposing corporate liability takes one of two approaches:
 - (i) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects a wide variety of decision-making systems in legal persons.
 - (ii) Alternatively, liability is triggered when persons with the highest level of managerial authority (1) offer, promise or give a bribe to an official; (2) direct or authorise a lower level person to offer, promise or give a bribe to an official; or (3) fail to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.
- (b) Whether corporate liability depends on the conviction of a natural person for the crime;
- (c) Liability for bribery committed as a result of a decision made by the unit collectively.

Jurisdiction for Prosecuting Bribery

P.R. China has territorial and nationality jurisdiction for prosecuting bribery. To ensure its overall jurisdictional basis is sufficiently broad, P.R. China could consider extending nationality jurisdiction to cover legal persons.

Sanctions for Bribery

P.R. China has a detailed sanctions regime for punishing bribery based on the amount of money or property accepted as bribes and the seriousness of the circumstances. To further strengthen its sanctions regime for bribery, P.R. China may wish to clarify the following issues:

- (a) The factors taken into account in determining the “seriousness of the circumstances”;
- (b) Express language making mandatory the confiscation of the proceeds of bribery;

- (c) Express language providing for imposition of fines of equivalent value to the property subject to confiscation if, for example, the bribe or proceeds thereof have disappeared;
- (d) The provision of administrative (disciplinary) sanctions and the availability of blacklisting and debarment from public procurement.

Tools for Investigating Bribery

There are a number of tools available for the investigation of bribery in P.R. China. Law enforcement investigations also override financial sector secrecy provisions. However, P.R. China could improve its ability to investigate bribery cases by addressing the following issues:

- (a) The availability of special investigative techniques such as wiretapping and secret surveillance, and the ability to engage in covert operations such as “sting” operations or the use of “controlled deliveries”;
- (b) Formalising in writing practices (if they exist) such as plea negotiations with a defendant, reliance on co-operative informants or witnesses, and granting immunity from prosecution to persons who co-operate in corruption investigations or prosecutions.

Enforcement

Statistics are crucial in determining whether a scheme criminalising bribery is effective. P.R. China should endeavour to maintain detailed information on the number of bribery investigations, prosecutions, convictions and sanctions (including confiscation).

RELEVANT LAWS AND DOCUMENTATION

Criminal Law of the People’s Republic of China: english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100050381.html

Criminal Procedure Law of the People’s Republic of China: english.mofcom.gov.cn/article/lawsdata/chineselaw/200211/20021100053376.html

Supreme People’s Procuratorate: www.gov.cn/english/links/supremeprocuratorate.htm

Ministry of Supervision: www.gov.cn/english/2005-10/03/content_74320.htm

NOTES

- ¹ See Allen & Overy LLP (2008), *Navigating China's New Anti-Bribery Measures*, Allen & Overy LLP, December 2008, at p. 2, available at: www.allenoverly.com/AOWeb/binaries/49632.PDF
- ² Supreme People's Court and the Supreme People's Procuratorate (2007), *Opinions of the Supreme People's Court and the Supreme People's Procuratorate on Issues concerning the Application of Law in the Handling of Criminal cases Involving the Acceptance of Bribes*, Supreme People's Court and the Supreme People's Procuratorate, People's Republic of China, 2007, at Section VI.: Accepting Bribery Through the Specific Concerned Person(s).
- ³ *Ibid.* Section VI.
- ⁴ See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ⁵ See: Zhihui Zhang & Caiwei (2004), "Chine/China", *Revue Internationale de Droit Pénal*, Vol. 74, Association Internationale de Droit Pénale, France, at pp. 157-158.
- ⁶ See also: Zhihui Zhang & Caiwei (2004), *supra* note 3, at p. 158, who assert: "The target of the crimes of bribery is money and property; the benefits, which are not money or property, cannot be the target or crimes of bribery".
- ⁷ *Ibid.*, p.158.
- ⁸ See: Yanfen, Qian (2009), "All industries to have bribery "black list" in Zhejiang," *China Daily*, 1 September 2009, www.chinadaily.com.cn/china/2009-09/01/content_8640302.htm.
- ⁹ Jiachen, L. (1999), "The Legislation and Judicial Practice on Punishment of Unit Crimes in China", *Criminal Responsibility of Legal and Collective Entities*, eds. Eser, Heine and Huber, 1999, as cited in Allens Arthur Robinson LLP (2008), *Corporate Culture as a Basis for the Criminal Liability of Corporations*, Allens Arthur Robison, 2008, pp. 51.
- ¹⁰ *Ibid.*, p. 52.
- ¹¹ Jiachen, L. (2008), *supra* note 9, at pp. 52-53.
- ¹² As interpreted by: Allens Arthur Robinson (2008), *supra* note 9, at p. 52.
- ¹³ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ¹⁴ See: Yanfen, Qian (2009), "All industries to have bribery "black list" in Zhejiang," *China Daily*, 1 September 2009, available at: www.chinadaily.com.cn/china/2009-09/01/content_8640302.htm.

- ¹⁵ See: Jianlin, B. (2003), “The Application of Criminal Procedural Principles in Discipline Procedure in China”, *International Review of Penal Law*, Vol. 74, International Association of Penal Law, at p. 841.
- ¹⁶ P.R. China (2008), *2008-2012 Work Plan to Establish and Complete a System of Punishing and Preventing Corruption*, P.R. China, at p. 23.
- ¹⁷ See: CCTV (2009), “Campaign Launched Against Commercial Bribery”, *CCTV*, 26 November 2009, available at: english.cctv.com/program/chinatoday/20091126/101258.shtml
- ¹⁸ OECD (2005), *China in the Global Economy: Governance in China*, OECD, Paris, pp. 113-114.
- ¹⁹ FATF (2007), *First Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: People’s Republic of China*, FATF, Paris, June 2007, p. 139.
- ²⁰ Extradition Law of the People’s Republic of China (Order of the President No. 42), Article 7.

Criminalisation of Bribery in Cook Islands

Crimes Act
(Pacific Islands Legal Information
Institute - www.paclii.org)

Section 110 (Interpretation)

In this Part of this Act, unless the context otherwise requires,-

"Bribe" means any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect;

"Judicial officer" means a Judge or Commissioner of any Court, Coroner, or Justice, or any other person holding any judicial office, or any person who is a member of any tribunal authorised by law to take evidence on oath;

"Law enforcement officer" means any constable or any person employed in the detection or prosecution or punishment of offenders;

"Official" means any person in the service of Her Majesty in right of New Zealand in the Cook Islands (whether that service is honorary or not, and whether it is within or outside the Cook Islands), or any member or employee of any Island Council.

Section 116 (Corruption and bribery of official)

(1) Every official is liable to imprisonment for a term not exceeding seven years who, whether within the Cook Islands or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his official capacity.

(2) Every one is liable to imprisonment for a term not exceeding three years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any official in respect of any act or omission by him in his official capacity.

INTRODUCTION

The Cook Islands is self-governing and in free association with New Zealand. It has full constitutional authority to enter into international

arrangements and treaties. The Government of the Cook Islands can also request the New Zealand Government to extend ratification of international conventions to the Cook Islands. The Cook Islands has been a member of the APG since 2001. The Cook Islands' legal system is based on English common law. It is not a State Party to UNCAC as of May 2010. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

The Cook Islands' general active and passive domestic bribery offences are found in the Crimes Act. In addition, active and passive domestic bribery may also be covered by the Secret Commissions Act 1994-95. In general terms, the Act prohibits the giving and receiving of secret commissions or kickbacks by officials. This report will focus on the Crimes Act offences but may refer to the Secret Commissions Act where appropriate.

The Crimes Act deals with active and passive domestic bribery through 12 separate, overlapping offences. The general offence of bribing an "official" is found in Section 116. The remaining Sections 111-115 contain several additional offences of bribery of different types of officials, namely judicial officers, Registrars and Deputy Registrars of courts, Government Ministers, members of the Executive Council, members of the Legislative Assembly, and law enforcement officers. Bribery of many of these enumerated officials will be caught by both the general offence in Section 116 and one or more of the specific offences in Sections 111-115. This brings into application Section 9(3) Crimes Act, which provides that "Where an act or omission constitutes an offence under two or more provisions of [the Crimes Act], the offender may be prosecuted and punished under any one of those provisions".

There is additional overlap for bribery of judicial officials. Section 111(1) covers passive bribery of "judicial officers" for any "act done or omitted". Section 111(2) covers passive bribery of "judicial officers" for any "act done or omitted ... *not being an act or omission to which [Section 111(1)] applies.*" Section 111(2) is thus meant to catch passive judicial bribery not covered by Section 111(1). However, it is difficult to imagine when this would ever arise, given the practically identical wording of the two provisions. The question of which offence operates is important because they carry significantly different maximum penalties. A similar issue arises for the offences of giving a bribe to any person with intent to influence a judicial officer in Sections 112(1) and 112(2).

Regarding the different modes of committing bribery, the Crimes Act active domestic bribery offences expressly cover a person who "gives or offers

or agrees to give” a bribe. A promise to bribe is not expressly covered, nor is there case law to confirm that it is covered. There is also no case law to clarify whether the offences cover bribes that are made but not received, and bribes that are rejected by an official. On the passive bribery side, the Crimes Act offences expressly cover a person who “accepts or obtains, or agrees or offers to accept or attempts to obtain” a bribe. Requesting or soliciting a bribe is not expressly covered but may be covered by an “offer to accept” a bribe.

The Crimes Act bribery domestic offences cover bribes provided to third party beneficiaries. The passive bribery offences cover an official who accepts, obtains etc. any bribe “for himself or any other person”. The active bribery offences cover the giving, offering etc. of any bribe “to any person”, which implicitly covers someone other than the public official in question.

Less clear is bribery through intermediaries. None of the domestic bribery offences contain express language to this effect, e.g. the bribe is given “to an official or an intermediary” or “directly or indirectly”. Case law was not available to confirm whether bribery through intermediaries are covered.

International standards require bribery offences to cover a broad range of public officials, namely any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.¹

The Crimes Act bribery offences collectively cover bribery of several types of officials. The general bribery offence in Crimes Act Section 116 covers bribery of a person “in the service of Her Majesty in right of New Zealand in the Cook Islands (whether that service is honorary or not, and whether it is within or outside the Cook Islands), or any member or employee of any Island Council” (Crimes Act Section 110). According to Cook Islands authorities, the offence covers officials such as those of the Cook Islands Financial Intelligence Unit (CIFIU), tax authorities, and customs authorities. The additional specific bribery offences cover particular types of officials including: a “judicial officer”, which is defined as “a Judge or Commissioner of any Court, Coroner, or Justice, or any other person holding any judicial office, or any person who is a member of any tribunal authorised by law to take evidence on oath” (Sections 110 and 112); a law enforcement officer (Sections 110 and 115); a Minister or a member of the Executive Council (Section 113); and a member of the Legislative Assembly (Section 114).

Nevertheless, the Crimes Act offences fall short of international standards in some respects. Notably missing from the Crimes Act offences is bribery of persons performing a public function for a public enterprise or provides a public service. In addition, the coverage of persons performing public functions for a public agency is unclear: the Crimes Act offences do not expressly refer to such individuals, and case law is not available to clarify this point.

International standards also require broad coverage of acts or omissions in relation to the performance of official duties. The Crimes Act domestic bribery offences are much more limited, as they only cover bribery of officials in respect of an act or omission by the official in his/her capacity as an official. The offences thus do not appear to cover any use of the public official's position or office, or acts or omissions outside the official's competence.²

Concerning the requisite mental element, the Crimes Act domestic bribery offences require a bribe to be given, accepted etc. "corruptly", an undefined term. Cook Island jurisprudence offers inconsistent interpretations of "corruptly". One case observed that interpretation of the term "has been a judicial task of some difficulty." Courts have variously noted that the concept does not mean "dishonestly but the doing purposely of an act forbidden as tending to corrupt", or an intention to influence a person. Others have suggested that the definition of the term depends on local traditions on hospitality. At least one case considers that the term "does nothing to add to the definition. It is tautology."³

Other jurisdictions have experienced similar uncertainty with the notion of "corruptly". The same word was found in U.K. criminal statutes on corruption.⁴ U.K. case authorities interpreting this term were unclear and in "impressive disarray". Some interpreted "corruptly" to mean "doing an act that the law forbids as tending to corrupt", while others required further proof that the accused acted dishonestly.⁵ Recent reform proposals in the U.K. by the Law Commission, the Government and a Parliamentary Joint Committee all favour eliminating the concept of "corruptly".⁶ The new bribery offences in the U.K. Bribery Act 2010 accordingly does not require an advantage to be given "corruptly". For similar reasons, the OECD Working Group on Bribery has also recommended that another country replace the term "corruptly" in its foreign bribery offence with a clearer concept.⁷

The Crimes Act domestic bribery offences likely cover both pecuniary and non-pecuniary bribes. A "bribe" is defined as "any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect". This definition, particularly the reference to "any benefit", should cover non-pecuniary advantages. It is unclear, however, whether the definition of a bribe is

affected by the value of the bribe, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best-qualified bidder. As noted above, Cook Island courts have held that the definition of “corruptly” may allow the payment of advantages acceptable or tolerated under local customs to be considered legal.

The Crimes Act domestic bribery offences do not contain specific defences to bribery. There are no express defences of small facilitation payments, solicitation or “effective regret”. As with the payment of advantages acceptable or tolerated under local customs, the concept of “corruptly” could conceivably permit small facilitation payments.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

Foreign bribery is not an offence in the Cook Islands. Criminal Law Section 110 defines “officials” as “any person in the service of Her Majesty in right of New Zealand in the Cook Islands (whether that service is honorary or not, and whether it is within or outside the Cook Islands), or any member or employee of any Island Council.” This definition clearly does not cover officials of foreign governments or public international organisations.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Legal persons may be liable for the Crimes Act domestic active bribery offences. Section 2 of the Act defines a “person” to include “the Crown and any public body or Island Council, and any board, society, or company, and any other body of persons, whether incorporated or not”.

Whether and how corporate criminal liability for bribery would be imposed in practice is wholly unclear. There is no reported case law in which a company has been prosecuted of a criminal offence. Nothing in the Crimes Act indicates when a company is considered to have committed a crime. There is no guidance on when the acts or omissions of a natural person may be attributed to a legal person, or whose acts or omissions may trigger liability, or whether the conviction of a natural person is a prerequisite to convicting a legal person. Furthermore, the Crimes Act active bribery offences are punishable only by imprisonment; fines are not available.⁸ It is thus not clear what the penalty for legal persons would be.

Should Cook Island courts be confronted with the issue of liability of legal persons, they may well apply U.K. or New Zealand case law, given the territory’s common law history. The leading case is the well-known U.K. House of Lords decision in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153. The

principle is commonly known as the “identification” doctrine. Under *Tesco*, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company’s “directing mind and will”.⁹

The limits of the identification doctrine in cases of complex corporate crimes such as bribery are now well-documented. Prosecutors, law enforcement officials, and academics in the U.K. have denounced the *Tesco* regime as ineffective and unsatisfactory for bribery offences. The problem is at least three-fold. First, the identification theory requires guilty intent to be attributed to a very senior person in the company. Liability is unlikely to arise when bribery is committed by a regional manager or even relatively senior management, let alone a salesperson or agent, even if the company benefitted from the crime. Second, there is also no liability even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, the identification theory requires the requisite criminal intent to be found in a single person with the directing mind and will; aggregating the states of mind of several persons in the company will not suffice. This ignores the realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.¹⁰

An effective regime of liability of legal persons for bribery must address these limitations. The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.¹¹ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

Territorial jurisdiction to prosecute bribery is provided under Section 4(2), which states that the Crimes Act applies to “all acts done or omitted in the Cook Islands”. It is unclear whether this provision covers an offence that takes place partly in the Cook Islands, e.g. when a briber in the Cook Islands calls an official to arrange a meeting outside of Cook Islands, and then gives a bribe to the official during the meeting.

Crimes Act Section 7A provides extraterritorial jurisdiction to prosecute bribery that occurs wholly outside the Cook Islands. The provision applies if the offender is ordinarily resident in the Cook Islands, or has been found in the Cook Islands and has not been extradited. Extraterritorial jurisdiction is also available “if a person in respect of whom the offence is alleged to have been committed is ordinarily resident in the Cook Islands.” It is unclear whether this provision could be used to prosecute a person who is not resident in the Cook Islands and who bribes a Cook Island official extraterritorially.

There is extraterritorial jurisdiction to prosecute at least some legal persons. Section 7A provides jurisdiction to prosecute “a body corporate, or a corporation sole, incorporated under the law of the Cook Islands”. This provision is narrower than the range of legal persons covered by the bribery offences in Sections 111-116, which covers “any board, society ... and any other body of persons, whether incorporated or not”.

SANCTIONS FOR BRIBERY

Domestic bribery committed by natural persons in the Cook Islands is punishable by the following maximum sanctions:

Offence	Maximum sentence available
Passive bribery by a judicial officer (Section 111(1))	14 years' imprisonment
Passive bribery by a judicial officer, or Registrar or Deputy Registry of any court (Section 111(2))	7 years' imprisonment
Active bribery by a judicial officer (Section 111(1))	7 years' imprisonment
Active bribery by a judicial officer, or Registrar or Deputy Registry of any court (Section 111(2))	5 years' imprisonment
Passive bribery of a Minister of the Crown or member of the Executive Council	14 years' imprisonment

Offence	Maximum sentence available
Active bribery of a Minister of the Crown or member of the Executive Council	7 years' imprisonment
Passive bribery of a member of the Legislative Council	7 years' imprisonment
Active bribery of a member of the Legislative Council	3 years' imprisonment
Passive bribery of a law enforcement officer	7 years' imprisonment
Active bribery of a law enforcement officer	3 years' imprisonment
Passive bribery of an official	7 years' imprisonment
Active bribery of an official	3 years' imprisonment

The maximum punishment available for legal persons is unclear, since the Crimes Act only provides for sentences of imprisonment.

The Proceeds of Crime Act (POCA) allows confiscation of proceeds of bribery, but the definition of “proceeds” may limit the availability of this sanction. Upon conviction for bribery, a court shall order forfeiture of “tainted property”, which is defined as (a) property used or intended to be used in, or in connection with, the offence (essentially instrumentalities of crime), or (b) “proceeds” of that offence. “Proceeds” is in turn defined – rather unusually – as “property into which any property derived or realized directly from a serious offence was later successively converted, transformed or intermingled, as well as income, capital or other economic gains derived or realized from such property at any time since the commission of the offence”. This definition covers only “indirect” proceeds (i.e. property into which “direct” proceeds was later successively converted, transformed or intermingled). It excludes “direct” proceeds of crime (i.e. property derived or realised directly from crime).¹² In sum, a court may therefore forfeit a bribe and the indirect proceeds of bribery, but not the direct proceeds.

Where confiscation is not possible or practicable, a court has two options. First, a court may order a person to pay an amount equal to the value of the property subject to forfeiture if the property (a) cannot be found; (b) has been transferred to a *bona fide* third party; (c) is located outside the Cook Islands; or (d) has been mingled with other property (POCA Section 23). Second, a court may impose a pecuniary penalty order in an amount equal to the benefit from the offence accruing to the offender (POCA Section 26).

The availability of confiscation against legal persons is unclear. Unlike the Crimes Act, the POCA does not define “persons” to include legal persons.

A person who has been convicted of active and passive domestic bribery is barred from being a member of Parliament for five years (Constitution Section 28B(1)(d)). Information was not available on whether additional administrative sanctions (*e.g.* debarment from seeking procurement contracts) are available for bribery.

TOOLS FOR INVESTIGATING BRIBERY

The Criminal Procedure Act provides only limited investigative means for bribery cases. Section 96 allows a court to issue a warrant to search and seize anything in respect of an offence, including evidence of an offence and anything that is intended to be used to commit an offence.

The POCA provides a much wider range of investigative tools in bribery cases. A court may issue production orders allowing bribery investigators to obtain documents relevant to identifying, locating, quantifying or tracing a suspect's property or any "tainted property". A production order overrides any law that prohibits disclosure of information (POCA Sections 79-80). An order could thus be used to obtain relevant financial and other information from financial institutions, though the definition of "tainted property" noted above could limit the usefulness of this tool. In addition, the APG questioned the availability of information relating to international trusts.¹³ A court may also issue a search warrant for a relevant document, or for tainted property itself (POCA Sections 35 and 85). Finally, a court may issue a monitoring order that would require a financial institution to provide information about transactions conducted during a particular period through an account held by a particular person (POCA Section 87).

To obtain information from the tax and other government authorities, the POCA allows the Solicitor General to direct the release of information or documents in the possession or control of a Government department or statutory body. This power to demand information or documents overrides any other applicable law (POCA Section 93). This presumably would override any laws concerning tax secrecy. It should be noted, however, that it is the Solicitor-General, not investigators or prosecutors, who has the power to order production.

POCA Section 50 also allows for the freezing of property. A court issues a restraining order over "tainted property" if a person has been charged or convicted of bribery, or is reasonably believed to have committed bribery. If the tainted property belongs to that person, then the court may restrain the property if the person derived a benefit directly or indirectly from the commission of the offence.

POCA Section 50 further permits a court to restrain tainted property that is controlled by a defendant but held by another individual, but the APG questioned the scope of this provision. In their view, applications for restraint may only be brought *viz.* “realisable property” (Section 48). For property not held by a defendant, “realisable property” only covers property *gifted* by the defendant to a third party (Section 6). Forms of transfer other than gifts are not covered.¹⁴

Special investigative techniques are largely not available in bribery investigations. The Criminal Procedure Act allows wiretapping and the use of listening devices only in investigations into an offence of participating in a criminal organisation. There are no statutory provisions concerning the use of secret surveillance, video recording, email interception, undercover police operations, or controlled deliveries.

International assistance is available in bribery cases. In order to qualify for the seeking of extradition or mutual legal assistance, an offence must be punishable by death, imprisonment for not less than 12 months, or a fine of more than NZD 5 000 (Extradition Act Section 4(5) and Mutual Assistance in Criminal Matters Act Section 3). All bribery offences thus qualify.¹⁵

There is no information on whether Cook Island authorities may rely on co-operative offenders, informants or witnesses when investigating and prosecuting bribery cases. It is also unclear whether plea bargaining is available for bribery or any other types of criminal offences.

ENFORCEMENT OF BRIBERY OFFENCES

The Cook Islands Police is responsible for criminal bribery investigations, while the Cook Islands Attorney General has conduct of bribery prosecutions.

Prosecutions for the bribery offences in the Crimes Act require prior approval of an official other than a prosecutor. Prosecutions of a Minister, a member of the Executive Council, or a member of the Legislative Assembly require leave of a Judge of the High Court. Notice of the intention to apply for leave must be given to the potential defendant in question. Prosecutions of any other official require the leave of the Attorney-General (or if no such appointment has been made, the Minister of Justice). The Attorney-General may make inquiries before deciding whether to grant leave.¹⁶ As of April 2010, the Attorney-General was also a member of Cabinet.

Statistics on investigations, prosecutions, convictions, and sanctions for passive and active domestic bribery in the Cook Islands are not available.

However, a 2009 APG report noted that “two cases in recent years involved fraud by government Ministers profiting from government purchases.” Another case involved officials misappropriating up to NZD 1.8 million. The report did not refer to any bribery cases. The report also noted that there had been no proceeds of crime investigations and thus no forfeiture of proceeds of crime.¹⁷

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

The Cook Islands’ active and passive domestic bribery offences in the Crimes Act meet many requirements found in international standards, *e.g.* coverage of the different modes of committing the offences and third party beneficiaries. The Cook Islands could strengthen these offences by addressing the following issues:

- (a) The overlapping domestic bribery offences in the Crimes Act;
- (b) Incomplete offences, such as when a briber is offered to but not received by an official, or when an official rejects a bribe;
- (c) Bribery through intermediaries;
- (d) Bribery of any person performing a public function, including for a public agency or public enterprise, or provides a public service;
- (e) Bribery in order that an official use his/her position or office, or performs acts or omissions outside the official’s competence;
- (f) The definition of giving, accepting etc. a bribe “corruptly”; and
- (g) Whether the definition of a bribe is affected by the value of the bribe, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best-qualified bidder.

Bribery of Foreign Public Officials

To bring its criminal bribery offences in line with international standards, the Cook Islands should criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

The Cook Islands may hold corporations criminally liable for bribery under the Penal Code. This provision is commendable, since international standards require legal persons to be held liable for bribery. However, the provision's application in practice is unclear. To improve the effectiveness of this regime, the Cook Islands could consider whether its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

The Cook Islands could also consider addressing whether a legal person would be punished only if the natural person who bribed an official is also convicted.

Jurisdiction for Prosecuting Bribery

The Cook Islands already has territorial and extraterritorial jurisdiction to prosecute domestic bribery. It could consider addressing the following:

- (a) Whether and to what extent there is jurisdiction to prosecute domestic and foreign bribery that occurs partly in the Cook Islands; and
- (b) The scope of extraterritorial jurisdiction for prosecuting legal persons.

Sanctions for Bribery

The maximum available punishment against natural persons for bribery offences is largely in line with international standards. To ensure an effective regime in practice, the Cook Islands could consider addressing:

- (a) Availability of fines for active and passive bribery committed by natural persons;
- (b) Range of fines available against legal persons for active bribery;
- (c) Confiscation of the direct proceeds of bribery accruing to the briber;
- (d) Confiscation against legal persons; and
- (e) Additional administrative sanctions for bribery, such as disbarment from public procurement.

Tools for Investigating Bribery

Cook Island bribery investigators have a range of investigative tools at their disposal, particularly under the Proceeds of Crime Act. The Cook Islands could consider some additional matters:

- (a) The effectiveness of the restraining order provisions in POCA;
- (b) Special investigative techniques in bribery investigations, such as wiretapping, email interception, secret surveillance, video recording, listening and bugging devices, undercover police operations, and controlled deliveries;
- (c) The use of co-operative offenders, informants and witnesses in bribery cases; and
- (d) Plea bargaining in bribery cases.

Enforcement of Bribery Offences

To properly measure the effectiveness of its scheme for criminalisation of bribery, the Cook Islands should maintain statistics on investigations, prosecutions, convictions, and sanctions for passive and active domestic bribery committed by natural and legal persons.

RELEVANT LAWS AND DOCUMENTATION

Crimes Act and other Cook Island legislation and judicial decisions: www.paclii.org

APG (2000), *Mutual Evaluation Report on Cook Islands*: www.apgml.org

NOTES

- ¹ See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ² See OECD Convention, Article 1(4)(c) and Commentary 19.
- ³ These cases deal with the term as used in the Secret Commissions Act 1994-95 and the Electoral Acts 1966 and 2004. See *In re Constituency of Teenui-Mapumai v. Simiona*, [1983] CKHC 10; *Pokoati v. Tetava*, [1978] CKHC 2; *In re Matavera Constituency* [1983] CKHC 5; *Hosking v. Browne*, [1978] CKHC 1; and *Wigmore v. Matapo*, [2005] CKCA 1.
- ⁴ Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Act 1906.
- ⁵ See OECD (1999), *Phase 1 Report: United Kingdom*, Section 1.1.2; U.K. Law Commission (2008), *Reforming Bribery*, para. 2.33; D. Lanham, “Bribery and Corruption”, *Essays in Honour of J C Smith* (1987) 92 at p. 104.
- ⁶ The U.K. Law Commission (2008), *Reforming Bribery* (Law Com No. 313); U.K. Ministry of Justice (March 2009), *Bribery: Draft Legislation*, Cm 7570; Joint Committee on the Draft Bribery Bill (July 2009), *Report on the Draft Bribery Bill*, HL Paper 115-I / HC 430-1.
- ⁷ See OECD (2006), *Phase 2 Report: New Zealand* at paras. 156-161.
- ⁸ Compare with the offence involving indecent documents in the Crimes Act 138, which prescribes a maximum fine for a “body corporate”.
- ⁹ U.K. Law Commission Report, *Reforming Bribery* (2008) at para. 6.26.
- ¹⁰ See U.K. Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ¹¹ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ¹² This was also noted in the Initiative’s previous Thematic Review. See ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (2007), *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 128. See also APG (2009), *Mutual Evaluation Report: Cook Islands*, paras. 186 and 190.
- ¹³ APG (2009), *Mutual Evaluation Report: Cook Islands*, paras. 1137-1138.
- ¹⁴ APG (2009), *Mutual Evaluation Report: Cook Islands*, paras. 192-196.
- ¹⁵ Subject to additional conditions in an applicable treaty.
- ¹⁶ Crimes Act, Sections 113(3), 114(3) and 117.
- ¹⁷ APG (2009), *Mutual Evaluation Report: Cook Islands*, paras. 38 and 218-220.

Criminalisation of Bribery in the Fiji Islands

Prevention of Bribery Promulgation No. 12 of 2007 (From the Fiji Independent Commission against Corruption)

Section 4 Bribery

(1) Any person who, whether in Fiji or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant's –

- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
- (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant's capacity as a public servant; or
- (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body

shall be guilty of an offence.

(2) Any public servant who, whether in Fiji or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his –

- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
- (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by himself or by any other public servant in his or that other public servant's capacity as a public servant; or
- (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body

shall be guilty of an offence.

CRIMES DECREE 2009
(Provided by the Fiji Independent Commission
against Corruption)

Section 134 Bribery of Public Officials

(1) A person commits an indictable offence (which is triable summarily) if —

- (a) the person without lawful authority or reasonable excuse —
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a benefit to another person; or
 - (iv) causes an offer of the provision of a benefit, or a promise of the provision of benefit, to be made to another person; and
- (b) the person does so with the intention of influencing a public official (who may be the other person) in the exercise of the officer's duties as a public official.

Penalty — Imprisonment for 10 years.

(2) In a prosecution for an offence against sub-section (1), it is not necessary to prove that the defendant knew—

- (a) that the official was a public official; or
- (b) that the duties were duties of a public official.

Section 135 Receiving a Bribe

135. — (1) A public official commits an indictable offence (which is triable summarily) if —

- (a) the public official without lawful authority or reasonable excuse —
 - (i) asks for a benefit for himself, herself or another person; or
 - (ii) receives or obtains a benefit for himself, herself or another person; or
 - (iii) agrees to receive or obtain a benefit for himself, herself or

another person; and

(b) the public official does so with the intention —

(i) that the exercise of the official's duties as a public official will be influenced; or

(ii) of inducing, fostering or sustaining a belief that the exercise of the official's duties as a public official will be influenced.

Penalty — Imprisonment for 10 years.

INTRODUCTION

Fiji's legal system is based on the English common law system. It acceded to the UNCAC in May 2008. Fiji's criminal bribery offences were externally reviewed under the UNCAC's Pilot Review Mechanism. Fiji has been a member of the APG since 1998.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Fiji's main bribery offences are found in two statutes, Section 4 of the Prevention of Bribery Promulgation No. 12 of 2007 (POBP), and Sections 134 and 135 of the Crimes Decree 2009 (CD). The offences in the two statutes largely overlap; in many cases, both may be applicable.

Additional criminal offences may apply in bribery cases. At least five other statutes create criminal offences for active and/or passive bribery of specific officials such as parliamentarians and officials in tax, customs, excise and food safety.¹ These offences may further overlap with the bribery offences in the CD and POBP.² These overlapping offences raise the question of which offences apply in a given case. This is of particular importance since these offences may impose different maximum penalties. The Fijian authorities state that the relevant prosecuting body has discretion in deciding with which offence it would proceed. Furthermore, the principle of "double-jeopardy" prevents multiple convictions for the same act. The principle, however, does not require one offence to apply over another. In any event, this report focuses on the main offences in POBP Section 4 and CD Sections 134 and 135 but refers to the additional offences where relevant.

International standards generally require coverage of three modes of active domestic bribery, namely offering, giving, and promising a bribe. POBP Section 4(1) covers the "offering" of a bribe, which is defined in Section 2(2) to

include giving; affording; holding out; and agreeing, undertaking or promising to give, afford or hold out. CD Section 134 covers providing, offering and promising to provide a benefit to an official. Both offences accordingly meet international standards. In addition, the bribery offence in the Customs Act Section 123 covers a person who “endeavours to bribe” an official. Whether this meets international standards is unclear.

As for passive domestic bribery, international standards generally demand coverage of solicitation and acceptance of a bribe. POBP Section 4(2) covers soliciting and accepting an advantage, while CD Section 135 covers asking, receiving, obtaining, and agreeing to receive or obtain a bribe. Both offences accordingly meet international standards.

International standards require coverage of a person who uses an intermediary to offer, give, solicit etc. a bribe. The POBP covers this situation, since the definitions of “offer”, “solicit” and “accept” include actions performed by “any other person acting on [the offender’s] behalf” (POBP Section 2(2)). CD Section 134 covers a person who “causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person”. This covers the giving etc. of a bribe via an intermediary.³ The passive bribery offence is less clear since Section 135 does not contain comparable language.

Effective bribery offences must cover bribes given to a public official for the benefit of a third party, or directly to a third party upon the instructions or agreement of the official. The offences in the POBP and CD meet this requirement. POBP Section 2 covers benefits given, offered etc. “to or for the benefit of or in trust for” an official. CD Section 134 deals with the giving etc. of a benefit to another person with the intention of influencing a public official, who may be the other person. The offence thus contemplates third party beneficiaries since the recipient of the benefit may be someone other than the official. CD Section 135 covers an official who asks etc. for a benefit “for himself, herself or another person”. Third party beneficiaries are therefore also covered. However, the bribery offences in the related statutes fail to explicitly address the issue of third party beneficiaries.

International standards require a broad definition of a “public official”. An offence must cover bribery of any person holding a legislative, executive, administrative or judicial office of a country, whether appointed or elected, permanent or temporary, paid or unpaid, and irrespective of that person’s seniority. The definition must also include any person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of a country.⁴ International standards

thus take essentially a functional approach, i.e. by referring to persons who perform specified functions.

The POBP offence covers bribery of “public servants”, which covers two categories of persons (POBP Section 2(1)). The first is “prescribed officers”, which includes “any person holding an office of emolument, whether permanent or temporary, under the Government”; “any official of the Government appointed by the President or who has sworn an oath of office before the President”; Chairman of the Public Service Commission; staff of the Fiji Independent Commission Against Corruption; a holder of judicial office; a judicial officer appointed by the Chief Justice; and staff of the Judiciary. The second category is “employees of public bodies”. Public bodies are in turn defined as the Government; the Cabinet; the Parliament; any board, commission, committee or other body, whether paid or unpaid, appointed by or on behalf of the President or the Cabinet; and any board, commission, committee or body listed in Schedule 1 of the POBP.

There are some evident shortcomings in the definitions of a “public official” in the POBP. Employees of Parliament are expressly covered, while Parliamentarians are not. This is partially remedied by Section 21 of the Parliamentary Powers and Privileges Act which criminalises passive bribery of Parliamentarians, but active bribery of legislators remains unaddressed.

There is additional general uncertainty over whether the POBP covers all required categories of public officials. As noted above, international standards define a “public official” by referring to the functions performed by a particular person. What matters is what a person does, not the title or position he/she holds. The POBP does precisely the opposite by referring to specific offices or positions, either by name or by specifying certain criteria. Because of this difference in approaches, it is difficult to ensure that the POBP covers all persons who perform the functions as required under international standards.

The CD contains a completely different definition. Sections 134 and 135 apply to bribery of “public officials”, a term defined in CD Section 4 to include the President or Vice President; any person appointed or nominated under an Act, promulgation, decree or by election including Ministers, Members of Parliament and Local Government councillors; any person employed in the public service; a holder of an office under the Constitution; any judge or magistrate or judicial or quasi-judicial office holder; any person who holds or performs the duties of an office established by or under any law; an officer or employee of a government authority or agency; a contract service provider for a government contract, and an officer or employee of such a contract service provider.

The CD definition of a public official is closer to international standards than its counterpart in the POBP, but there may still be deficiencies. The categories of “contract service providers” and their officers or employees may cover some but not all persons who perform a public function, including for a public agency or public enterprise, as required by international standards. The same may be true for persons who provide a public service, as defined in the domestic law of a country.

International standards further require broad coverage of the types of acts that an official performs in exchange for a bribe. Offences must cover bribes in order that an official acts or omits to act in relation to the performance of official duties, including any use of the public official's position or office, and acts or omissions outside the official's competence.⁵

The POBP meets this standard. POBP Section 4 broadly covers a public servant performing or abstaining from performing any act in his/her capacity as a public servant; expediting, delaying, hindering or preventing the performance of an act by that or any other public servant in the capacity of a public servant; and assisting, favouring, hindering or delaying any person in the transaction of any business with a public body. The offence of bribery in relation to government contracts (POBP Section 5) may also apply to acts or omissions outside an official's competence.

On the other hand, the CD does not appear to meet this requirement. CD Sections 134 and 135 only cover bribery in order to influence a public official “in the exercise of the officer's duties as a public official”. The offence therefore does not cover an official who acts outside his/her competence.

The POBP and CD contain a sufficiently broad definition of a bribe. Under CD Section 133, a bribe may be “any advantage including political gain and is not limited to property”. Under POBP Section 2(1), an “advantage” includes money, valuable security, property, office, employment, contract, discharge/release/payment of a loan or liability, service, favour, and the exercise or forbearance from the exercise of any right, power or duty. Both offences therefore cover pecuniary and non-pecuniary advantages. Information was not available on whether the definition of a bribe is affected by its value, results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder.

Regarding defences, the POBP does not expressly contain some defences to bribery that are found in certain jurisdictions, *e.g.* small facilitation payments, solicitation or “effective regret”. The absence of these defences could enhance the effectiveness of the bribery offences. POBP Section 19 also

states that it is not a defence to show that an advantage given “is customary in any profession, trade, vocation, calling or tradition”. This provision only applies to the POBP, which raises the question of whether a defence of customary payments exists for the bribery offences in the CD and other statutes.

Additional defences are available. A person is not guilty of an offence under POBP Sections 4 or CD Sections 134 or 135 if he/she acted with lawful authority or reasonable excuse. The burden of proof is on the accused. “Lawful authority” and “reasonable excuse” are not defined. It is therefore not entirely clear whether these defences allow consideration of factors such as the value of the bribe, its results, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber was the best qualified bidder. The Fijian authorities state that these factors are not considered in deciding whether an offence has been committed, but they may be considered at sentencing.

A defence of consent is also available under POBP Sections 4(3) and (4). A public servant other than a prescribed officer may solicit or accept an advantage if he/she has written permission of the public body by which he/she is employed. The permission must either be granted before the advantage is solicited or accepted, or applied for or obtained as soon as reasonably possible after. International standards do not contemplate such a defence.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

It is not an offence to bribe public officials of foreign governments or public international organisations in the conduct of international business. The definition of officials in the CD and POBP refer only to Fijian public officials. Fiji asserts that the common law offences of bribery and misconduct in public office cover foreign bribery.⁶ In the absence of confirmatory case law, this conclusion appears doubtful.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Fiji may impose liability of legal persons for bribery. The offences in CD Sections 134 and 135, and POBP Section 4 apply to any “persons”. CD Section 4 defines “persons” to include corporations when the term is used with reference to property, but it is unclear whether bribery offences fall into this category. However, the Interpretation Act, Section 2 adds that the term “person” includes “any company or association or body of persons, corporate or unincorporated”. This may be sufficient to establish corporate liability under the POBP and the CD.

Even if corporate liability is available, questions about attribution remain, at least for the POBP. Nothing in the POBP indicates when a company is considered to have committed a crime. There is no guidance on when the acts or omissions of a natural person may be attributed to a legal person, whose acts or omissions may trigger liability, or whether the conviction of a natural person is a prerequisite to convicting a legal person.⁷ There appears to have been no convictions of legal persons for an intentional criminal offence, including bribery.

Should Fijian courts be confronted with the issue of liability of legal persons, they may well apply U.K. case law, given the country's common law history. The leading case is the well-known U.K. House of Lords decision in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153. The principle is commonly known as the "identification" doctrine. Under *Tesco*, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company's "directing mind and will".⁸

The limits of the identification doctrine in cases of complex corporate crimes such as bribery are now well-documented. Prosecutors, law enforcement officials, and academics in the U.K. have denounced the *Tesco* regime as ineffective and unsatisfactory for bribery offences. The problem is at least three-fold. First, the identification theory requires guilty intent be attributed to a very senior person in the company. Liability is unlikely to arise when bribery is committed by a regional manager or even relatively senior management, let alone a salesperson or agent, even if the company benefitted from the crime. Second, there is also no liability even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, the identification theory requires the requisite criminal intent to be found in a single person with the directing mind and will; aggregating the states of mind of several persons in the company will not suffice. This ignores the realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.⁹

The CD, however, is far more robust. Under CD Part 8, a body corporate *must* be attributed with the physical elements of a bribery offence that is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority. A body corporate *must* also be attributed with the fault elements of a bribery offence if it "expressly, tacitly or impliedly authorised or permitted the commission of the offence." The means by which such an authorisation or permission may be established include:

- (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

The company has a defence in the case of a high managerial agent (paragraph (b) above) if the company proves that it used due diligence to prevent the offence. This is not intended to be an exhaustive list of the circumstances in which a body corporate can be held liable for offences committed by employees and agents and a court may apply a stricter basis of liability where it considers it appropriate, such as in cases where the degree of harm and difficulty of detection is a particular problem.

The OECD Working Group on Bribery has considered a similar scheme of corporate liability in a different jurisdiction. While noting that such a scheme on its face may meet international standards, the Working Group also observed that actual prosecutions under the scheme had been limited to regulatory (*e.g.* environmental) offences. The Working Group accordingly decided to follow up the provision's application as practice develops.¹⁰

JURISDICTION TO PROSECUTE BRIBERY

The POBP and CD provide for universal jurisdiction to prosecute domestic bribery. The active and passive bribery offences in POBP Sections 4(1) and 4(2) may be committed "whether in Fiji or elsewhere". For the CD bribery offences, jurisdiction arises whether or not the conduct constituting the alleged offence occurs in Fiji and whether or not a result of the conduct constituting the alleged offence occurs in Fiji. Both statutes go beyond what is required in international standards.

SANCTIONS FOR BRIBERY

The available punishment for Fiji's bribery offences is shown in the table below.

Offence	Maximum available sentence
Prevention of Bribery Promulgation (POBP)	
Active bribery (POBP Section 4(1))	FJD 500 000 (approx. EUR 180 000 or USD 260 000) and 7 years' imprisonment
Passive bribery (POBP Section 4(2))	
Crimes Decree (CD)	
Active bribery (CD Section 134)	10 years' imprisonment and/or an unlimited fine
Passive bribery (CD Section 135)	
Parliamentary Powers and Privileges Act	
Passive bribery of parliamentarians (Section 21)	FJD 400 (approx. EUR 140 or USD 200) and/or 2 years' imprisonment
Customs Act	
Active bribery of customs official (Section 123)	FJD 5 000 (approx. EUR 1 800 or USD 2 600) and/or 2 years' imprisonment
Excise Act	
Passive bribery of excise official (Section 58)	FJD 5 000 (approx. EUR 1 800 or USD 2 600) and/or 3 years' imprisonment

Offence	Maximum available sentence
Income Tax Act	
Passive bribery of tax official (Section 4(2))	FJD 1 000 (approx. EUR 350 or USD 500) and/or 3 years' imprisonment
Food Safety Act	
Active bribery of food safety official (Section 36)	FJD 2 500 (approx. EUR 900 or USD 1 300) or 12 months' imprisonment

These maximum available sentences against natural persons for the bribery offences are generally effective, proportionate and dissuasive, with some notable exceptions. The maximum punishment for passive bribery of parliamentarians, active bribery of food safety officials, and active bribery of customs officials appear to fall below the acceptable threshold.

For legal persons, the maximum sanctions under the POBP may be below international standards. The maximum fine under POBP Section 4 is only FJD 500 000 (approx. EUR 180 000 or USD 260 000). This is likely insufficient for large corporations. The fines under the offences outside the POBP are even lower. The CD, however, allows for unlimited fines.

The Fijian authorities stated that the sanctions imposed for bribery-related offences under the now-repealed Penal Code have ranged from imprisonment 2.5 to 4 years. The maximum fine that has been imposed was FJD 10 000. There have not been any prosecutions under CD Sections 134-137 given the recency of the statute. In 2009, the FICAC charged six bribery cases under the POBP which resulted in three convictions and sentences of six to twelve months imprisonment and fines of FJD 200 to 10 000. In one case, a briber who was a foreign national and a senior manager of a foreign company was sentenced to a FJD 10 000 fine and three years' imprisonment, two of which were suspended.

Confiscation may be difficult for bribery offences under the POBP and the CD. Neither statute contains provisions on confiscation. However, Fiji stated that the court in one POBP case on its own motion confiscated a bribe to the State, payable to the Consolidated Revenue Account.¹¹ This may well set the precedent for the confiscation of bribery proceeds under the POBP.

The Proceeds of Crime Act (POCA) would allow forfeiture in cases of bribery under the POBP and CD. The Act provides for forfeiture upon conviction, civil forfeiture, payment in lieu of forfeiture, and pecuniary penalty orders. A court may order forfeiture of instrumentalities, and direct and indirect proceeds of bribery. However, only the Director of Public Prosecutions (DPP) may apply to a court for forfeiture under the POCA. This creates some practical difficulties, since most bribery prosecutions are conducted by the Fiji Independent Corruption Against Corruption (FICAC), not the DPP. It is therefore not certain that confiscation would be sought in cases under the POBP.

Convictions under the POBP may also disqualify a person from engaging in certain activities. A conviction results in a mandatory ten-year ban on being a Member of Parliament, Cabinet and other listed public bodies. A person who was a company director or manager, a practising professional, or a partner of a firm at the time of the offence may also be prohibited from engaging in those activities for up to seven years (POBP Sections 33 and 33A). It is not clear whether bribers can also be debarred from seeking public procurement contracts.

TOOLS FOR INVESTIGATING BRIBERY

The FICAC is the principal body for investigating bribery cases in Fiji, though the Fiji police and DPP are also competent to investigate and prosecute bribery offences. Several statutes provide investigative tools for bribery cases, but the availability of these tools is compartmentalised. Investigative powers in the CD are available to most investigative agencies, but tools in the FICAC and POCA are available only to the FICAC and DPP respectively.

The FICAC can obtain information and records from financial institutions through production orders. Section 13 POBP allows the Commissioner to order the production of banking, financial and company documents that are relevant to an investigation. Section 50 POCA also allows a police officer to apply for an order to produce “property tracking documents”, which includes relevant banking and financial documents. Bank secrecy rules do not impede the production of relevant documents (POBP Section 13(3) and POCA Section 50(3)).

Tax information is available under a different procedure. Under POBP Section 13A, an FICAC Commissioner or a designate may apply for a Court order to obtain tax records from the tax authorities. A Court may grant the order if there are reasonable grounds to believe that an offence has been committed and that the evidence sought is relevant to the investigation. The Court must also be satisfied that disclosure is in the public interest, having regard to the seriousness of the offence, whether the case could be effectively investigated without the information sought, the benefit that disclosure would likely accrue to the investigation, and the public interest in preserving secrecy. In sum, the Court must engage in a balancing exercise; disclosure is not guaranteed even if the evidence sought is relevant to an investigation. For bribery investigations not conducted by the FICAC, the Criminal Procedure Decree provides a similar mechanism for obtaining tax information, according to Fijian authorities.

The FICAC may also apply for a court order to demand information from an individual, including the target of an investigation (POBP Section 14). An order may require the target of an investigation to provide a statement of his/her property, liabilities and expenses over a certain period of time. An order may also be directed at a third party or a person in charge of a public body who has knowledge of the relevant facts. In addition, POBP Section 16 allows an investigator to seek assistance from any public servant.

Special investigative techniques have been used in bribery cases even though they may be legally unavailable. The Illicit Drugs Control Act allows some investigative tools such as interception of telecommunications, tracking

devices and controlled deliveries. However, these provisions apply only to drug investigations; there are no similar provisions that apply to other crimes such as bribery.

Nevertheless, these techniques have been used in cases not involving illegal drugs. Undercover operations have also been conducted on many occasions for a wide range of non-drug related offences.¹² According to the Fijian authorities, the common law provides the legal basis for special investigative techniques in non-drug cases. For example, the Supreme Court of Fiji in 2009 upheld and approved the use of listening devices used by a prosecution witness who had been approached by a defence counsel to change his testimony in return for money and other benefits. This dependence on the common law as the legal basis for using certain special investigative techniques offers flexibility. However, clear legislation requiring prior judicial authorisation for the use of such techniques would be more effective in protecting individual rights to privacy, and in ensuring that such techniques are used only in appropriate cases.

Bank, financial accounts and other property may be frozen. POBP Section 14C allows a court to issue an order to restrain property (a) in the possession of, (b) under the control of, or (c) is due to the target of an investigation. The CD does not provide for freezing orders, but proceeds of crime may be restrained under the POCA. Under Section 19B, the Director of Public Prosecutions may ask a court to restrain property if there are reasonable grounds to suspect the property may be subject to forfeiture or a pecuniary penalty order.

International assistance is available in bribery investigations. Fiji will extradite a person to a foreign country only if the underlying conduct, had it occurred in Fiji, is punishable by death or imprisonment for at least 12 months or life. Foreign countries may impose a similar threshold for extraditions of persons to Fiji because of reciprocity. In any event, all of Fiji bribery offences would meet a 12-month requirement. All criminal offences qualify for mutual legal assistance (MLA) unless the assistance relates to proceeds of crime or search and seizure, in which case the offence must be punishable in Fiji by six months or a fine of FJD 500. All bribery offences meet this threshold.¹³

An offender may be granted testimonial immunity in bribery cases. Under POBP Section 23, a witness may be given immunity from prosecution for any offences disclosed by his/her testimony if such testimony is full and truthful. Immunity is provided only if it is requested by the FICAC Commissioner or the Director of Public Prosecutions (DPP) and approved by a court. However, there are no guidelines on when the Commissioner or DPP would make such a

request. The provision also has two limitations. First, it only applies to court testimony, not other forms of co-operation with the authorities, *e.g.* during the investigative stage. Second, it is an all-or-nothing provision. Co-operating offenders are given total immunity; they cannot be given a reduced sentence in return for co-operation.

ENFORCEMENT OF BRIBERY OFFENCES

There is overlapping enforcement jurisdiction in Fiji's bribery offences. The FICAC is the principal body for investigating and prosecuting the bribery offences in the POBP and CD. Nevertheless, the Fiji Police and the Director of Public Prosecutions (DPP) also have jurisdiction to investigate and prosecute these offences. The FICAC Commissioner may commence proceedings in his own name without the consent of the DPP (Fiji Independent Commission Against Corruption Promulgation Section 12B(3)).

The FICAC web site and Annual Report contain some limited statistics and information about major cases. In 2008, the Commission recorded 31 investigations, 29 prosecutions, and 1 conviction. A total of 155 charges were laid, 6 of which were for "Official Corruption" under now-repealed Penal Code Section 106.¹⁴ As noted above, the Fijian authorities stated that the FICAC charged six bribery cases under the POBP in 2009, resulting in 3 convictions.

RECOMMENDATIONS FOR A WAY FORWARD

Fiji has made significant efforts in criminalising bribery offences. To further enhance compatibility with international standards, it could consider addressing the following issues.

Elements of the Active and Passive Domestic Bribery Offences

Fiji's general bribery offences, especially those in the POBP, already meet many aspects of international standards, such as their express coverage of different modes of active and passive bribery. To further improve its bribery offences, the Fiji could consider addressing the following areas:

- (a) The overlapping offences in the CD, POBP and other statutes;
- (b) Bribes given to third party beneficiaries for bribery offences outside the CD and POBP;

- (c) A definition of “public official” that includes any person who performs a public function, including for a public agency or public enterprise, or provides a public service;
- (d) For the bribery offences outside the POBP, including the CD: bribery in order that an official acts or omits to act in relation to the performance of official duties, including any use of the public official’s position or office, and acts or omissions outside the official’s competence. This encompasses bribery (including making facilitation payments) in order that an official performs his/her duty or exercises his/her discretion in favour of the briber.
- (e) Defence of customary payments for bribery offences outside the POBP; and
- (f) The scope of the defences of “lawful authority”, “reasonable excuse” and consent by an official’s employer.

Bribery of Foreign Public Officials

To bring its criminal bribery offences into line with international standards, Fiji should enact an offence to criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Fiji could consider addressing the following issues:

- (a) Whether corporate liability depends on the conviction of a natural person for the crime;
- (b) The rules for attributing liability for bribery to a legal person under the POBP; and
- (c) The lack of prosecutions of legal persons in practice.

Sanctions for Bribery

The maximum sanctions available for bribery against natural persons under the CD and POBP are generally effective, proportionate and dissuasive, though Fiji could consider addressing the following additional issues:

- (a) Adequacy of sanctions under the Parliamentary Powers and Privileges Act, Customs Act, and Food Safety Act;
- (b) Sanctions against legal persons for bribery;
- (c) Confiscation of the bribe and the direct and indirect proceeds of bribery under the POBP and CD, particularly in prosecutions conducted by the FICAC; and
- (d) Availability of administrative sanctions such as blacklisting and debarment from seeking public procurement contracts.

Tools for Investigating Bribery

The POBP contains some useful tools for investigating bribery, such as production orders for obtaining bank and financial records. To enhance the ability of law enforcement to investigate bribery, the following matters could be addressed in the context of bribery investigations:

- (a) The availability of investigative tools in the POBP in cases not investigated or prosecuted by the FICAC;
- (b) A statutory scheme requiring prior judicial authorisation for using special investigative techniques in bribery cases; and
- (c) Plea bargaining, and offering a reduced sentence in return for an offender's assistance in an investigation or prosecution.

Enforcement of Bribery Offences

Fiji could consider maintaining detailed statistics on the investigation, prosecution, conviction and sanctions for bribery offences. Such detailed statistics would be necessary to assess the effectiveness of Fiji's enforcement regime.

RELEVANT LAWS AND DOCUMENTATION

Laws of Fiji – Fijian Government: www.itc.gov.fj

Pacific Islands Legal Information Institute: www.paclii.org

Fiji Independent Commission against Corruption: www.ficac.org.fj

Fijian Law Reports: www.vanuatu.usp.ac.fj/library/Paclaw/Fiji/Fiji_cases/plmFIJI_main.html

NOTES

- ¹ See Parliamentary Powers and Privileges Act, Section 21; Income Tax Act, Section 4(2); Customs Act, Section 123; Excise Act, Section 58; and Food Safety Act, Section 36(2)(f).
- ² These additional offences include the mere taking of a benefit (POBP Section 3), corrupting benefits given to or received by an official (CD Section 136 and 137), abuse of office (CD Section 139), corrupt practices (CD Section 149), receiving secret commissions (CD Section 150), bribery in relation to government contracts (POBP Section 5), and bribery by persons with dealings with the government (POBP Section 8).
- ³ OECD (1999), *Phase 1 Report: Australia*, Section 1.1.5.
- ⁴ See UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and African Union Convention on Preventing and Combating Corruption Article 1. But compare with Council of Europe Criminal Law Convention on Corruption Articles 1 and 4.
- ⁵ See OECD Convention, Article 1(4)(c) and Commentary 19.
- ⁶ UNODC (2009), *Compliance with the United Nations Convention against Corruption: Report by the Secretariat*, CAC/COSP/2009/9, para. 54.
- ⁷ Compare with the Proceeds of Crime Act, Section 71, which specifically when a criminal act and mental state is attributed from a natural person to a body corporate.
- ⁸ U.K. Law Commission Report, *Reforming Bribery* (2008) at para. 6.26.
- ⁹ See U.K. Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ¹⁰ OECD (2006), *Phase 2 Report: Australia*, paras. 151-153.
- ¹¹ *FICAC v. Chen Xue Liang & Denchuan Zhao*, [2010] HAC 050/10S (16 June 2010).
- ¹² World Bank (2006), *Detailed Assessment Report Anti-Money Laundering and Combating the Financing of Terrorism*, para. 263.
- ¹³ For both extradition and MLA, additional conditions in an applicable treaty or foreign law may apply.
- ¹⁴ FICAC (2009), *Annual Report 2008*, p. 23.

Criminalisation of Bribery in Hong Kong, China

Prevention of Bribery Ordinance

Section 2 Interpretation

- (2) For the purposes of this Ordinance-
- (a) a person offers an advantage if he, or any other person acting on his behalf, directly or indirectly gives, affords or holds out, or agrees, undertakes or promises to give, afford or hold out, any advantage to or for the benefit of or in trust for any other person;
 - (b) a person solicits an advantage if he, or any other person acting on his behalf, directly or indirectly demands, invites, asks for or indicates willingness to receive, any advantage, whether for himself or for any other person; and
 - (c) a person accepts an advantage if he, or any other person acting on his behalf, directly or indirectly takes, receives or obtains, or agrees to take, receive or obtain any advantage, whether for himself or for any other person.

Section 3 Soliciting or accepting an advantage

Any prescribed officer who, without the general or special permission of the Chief Executive, solicits or accepts any advantage shall be guilty of an offence.

Section 4 Bribery

- (1) Any person who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, offers any advantage to a public servant as an inducement to or reward for or otherwise on account of that public servant's-
- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
 - (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by that public servant or by any other public servant in his or that other public servant's capacity as a public servant; or
 - (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any

business with a public body,

shall be guilty of an offence.

(2) Any public servant who, whether in Hong Kong or elsewhere, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his-

- (a) performing or abstaining from performing, or having performed or abstained from performing, any act in his capacity as a public servant;
- (b) expediting, delaying, hindering or preventing, or having expedited, delayed, hindered or prevented, the performance of an act, whether by himself or by any other public servant in his or that other public servant's capacity as a public servant; or
- (c) assisting, favouring, hindering or delaying, or having assisted, favoured, hindered or delayed, any person in the transaction of any business with a public body,

shall be guilty of an offence.

Section 9 Corrupt transactions with agents

(1) Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his-

- (a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or
- (b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business,

shall be guilty of an offence.

(2) Any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's-

- (a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or
- (b) showing or forbearing to show, or having shown or forborne to show, favour or disfavour to any person in relation to his principal's affairs or business,

shall be guilty of an offence.

INTRODUCTION

Hong Kong, China's legal system is based on the English common law system. Its criminal bribery offences have not been externally reviewed. The UNCAC applies to Hong Kong, China by reason of P.R. China's ratification. Hong Kong, China has been a member of the FATF and APG since 1991 and 1997 respectively.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Hong Kong, China's general active and passive domestic bribery offences for the public sector are found in the Prevention of Bribery Ordinance (POBO) Sections 4(1) and (2). The POBO Sections 5-8 contain additional public sector bribery offences that deal with specific situations, e.g. bribery concerning public contracts, procuring the withdrawal of tenders, auctions, and bribery by persons who deal with public bodies. Sections 4(2A) and (2B) concern bribery of the Chief Executive, while Section 3 deals exclusively with "prescribed officers" who accept or solicit an advantage without the general or special permission of the Chief Executive of Hong Kong, China. Section 9(1) and (2), which deal with the bribery of agents, contain Hong Kong, China's private sector bribery offences and also apply to both active and passive domestic bribery. These offences are concerned with the corruption of the principal-agent relationship but they can also be applied to the public sector because the definition of an agent includes a public servant. Hong Kong, China states that, in practice, the offences in Section 9(1) and (2) are only applied to cases of private sector corruption and bribery of foreign public officials, and not to bribery of Hong Kong, China public officials. In addition to bribery offences, Section 9(3) also contains an offence of agent using a document with intent to deceive the principal. This report will focus on the general bribery offences in POBO Sections 4(1) and (2) but will refer to the additional offences if necessary. This report will also consider POBO Section 9 which Hong Kong, China uses to deal with bribery of foreign public officials but not bribery of Hong Kong, China officials.

International standards generally require coverage of three modes of committing active domestic bribery, namely offering, giving, and promising a bribe. POBO Section 4(1) covers the offering of an advantage, which is defined in Section 2(2)(a) as including the giving, affording or holding out, or agreeing, undertaking or promising to give, afford or hold out. This definition goes beyond what is required by international standards. The Hong Kong, China authorities also state that the offence covers bribes that are made but not received, or bribes that are rejected by an official. This is the result of the breadth of the

definition of “offer” as set out above and case law which establishes that the offence is committed as soon as an offer is made.¹

As for passive domestic bribery, international standards generally demand coverage of solicitation and acceptance of a bribe. POBO Section 4(2) expressly covers solicitation, which is defined as demanding, inviting, asking for or indicating a willingness to receive an advantage. The provision also covers acceptance, which is defined as taking, receiving or obtaining, or agreeing to take, receive or obtain, any advantage. POBO Section 4(2) therefore again goes beyond what is required by international standards.

Commensurate with international standards, the general bribery offences in the POBO expressly cover bribes offered, solicited, etc. by the offender “or any other person acting on his behalf, directly or indirectly”. The offences also cover third party beneficiaries, according to Hong Kong, China authorities. The active domestic bribery offence covers advantages offered to or for the benefit of or in trust for a public official. The passive domestic bribery offence covers advantages solicited or accepted for the offender or any other person.

International standards require bribery offences to cover any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.² International standards thus take essentially a functional approach, i.e. by referring to persons who perform specified functions.

The POBO takes a different approach by referring to specific offices or positions, not functions. Hong Kong, China believes that non-specific generic type descriptions such as “persons performing a public function” are vague, lending uncertainty to the scope of the offence and requiring judicial interpretation to develop the concept. Section 4 covers bribery of “public servants”, which is defined to include three categories of persons:

- (a) A “prescribed officer”, which includes (i) a holder of an “office of emolument”, whether permanent or temporary, under the Government, and (ii) certain designated officials, such as principal officials under the Basic Law (essentially senior officials in the executive government), the Monetary Authority and persons appointed to assist him/her, the Chairman of the Public Service Commission, staff members of the Independent Commission

- Against Corruption (ICAC), certain designated judicial officers, and staff members of the Judiciary;
- (b) An employee of a “public body”, which is in turn defined as the Government, Legislative Council, Executive Council, District Councils, any board, commission, committee or body appointed by or on behalf of the Chief Executive or the Chief Executive in Council; and 103 scheduled “public bodies”, which include utilities companies, educational institutions, and public transportation companies;
 - (c) Persons who hold office in or are members of a body responsible for the management or conduct of certain types of scheduled “public bodies”. These include certain bodies in the financial sector (such as the stock and future exchanges), clubs, associations, or educational institutions.

In addition, active and passive bribery of the Chief Executive of Hong Kong, China is covered by separate offences (Sections 4(2A) and (2B)). According to Hong Kong, China, the POBO covers all judicial, legislative and executive office and the civil service, and has a twofold approach to other categories of public sector officials. It has a definition of “public servant” which covers persons of a special class and a schedule of public bodies whose employees are made public servants. Hong Kong, China adds that the public sector in the POBO refers to the Hong Kong, China public sector. Hence, the definition of “public servants” in the POBO does not include officials of any government outside Hong Kong, China. All officials of governments other than Hong Kong, China’s are treated as agents who are subject to Section 9 of POBO.

International standards also require broad coverage of acts or omissions in relation to the performance of official duties, including any use of the public official’s position or office, and acts or omissions outside the official’s competence. In this regard, the POBO’s domestic bribery offences (Section 4(1) and (2)) are broad, covering a public servant acting or omitting to act in his/her capacity as a public servant; expediting, delaying, hindering or preventing the performance of an act by the public servant (or another public servant) in the capacity of a public servant; and assisting, favouring, hindering or delaying any person in the transaction of any business with a public body.

The POBO contains a very broad definition of a bribe. Under Section 2(1), an “advantage” includes money, valuable security, property, office, employment, contract, service, favour, discharge/release/payment of a loan or liability, and the exercise or forbearance from the exercise of any right, power or duty. Both pecuniary and non-pecuniary bribes are thus covered.

The POBO does not contain some defences to bribery that are found in certain jurisdictions. According to the Hong Kong, China authorities, there are no defences of small facilitation payments, solicitation or “effective regret”. The absence of these defences could enhance the effectiveness of the bribery offences. Hong Kong, China states that its government has had, and continues to have and to encourage, an attitude of zero tolerance to all forms of corruption.

Other defences are available, however. A person is not guilty of an offence under POBO Sections 4(1) and (2) if he/she acted with lawful authority or reasonable excuse. The burden of proof is on the accused. “Lawful authority” and “reasonable excuse” are not defined. According to Hong Kong, China, there are no concerns over the breadth of this defence. The defence only arises when it is proven beyond a reasonable doubt that an advantage has been offered or solicited or accepted for a corrupt purpose. In this situation, “the principal’s consent” is the only form of lawful authority or reasonable excuse that ever arises, and this defence is most often raised in private sector corruption cases. Other defences that are raised in both public and private sector corruption cases include what was offered or accepted was not an advantage, and that the offer or acceptance of an advantage was not for a corrupt purpose. Hong Kong, China adds that Section 11 of POBO limits the scope of defences by providing that it shall be no defence that the offeree or acceptor of an advantage did not actually have the power, right or opportunity to do or not do the act or omission for which the bribe was offered or accepted.

International standards also require the definition of a bribe not to be affected by factors such as the value of the bribe, its results, the perceptions of local custom towards bribery, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber was the best qualified bidder. The Hong Kong, China authorities indicated that these factors do not affect the definition of a bribe but a bribe of particularly low value is relevant to determining whether an advantage is given “corruptly”. It is not a defence that there is a practice of paying bribes in a particular profession, trade, vocation or calling (POBO Section 19). The results of the bribe are irrelevant to whether a bribery offence has taken place as the offence is complete upon the offer, solicitation or acceptance of an advantage.³ There are also no local cultural customs within Hong Kong that excuse or justify bribery, according to Hong Kong, China.

A defence of consent is also available under Sections 4(3) and (4). A public servant other than a prescribed officer may solicit or accept an advantage if he/she has the written permission of the public body by which he/she is employed. The permission must either be granted before the advantage is

solicited or accepted, or applied for and obtained as soon as reasonably possible thereafter. Hong Kong, China states that the scope of this defence is limited since all civil servants are prescribed officers.

Nevertheless, this leaves the defence available to two categories of individuals. First, the defence is available to employees of “public bodies” (defined in the POBO to include the Government, Legislative Council, Executive Council, District Councils, any board, commission, committee or body appointed by or on behalf of the Chief Executive or the Chief Executive in Council) who are not also prescribed officers (see Sections 4(3) and Section 2 definitions “public servant” and “public body”). According to Hong Kong, China authorities, in reality most employees of these public bodies are prescribed officers. Those who are not would have to have a principal who could give the consent required by the defence. No member of government would ever give such consent and so the defence is only of benefit to the non-government public sector where a non-government principal existed.

Second, according to Hong Kong, China authorities, the defence applies to persons in “the wider public sector” as defined by the POBO. Many of these individuals are employees of private companies and would be regarded in many countries as part of the private sector. But under Hong Kong, China law, these individuals are considered “public servants” and are covered by the Section 4 general bribery offence.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

The POBO does not have a specific offence of bribery of foreign public officials. Instead, this crime is dealt with through the offence of corrupt transactions with agents (POBO Section 9). The offence in Section 9(2) prohibits the offering of an advantage to an agent to induce or reward the agent for an act or omission, or for showing favour or disfavour, in relation to his/her principal's affairs or business. Section 9(1) prohibits an agent from soliciting or accepting an advantage for the same purpose. The POBO defines an agent to include “any person employed by or acting for another”. This definition includes a public official of a place outside of Hong Kong, China, according to the Court of Final Appeal.⁴

Hong Kong, China states that it meets UNCAC requirements regarding bribery of foreign public officials. This is because Hong Kong, China has an offence (POBO Section 9) that applies to bribery of foreign public officials in its territory, and because it can extradite⁵ any person to any jurisdiction where that person has engaged in the bribery of a foreign public official in that jurisdiction. There has been one foreign bribery conviction to date. The case involved the

bribery of a Hong Kong, China resident who had been employed by the consulate of a foreign government as an investigator to examine work visa applications.⁶

The criminalisation of foreign bribery is commendable, but it should be noted that the offence in POBO Section 9, in referring to the persons to whom it applies, does not expressly mention foreign public officials. Instead, the offence applies to the bribery of “agents”, which is defined as “a person employed by or acting for another”. The Hong Kong, China authorities state that the definition of agent is broadly interpreted and provides effective coverage of foreign public officials.

Section 9 also provides a defence if the principal gives the agent permission to receive the advantage. However, the permission need not be written, unlike the POBO Section 4 domestic bribery offences. A defendant could thus conceivably raise the defence by claiming a foreign official had received oral permission from his/her superior to receive the bribe. Hong Kong, China states that this does not raise any concerns, since the defence would succeed only if the accused proves on a balance of probabilities that such permission had in fact been given. The accused would also need to prove that the person who gave the permission had authority to do so, or that the accused genuinely believed the person had such authority.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Hong Kong, China can impose criminal liability against legal persons, including for bribery. The term “person” in the POBO includes “any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word ‘person’ occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation” (Interpretation and General Clauses Ordinance Section 3).

The rules for imposing liability are found in common law, not statute. The leading case is the well-known U.K. House of Lords decision in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153. The principle is commonly known as the “identification” doctrine. Under *Tesco*, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company’s “directing mind and will”.⁷ Generally, this would be a director and a senior officer of the company, according to Hong Kong, China authorities.

The Hong Kong, China authorities also referred to the U.K. Privy Council decision of *Meridian Global Funds Management Asia Ltd. v. Securities Commission*, [1995] 2 AC 500. According to *Meridian*, whether the criminal act

of a natural person is attributed to the legal person depends on the offence's underlying purpose.⁸ The case, however, concerned a regulatory securities offence, not a conventional crime. Although *Meridian* may add some flexibility to the rule in *Tesco*, it does not appear to have produced significant impact in intentional criminal offences.⁹

The limits of the identification doctrine in cases of complex corporate crimes such as bribery are now well-documented. Prosecutors, law enforcement officials, and academics in the U.K. have denounced the *Tesco* regime as ineffective and unsatisfactory for bribery offences. The problem is at least three-fold. First, the identification theory requires guilty intent be attributed to a very senior person in the company. Liability is unlikely to arise when bribery is committed by a regional manager or even relatively senior management, let alone a salesperson or agent, even if the company benefited from the crime. Second, there is also no liability even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, the identification theory requires the requisite criminal intent to be found in a single person with the directing mind and will; aggregating the states of mind of several persons in the company will not suffice. This ignores the realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.¹⁰ Some jurisdictions have thus reformed the identification theory of corporate liability.

Although Hong Kong, China can prosecute legal persons for bribery, it considers that prosecuting natural persons is a far more effective deterrent to corruption. It will therefore prosecute a company only if the company's senior management is, in respect of the particular act of bribery, directly involved in the decision to employ corruption to benefit the company. Hong Kong, China indicated that it convicted two legal persons in 1976 under POBO Section 9 for offering bribes to the agents of companies with whom they, the legal persons, were doing business.

Hong Kong, China considers that it is compliant with UNCAC notwithstanding this prosecutorial policy and the identification theory of corporate liability. The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.¹¹ When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other

words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.

- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

Hong Kong, China has universal jurisdiction to prosecute active and passive bribery of its officials. The offences in POBO Sections 4(1) and (2) may be committed “whether in Hong Kong or elsewhere”. This jurisdiction applies to both legal and natural persons. Section 4 offences are the only POBO offences that are extraterritorial in nature and they only apply to the bribery of Hong Kong, China public servants.

The jurisdictional basis for prosecuting bribery of foreign public officials is narrower. There is jurisdiction to prosecute foreign bribery if the offer or acceptance of an advantage takes place inside Hong Kong, China, since the offence is committed immediately when the offer or acceptance is made.¹² Less clear is when the offer or acceptance of an advantage takes place outside of Hong Kong, China. Unlike the domestic bribery offence in POBO Section 4, the corruption of agent offence in POBO Section 9 does not expressly apply to acts committed “whether in Hong Kong or elsewhere”. According to Hong Kong, China authorities, jurisdiction to prosecute arises only if there is a substantial connection between the crime and Hong Kong, China, *e.g.* when a primary element of the offence takes place in Hong Kong, China, or the offence is concluded there. This requires the offer or acceptance, as these words are defined in the POBO,¹³ of a bribe to take place in Hong Kong, China. The Hong Kong, China authorities add that its appellate courts have now definitively confirmed the application of POBO Section 9 to transnational corruption. According to a recent decision,¹⁴ the fact that the agent is a foreign public official and that the corrupt act is to be carried out outside of Hong Kong, China does not make the offence non-justiciable in Hong Kong, China under the legal principles of extraterritoriality.

SANCTIONS FOR BRIBERY

Active and passive domestic and foreign bribery (POBO Sections 4 and 9) is punishable by up to seven years' imprisonment and a fine of HKD 500 000 (approx. USD 65 000 or EUR 46 000). Because of the potential length of the custodial sentence, these maximum sanctions are effective, proportionate and dissuasive for natural persons. They are not for legal persons, however, since jail sentences are not available. In many cases, the values of the bribe and the contract concerned will be many multiples of the maximum available fine.

The availability of confiscation could compensate for a low fine. Under the Organized and Serious Crime Ordinance (OSCO), a court may confiscate proceeds of active and passive domestic and foreign bribery upon conviction if the proceeds exceeds HKD 100 000 (approx. USD 13 000 or EUR 9 000). This threshold is ostensibly to allow the defendant reasonable means for living and legal expenses, but it has raised the concerns that it may not always serve this purpose.¹⁵

The OSCO defines proceeds as any payments or other rewards received in connection with the commission of that offence; any property derived or realised, directly or indirectly, by him from any of the payments or other rewards; and any pecuniary advantage obtained in connection with the commission of that offence. Proceeds includes a bribe as well as revenue generated from a contract obtained through bribery.

In practice, a confiscation order under OSCO operates more like a fine. Once a court quantifies the proceeds, a financial investigation of the defendant is conducted to determine whether he/she has any realisable property available to satisfy the order. If so, the court can make a confiscation order which can then be satisfied against the realisable property. This approach alleviates the need for a court to order a fine in lieu of forfeiture when the property constituting proceeds have disappeared or have been spent.

The POBO also provides for restitution of an advantage in some cases. Section 12(1) provides that a court shall order an offender upon conviction to pay "to such person or public body ... the amount or value of any advantage received by him, or such part therefore as the court may specify." This provision is available for active and passive domestic and foreign bribery (POBO Sections 4 and 9). According to Hong Kong, China authorities, restitution is also available regardless of whether the prosecution proceeds by indictment or summary trial.

Additional administrative sanctions may be available upon conviction. A person convicted of bribery is disqualified from certain public office for five

years. He/she may also be prohibited from taking or continuing employment in a corporation or a public body as a director or manager, or from practicing his/her profession, for up to seven years (POBO Sections 33 and 33A). According to the Hong Kong, China authorities, debarment from participation in public works projects is also available. The Hong Kong Special Administrative Region Government maintains lists of approved contractors for invitations to tender for public works contracts. Listed contractors that engage in misconduct (such as bribery) may be removed or suspended from the lists. Over the past ten years, 27 contractors who were found to have engaged in bribery or misconduct as a result of ICAC investigations have been sanctioned. In addition, tender documents and public works contracts also restrict contractors from offering advantages to the employees and agents of the government department involved. Breach of this provision invalidates a tender or terminates a contract, with the contractor liable for any consequent loss or damages.

TOOLS FOR INVESTIGATING BRIBERY

The POBO contains several means for gathering financial and other information in corruption investigations. Under Section 13, if there is reasonable cause to believe that an offence under the POBO has been committed, and that any financial account, documents or books are likely relevant to an investigation, the Commissioner of the ICAC may authorize an officer to require the inspection or production of those books and documents. The person or body to whom the authorisation is produced may also be required to provide information as to whether there are other documents or records of interest to the investigation.

A Court may authorize the Commissioner of the ICAC to issue a written notice, under POBO Section 14, requiring a person, including a suspect, to produce information if there are reasonable grounds to suspect that an offence has been committed under the POBO. Under Section 14, a suspect may be required by the notice to provide a statutory declaration or written statement enumerating the property in his/her ownership or possession in the previous three years, and information about the property's acquisition and/or disposal. The suspect may be required to enumerate his/her liabilities and expenditures incurred by him/her and his/her immediate family over the three-year period. He/she may also be required to list property that he/she has transferred outside of Hong Kong, China over a specified period. A person who is not a suspect may be required to furnish specified information, answer orally questions under oath or affirmation, and/or produce any relevant document. Notices under POBO Section 14 may also be directed to government departments or public bodies to obtain relevant documents, or to a bank manager for the production of

documents relating to the accounts of a named person and his/her immediate family members.

Hong Kong's financial intelligence unit is the Joint Financial Intelligence Unit (JFIU) which is operated by the Hong Kong Police Force and the Hong Kong Customs and Excise Department. The JFIU forwards suspicious transactions reports involving corruption that it receives to the ICAC. ICAC maintains close liaison with the JFIU and is kept informed of matters involving corruption related money laundering.

Under POBO Section 17, a Court may issue a warrant to search any premises for relevant evidence. Once lawful entry has been gained to premises by means of the warrant, the Independent Commission Against Corruption Ordinance authorizes ICAC officers to seize any relevant evidence. However, a warrant may not be issued to search a lawyer's office unless that lawyer (or his/her clerk or servant) is suspected of having committed an offence under the POBO. POBO Sections 13 and 14 may be used to require a lawyer to produce information concerning investments by a client but not information subject to legal privilege.

The gathering of information covered by tax secrecy is governed by POBO Section 13A. A Court may order the production of materials in the possession of tax authorities if there are reasonable grounds to suspect that an offence under the POBO has been committed. The Court must also be satisfied that there are reasonable grounds to believe that the material sought is likely to be relevant to the investigation and that production of the material is in the public interest. In assessing the last factor, the Court must consider the seriousness of the offence, whether the investigation would be effective without the materials, the benefit likely to accrue to the investigation, and the interest in preserving secrecy. Hong Kong, China authorities report that they have obtained tax information through this provision in past investigations.

Hong Kong, China indicates that investigators in corruption cases may also use covert investigative techniques such as wiretapping, secret surveillance (video recording, listening and bugging devices), controlled deliveries, and undercover operations. According to Hong Kong, China authorities, no legal basis is required for controlled deliveries unless the operation breaches the law in some way. Insofar as an operation may breach any person's right to privacy, it would be regulated by the Interception of Communications and Surveillance Ordinance. The Director of Public Prosecutions may also authorise the offering and granting of immunity to a person who has assisted law enforcement in detecting or controlling criminal activity, and who in the process has become a party to the commission of

criminal offences. Immunity generally will only be offered in cases involving criminal activity that is serious or poses a serious threat to law and order or public safety, and where conventional means of detection or control are unlikely to be effective.¹⁶

POBO Section 14C provides for the restraint of property. A Court may issue a restraining order over property that is in the possession or control of the subject of an investigation, as well as property held by a third party on the suspect's behalf.

The offences in POBO Sections 4 and 9 meet dual criminality requirements for the purpose of obtaining mutual legal assistance (MLA) in corruption investigations. Under the Mutual Legal Assistance in Criminal Matters Ordinance (MLACMO), requests for some types of MLA can be made in all criminal investigations, while others can be made for an offence punishable by death or imprisonment for not less than 24 months. Hitherto, Hong Kong, China has negotiated and signed 27 bilateral agreements on MLA. Noting that the MLACMO does not apply to P.R. China or Macao, China, Hong Kong, China relies on court-to-court letters rogatory requests, which allows examination of witnesses and production of documents, in obtaining MLA from these jurisdictions.¹⁷

The offences in POBO Sections 4 and 9 also meet dual criminality requirements for extradition, which is known as surrender of fugitive offenders (SFO) in Hong Kong, China. The Fugitives Offenders Ordinance (FOO) does not restrict the types of offences for which surrender may be sought. Hong Kong, China's bilateral SFO agreements contain generic descriptions of offences for which surrender may be made including offences against the law relating to bribery, corruption, secret commissions and breach of trust. However, Hong Kong, China will only surrender a fugitive to a foreign state for bribery and corruption offences that are punishable by at least 12 months' imprisonment and this is a reciprocal limitation contained in its bilateral agreements with other jurisdictions. Foreign legislation and applicable treaties may impose further limitations on SFO and MLA, but Hong Kong, China states that in practice it obtains a wide range of assistance from foreign jurisdictions in both MLA and SFO. UNCAC's MLA and extradition provisions have been made the subject of legislative orders under MLACMO and FOO. This ensures that Hong Kong, China meets the requirements of the Convention and can provide reciprocal assistance to that which it seeks from foreign jurisdictions.

SFO from P.R. China is governed by administrative arrangements, not the FOO. These arrangements may be used to return to Hong Kong, China (1) Hong Kong, China residents who fled to the mainland after committing crimes in

Hong Kong, China, and (2) Hong Kong, China residents who committed crimes in both the mainland and in Hong Kong, China, after serving sentences in P.R. China.¹⁸

Hong Kong, China may also rely upon co-operative offenders in bribery cases. A prosecutor may exercise his/her discretion not to prosecute a suspect or accused who is willing to co-operate in the investigation or prosecution of others, or if he/she has already done so. As well, the Director of Public Prosecutions may also grant immunity from prosecution to an accomplice who gives evidence that is unavailable from other sources and is necessary for the conviction of other significantly more culpable offenders. In deciding whether to grant immunity, the prosecutor will also consider whether the co-operating accomplice has received any inducements, the co-operating accomplice's credibility as a witness, whether the co-operating accomplice has fully disclosed all relevant information, and the nature and strength of any corroborating evidence. When a co-operating accomplice testifies, a court may order that he/she may not be prosecuted for any offence disclosed by his/her evidence.¹⁹

Plea bargaining is available for all criminal offences, including bribery. Plea negotiations are normally not instituted by the prosecution. A prosecutor may agree to accept a guilty plea to a reduced number of charges or less serious charges. In deciding to accept an adjusted plea, a prosecutor must consider whether the agreement is in the public interest and also assess whether the adjusted charge is supported by the evidence, reflects the essential criminality of the conduct, and matches the seriousness of the crime. Other relevant factors include the time and expense of a trial, and whether it would save a witness from the stress of testifying.²⁰ However, Hong Kong, China states that a prosecutor does not have the power to seek a lighter sentence in return for a guilty plea by the accused to the same, reduced or less serious charges. Nor can a court be compelled to impose a sentence that has been agreed between a defendant and the prosecution under a plea bargain. The prosecution does not enter into any agreement with defendants on the sentence that should be imposed.

ENFORCEMENT OF BRIBERY OFFENCES

The ICAC conducts criminal corruption investigations in Hong Kong, China. The Secretary for Justice is responsible for subsequent prosecution of cases. Under POBO Section 31, the prosecution of all the main corruption offences, contained in Part II of the POBO, requires the consent of the Secretary for Justice. The Secretary is appointed by the Central People's Government of P.R. China upon the nomination of Hong Kong, China's Chief Executive. The Secretary heads the Department of Justice which, according to

the Basic Law, “control[s] criminal prosecutions, free from any interference”. He is also a member of the Executive Council (which is essentially the Chief Executive’s cabinet).²¹ There are no statutory guidelines on the factors that the Secretary for Justice should consider when deciding whether to grant consent. However, the common law requires him to act fairly and reasonably.

Hong Kong, China provided the following detailed enforcement statistics on active and passive domestic and foreign bribery offences involving natural persons in 2004-2008. The Hong Kong, China authorities explain that the number of investigations is much higher than that for prosecutions for several reasons. Some investigations did not lead to prosecutions. Others revealed other offences that were connected with or facilitated by corruption, resulting in prosecutions of the non-corruption offences. Some investigations also resulted in charges of the common law offence of misconduct in public office rather than bribery under the POBO.

The statistics indicate that the use of forfeiture appears to be very low. Official prosecutorial policy is that confiscation should not be considered as a “mere optional addition to sentence proceedings or to the conduct of a prosecution”.²² Yet, although there were 85 convictions for active and passive domestic bribery in 2004-2008, forfeiture was imposed in just four cases. The FATF has reached a similar conclusion that forfeiture may be underused.²³

Active domestic bribery (Public servants including prescribed officers)	2004	2005	2006	2007	2008	Total
Investigations (including passive domestic) ¹	1116	1078	927	848	827	4796
Prosecutions ²	16	9	9	7	13	54
Convictions ^{3&4}	8	11	11	4	9	43
Acquittals ³	0	2	0	2	1	5
Custodial sentence	7	9	9	3	9	37
Fine	0	1	1	0	1	3
Restitution	0	1	0	1	0	2
Forfeiture	0	1	2	0	0	3
Community service order	0	1	0	1	0	2
Suspended sentence	1	0	2	0	0	3

Passive domestic bribery (Public servants including prescribed officers)	2004	2005	2006	2007	2008	Total
Investigations (including active domestic) ¹	1116	1078	927	848	827	4796
Prosecutions ²	13	14	6	4	6	43
Convictions ^{3&4}	8	11	9	7	2	37
Acquittals ³	3	3	2	0	1	9
Custodial sentence	4	10	7	4	1	26
Fine	1	1	1	0	0	3
Restitution	2	3	2	1	0	8
Forfeiture	0	0	1	0	0	1
Community service order	2	0	1	3	1	7
Suspended sentence	2	1	0	0	0	3
Active domestic bribery¹ (Private sector: private to private)	2004	2005	2006	2007	2008	Total
Investigations (including passive domestic) ¹	1740	1868	1731	1914	1794	9047
Prosecutions ²	27	31	39	27	33	157
Convictions ^{3&4}	18	22	24	22	24	110
Acquittals ³	7	8	4	17	9	45
Custodial sentence	11	15	15	14	16	71
Fine	0	1	2	0	2	5
Restitution	3	1	2	0	0	6
Forfeiture	0	1	1	0	0	2
Community service order	4	2	3	7	5	21
Suspended sentence	3	5	6	1	2	17
Passive domestic bribery¹ (Private sector: private to private)	2004	2005	2006	2007	2008	Total
Investigations (including active domestic) ¹	1740	1868	1731	1914	1794	9047
Prosecutions ²	28	31	48	34	58	199

Convictions ^{3&4}	19	23	37	35	47	161
Acquittals ³	4	7	2	10	6	29
Custodial sentence	13	16	28	26	33	116
Fine	1	4	1	2	5	13
Restitution	8	7	21	21	26	83
Forfeiture	0	1	0	1	1	3
Community service order	3	3	8	6	8	28
Suspended sentence	3	4	1	3	5	16
Active and passive foreign bribery⁵						
	2004	2005	2006	2007	2008	Total
Investigations	5	2	6	3	0	16
Prosecutions	0	0	0	0	0	0
Misconduct in public office⁸						
	2004	2005	2006	2007	2008	Total
Prosecutions ²	4	1	3	3	5	16
Convictions ^{3&4}	2	0	2	2	1	7
Acquittals ³	2	0	0	2	1	5
Custodial sentence	2	0	2	0	1	5
Fine	0	0	0	1	0	1
Restitution	0	0	0	0	0	0
Forfeiture	0	0	0	0	0	0
Community service order	0	0	0	1	0	1
Suspended sentence	0	0	0	0	0	0
Prosecution of other offences arising from corruption investigations⁶						
	2004	2005	2006	2007	2008	Total
Prosecutions ²	329	262	236	271	218	1316
Convictions ^{3&4}	240	185	210	214	209	1058
Acquittals ³	71	70	53	48	37	279
Custodial sentence	112	80	119	88	80	479

Fine	41	43	17	18	16	135
Restitution	8	2	4	9	7	30
Forfeiture	0	1	3	0	0	4
Community service order	62	55	57	87	94	355
Suspended sentence	36	28	24	31	28	147
Compensation order	10	20	12	11	24	77

Note:

1. The investigation figures relate to pursuable corruption reports.
2. Prosecution figures are person-based and relate to the year in which an individual was charged. Hence, if a person was charged with multiple offences, it is counted once only. The figures also include inchoate offences.
3. Conviction and acquittal figures are person-based and relate to the year in which the result was determined. It may differ from the year of prosecution.
4. Multiple penalties may be imposed concurrently against the same offender, e.g. custodial sentence plus forfeiture. The total sentence imposed on the convicted individual is reflected in the respective rows.
5. The figures for active and passive foreign bribery are included in and were extracted from the figures under the heading "Active domestic bribery (Private sector: private to private)" and "Passive domestic bribery (Private sector: private to private)" earlier in this table. Please see also note 7.
6. The ICAC is empowered to investigate and prosecute offences connected with or facilitated by corruption. For persons prosecuted for corruption and other offences, they are counted only once as a corruption offence and are excluded from this table.
7. Figures include active and passive bribery of foreign public officials. Please see also note 5.
8. There are no separate statistics for investigations of the offence of misconduct in public office. At the investigative stage, these cases are classified as "Active/Passive domestic bribery (Public servants including prescribed officers)" and are therefore included under these categories in this table above.
9. In addition to the sanctions listed in the table, 27 contractors who were found to have engaged in bribery or misconduct as a result of ICAC investigations were removed or suspended in the past 10 years from the lists of approved contractors for invitations to tender for public works contracts.

RECOMMENDATIONS FOR A WAY FORWARD

Hong Kong, China has an impressive arsenal of investigative tools in bribery cases. The POBO contains a wide range of means to gather financial, tax and other information and records. Covert investigative techniques and property restraint orders are available in bribery cases. Guidelines are in place

to deal with plea bargaining and the granting of immunity to offenders in return for co-operation. The maximum available punishment for natural persons for the POBO bribery offences are largely in line with international standards.

Hong Kong, China's regime could be further strengthened. For example, Hong Kong, China could consider increasing the use of forfeiture in practice. The maximum available fine for legal persons could be higher. It could also consider continuing its efforts to develop MLA relationships with more jurisdictions.

RELEVANT LAWS AND DOCUMENTATION

Prevention of Bribery Ordinance and other relevant legislation: www.legislation.gov.hk

Judgments and Legal Reference of the Hong Kong, China Judiciary: www.judiciary.gov.hk

Statement of Prosecution Policy and Practice: www.doj.gov.hk

FATF (2008), *Third Mutual Evaluation Report: Hong Kong*: www.fatf-gafi.org

NOTES

¹ *HKSAR v. So Kam-tim*, [1997] HKLRD 1123; *B v. Commissioner of the ICAC*, FACC No. 6 of 2009.

² See UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and African Union Convention on Preventing and Combating Corruption Article 1. But compare with Council of Europe Criminal Law Convention on Corruption Articles 1 and 4.

³ Section 11 of the POBO; *HKSAR v So Kam-tim*, [1997] HKLRD 1123; *B v. Commissioner of the ICAC*, FACC No. 6 of 2009.

⁴ *B. v. Commissioner of the ICAC*, FACC No. 6 of 2009.

⁵ Extradition is known as Surrender of Fugitive Offenders in Hong Kong, China.

⁶ *R. v. Yeung Chung-wai*, CACC 156 of 1995.

⁷ UK Law Commission Report, *Reforming Bribery* (2008) at para. 6.26.

⁸ "It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company" (*Meridian* at p. 511).

- ⁹ See OECD (2005), *Phase 2 Report: United Kingdom* at paras. 198-9; and OECD (2006), *Phase 2 Report: New Zealand* at para. 184.
- ¹⁰ See UK Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ¹¹ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ¹² *B. v. Commissioner of the ICAC*, FACC No. 6 of 2009.
- ¹³ See paragraphs 3 and 4 herein. According to Hong Kong, China authorities, as a result of the broad definitions of these words, the bribe transaction need not take place in Hong Kong, China. An agreement reached in Hong Kong, China to pay or receive a bribe at a future date outside of Hong Kong, China is still an acceptance in Hong Kong, China.
- ¹⁴ *B. v. Commissioner of the ICAC*, FACC No. 6 of 2009.
- ¹⁵ See FATF (2008), *Mutual Evaluation Report: Hong Kong, China*, para. 162.
- ¹⁶ Department of Justice, *Statement of Prosecution Policy and Practice*, para. 19.2.
- ¹⁷ See FATF (2008), *Mutual Evaluation Report: Hong Kong, China*, paras. 851-2.
- ¹⁸ See FATF (2008), *Mutual Evaluation Report: Hong Kong, China*, paras. 913.
- ¹⁹ Department of Justice, *Statement of Prosecution Policy and Practice*, Sections 9(o) and 19; POBO Section 23.
- ²⁰ Department of Justice, *Statement of Prosecution Policy and Practice*, Section 19.
- ²¹ Web sites of the Department of Justice (www.doj.gov.hk) and the Executive Council (www.ceo.gov.hk), and the Basic Law, Article 63.
- ²² Department of Justice, *Statement of Prosecution Policy and Practice*, para. 26.1.
- ²³ FATF (2008), *Mutual Evaluation Report: Hong Kong, China*, para. 209.

Criminalisation of Bribery in India

Prevention of Corruption Act 1988

**(From the Ministry of Personnel, Public
Grievances and Pensions: www.persmin.nic.in)**

Section 7 Public servant taking gratification other than legal remuneration in respect to an official act

7. Whoever, being, or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person, with the Central Government or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company referred to in Clause (c) of Section 2, or with any public servant, whether named or otherwise shall be punishable with imprisonment which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Section 11 Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant

11. Whoever, being a public servant, accepts or obtains or agrees to accept or attempts to obtain for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

Section 12 Punishment for abetment of offences

defined in section 7 or 11

12. Whoever abets any offence punishable under section 7 or section 11 whether or not that offence is committed in consequence of that abetment, shall be punishable with imprisonment for a term which shall be not less than six months but which may extend to five years and shall also be liable to fine.

INTRODUCTION

As of September 2010, India has signed but not yet ratified the UNCAC. It has been a member of the APG since 1998. India's legal system is mainly based on statutory and common law. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

India's main bribery offences are found under Chapter III, Sections 7, 11 and 12 of the Prevention of Corruption Act 1988 (PCA). The PCA repeals the Prevention of Corruption Act 1947, the Criminal Law Amendment Act 1952, and has removed Sections 161 to 165A (inclusive) of the Indian Penal Code (IPC). This report focuses on these bribery offences as well as on Sections 13 and 14 of the PCA on criminal misconduct by a public servant and the habitual committing of the Section 12 offence.

The PCA covers active domestic bribery indirectly through the act of abetment.¹ Section 12 criminalises the abetment of the bribery offences under Sections 7 and 11 of the PCA. Section 24 further provides that a statement made by a bribe-giver in any proceeding against a public servant for passive bribery under Sections 7 to 11, 13 and 15 of the PCA shall not subject him/her to prosecution under Section 12. In light of Sections 12 and 24, the PCA can be read as covering active bribery. However, framing active bribery through the act of abetment does not meet international standards, which require more specific language criminalising the intentional offering, promising or giving of a bribe, whether directly or indirectly. It is also unclear whether incomplete offences, such as when a bribe is offered to but not received by a public servant, or when a public servant rejects a bribe, are covered by the PCA. Covering active bribery this way can also be challenging for law enforcement authorities, and does not adequately raise awareness that active bribery as well as passive bribery are offences in India.

International standards for the criminalisation of passive domestic bribery cover the "requesting, soliciting, receiving or accepting" of a bribe by a public

official. Sections 7 and 11 of the PCA concern passive domestic bribery. The language used in these offences, such as the terms “legal remuneration”, “favour or disfavour” or “consideration”, does not comply with the language typically used in international standards. The ensuing sections will highlight the provisions where there is lack of clarity and conformity to international standards.

Section 7 covers a public servant who “accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act...” Section 11 appears to be a broader provision, in that it is an offence for a public servant to accept or obtain or agree to accept or attempt to obtain for himself, or for any other person, any valuable thing without consideration or for inadequate consideration from a person having any connection with the official functions of the public servant “whom he knows to have been, or to be, or to likely to be concerned in any proceedings or business transacted or about to be transacted by such public servant...”. Therefore, there is no further requirement that the “valuable thing” be obtained as a motive or reward for the official’s acts. Section 7 thus appears to address conventional forms of bribery—i.e. where the purpose of the bribe is to obtain a specific advantage in return.

Under Section 7, the bribe must be taken as a “motive or reward” for doing or forbearing to do an official act, or; showing or forbearing to show favour or disfavour to someone in the exercise of his/her official functions, or; rendering or attempting to render any service or disservice to any person with the Central or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company or with any public servant. It is not necessary that the act for which the bribe is given is actually performed; for a public servant to be found guilty under Section 7, it is sufficient that a representation is made that the act has been or will be performed. Similarly, it is not necessary that favour was in fact shown to the briber, but that he/she is led to believe that the matter would go against him/her if he/she did not give the bribe.² In contrast to Section 7, the question of “motive or reward” under Section 11 is immaterial. Therefore, the mere taking of a valuable thing without consideration or for inadequate consideration constitutes an offence if it is from a person having any connection with the official functions of the public servant whom he/she “knows to have been, or to be, or to likely to be concerned in any proceedings or business transacted or about to be transacted...”.

Commensurate with international standards, requesting or soliciting a bribe is covered by the wording “attempts to obtain” under Sections 7 or 11.

International standards also demand coverage of bribery through intermediaries. There is no express provision concerning bribery through intermediaries in the PCA and it is unclear whether this may be covered by the wording “from any person” under Sections 7 and 11, or by the wording “from any person whom he knows to be interested in or related to the person so concerned” under Section 11. It is also unclear whether the abetment offence under Section 12 covers active domestic bribery through an intermediary. In the absence of supporting case law, the PCA would require more specific language covering direct and indirect bribery to meet international standards. As for third party beneficiaries, Sections 7 and 11 expressly cover a public servant who asks or takes a bribe or valuable thing “for himself or for any other person”.

Bribery offences generally must cover any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.³ The PCA covers both public servants as well as those expecting to be public servants. By including those expecting to be public servants, the PCA goes beyond what is required by international standards. “Public servant” is defined in Chapter I, Section 2(c) as any person in the service or pay of the Government or local authority, or remunerated by the Government by fees or commission for the performance of any public duty. “Public duty” is defined as a “duty in the discharge of which the State, the public or the community at large has an interest.”⁴

The PCA expressly includes as “public servants” judges, arbitrators and judicial officers, including court-appointed liquidators, receivers and commissioners. Those in the service or pay of Government-owned corporations (whether established under a Central, Provincial or State Act) or an authority or body owned, controlled or aided by the Government or a Government company are also covered. This also extends to any person who is the president, secretary or other office-bearer of a registered co-operative society engaged in agriculture, industry, trade or banking, receiving or having received any financial aid from the Central or State Government or from any corporation established by or under Central, Provincial or State Act, or any body owned, controlled or aided by the Government or a Government company. It is unclear whether government-controlled companies are also covered by this definition (i.e. where the Indian Government owns less than 50 percent of the voting shares but still has control over the company by some other means). The IPC defines “Government” as the Central Government or the Government of a State.⁵ It is therefore unclear whether those in the Legislative branch of Government are covered by the PCA. It is also uncertain whether the definition of “public servant” covers those who are unpaid or employed on a temporary basis.

International standards for the criminalisation of bribery also require broad coverage of acts or omissions in relation to the performance of official duties. This includes any use of the public official's position or office, and acts or omissions outside the official's scope of competence. In this regard, international standards require coverage of the situation where a briber gives a bribe to a public official in order that the official use his/her office, though acting outside his/her competence, to make another official perform the act for which the bribe was intended.⁶ The PCA Section 7 offence deals with bribery whereby a public servant does or forbears from doing any official act, or; shows favour or disfavour to any person in the exercise of his/her official functions, or; renders or attempts to render any service or disservice to any person with the Central or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company or with any public servant. This definition may differ from international standards in the following respects: 1. It is not clear whether the term "official act" is meant to be interpreted strictly, in which case it might only refer to formal aspects of a public official's duties (e.g. acts related to a public official's duties, such as releasing confidential information about a competitor's bid, might not be covered); 2. It is not clear whether the offence covers a biased exercise of judgment or discretion (e.g. awarding a public procurement contract on the basis of a bribe rather than credentials); and 3. The definition does not seem to cover an official who acts outside his/her competence, for example to influence another public official or a private individual,⁷ or to engage in acts such as divulging confidential information or State secrets.

The bribery offences under the PCA cover bribes of both a monetary and non-monetary nature. Section 7(b) defines "gratification" as "not restricted to pecuniary gratifications or to gratifications estimable in money". The PCA provides no further information on whether the definition of "gratification" is affected by its value, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder. According to India's Central Vigilance Commission (CVC), the term "gratification" is used in the larger sense as connoting "anything which affords gratification or satisfaction or pleasure to the taste, appetite or the mind".⁸ The term "valuable thing" is also applied under Section 11 of the PCA to describe a bribe but does not elaborate on its meaning. It has also not been defined under the Indian Penal Code or the Criminal Procedure Code. However, Indian authorities confirm that the term would also cover bribes of both a pecuniary or non-pecuniary nature.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

There are no express active and passive foreign bribery offences in the PCA. Foreign public officials are not included in the PCA's definition of "public servant"; therefore, the active bribery offence through abetment under Section 12, and the passive bribery offences under Sections 7 and 11, do not extend to foreign public officials.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

India can impose criminal liability against legal persons for bribery. Section 2 of the IPC provides that every person shall be liable to punishment under the Code. Section 11 defines "person" as including "any Company or Association or body of persons, whether incorporated or not".⁹ However, it is unclear whether the liability of legal persons applies to state-owned or controlled companies, in the absence of supporting case law. It is also unclear whether corporate liability depends on the conviction of a natural person for the crime. According to Indian authorities, there appear to be no cases to date where a legal person has been convicted for bribery.

Indian courts have inherited the identification doctrine from the English legal system. Under this approach, which was set out by the U.K. House of Lords in *Tesco Supermarkets Ltd. v. Nattrass* [1972] AC 153, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company's "directing mind and will".¹⁰ The *Tesco* identification doctrine has been widely denounced as ineffective for bribery offences. This is because the doctrine requires the guilty intent to be found in a very senior person in the company. Liability is unlikely to arise when bribery is committed by a regional manager or by relatively senior management, let alone a salesperson or agent, even if the company benefitted from the crime. Liability would also not arise under *Tesco* even if senior management knowingly failed to prevent an employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. The *Tesco* doctrine also requires the criminal intent to be found in a single person in the company with the directing mind and will. This ignores the realities and complex structures of the modern multinational company, which is often decentralised, and in which it is difficult to identify a single decision maker.¹¹

An effective regime of liability of legal persons for bribery must address these limitations. The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.¹² These standards are instructive for meeting the

comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

India has jurisdiction over bribery committed in its territory. Section 1 of the PCA provides for territorial jurisdiction and applies to the whole of India with the exception of the State of Jammu and Kashmir. However, it is unclear whether territorial jurisdiction is extended to offences which only partly take place in India.

Section 1 of the PCA also provides for nationality jurisdiction. Accordingly, jurisdiction is available to prosecute Indian citizens who commit bribery while outside of India, including the abetment of bribery under Section 12 of the PCA. This is also provided for under Section 188 of the Code of Criminal Procedure (CCP) and under Chapter I of the IPC.¹³

Nationality jurisdiction is not extended to prosecute legal persons for bribery; Indian companies are not included as “citizens” under the PCA, CCP or IPC.

SANCTIONS FOR BRIBERY

The bribery offences under the PCA (Sections 7, 11 and 12) are punishable by imprisonment for a term which shall not be less than six months but which may extend to five years. Offenders are also liable to a fine; however, the amount of fines which may be imposed is unclear.

In addition to the main bribery offences, Section 13 of the PCA establishes the offence of “criminal misconduct by a public servant” for habitually engaging in the acts of bribery set out in Sections 7 and 11. A separate provision for habitually committing the bribery offence under Section 12 is provided for under Section 14 of the PCA. The PCA does not provide a definition for the term “habitually”; it is therefore unclear whether this applies to a situation where the offender can be convicted for engaging in a series of bribery offences, or whether it applies to an offender with a previous conviction. The punishment for the offence of criminal misconduct by a public servant is imprisonment for a term not less than one year but no more than seven years, and also liable to a fine (Section 13(2)). The punishment for those who habitually commit the offence of bribery under Section 12 is imprisonment for a term not less than two years but no more than seven years, and also liable to a fine (Section 14).

In fixing the fine for Sections 13 and 14 offences, the court is to take into consideration the amount or the value of the property, if any, which the accused person has obtained by committing the offence (Section 16). Additional administrative (disciplinary) sanctions are available for public servants who take or solicit bribes, ranging from censure, pay and/or post reduction, to dismissal. The PCA does not explicitly indicate whether other administrative sanctions such as debarment from public procurement are available; however, the Government of India does reportedly apply informal blacklisting mechanisms against companies that bribe Indian public officials.¹⁴

The PCA does not specifically provide for the confiscation of the bribe and the proceeds of the bribery. Section 105(H) of the CCP makes general provision for the forfeiture of proceeds of crime and Section 105(I) allows a fine of an equivalent amount to be imposed if forfeiture is not possible. The term “proceeds of crime” is undefined under the CCP and it is therefore unclear whether it covers property derived directly or indirectly from a bribe. The proposed Prevention of Corruption (Amendment) Bill 2008 inserts a new chapter in the PCA for the forfeiture of illegally acquired property, which also provides for a fine of equivalent amount if forfeiture is not possible.¹⁵ However, the Bill’s definition of “property” also does not specify property derived directly or indirectly from a bribe.¹⁶

TOOLS FOR INVESTIGATING BRIBERY

The CVC exercises superintendence over the Central Bureau of Investigation (CBI),¹⁷ which is charged with the investigation of offences under the PCA. Chapter IV, Section 18 of the PCA provides investigative powers to inspect the bankers’ books and take certified copies of relevant entries of

persons suspected to have committed an offence under the PCA, or of any other person suspected to be holding money on behalf of such persons. The Bankers' Books Evidence Act (BBEA) defines "bankers' books" to include "ledgers, day-books, cash-books, account-books and all other books used in the ordinary business of a bank."¹⁸ The term "bankers' books" under the BBEA applies only to banks and does not include the records of all financial institutions (i.e. credit unions, insurance companies, brokerage firms, mutual fund companies). However, according to Indian authorities, the CCP empowers investigators to obtain this information from other financial institutions for the purposes of an investigation. The CCP also provides for the seizure of additional information, such as account-opening information, client correspondence and instructions, account statements, etc. The CBI is also empowered to inspect and obtain copies of any classified or graded documents from the Audit Office.¹⁹ According to Indian authorities, investigators can access tax information. Search and seizure of company records (e.g. accounting records, corporate records that show the beneficial owners) or of the financial and company records of third party beneficiaries are also available under Indian law.

In addition, section 105D of the CCP also empowers an authorised officer to undertake "any inquiry, investigation or survey of any person, place, property, assets, documents, books of account in any bank or public financial institution or any other relevant matters" in identifying any unlawfully acquired property, and Section 105E of the CCP provides for the seizure of such property.²⁰ While the Public Financial Institutions (Obligations As To Fidelity And Secrecy) Act 1983 expressly permits the furnishing of financial information to the Central Government,²¹ the search and seizure provisions within the CCP, as general law, cannot override any specially enacted secrecy laws. However, according to Indian authorities, the CBI has not encountered any problems obtaining information because of secrecy laws.

Neither the PCA nor the CCP make express provision for the use of special investigative techniques in bribery investigations, such as wiretapping, secret surveillance, or undercover operations. The interception of communications is permitted under the Unlawful Activities (Prevention) Act 1967, the Information Technology Act 2000, and the Indian Telegraph Act 1885. Indian authorities also confirm that the CBI can intercept telephonic communications and has done so in practice. The intercept product can also be used as evidence in court. The CVC also employs the practice of "laying traps" in the office of a public servant who is suspected to be about to accept a bribe;²² this appears to be similar to the special investigative tool of "controlled deliveries".

There are no provisions on plea negotiations or the use of co-operative informants or witnesses in the PCA or CCP, and it is not clear whether such tools are used in practice. However, Section 24 of the PCA does provide that a statement made by a bribe-giver in any proceeding against a public servant shall not subject him/her to prosecution. Indian authorities also state that Section 306 of the CCP may be used for the granting of “approver status” to persons who cooperate in investigations.

International assistance is available for investigating bribery. Outgoing mutual legal assistance (MLA) requests are provided for under Section 166A of the CCP; however, the CCP only provides for witness testimony and the production of evidence.²³ Assistance such as for search warrants, transfer of persons in custody to give evidence, the freezing of bank accounts, and the tracing of proceeds of bribery do not appear to be covered. The bribery offences under the PCA are listed as scheduled offences under the Prevention of Money Laundering Act 2002 (PMLA). MLA relating to the proceeds of corruption may therefore be available under the PMLA, provided there is an applicable treaty or arrangement, and if the investigation or prosecution concerns a money laundering offence. India may seek extradition for offences that are punishable by at least one year’s imprisonment (subject to any legal preconditions or restrictions in an applicable treaty or foreign legislation).²⁴ Accordingly, the bribery offences under the PCA would be covered as extraditable offences.

ENFORCEMENT OF BRIBERY OFFENCES

The CBI is the primary agency charged to conduct criminal investigations and prosecutions of bribery and corruption offences under the PCA. Under Section 19 of the PCA, the prosecution of Section 7 and 11 bribery offences require the authorization of the Central Government, the State Government or the relevant authority competent to remove the public servant from office. It is unclear who in the Central or State Government, or relevant competent authority, issues this sanction.

In 2007, the CBI registered 558 cases under the PCA involving a total of 936 public servants. These cases mainly involved criminal misconduct by showing undue favour, obtaining bribes and possession of disproportionate assets by public servants.²⁵ However, it is unclear whether these cases concern the specific offence of “criminal misconduct” under Section 13 of the PCA, or whether the term is herewith applied in the more general sense and refers to the individual offences under the PCA. There is also no information on the number of cases specifically concerning bribery.

During the same year, 796 cases were investigated under the PCA and the CBI recommended disciplinary action and prosecution in 229 cases; prosecution in 420 cases; disciplinary action in 82 cases; administrative action in 10 cases; and, closure in 52 cases. The courts disposed of 498 cases under trial of which 317 cases resulted in conviction, 127 in acquittal, 38 discharges, and 16 cases were disposed of for other reasons. The overall conviction rate was 63.6 percent.²⁶ Again, there are no available statistics pertaining specifically to bribery.

As for administrative sanctions, in 2007, major administrative (disciplinary) penalties were imposed upon 1002 public servants, and minor administrative (disciplinary) penalties were imposed upon 1164 public servants.²⁷ There are no available statistics that pertain to the sanctions imposed specifically for bribery

RECOMMENDATIONS FOR A WAY FORWARD

India has undertaken significant efforts in criminalising bribery, especially in the area of passive domestic bribery. To further enhance compatibility with international standards, India could consider the following.

Elements of the Active and Passive Bribery Offences

The PCA already contains a number of positive features that conform to international standards. For example, it covers passive domestic bribery offences and third party beneficiaries. The PCA also importantly provides a broad definition of “public servant” that includes those “expecting to be a public servant” as well as state-owned enterprises and corporations, and companies receiving state aid. This goes beyond what is required by international standards. The terms “gratification” and “valuable thing” under the PCA also broadly cover both pecuniary and non-pecuniary advantages.

To improve its bribery offences, India could consider further addressing the following areas:

- (a) A specific offence criminalising active domestic bribery;
- (b) Clarification of the relationship between the offences in sections 7 and 11 of the PCA, and the use of language in those offences that does not comply with language typically used to define these kinds of offences and international standards (e.g. “legal remuneration”, “favour or disfavour” “gratification”, “without consideration”).

- (c) Express language covering additional modes of committing bribery, such as a promise to give a bribe;
- (d) Clearer language covering bribery through the use of intermediaries;
- (e) Ensuring that the term “official act” is not applied too narrowly, and that it includes any use of a public official’s position, whether or not within his/her authorised competence;
- (f) Incomplete offences, such as when a bribe is offered to but not received by an official, or when an official rejects a bribe.

Bribery of Foreign Public Officials

To conform to international standards, India may wish to consider adopting a specific offence criminalising bribery of officials of foreign countries and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

International standards require that legal persons be held liable for bribery. India’s Penal Code broadly includes “corporations or associations or body of persons whether incorporated or not” in its definition of “persons”. However, legal persons have never been held criminally liable for bribery in India. To further strengthen its liability of legal persons regime for bribery, India could consider whether its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects a wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when persons with the highest level of managerial authority (i) offer, promise or give a bribe to an official; (ii) direct or authorise a lower level person to offer, promise or give a bribe to an official; or (iii) fail to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

India could also consider:

- (c) Whether corporate liability depends on the conviction of a natural person for the crime;
- (d) Application of liability to state-owned and controlled enterprises.

Jurisdiction for Prosecuting Bribery

In addition to territorial jurisdiction, India also has nationality jurisdiction to prosecute natural persons for bribery. This is in line with international standards. To ensure its overall jurisdictional basis for prosecuting bribery is sufficiently broad, India could address the follow matters:

- (a) Providing nationality jurisdiction to prosecute legal persons for bribery;
- (b) Jurisdiction to prosecute bribery offences that take place partly in India.

Sanctions for Bribery

To conform to international standards, sanctions for bribery should be effective, proportionate and dissuasive. The main bribery offences under the PCA are punishable by a minimum of six months and a maximum of five years' imprisonment and fine. This is commensurate with international standards. To further strengthen its sanctions regime for bribery, India may wish to consider the following issues:

- (a) Express language providing for the confiscation of the bribe and the direct and indirect proceeds of bribery, and the availability of fines of equivalent value to the property subject to confiscation if, for example, the bribe or proceeds thereof have disappeared;
- (b) The availability of blacklisting and debarment from public procurement.

Tools for Investigating Bribery

India could improve its ability to investigate bribery cases by addressing the following issues:

- (a) The availability of special investigative techniques such as secret surveillance and undercover operations;

- (b) The availability of information that may be protected by specially enacted secrecy laws;
- (c) Formalising in writing practices (if they exist) such as plea negotiations with a defendant, reliance on co-operative informants or witnesses, and granting immunity from prosecution to persons who cooperate in corruption investigations or prosecutions;
- (d) The ability to seek MLA in bribery cases.

Enforcement

India should be commended for maintaining detailed statistics on the number of case registrations, investigations, prosecutions and convictions under the PCA, including the number and nature of the sanction. As statistics are essential to ascertain whether a scheme criminalising bribery is effective, India may wish to consider breaking down these figures by type of offence and maintain more detailed statistics which specifically pertain to bribery cases.

RELEVANT LAWS AND DOCUMENTATION

Indian Penal Code, Code of Criminal Procedure: www.commonlii.org

Prevention of Corruption Act 1988: www.persmin.nic.in/EmployeesCorner/Acts_Rules/PCAct/pcact.pdf

Central Vigilance Commission Manuals and Annual Reports: www.cvc.nic.in

NOTES

¹ Abetment is defined under Chapter V, Section 107 of the Penal Code of India: “A person abets the doing of a thing who - First - Instigates any person to do that thing; or Secondly - Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly - Intentionally aids, by any act or illegal omission, the doing of that thing”.

² Central Vigilance Commission, Vigilance Manual, Chapter VI: Penal Provisions, Section 3.1.3.

- ³ See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ⁴ Prevention of Corruption Act 1988, Chapter 1, Section 2(b).
- ⁵ Indian Penal Code, Chapter II, Section 17.
- ⁶ See OECD Convention Commentary 19.
- ⁷ This could be covered by a broad interpretation of Section 8 (Taking gratification, in order, by corrupt or illegal means, to influence public servant) and Section 9 (Taking gratification, for exercise of personal influence with public servant) of the PCA.
- ⁸ Central Vigilance Commission, Vigilance Manual, Chapter VI: Penal Provisions, Section 3.1.8.
- ⁹ See *ANZ Grindlays Bank Ltd & Ors v Directorate of Enforcement* [2005] INSC 315. The Indian Supreme Court held that where a statute mandated imprisonment and a fine, a court could impose a fine alone. The Court did not address the situation where the only prescribed punishment is imprisonment.
- ¹⁰ U.K. Law Commission Report, *Reforming Bribery* (2008) at para. 6.26.
- ¹¹ See U.K. Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005) *Phase 2 Report: United Kingdom* at para. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ¹² OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ¹³ In this regard, it is worth noting Article 28 of the PCA which states that the Act shall be in addition to, and not in derogation of, any other law for the time being in force.
- ¹⁴ See for example: Shukla, Ajay (2009), “No thanks, you’re blacklisted”, *Business Standard*, 17 November 2009, www.business-standard.com/india/news/ajai-shukla-no-thanks-you%5Cre-blacklisted/376681
- ¹⁵ The Prevention of Corruption (Amendment) Bill 2008, Bill No. 70 of 2008, Chapter IVA, Section 18(c).
- ¹⁶ The Prevention of Corruption (Amendment) Bill 2008, Bill No. 70 of 2008, Chapter IVA, Section 18A.(2).
- ¹⁷ The Central Bureau of Investigation is also known as the Delhi Special Police Establishment.
- ¹⁸ Bankers’ Books Evidence Act 1891, Section 2(3).
- ¹⁹ Central Vigilance Commission, Vigilance Manual, at pp. 46-47.
- ²⁰ Code of Criminal Procedure, Sections 102, 105D and 105E.
- ²¹ Public Financial Institutions (Obligations As To Fidelity And Secrecy) Act 1983, Section 3.

- ²² Central Vigilance Commission, Vigilance Manual, at p. 51.
- ²³ Code of Criminal Procedure 1973, Sections 166A.
- ²⁴ Extradition Act 1962, Section 3(c)(ii).
- ²⁵ Central Vigilance Commission Annual Report 2007 at p. 61.
- ²⁶ Central Vigilance Commission Annual Report 2007 at p. 62.
- ²⁷ Central Vigilance Commission Annual Report 2007 at pp. 22-23.

Criminalisation of Bribery in Indonesia

Law No. 31/1999 on Corruption Eradication (as amended by Law No. 20/2001)

(From the Corruption Eradication Commission (KPK)):

www.kpk.go.id/modules/edito/content.php?id=18

Article 5

(1) Any person(s) who:

- a. gives or promises something to a civil servant or state apparatus with the aim of persuading him/her to perform an action or not to perform an action because of his/her position in violation of his/her obligation; or
- b. gives something to a civil servant or state apparatus because of or in relation to something in violation of his/her obligation whether or not it is done because of his/her position,

shall be sentenced to a minimum 1 (one) year's imprisonment and a maximum of 5 (five) years imprisonment and/or be fined a minimum of Rp. 50.000.000 (fifty million Rupiahs) and a maximum of Rp. 250.000.000 (two hundred and fifty million Rupiahs).

(2) The civil servant or state apparatus who receives a payment or promise as referred to in paragraph (1) letter a. or b. shall be sentenced to the same jail term as that referred to in paragraph (1).

Article 6

(1) Anybody that:

- a. gives or promises something to a judge with the aim of influencing the decision of the case handed down to him/her for trial; or
- b. gives or promises something to an individual who according to the legislation is appointed a lawyer to attend a trial session with the aim of influencing the advice or views on the case referred to the court for trial,

shall be sentenced to a minimum of 3 (three) years imprisonment and a maximum of 15 (fifteen) years imprisonment and be fined to a minimum of Rp.

150.000.000 (one hundred and fifty million rupiahs) and a maximum of Rp. 750.000.000 (seven hundred and fifty thousand Rupiahs).

(2) The judge receiving the payment or promise as referred to in paragraph (1) letter a. or the lawyer receiving the payment or promise as referred to in paragraph (1) letter b. shall be sentenced to the same jail term as that referred to in paragraph (1).

Article 11

A civil servant or state apparatus who receives a payment or a promise believed to have been given because of the power or authority related to his/her position or prize; or a promise which according to the contributor is still given in relation to the position of the civil servant or state apparatus shall be sentenced to a minimum of 1 (one) year's imprisonment and a maximum of 5 (five) years imprisonment and be fined a minimum of Rp. 50.000.000 (fifty million Rupiahs) and maximum of Rp. 250.000.000.000 (two hundred and fifty million Rupiahs).

Article 12

a. A civil servant or state apparatus who receives a payment or promise believed to have been given to encourage him/her to do something, or not to do anything because of his/her position, in violation of his/her obligation;

b. A civil servant or state apparatus who receives a payment believed to have been given due to the fact that he/she has done something or has not done something in relation to his/her position, in violation of his/her obligation;

c. A judge that receives a payment or a promise believed to have been given to influence the verdict of the case handed down to him/her for trial.

Article 12B

(1) Any gratification for a civil servant or state apparatus shall be considered a bribe when it has something to do with his/her position, and is against his/her obligation or task, with further provisions that:

- a. when the gratification amounts to Rp. 10.000.000 (ten million Rupiahs) or more, it is the recipient of the gratification who shall prove that the gratification is not a bribe;
- b. when the gratification amounts to less than Rp. 10.000.000 (ten million Rupiahs), it is the public prosecutor who shall prove that the gratification is a bribe.

(2) A civil servant or state apparatus who is found guilty of the criminal offense as referred to in paragraph (1) shall be sentenced to life imprisonment or a minimum of 4 (four) years imprisonment and a maximum of 20 (twenty) years imprisonment and be fined a minimum of Rp. 200.000.000 (two hundred million

Rupiahs) and a maximum of Rp. 1.000.000.000 (one billion Rupiahs).

**Law No. 11/1980 on Anti-Bribery Law or Bribery
Offences
(Excerpts provided by the Corruption Eradication
Commission (KPK))**

Article 2

Anyone who gives or promises something to someone with the aim of persuading him/her to perform an action or not to perform an action in his/her position, in violation of his/her authority or obligation related to public interest, shall be sentenced for bribery to a maximum of 5 (five) years and be fined to a maximum of Rp. 15 000 000 (fifteen million Rupiah).

Article 3

Anyone who receives something or promises, which he/she know or considers to have been known that the gifts or promises are with the aim of persuading he/she to perform an action or not to perform an action in his/her position, in violation of his/her authority or obligation related to public interest, shall be sentenced to bribery to a maximum of 3 (three) years and be fined to a maximum of Rp. 15 000 000 (15 million Rupiah).

INTRODUCTION

Indonesia's legal system is based on civil (Roman-Dutch) law, with indigenous influences, and some Islamic (Sharia) law at the local level in certain regions.¹ Indonesia signed and ratified the UNCAC in September 2006. It has been a member of the APG since 1999. As of September 2010, Indonesia has participated in the UNCAC Pilot Review Programme and its bribery offences have been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Indonesia's main bribery offences are found under Chapter I, Articles 5, 6, 11, 12, and 12B of Law No. 31/1999 on Corruption Eradication (as amended by Law No. 20/2001) (LCE). Article 13 of the LCE provides the related offence of the offering of gifts/payments to a civil servant.² The Indonesian Penal Code also provides identical bribery offences which were expressly incorporated into the LCE by the amending Law No. 20/2001. Finally, bribery offences are also covered by Articles 2 and 3 of Law No. 11/1980 on Anti-Bribery Law and Bribery

Offences (ABLBO), which is still in force. This report will therefore focus on the bribery offences contained in the LCE and ABLBO but the comments herein apply equally to the corresponding Penal Code offences, where applicable.

International standards for the criminalisation of active domestic bribery cover the promise, offering or giving of a bribe to a public official. In this regard, there appears to be an overlap between the offences under Articles 5 and 13 of the LCE and Article 2 of the ABLBO. While there are differences in the elements of these offences, there can be cases of bribery of public officials in which all of these offences could apply. For example, in the case where someone gives a material advantage to a public official, it is unclear which of these offences would apply. This is problematic, as the maximum punishments are different for the offences. Article 5 of the LCE criminalises any person who “gives or promises something to a civil servant”. Article 13 covers the “offering” of gifts/payment or promises to a civil servant. Article 6 specifically addresses active bribery of judges and lawyers, and criminalises anybody that gives or promises something to a judge or lawyer with the aim to influence the decision or the advice or views on the case referred to the court. Finally, the active bribery offence under the ABLBO covers “giving or promising something to someone...” To meet international standards, Article 5 of the LCE and Article 2 of the ABLBO should expressly cover the “offering” of a bribe. It is unclear whether incomplete offences, such as when a bribe is offered but not received by a public servant, or when a public servant rejects a bribe, are covered by the LCE, although Indonesian authorities state that this would be covered under the law of attempt provided by Article 15 of the LCE.

The Indonesian authorities assert that in the Bahasa Indonesian version of the LCE, there is no difference in wording between Article 5 and Article 13, and that Article 13 does not include the “offering” of gifts, payments or promises but rather covers “anyone who *gives* gifts or promise to a civil servant with a view to abuse the power or authority vested in the post of position...” (emphasis added). If this is the case, then Article 13 would also have to expressly include the “offering or promising” of gifts to meet international standards.

Articles 5(2), 6(2), 11 and 12 of the LCE, and Article 3 of the ABLBO deal with passive domestic bribery. Articles 5(2) and 6(2) criminalise respectively, the public servant or state apparatus, or the judge or lawyer, who receives the bribe as referred to in the active bribery provisions of Articles 5(1) and 6(1). Articles 11 and 12 provide for additional passive bribery offences. Articles 11 and 12 cover a civil servant or state apparatus who “receives a payment or promise”. Article 12 also specifically covers a judge who receives a payment or promise believed to have been given to influence the verdict of a case. The passive bribery offences under the LCE cover the public official who “receives”

a bribe. Finally, Article 3 of the ABLBO similarly covers “anyone who receives something...” As in the case of active bribery, there appears to be an overlap between these offences as well, and it is unclear which Article would apply for acts that could fall under more than one provision. The requesting or solicitation of a bribe by a public official is not expressly covered by the LCE or the ABLBO; however, Indonesian authorities state that Article 56(2) of the Penal Code, which criminalises the solicitation of a crime, including bribery, would apply.

International standards require the criminalisation of bribery through intermediaries. Accordingly, a public official who solicits or accepts a bribe from a third party intermediary, or an individual who gives a bribe to a third party to in turn give to the public official, should be covered. In the case of bribery through an intermediary, Indonesian provisions do not expressly impose liability against the briber and the official; according to Indonesia, the intermediary would be held liable under Article 15 of the LCE as “assisting” or “consulting” for a criminal act of corruption, and the briber and the official would be covered as principal perpetrators in cases of active or passive bribery respectively. The bribery offences under the LCE and the ABLBO also do not expressly cover third party beneficiaries.

Bribery offences should also cover any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and, any person defined as a “public official” under domestic law.³ The Penal Code does not expressly define “civil servants”; however, Chapter XXVIII (Crimes Committed by Officials) and Chapter VIII (Crimes Against Public Authority) of the Penal Code include as officials any person continuously or temporarily in charge of a public service or office. The bribery offences under the LCE expressly cover “civil servants”, “state apparatus”, “judges” and “appointed lawyers”. “Civil servants” are defined under Article 1, Section 2 of the LCE and include those covered under the Law on Civil Service (Law No. 8/1974) and the Criminal Code; people receiving salaries or wages from the state finance or regional finance; people receiving salaries from a corporation that receives assistance from state finance or regional finance, and; people receiving salaries or wages from other corporations which use capital or facilities from the state or from the public. The LCE defines “state apparatus” as that referred to under Law No. 28/1999 on the State Organizer who is Clean and Free from Corruption, Collusion and Nepotism. This covers State Functionaries in the State Supreme Institution and High Institutions (the People’s Consultative Assembly, the House of Representatives, the Audit Board and the Supreme Court); Ministers; Governors; Judges; other State Functionaries under the Regulations and Legislation in force, and; other

Functionaries having strategic functions in relation to the Organizing of the State under the Regulations and Legislation in force.⁴ As mentioned above, judges are also expressly covered under Articles 6 and 12 of the LCE. The definition of “civil servant” under the LCE focuses on those deriving salaries or wages from the State or from corporations receiving State aid or using capital or facilities from the State. The definition therefore does not appear to cover unpaid officials, government contractors, or persons performing public functions for a privately held company. It is unclear what types of public officials are covered by the ABLBO.

International standards for the criminalisation of bribery require broad coverage of acts or omissions in relation to the performance of official duties, including any use of the public official's position or office, and acts or omissions outside the official's scope of competence. The bribery offences under Articles 5 and 12 of the LCE and Articles 2 and 3 of the ABLBO cover bribery to persuade a civil servant or state apparatus to perform or not to perform an official action “in violation of his/her obligations” but do not cover bribery to perform an official action which is not in violation of his/her obligations. This appears to be addressed under Articles 11 and 12B of the LCE, which cover a bribe given because of the power or authority of the civil servant's position or when it has something to do with his/her position and his/her obligation and task. However, Indonesia states that this does not cover an official who acts outside his/her competence, for example to influence another public official or a private individual, or to engage in acts such as divulging confidential information or State secrets.

The bribery offences under Articles 5, 6, 11 and 12 of the LCE and Articles 2 and 3 of the ABLBO apply the wording “something” and “payment” or “promise(s)” in reference to the nature of the bribe. The LCE does not expressly define these terms as covering bribes of both a pecuniary and non-pecuniary nature, and the term “payment” suggests it may only cover pecuniary bribes. However, Indonesian authorities confirm that both pecuniary and non-pecuniary bribes are covered by the LCE and refer to the term “something” under Articles 5 and 6. Indonesian authorities also refer to the applicability of the ABLBO, which states that “something” or “promise” does not necessarily have to refer to money or goods. The term “gratification”, which is applied in Article 12B, is defined as including payments or gifts in the broad sense, including money, goods, discount, recompense, interest-free loans, travel tickets, lodging, tours, free medicine and other facilities. This further includes gratifications received at home or from abroad and those done using electronic devices.⁵ Thus, “gratification” would cover benefits of both a pecuniary and non-pecuniary nature.

The LCE provides no information on whether these various definitions of a bribe are affected by its results, the perceptions of local custom, tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder. While the LCE also does not elaborate as to whether these definitions are affected by the value of the bribe, Article 12B provides that where the gratification amounts to IDR 10 million (approx. USD 1 000 or EUR 7 000) or more, the onus is on the recipient to prove it is not a bribe, and where the gratification amounts to less, it is for the public prosecutor to prove it is a bribe. Indonesian authorities assert that the LCE does not provide a *de minimis* amount to constitute a bribe.

The LCE does not provide for any specific defences to the bribery offences, such as small facilitation payments (e.g. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits), “effective regret” (i.e. the individual who offered, promised or gave the bribe reports this fact to the law enforcement authorities before or after the official provides the advantage) or solicitation (i.e. no active bribery offence takes place if the official requested the bribe). It is unclear whether such provisions are made under the ABLBO.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

Indonesia does not currently expressly criminalise the active and passive bribery of officials of foreign countries and public international organisations in the conduct of international business. Indonesian authorities point to the ABLBO which, they assert, can encompass active and passive foreign bribery. Articles 2 and 3 respectively apply the wording “anyone who gives or promises something to *someone*” and “*anyone* who receives something or promises...” (emphasis added), which, according to Indonesian authorities, could include foreign public officials and officials of international organisations. However, these provisions are vague and fall short of the wording used in international standards. It should also be noted that Indonesia’s UNCAC Gap Analysis states that Indonesia’s laws do not at present provide for foreign bribery under Article 16 of the UNCAC.⁶ Indonesia is therefore not in compliance with article 16(1) of the UNCAC.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Article 20 of the LCE covers liability of legal persons for bribery and provides that “in the event the criminal act of corruption is committed by or on behalf of a corporation, the lawsuit and the sentence can be instituted against and imposed on the corporation or its board of directors”. Article 1 of the LCE defines “corporation” as constituting an organized collection of people and/or

wealth, and can be in the form of legal bodies and non-legal bodies. This appears to cover state-owned enterprises. The sentence for corporations found guilty of bribery is limited to the prescribed fine, with the maximum sentence increased by one third.

The LCE defines “board” as including those that have the authority to make the decisions and the policy of the corporation, “making it ultimately responsible for any corrupt act made in the name of the corporation”. Article 20(2) further provides that the criminal act of corruption must be committed in the course of employment but does not elaborate under what circumstances the acts of senior management, relatively senior management or other employees may be attributed to the corporation. It is also unclear whether corporate liability depends on the conviction of a natural person for the crime. In this regard, Indonesian authorities have expressed their cognizance of the weaknesses within the LCE with regard to the attribution of corporate criminal liability.

The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.⁷ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

Under Article 2 of the Penal Code, Indonesia has jurisdiction over bribery offences committed within its territory. It is unclear whether territorial jurisdiction is extended to offences which only partly take place in Indonesia.

Indonesian penal provisions also provide nationality jurisdiction if dual criminality is met (Article 5(2), Penal Code). Jurisdiction is also extended over Indonesian officials who, outside Indonesia, commit one of the passive bribery offences under Articles 11 and 12 of the LCE.⁸ Thus, jurisdiction applies to passive bribery committed abroad by an Indonesian official, including one who does not have Indonesian nationality. For these provisions, dual criminality is not required. Indonesian authorities state that nationality jurisdiction is extended to cover legal persons for bribery and that Article 5 of the Penal Code should be read in conjunction with Article 20 of the LCE.

SANCTIONS FOR BRIBERY

To meet international standards, sanctions for bribery should be effective, proportionate and dissuasive. The bribery offences under Articles 5 and 11 of the LCE are punishable by imprisonment for a minimum term of one year and a maximum term of five years and/or a minimum fine of IDR 50 million (approx. USD 5 000 or EUR 3 500) and a maximum fine of IDR 250 million (approx. USD 25 000 or EUR 17 500). Civil servants and state apparatus are only subject to the prescribed imprisonment terms under Article 5. The bribery offences under Article 6 of the LCE are punishable by imprisonment for a minimum term of three years and a maximum term of fifteen years and a minimum fine of IDR 150 million (approx. USD 15 000 or EUR 10 500) and a maximum fine of IDR 750 million (approx. USD 75 000 or EUR 52 000). The offences under Articles 12 and 12B of the LCE are punishable by life imprisonment, or a minimum of four years imprisonment and a maximum of twenty years imprisonment and a minimum fine of IDR 200 million (approx. USD 20 000 or EUR 14 000) and a maximum fine of IDR 1 billion (approx. USD 99 000 or EUR 70 000). The maximum sentence under Article 13 is three years imprisonment and/or a maximum fine of IDR 150 million (approx. USD 15 000 or EUR 10 400). Finally, the bribery offences under Articles 2 and 3 of the ABLBO are punishable respectively by imprisonment for a maximum term of five years and a maximum fine of up to IDR 15 million (approx. USD 1 700 or EUR 1 300), and imprisonment for a maximum terms of three years and a maximum fine of IDR 15 million (approx. USD 1 500 or EUR 1 040). The maximum amount of fines prescribed under the LCE and the ABLBO fall short of international standards for sanctions imposed on companies for bribery.

Article 18(1)(a) of the LCE provides for the confiscation of the bribe, and the proceeds and instrumentalities of bribery. It is unclear whether this covers indirect proceeds of bribery. The LCE appears to cover confiscation from third parties under Article 19. However, confiscation falls under the category of “additional sentences” and it is therefore unclear whether it is mandatory. Additional sanctions listed under Article 18 include the payment of

compensation and the whole or partial closure of the guilty corporation (Articles 18(b) and 18(c)). Indonesian authorities state that the payment of compensation under Article 18(1)(c) covers the imposition of fines of equivalent value to the property subject to confiscation if, for example, the bribe or proceeds thereof have disappeared. If the payment of compensation cannot be undertaken because the bribe or proceeds thereof have disappeared, after 30 days of the final verdict, the LCE grants authority to the prosecutor to confiscate the wealth of the defendant to provide the compensation.

The LCE does not expressly provide for administrative (disciplinary) sanctions for civil servants who take or solicit bribes and it is unclear whether other administrative sanctions, such as debarment from public procurement, are available.

TOOLS FOR INVESTIGATING BRIBERY

The Corruption Eradication Commission (KPK) was established pursuant to Law No. 30/2002 on the Commission for Eradication of Criminal Acts of Corruption (KPK Law) and has the primary power to investigate acts of corruption, including bribery, in Indonesia. The KPK is authorized to conduct preliminary investigation, investigation and prosecution of acts of corruption that involve law enforcement officers, government executives, or other parties connected to acts of corruption. It also has the power to supervise and coordinate investigations and prosecutions by other institutions authorised to combat corruption.⁹

Article 12 of the KPK Law sets out the investigative tools of the KPK, which include:

- (a) conduct wiretapping the recording of conversations;
- (b) order travel bans;
- (c) request information from banks or other financial institutions on the financial details of a suspect or defendant;
- (d) order banks or other financial institutions to block accounts suspected to harbour the gains of corrupt activities of a suspect, defendant, or other connected party;
- (e) order the employer of a suspect to suspend the suspect from his/her office;
- (f) request data on the wealth and tax details of a suspect or defendant from the relevant institutions;

- (g) temporarily halt financial transactions, trade transactions, and other forms of contract, or temporarily annul permits, licenses, and concessions owned by suspects or defendants, assuming that preliminary evidence points to connections to a corruption case currently being investigated;
- (h) request assistance from Interpol Indonesia or the law enforcement institutions of other nations to conduct searches, arrests, and confiscations in foreign countries;
- (i) request assistance from the Police or other relevant institutions to conduct arrests, confinements, raids and confiscations in corruption cases currently being investigated.

The KPK is also obliged to provide witness and whistleblower protection for those who provide reports and information on acts of corruption.¹⁰ The KPK Law broadly provides for access to, and freezing of, bank accounts of suspects, defendants and third parties. There are no express provisions within the KPK Law or the LCE concerning the application of secrecy laws; however, Indonesian authorities state that the KPK does have the authority to request the wealth or tax information of a suspect or defendant from the relevant institutions, including banks and the Directorate General for Tax and has exercised this authority to obtain information ordinarily protected by bank secrecy. The Indonesian criminal justice system does not provide for plea negotiations, immunity and sentence reduction mechanisms. However, as part of the pre-investigation and investigation process, the KPK can use cooperative informants, but it is unclear whether they have been used in practice. The KPK and other law enforcement authorities also have the ability to conduct forms of undercover operations, such as “sting operations”, where members of law enforcement offer the suspect an opportunity to commit a crime in order to gather evidence, or the use of “controlled deliveries”, in which a pre-arranged delivery of money is delivered to the suspect in a monitored setting in order to identify the persons involved in the commission of an offence. The KPK is also empowered to conduct wiretapping and record conversations, and such materials are admissible as evidence (LCE Article 26 A). It has been noted, however, that there is a lack of technical equipment for carrying out special investigative techniques, and the skills or know-how to use such equipment.¹¹

As the KPK does not investigate all cases of bribery, it is unclear whether the tools under Article 12 of the KPK Law are available to other law enforcement agencies for the investigation of bribery, or whether they are restricted to those listed under Articles 29 and 30 of the LCE; these include the right to open, examine and confiscate mail and telecommunications or other instruments suspected to be related to the corrupt act under investigation; the ability to request information from banks, and; the ability to “block” (freeze) bank

accounts. However, the KPK states that it is able to share with, and effectively obtain, information about bribery cases from other relevant bodies, including the Indonesian Financial Transaction Reports and Analysis Centre, the National Ombudsman Commission, and the Business Supervisory Commission.

International assistance is available for investigating bribery, including for the conduct of searches, arrests and confiscations. In corruption cases, mutual legal assistance (MLA) may be requested by the Minister of Law and Human Rights, as well as by the Chairman of the KPK. MLA is also available in relation to the recovery of proceeds of crime, including for bribery and corruption under the Law on Mutual Legal Assistance in Criminal Matters (Law No. 1/2006) (LMLACM) and the Law on the Crime of Money Laundering (Law No. 15/2002) (LCML). The LMLACM broadly defines “proceeds of crime” as any property derived from a crime as well as property converted or transformed from direct proceeds or from other indirect proceeds. This definition also covers income, capital and other economic gains derived from direct or indirect proceeds. Indonesia may provide extradition for bribery; corruption is listed as an extraditable offence under the Law on Extradition (Law No. 1/1979).

ENFORCEMENT OF BRIBERY OFFENCES

Specific statistics on the enforcement of bribery offences are not available. In 2008, the KPK investigated 53 cases of corruption, of which it appears that 14 directly involved allegations of bribery.¹² 43 corruption cases were prosecuted in 2008, where it appears that 13 involved charges of bribery. In 2007, the KPK investigated 29 cases of corruption, of which it appears that 5 directly involved allegations of bribery. 24 corruption prosecutions were brought in 2007, of which it appears that 2 involved charges of bribery.

The KPK has the ability to prosecute cases in a specialized anti-corruption court (Corruption Crimes Court), which has exclusive jurisdiction over cases brought by the KPK (Law No. 49/2009 on the Anti-Corruption Court). The KPK handles around 30 percent of Indonesia’s corruption cases, and to date, the KPK’s conviction rate is 100 percent.¹³

RECOMMENDATIONS FOR A WAY FORWARD

Indonesia has made significant progress in criminalising bribery and its laws meet many aspects of international standards. To further strengthen its bribery laws, Indonesia could consider addressing the following issues.

Elements of the Active and Passive Bribery Offences

The LCE and ABLBO contain a number of features that conform to international standards. For example, it generally covers both active and passive domestic bribery and the LCE importantly provides a broad definition of “civil servant”. By covering employees of corporations receiving state aid or using state facilities, the LCE goes beyond what is required by international standards.

To improve its bribery offences, Indonesia could consider addressing the following areas:

- (a) Specific language covering the offering of a bribe under the active domestic bribery offences;
- (b) Specific language covering the requesting and solicitation of a bribe under the passive domestic bribery offences;
- (c) Express language covering additional modes of committing bribery, such as bribery through an intermediary, and third party beneficiaries;
- (d) Broader language in the definition of civil servants to cover government contractors, unpaid officials and those who perform public functions for private companies;
- (e) More specific language covering the situation where a bribe is given or taken in order for a public servant to perform his/her official duties, and the situation where the bribe is given or taken in order to use the official’s position outside the his/her authorised competence;
- (f) Express provision for incomplete offences, such as when a bribe is offered to but not received by an official, or when an official rejects a bribe.

Bribery of Foreign Public Officials

Indonesian law does not provide for an express active or passive foreign bribery offence. To meet international standards, Indonesia should consider adopting a specific offence criminalising bribery of officials of foreign countries and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

International standards require that legal persons be held liable for bribery. The LCE is progressive in that it expressly provides for corporate liability for criminal acts of corruption and broadly defines “corporation”. To improve the effectiveness of its liability of legal persons regime, Indonesia could consider whether its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects a wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when persons with the highest level of managerial authority (i) offer, promise or give a bribe to an official; (ii) direct or authorise a lower level person to offer, promise or give a bribe to an official; or (iii) fail to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Indonesia could also consider addressing whether corporate liability depends on the conviction of natural person for the crime.

Jurisdiction for Prosecuting Bribery

In addition to territorial jurisdiction, Indonesia also has nationality jurisdiction to prosecute certain natural persons for bribery. To ensure its overall jurisdictional basis for prosecuting bribery is sufficiently broad, Indonesia could address the follow matters:

- (a) Jurisdiction to prosecute bribery offences that take place partly in Indonesia;
- (b) Dual criminality requirement for offences committed by Indonesian nationals outside of Indonesia.

Sanctions for Bribery

To further strengthen its sanctions regime for bribery, Indonesia may wish to consider the following issues:

- (a) Express language making the confiscation of the proceeds of bribery mandatory;
- (b) The provision of administrative (disciplinary) sanctions for civil servants who take or solicit bribes;
- (c) The availability of blacklisting and debarment from public procurement.

Tools for Investigating Bribery

There are a wide range of tools available for the investigation of bribery in Indonesia. However, Indonesia could improve its ability to investigate bribery cases by formalising in writing practices (if they exist) such as plea negotiations with a defendant, reliance on co-operative informants or witnesses, and granting immunity from prosecution to persons who co-operate in corruption investigations or prosecutions;

Enforcement

Indonesia maintains detailed information on the types of corruption investigations and prosecutions undertaken by the KPK. As statistics are essential in determining whether a scheme criminalising bribery is effective, Indonesia may wish to consider maintaining more detailed statistics on the number of bribery investigations, prosecutions, convictions and sanctions (including confiscation).

RELEVANT LAWS AND DOCUMENTATION

Indonesian Penal Code: www.ilo.org/dyn/natlex/docs/ELECTRONIC/73932/85347/F55596828/IDN73932.pdf

Law No. 28/1999 on the State Organizer who is Free from Corruption, Collusion and Nepotism; Law No. 31/1999 on Corruption Eradication (as amended by Law No. 20/2001); Law No. 30/2002 on Corruption Eradication Commission: www.kpk.go.id/modules/edito/content.php?id=18

KPK Annual Reports: www.kpk.go.id/modules/wmpdownloads/singlefile.php?cid=13&lid=30

NOTES

- ¹ See: CIA World Factbook: Indonesia, available at: www.cia.gov/library/publications/the-world-factbook/geos/id.html; See also: Robin Bush (2008), *Regional 'Sharia' Regulations in Indonesia: Anomaly or Symptom?*, available at: asiafoundation.org/resources/pdfs/ShariaRegulations08RobinBush.pdf
- ² Article 13 of the LCE provides: "Anyone offering gifts/payments or promises to a civil servant with a view to abuse the power or authority vested in the post or position, or by the provision of gifts or promises is considered to have vested interests in the post or position shall be fined to a maximum of sentenced 3 (three) years and/or fined to a maximum of Rp. 150.000.000 (one hundred and fifty million Rupiahs)".
- ³ See UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ⁴ Law No. 28/1999 on The State Organizer who is Clean and Free from Corruption, Collusion and Nepotism
- ⁵ See Elucidation of Law No. 20/2001 on Amendment to Law No. 31/1999 on Corruption Eradication, Article 12B.
- ⁶ See Corruption Eradication Commission (2006), *UNCAC Gap Analysis Study Report for Indonesia*, Corruption Eradication Commission Indonesia, at p. 101.
- ⁷ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ⁸ Indonesian Penal Code, Article 7.
- ⁹ Corruption Eradication Commission (2008), *KPK Annual Report 2008*, Corruption Eradication Commission, Indonesia
- ¹⁰ Law No. 30/2002 on the Commission for the Eradication of Criminal Acts of Corruption, Article 15.
- ¹¹ Corruption Eradication Commission (2006), *UNCAC Gap Analysis Study Report for Indonesia*, Corruption Eradication Commission Indonesia, at p. 42.
- ¹² Corruption Eradication Commission (2008), *KPK Annual Report 2008*, Corruption Eradication Commission, Indonesia, at pp. 31-51. The KPK Annual Reports provide a brief summary of the types of cases investigated and prosecuted, but do not list the specific charge(s).
- ¹³ See: Michael Buehler (2009), *Of Gecko's and Crocodiles: Evaluating Indonesia's Corruption Eradication Efforts*, November 2009, Columbia University.

Criminalisation of Bribery in Japan

Penal Code (Unofficial Translation)

Article 197 (Acceptance of Bribes; Acceptance upon Request; Acceptance in Advance of Assumption of Office)

(1) A public officer or arbitrator who accepts, solicits or promises to accept a bribe in connection with his/her duties shall be punished by imprisonment with work for not more than 5 years; and when the official agrees to perform an act in response to a request, imprisonment with work for not more than 7 years shall be imposed.

(2) When a person to be appointed a public officer accepts, solicits or promises to accept a bribe in connection with a duty to be assumed with agreement to perform an act in response to a request, the person shall be punished by imprisonment with work for not more than 5 years in the event of appointment.

Article 197-2 (Passing of Bribes to a Third Party)

When a public officer, agreeing to perform an act in response to a request, causes a bribe in connection with the official's duty to be given to a third party or solicits or promises such bribe to be given to a third party, imprisonment with work for not more than 5 years shall be imposed.

Article 197-3 (Aggravated Acceptance; Acceptance after Resignation of Office)

(1) When a public officer commits a crime prescribed under the preceding two Articles and consequently acts illegally or refrains from acting in the exercise of his or her duty, imprisonment with work for a definite term of not less than 1 year shall be imposed.

(2) The same shall apply when a public officer accepts, solicits or promises to accept a bribe, or causes a bribe to be given to a third party or solicits or promises a bribe to be given to a third party, in connection with having acted illegally or having refrained from acting in the exercise of the official's duty.

(3) When a person who resigned from the position of a public officer accepts, solicits or promises to accept a bribe in connection with having acted illegally or

having refrained from acting in the exercise of his or her duty with agreement thereof in response to a request, the person shall be punished by imprisonment with work for not more than 5 years.

Article 197-4 (Acceptance for Exertion of Influence)

A public officer who accepts, solicits or promises to accept a bribe as consideration for the influence which the official exerted or is to exert, in response to a request, upon another public officer so as to cause the other to act illegally or refrain from acting in the exercise of official duty shall be punished by imprisonment with work for not more than 5 years.

Article 197-5 (Confiscation and Collection of a Sum of Equivalent Value)

A bribe accepted by an offender or by a third party with knowledge shall be confiscated. When the whole or a part of the bribe cannot be confiscated, an equivalent sum of money shall be collected.

Article 198 (Giving of Bribes)

A person who gives, offers or promises to give a bribe provided for in Articles 197 through 197-4 shall be punished by imprisonment with work for not more than 3 years or a fine of not more than 2,500,000 yen.

Unfair Competition Prevention Act

Article 18 (Prohibition of provision of illicit profit, etc. to foreign public officials, etc.)

(1) No person shall give, or offer or promise to give, any money or other benefits to a foreign public officer for the purpose of having the foreign public officer act or refrain from acting in a particular way in relation to his/her duties, or having the foreign public officer use his/her position to influence another foreign public officer to act or refrain from acting in a particular way in relation to that officer's duties, in order to obtain illicit gains in business with regard to international commercial transactions.

(2) The term "foreign public officer" as used in the preceding paragraph means any of the following:

- (i) a person who engages in public services for a foreign, state, or local government;
- (ii) a person who engages in services for an entity established under a special foreign law to carry out specific affairs in the public interest;
- (iii) a person who engages in the affairs of an enterprise of which the number of voting shares or the amount of capital subscription

directly owned by one or more of the foreign, state, or local governments exceeds 50 percent of that enterprise's total issued voting shares or total amount of subscribed capital, or of which the number of officers (which means directors, auditors, secretaries, and liquidators and other persons engaged in management of the business) appointed or designated by one or more of the foreign, state, or local foreign governments exceeds half of that enterprise's total number of officers, and to which special rights and interests are granted by the foreign state or local governments for performance of its business, or a person specified by a Cabinet Order as an equivalent person;

- (iv) a person who engages in public services for an international organization (which means an international organization constituted by governments or intergovernmental international organizations); or
- (v) a person who engages in the affairs under the authority of a foreign, state, or local government or an international organization, and which have been delegated by such organization.

Article 21 (Penal Provisions)

(2) Any person who falls under any of the following items shall be punished by imprisonment with work for not more than five years or a fine of not more than five million yen, or both.

- (vi) a person who violates any provision of Articles 16, 17, or 18(1).

(5) The offense prescribed in item 5 of paragraph 2 shall also apply to a person who committed it outside Japan.

Article 22 (Responsibility of Legal Persons)

(1) When a representative of a juridical person, or an agent, employee or any other of a juridical person or an individual has committed a violation prescribed in any of the provisions of items 1, 2 or 6 of paragraph 1 or paragraph 2 of the preceding Article with regard to the business of said juridical person or said individual, not only the offender but also said juridical person shall be punished by a fine of not more than three hundred million yen, or said individual shall be punished by the fine prescribed in the relevant Article.

INTRODUCTION

Japanese criminal law and procedure draw from French, German and (more recently) Anglo-American legal systems. As a Party to the OECD Anti-Bribery Convention, Japan's offences for foreign bribery have been extensively

reviewed. Its domestic bribery offences, however, have not been externally reviewed. As of August 2009, Japan has signed but has not ratified the UNCAC. Japan has been a member of the FATF and APG since 1990 and 1997 respectively. To avoid duplication, this report will rely heavily on the OECD's monitoring reports regarding the foreign bribery offence and related enforcement issues. It will also refer to FATF/APG evaluation reports whenever appropriate.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Japan's general active and passive domestic bribery offences are found in the Penal Code (PC). Articles 197 to 197-5 deal with various forms of passive domestic bribery which will be elaborated below. Article 198 deals with active domestic bribery.

These active and passive domestic bribery offences meet international standards regarding the different modes for committing the offences. Active domestic bribery under PC Article 198 expressly covers giving, offering and promising to give a bribe. The passive domestic bribery offences in Articles 197 to 197-5 explicitly refer to accepting, soliciting and promising to solicit a bribe.

The domestic bribery offences cover bribes provided to third party beneficiaries. Article 197-2 specifically provides that it is an offence for a public officer to cause, solicit or promise a bribe to be given to a third party. The active domestic bribery offence in Article 198 does not expressly refer to third party beneficiaries. However, the provision covers bribe-giving "provided for in Articles 197 through 197-4" and thus includes the offence under Article 197-2.

The domestic bribery offences meet international standards on bribery through intermediaries. None of the domestic bribery offences contains express language on intermediaries. Nevertheless, case law has established that the offences largely cover this scenario. The only exception is where an intermediary does not carry out his/her principal's instructions by failing to offer, give or promise the bribe to the public official.¹ However, the Japanese authorities do not believe that there is a strong necessity to criminalise this situation.

The domestic bribery offences cover bribery of "public officers", a term defined to mean a "national or local government official, a member of an assembly or committee, or other employees engaged in the performance of public duties in accordance with laws and regulations". The offence is thus restricted to bribery of persons who perform public duties "in accordance with

laws and regulations". It is not clear whether there may be some officials who perform public duties that are not specifically described by law or regulation. In addition, there is no express coverage of a person holding judicial office, though Japan asserts that these officials are considered "national government officials" in the original Japanese version of the law. It is unclear whether such a person is considered a "national or local government official" or "other employee engaged in the performance of public duties". There is also no reference to persons who perform public functions for a public agency, or state-owned or controlled enterprises.² Finally, whether an official is paid or remunerated (*e.g.* receives a salary) is a relevant but not decisive factor in determining whether he/she is guilty of passive bribery, according to Japanese authorities.

International standards also require broad coverage of acts or omissions in relation to the performance of official duties. The PC Article 197, 197-2 and 197-3 domestic bribery offences appear much more limited, as they only cover an official who accepts, solicits etc. a bribe "in connection with his/her duties". The offences thus do not expressly cover any use of the public official's position or office, or acts or omissions outside the official's competence.³ The Japanese authorities assert that the concept "in connection with his/her duties" would be broadly interpreted. They also point out that the offence of Acceptance for Exertion of Influence in PC Article 197-4 does not contain a similar limitation.

The domestic bribery offences do not expressly indicate whether a "bribe" includes both pecuniary and non-pecuniary bribes.⁴ The Japanese authorities state that, according to Supreme Court jurisprudence, a "bribe means anything that fulfils man's need, greed or desire. Therefore, bribery offences cover all bribes of a monetary and also non-monetary nature." The Japanese authorities also indicate that the definition of a bribe is not affected by the value of the bribe/advantage, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of giving such bribes, or whether the briber was the best qualified bidder or otherwise could properly have been awarded the advantage. Case law was also not provided to support this proposition.

The PC domestic bribery offences do not contain some defences to bribery that are commonly found in other jurisdictions. According to the Japanese authorities, there are no defences of small facilitation payments, solicitation or "effective regret".

BRIBERY OF FOREIGN PUBLIC OFFICIALS

Active foreign bribery is covered under the Unfair Competition Prevention Act (UCPA) Article 18. The provision has been extensively reviewed under the

monitoring mechanism of the OECD Anti-Bribery Convention and thus need not be discussed in detail here. The 2005 Phase 2 and 2006 Phase 2 bis Reports noted the following issues:

- (a) The foreign bribery offence is not located in the PC as with the domestic bribery offences. Instead, it is found in the UCPA, a statute that deals primarily with competition in the Japanese market. The Working Group on Bribery was concerned that this reduced the visibility of the foreign bribery offence, and the priority given to the offence's enforcement. Accordingly, the Working Group recommended that Japan move the foreign bribery offence to the PC.⁵

In this Thematic Review, Japan stated that the UCPA provides a sufficient legal framework for implementing the OECD Anti-Bribery Convention since the UCPA and the Convention have similar objectives. In addition, offences in the PC are not accorded higher priority than those outside.

- (b) The foreign bribery offence covers a foreign public official who receives a bribe and transfers it to a third party beneficiary. However, the Japanese authorities asserted that the offence also covers a foreign official who instructs a briber to give a bribe directly to a third party beneficiary. The Japanese authorities added that, in such cases, either the third party beneficiary and the official would have "colluded", or the official would not have received the benefit in substance. The Working Group recommended that Japan consider clarifying this issue.⁶
- (c) The UCPA does not expressly provide for a defence of small facilitation payments, but the Guidelines provided vague examples suggesting that such a defence is available. Despite a January 2007 revision of the Guidelines, the Working Group recommended that Japan make clear in the Guidelines that Japanese law does not permit a defence of facilitation payments.⁷

Passive foreign bribery is not an offence in Japan.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Legal persons cannot be held liable for domestic bribery. There are no constitutional obstacles to establishing corporate liability. Indeed such liability has been created for foreign bribery (see below) and more recently for drug offences, money laundering, and organised crime.⁸ Despite these

developments, the Japanese authorities are not considering introducing corporate liability for domestic bribery as required under international standards.

Corporate liability for foreign bribery is available under Article 22 UCPA. The provision states that a legal person is liable where its representative, agent or employee has committed foreign bribery “with regard to the business of the legal person”. As with the foreign bribery offence, the OECD Working Group on Bribery has reviewed this provision extensively and decided to follow up developments concerning two issues:

- (a) The Group noted that a legal person is liable only if a natural person gives a bribe “with regard to the business” of the legal person. The Group was concerned that there would be no liability if the employee of one company bribed for the benefit of a related company (*e.g.* a subsidiary).

During this Thematic Review, the Japanese authorities stated that if an employee of a related company (*e.g.* a subsidiary) who committed foreign bribery is also an employee of the parent company, then the employee and the parent company can be punished.

- (b) The Group questioned whether in practice a company would be punished only if the natural person who committed the offence is also sanctioned.⁹ During this Thematic Review, the Japanese authorities stated that a legal person would be held liable if the natural person who bribed a foreign official is punishable.

JURISDICTION TO PROSECUTE BRIBERY

Jurisdiction to prosecute foreign and domestic bribery is covered by the PC. Under Article 1, the offences apply to crimes committed within the territory of Japan. It is unclear to what extent the provision gives rise to jurisdiction over crimes committed only partly in Japan. The Japanese authorities asserted that territorial jurisdiction arises when a part of an act constituting a crime is committed in Japan, or if a result of a crime is felt in Japan, but did not provide supporting case law.

As for extraterritorial jurisdiction, if bribery of a Japanese official takes place outside Japan, then there is jurisdiction to prosecute the official (PC Article 4(iii)). There is no extraterritorial jurisdiction to prosecute the briber for domestic bribery, however, even if he/she is a Japanese national. For bribery of foreign public officials, Japanese nationals who commit the crime outside of Japan may be prosecuted (UCPA Article 21(5)). Japan states that it also has

nationality jurisdiction to prosecute legal persons for foreign bribery. Nevertheless, the OECD Working Group on Bribery decided to follow up this issue as practice develops.¹⁰

SANCTIONS FOR BRIBERY

Foreign and domestic bribery are punishable by the following maximum sanctions:

Offence	Sentence available
Active domestic bribery (PC Article 198)	Imprisonment of up to 3 years or a maximum fine of JPY 2.5 million (approx. EUR 18 000 or USD 26 000)
Passive domestic bribery (PC Articles 197, 197-2 and 197-4)	Imprisonment of up to 5 years
Aggravated passive domestic bribery – official acts illegally or refrains from perform his/her duty (PC Article 197-3)	Minimum imprisonment of 1 year and maximum of 20 years. ¹¹
Active foreign bribery – natural persons (UCPA Article 21(2))	Imprisonment of up to 5 years and/or a maximum fine of JPY 5 million (approx. EUR 36 000 or USD 52 000)
Active foreign bribery – legal persons (UCPA Article 22)	Maximum fine of JPY 300 million (approx. EUR 2.2 million or USD 3.1 million)

A court shall confiscate a bribe upon conviction. PC Article 197-5 requires a bribe to be confiscated upon a conviction for domestic passive bribery. A broader regime of confiscation is found in Act on Punishment of Organised Crimes, Control of Crime Proceeds and Other Matters (APOC). APOC allows the confiscation of bribes given to domestic or foreign officials. It also expressly permits the confiscation of *indirect* proceeds (i.e. proceeds of proceeds) of *domestic passive* bribery¹² (but not *foreign* bribery).¹³ As well, APOC contains additional provisions that are not found in the PC, such as measures for dealing with intermingled property, joint property, and such property in the hands of third parties.¹⁴ If the bribe cannot be confiscated, then both the PC and APOC allow a court to “collect an equivalent sum of money” from the person against whom confiscation would have been ordered.¹⁵

By contrast, confiscation is not available for the proceeds of bribery accruing to a briber. PC Article 197-5 expressly refers to a bribe only, while the APOC specifically covers confiscation of the proceeds of passive but not active bribery.¹⁶ On its face, PC Article 19(i)(iii) might permit confiscation of the

proceeds of bribery as “an object produced or acquired by means of a criminal act or an object acquired as reward for a criminal act”. Nevertheless, the Japanese authorities have stated in this thematic review that confiscation of proceeds of domestic bribery is not possible. Furthermore, the Japanese authorities have expressed in the past that there may be difficulties in quantifying the proceeds of bribery.¹⁷ In this Thematic Review, the Japanese authorities state that confiscation of proceeds is not desirable because profits with tenuous or no connection with bribery might also be confiscated. In any event, they believe that the ability to impose fines for bribery obviates the need for confiscation.

A conviction for bribery may also lead to a limited form of debarment. A company and its board member or employee that has been convicted of domestic or foreign bribery may be disqualified from participating in contracts funded by official development assistance (ODA).¹⁸ However, debarment for public procurement contracts not funded by ODA is not available.

TOOLS FOR INVESTIGATING BRIBERY

Article 197 of the Code of Criminal Procedure (CCP) is used to gather financial and other information in bribery investigations, according to the Japanese authorities. The provision allows investigators to ask “public offices, or public or private organisations” to make a report on necessary matters relating to an investigation. The Japanese authorities indicate that all types of information and records are available, and that there are no rules on bank secrecy that would impede disclosure. The time needed to obtain such records varies from days to months, depending on the volume of information involved. However, if a financial institution refuses to produce the requested information, it cannot be sanctioned.¹⁹

Article 197 CCP is also used to obtain information concerning a taxpayer from tax authorities. As with bank information, the Japanese authorities indicate that all types of tax information and records are available, and that there are no rules on tax secrecy that would impede disclosure.

Judicial warrants for search and seizure are available (CCP Articles 99-113 and 218-219) but there are limitations to these powers. Objects in the possession of a current or former public officer may not be seized if the officer’s supervisory agency considers that seizure would harm important national interests. If the officer is a Minister or member of Parliament, then Cabinet or Parliament makes the national interest determination respectively. “National interest” is not defined. The CCP provides no avenues for challenging or judicially reviewing a refusal to allow seizure due to national interest.

Search and seizure warrants also cannot be used to seize objects containing confidential information held by a physician, dentist, midwife, nurse, attorney (including a foreign lawyer registered in Japan), patent attorney, notary public or a person engaged in a religious occupation, or any other person formerly engaged in these professions. The only exception is when the person in question consents to seizure, when refusal amounts to an abuse of rights, or if the Rules of Court provide otherwise.

Additional means of gathering evidence in bribery cases are much more limited. Bribery investigators cannot use special investigative techniques such as wiretapping,²⁰ secret surveillance, video recording, and listening and bugging devices. The authorities also cannot conduct undercover police operations or controlled deliveries. A court may seize postal items and telegrams (CCP Article 100), but there are no provisions for intercepting electronic communications such as email.

Freezing of assets subject to confiscation, known in Japan as a “securance order”, is available in bribery cases. If a prosecution has commenced, a court may freeze property if there are reasonable grounds to believe that the property is illicit and subject to confiscation. Before a prosecution has commenced, a court may also freeze property if it believes that there is cause and necessity for doing so (APOC Articles 22 and 23).

International assistance in bribery cases is governed by the Law on Extradition and Law for International Assistance in Investigation and other related matters. Japan will grant extradition to a foreign country only if the conduct in question, had it occurred in Japan, would be punishable by imprisonment for life or up to three years. When Japan seeks extradition, the requested state may apply a similar three-year threshold on the basis of reciprocity. But this should not pose a problem since Japan domestic and foreign bribery offences all meet this threshold.²¹ No such threshold applies for MLA. In practice, however, concerns have been expressed over the Japanese authorities’ readiness to seek MLA from foreign countries, at least in foreign bribery cases.²²

Japanese authorities indicate that they may rely on co-operative offenders, informants or witnesses when investigating and prosecuting bribery cases. However, there are no written guidelines or procedures to indicate when such means may be used, and what rewards (*e.g.* sentence reductions) that co-operating individuals may receive. Plea bargaining is not available for bribery or any types of criminal offences.

ENFORCEMENT OF BRIBERY OFFENCES

Corruption cases are criminally investigated and prosecuted by the general law enforcement and prosecutorial authorities. Japan does not have a specialised anti-corruption agency for this purpose.

Japan provided the following statistics on the enforcement of its bribery offences against natural persons in 2004-2007. There were no prosecutions of legal persons over the same period:

	2004	2005	2006	2007
Active domestic bribery				
Investigations	N/A	N/A	N/A	N/A
Prosecutions	115	142	111	92
Passive domestic bribery				
Investigations	N/A	N/A	N/A	N/A
Prosecutions	104	98	118	69
Active and passive domestic bribery				
Convictions	121	124	123	96
Acquittals	0	0	0	0

	2004	2005	2006	2007
Active foreign bribery				
Prosecutions	0	0	0	2
Convictions	0	0	0	2
Acquittals	0	0	0	0

Japan also provided the following statistics on the sanctions imposed for active and passive domestic bribery in 2004-2007:

Sentence	2004	2005	2006	2007
6 months – 1 year (suspended sentences)	12 (12)	14 (13)	18 (17)	11 (10)
1-2 years (suspended sentences)	74 (70)	68 (62)	65 (64)	48 (43)
2-3 years (suspended sentences)	27 (25)	35 (27)	34 (27)	33 (27)
3-5 years (suspended sentences)	8 (6)	7 (6)	6 (5)	4 (4)
Total number of convictions	121	124	123	98
Total number of jail sentences (suspended sentences)	121 (113)	124 (108)	123 (113)	96 (84)

In addition, two persons convicted of foreign bribery in 2007 were fined.

These statistics contain a few striking features. While the number of prosecutions for domestic bribery seems appropriate, the same statistic for foreign bribery is drastically lower, prompting the OECD Working Group on Bribery to express concerns.²³ The conviction rate is 100% once a prosecution has been commenced, though this extremely high rate is consistent with other crimes.²⁴ Practically all convictions result in jail sentences, but 90% of jail sentences are suspended. Also, fines were not imposed in these cases – and in fact unavailable for passive bribery. Questions therefore could be raised over whether sanctions for bribery in Japan are effective, proportionate and dissuasive.

The Japanese authorities state that they actively use the provisions on confiscation but were unable to provide statistics on the use of confiscation in bribery cases. Nevertheless, it has been noted that the use of confiscation orders in cases involving other types of crimes is low, considering Japan's size and wealth. There was also evidence that prosecutors preferred to seek fines in lieu of confiscation rather than confiscation orders.²⁵

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

The active and passive domestic bribery offences in PC Articles 197 to 197-5 already meet many requirements found in international standards, *e.g.* the different modes of committing the offences, and third party beneficiaries. Japan could strengthen these offences by addressing the following issues:

- (a) Where a principal instructs an intermediary to offer, give or promise a bribe to a public official, but the intermediary does not carry out those instructions; and
- (b) Express language confirming that bribery in order that an official uses his/her position outside his/her authorised competence is covered under Penal Code Article 197, 197-2, and 197-3.

Bribery of Foreign Public Officials

As a Party to the OECD Anti-Bribery Convention, Japan has an active foreign bribery offence that meets many requirements of the Convention. Japan could consider addressing the following issues that have been identified by the OECD Working Group on Bribery:

- (a) Placing the foreign bribery offence in the PC instead of the UCPA;
- (b) A foreign public official who instructs a briber to give a bribe directly to a third party beneficiary;
- (c) The treatment of small facilitation payments in the Guidelines.

Liability of Legal Persons for Bribery

To fully meet international standards, Japan should establish the liability of legal persons for domestic bribery. For foreign bribery, such liability is available. The OECD Working Group on Bribery has raised two issues concerning liability of legal persons for foreign bribery, namely: (a) liability of a legal person who benefits from a bribe given by an employee of a related legal person; and (b) whether in practice a legal person would be punished only if the natural person who bribed a foreign official is also sanctioned. Regarding the latter issue, the Japanese authorities have stated during this Thematic Review that a legal person would be held liable if the natural person who bribed a foreign official is punishable. This difference of opinion will be addressed in the Working Group on Bribery where the issue was originally raised.

Jurisdiction for Prosecuting Bribery

Japan has territorial jurisdiction to prosecute domestic and foreign bribery cases, and nationality jurisdiction to prosecute foreign bribery. It could consider addressing the issue of nationality jurisdiction to prosecute (i) active domestic bribery; and (ii) legal persons for active foreign bribery.

Sanctions for Bribery

The maximum available punishments against natural and legal persons for bribery offences are largely in line with international standards. To ensure an effective regime in practice, Japan could consider additional administrative sanctions for bribery, such as disbarment from public procurement contracts that are not funded by ODA.

Tools for Investigating Bribery

Japanese bribery investigators have some essential tools at their disposal, but Japan could consider some additional issues:

- (a) Exceptions to seizure through judicial warrants, such as national interest and professional confidentiality;
- (b) Special investigative techniques, such as wiretapping, email interception, secret surveillance, video recording, listening and bugging devices, undercover police operations, and controlled deliveries; and
- (c) Guidelines on the use of co-operative offenders, informants and witnesses.

Enforcement of Bribery Offences

Statistics indicate that Japan has been active in prosecuting domestic bribery cases. Issues that could be addressed include:

- (a) Prosecutions of foreign bribery; and
- (b) Suspended sentences.

RELEVANT LAWS AND DOCUMENTATION

Japanese Law Translation, Ministry of Justice: www.japaneselawtranslation.go.jp

OECD Phases 1 and 2 monitoring reports on Japan: www.oecd.org/daf/nocorruption

FATF (2008), *Third Mutual Evaluation Report: Japan*: www.fatf-gafi.org

NOTES

- ¹ See OECD (2005), *Phase 2 Report: Japan*, paras. 152-154. See also OECD (1999), *Phase 1 Report: Japan*, Section 1.1.5.
- ² Compare with the foreign bribery offence discussed below which expressly covers officials of state-owned or controlled enterprises.
- ³ See OECD Convention, Article 1(4)(c) and Commentary 19.
- ⁴ Again, this should be compared with the foreign bribery offence, which expressly covers “any pecuniary or other advantage”.
- ⁵ OECD (2005), *Phase 2 Report: Japan*, paras. 170-174; and OECD (2006), *Phase 2 bis Report: Japan*, paras. 101-109.
- ⁶ OECD (2005), *Phase 2 Report: Japan*, paras. 155-157; OECD (2007), *Follow-up Report on the Implementation of the Phase 2 Recommendations: Japan*, para. 13.
- ⁷ OECD (2005), *Phase 2 Report: Japan*, paras. 139-145; OECD (2006), *Phase 2 bis Report: Japan*, para. 37; OECD (2007), *Follow-up Report on the Implementation of the Phase 2 Recommendations: Japan*, para. 12.
- ⁸ Act on the Punishment of Organised Crime, Article 17; and Anti-Drug Special Provisions Law, Article 15.
- ⁹ See OECD (2005), *Phase 2 Report: Japan*, paras. 158-165.
- ¹⁰ OECD (2005), *Phase 2 Report: Japan*, paras. 166-167; and OECD (2006), *Phase 2 bis Report: Japan*, paras. 53-56.
- ¹¹ A term of imprisonment cannot exceed 20 years (Penal Code Article 12(1)).
- ¹² APOC Articles 13 and 2(3) (definition of “property derived from crime proceeds”).
- ¹³ APOC only allows confiscation of “any property given through [foreign bribery under the UCPL]”. The definition of “property derived from crime proceeds” does not apply to foreign bribery (APOC Articles 13 and 2(3) (“definition of crime proceeds”).
- ¹⁴ APOC Articles 14, 15 and 18.
- ¹⁵ PC Article 197-5 and APOC Articles 15 and 18.
- ¹⁶ For domestic bribery, see APOC Article 13 and Schedule (2)(I), which only refers to the PC *passive* bribery offences. For foreign bribery, the APOC (Articles 13 and 2(3)) only allows confiscation of “any property *given* through [foreign bribery under the UCPL]” (italics added).
- ¹⁷ OECD (1999), *Phase 1 Report: Japan*, Section 3.6; OECD (2005), *Phase 2 Report: Japan*, para. 182.
- ¹⁸ See Japan International Co-operation Agency’s *Rules on Sanctions against Persons Engaged in Fraudulent Practices, etc. in Projects of ODA Loan and Grant Aid; Rules on Sanctions to Suspend Eligibility for Participation in*

Contract Bids; and Implementation Rules for Sanctions against a Firm Engaged in Corrupt or Fraudulent Practices in Japan's Grant in Aids. See also OECD (2006), *Phase 2 bis Report: Japan*, para. 188.

¹⁹ OECD (2006), *Phase 2 bis Report: Japan*, para. 79.

²⁰ See also OECD (2006), *Phase 2 bis Report: Japan*, paras. 96-97 and 100.

²¹ Applicable treaties and foreign legislation may impose additional requirements for granting extradition or MLA.

²² OECD (2006), *Phase 2 bis Report: Japan*, paras. 78-84.

²³ OECD (2005), *Phase 2 Report: Japan*, paras. 9-14; OECD (2006), *Phase 2 bis Report: Japan*, paras. 57-64.

²⁴ Ramseyer and Rasmusen (2001), "Why Is the Japanese Conviction Rate So High?", *Journal of Legal Studies*, vol. 30 (University of Chicago).

²⁵ FATF (2008), *Third Mutual Evaluation Report: Japan*, paras. 268-269.

Criminalisation of Bribery in Kazakhstan

Criminal Code of Kazakhstan (Provided by the Financial Police of Kazakhstan)

Article 311. Receipt of a Bribe

1. Receipt by a person empowered to exercise public functions, or by a person equated to such person, either personally or through an intermediary of a bribe in the form of money, securities, other property, the right to property, or valuable benefits for the agreement to perform (or omit to perform) certain actions in favour of the briber or his/her principals, if such actions (omission to act) are within the competence of a given person empowered to exercise public functions, or a person equated to such person, or if he/she, by virtue of his/her official position, can make for such actions (omission to act), as well as for general protectorate or connivance in office, - shall be punished by a fine in the amount from seven hundred up to two thousand monthly calculation indices, or in the amount of wages or other income of a convict for a period from seven months up to one year, or by restriction of freedom for a period up to five years, or by imprisonment for the same period, with deprivation of the right to hold certain positions or to engage in certain types of activity for a period up to five years with or without confiscation of property.

2. The same act that has been committed by an official, as well as receipt of a bribe for doing illegal actions (omission to act), - shall be punished by imprisonment for a period from three to seven years with deprivation of the right to hold certain positions or to engage in certain types of activity for the period up to seven years with or without confiscation of property.

3. Acts as is mentioned in the first or second sections of this Article, which are committed by a person holding a senior public office, - shall be punished by imprisonment for a period from five to ten years with deprivation of the right to hold certain positions or to engage in certain types of activity for the period up to seven years with or without confiscation of property.

Notes:

[...]

4. The officials specified in notes to article 307 of the present Code, and also officials of the foreign states or the international organisations concern officials

with reference to the present article and article 312 of the present Code.

Article 307. Misuse of Official Powers

[...]

Notes:

1. Officials, members of the Parliament and of Maslikhats, judges and all public servants in accordance with the legislation of the Republic of Kazakhstan concerning public service shall belong to persons empowered to exercise public functions.

2. The following shall be equated to persons empowered to exercise public functions:

- 1) Persons elected to bodies of local government;
- 2) Citizens who have been duly registered as Presidential contenders, candidates to members of the Parliament of the Republic of Kazakhstan and members of Maslikhats as well as members of the elected bodies of local government;
- 3) Employees who permanently or temporarily work at the bodies of local government, and who are paid from the state budget funds of the Republic of Kazakhstan;
- 4) Persons who exercise managerial functions in the state-owned entities and entities in the charter capital of which the state shareholding is not less than thirty-five percent.

3. Persons who exercise functions of a public agent or those that perform organisational or administrative and economic functions in the state bodies, bodies of local government, as well as in the Armed Forces of the Republic of Kazakhstan, other troops and military formations of the Republic of Kazakhstan, whether permanently, temporarily or in accordance with a special authorization, shall be recognized as officials.

4. Persons who hold positions established by the Constitution of the Republic of Kazakhstan, constitutional laws and other laws of the Republic of Kazakhstan, enabling them to exercise directly the functions of the state and powers of state bodies, as well as persons who hold political offices of public servants pursuant to the legislation of the Republic of Kazakhstan concerning public service, shall be understood as persons holding senior public office.

Article 312. Giving a Bribe

1. Giving a bribe to a person empowered to exercise public functions, or to a person equated to such person, either personally or through an intermediary, -

shall be punished by a fine in the amount from two hundred up to five hundred monthly calculation indices, or in the amount of wages or other income of a convict for a period from two to five months, or by correctional labour for a period up to two years, or by restriction of freedom for a period up to three years, or by detention under arrest for a period from three to six months, or by imprisonment for a period up to three years.

2. Giving a bribe to an official, and equally giving a bribe for the commission of knowingly illegal actions (omission to act), or such actions committed repeatedly, or by an organised group, - shall be punished by a fine in the amount from seven hundred up to two thousand monthly calculation indices, or in the amount of wages or other income of a convict for a period from seven months up to one year, or by restriction of freedom for a period up to five years, or by imprisonment for the same period.

3. Bribery to the person, holding a responsible state post is punished by imprisonment for the term from five till ten years with right deprivation to occupy certain posts or to be taken by certain activity for the term up to seven years with confiscation of property or without that.

INTRODUCTION

The Kazakh legal system has roots in Soviet and continental law. Kazakhstan has been a State Party to UNCAC since June 2008. It is a member of the Eurasian Group on Combating Money Laundering and Financing of Terrorism (EAG). Since 2005, Kazakhstan's criminal bribery offences have been externally reviewed under the Monitoring Process of the OECD Anti-Corruption Network for Eastern Europe and Central Asia (ACN).¹ To avoid duplication, this report will refer extensively to the ACN's reports on Kazakhstan.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Kazakhstan's general active and passive domestic bribery offences are found in Articles 311 and 312 of the Criminal Code (CC). Article 312 deals with bribe-giving (active bribery) while Article 311 deals with bribe-taking (passive bribery). Each offence is divided into three sub-offences: (1) bribery of "persons empowered to exercise public functions", (2) bribery of "officials", and (3) bribery of senior officials as defined in the Constitution. These three categories of "public officials" are further defined in the notes to Article 307. This report focuses on these articles but refers to additional provisions such as Article 313

(mediation in bribery) and Article 307 (offence of misuse of official powers) where appropriate.

International standards require coverage of three modes of active domestic bribery, namely offering, giving, and promising a bribe. CC Article 312 refers only to giving. The Supreme Court of Kazakhstan has held that, for the crime of bribery, the actual giving/receiving of the bribe may occur before or after the official acts or omits to act in the briber's favour.² This would therefore cover some "promises" to bribe. Nevertheless, CA Article 312 falls short of fully meeting international standards. The ACN has recommended that Kazakhstan amend Article 312 to cover offers and promises to bribe.³ Kazakh officials replied that doing so "would lead to substantial difficulties in practice."⁴ What these difficulties are precisely is not clear.

As for passive domestic bribery, international standards generally demand coverage of accepting and soliciting a bribe. CC Article 311 covers only receipt of a bribe and not solicitation. This conclusion is reinforced by the statements of Kazakh officials that "the objective aspect of this offence consists in the *taking* by a person" of a bribe, and that the crime "is considered complete as of the moment of *receipt* of the subject of the bribe" (*italics added*).⁵ If the crime of passive bribery is complete only upon the physical acceptance of the bribe, as these statements suggest, then Article 311 would not cover solicitation. Kazakh authorities also cited a Supreme Court Resolution for the proposition that solicitation may be covered by the crime of "extortion".⁶ "Extortion" would cover only the seeking of a bribe through "threat of acts that could harm the legitimate interests of the briber or intentionally exposing the latter to such conditions under which he is forced to pay bribes." "Extortion" thus would not cover bribe solicitations where an official asks for a bribe without such "threats" of harm or exposure to the said conditions.

The crime of attempt ameliorates but does not fully remedy these deficiencies. Offering, promising and soliciting a bribe arguably amounts to attempted bribe-giving or bribe-taking, which are crimes under CC Article 24. Nevertheless, international standards require offering, promising and soliciting bribes to be full, completed offences, regardless of whether the offer, promise or solicitation is accepted.⁷

International standards also require coverage of a person who uses an intermediary to offer, give, solicit etc. a bribe. The active and passive bribery offences in CC Articles 311-312 expressly cover bribe-taking and giving "personally or through an intermediary". This is sufficient to meet international standards. The intermediary him/herself is guilty of a separate offence under Article 313.

International standards also require that bribery offences cover bribes given to a public official for the benefit of a third party, or directly to a third party upon the instructions of the public official. The CC does not cover such cases and thus fall short of international standards. The ACN has recommended that Kazakhstan amend its legislation accordingly.⁸ According to Kazakh authorities, a December 2009 statutory amendment may address the issue, but a translation of the amended law was not available.⁹

Effective bribery offences must also have a broad definition of “public official” that includes any person holding legislative, executive, administrative or judicial office, irrespective of seniority, and whether appointed or elected, permanent or temporary, paid or unpaid. The offence must also cover any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined and applied in the domestic law, and any other person defined as a “public official” in the domestic law.

The CC definition of a public official (found in an explanatory note under CC Article 307) is extensive but still falls short of international standards. The definition does not categorically cover all persons who perform a public function or who provides a public service. Also, the definition only covers persons “who exercise managerial functions in the state-owned entities and entities in the charter capital of which the state shareholding is not less than thirty-five percent.” It thus excludes persons who do not exercise “managerial functions” but nevertheless perform public functions. Also excluded are employees and officials of state-controlled enterprises in which the government owns less than 35% of the share capital. The shortcomings with the CC definition of “public official” are exacerbated by inconsistent definitions in several other statutes.¹⁰ The December 2009 amendments to the CC may deal with some of these issues, according to Kazakh authorities. Whether and to what extent this is the case is unclear. A translation of the amendments was not available.

To be effective, bribery offences must also broadly cover acts or omissions in relation to the performance of official duties, including any use of the public official’s position or office, and acts or omissions outside the official’s competence. The CC bribery offences seem to meet this requirement. Articles 311 (passive bribery) covers bribery of officials in return for acts “within the competence” of the official, or if the official, “by virtue of his/her official position, can make for such actions or omissions”. Article 312 (active bribery) does not describe the acts or omissions performed by the official, but presumably the description in Article 311 applies. Kazakh authorities believe that the offence of “abuse of power or authority” may also apply in some cases.

International standards require coverage of bribes of both a material and non-material nature. According to CC Article 311, a bribe must be “money, securities, other property, the right to property, or valuable benefits”, which suggests only things of economic value are covered. This view is reinforced by a Supreme Court ruling which states that a bribe must be “money; securities; material values, that rendered for free, but should be paid for; benefits granting proprietary rights, etc.”¹¹ The ACN has also recommended that Kazakhstan amend the CC to remedy this defect.¹²

A bribe must also not be affected by the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.¹³ There is no information on whether the definition of a bribe in the CC meets this requirement.

A small gifts defence is available, however. It is not a crime for a person empowered to exercise public functions (but not an official or a senior official) to accept a gift in exchange for an act or omission already performed. The defence only applies if the gift recipient is a first-time offender; there is no prior agreement between the giver and the official to provide the gift; the act or omission performed by the official in exchange for the bribe is lawful; and the value of the gift does not exceed “two monthly calculation indices”. The defence applies to both bribers and officials.¹⁴ The act may also attract disciplinary actions and/or administrative liability, according to Kazakh authorities.

Also available is a defence of “effective regret”. Under CC Article 65, a first-time offender is exculpated if (1) he/she voluntarily admits guilt to the police, (2) contributes to the disclosure of a given crime, or (3) makes amends for the damage inflicted by his/her crime. If the offender is not a first-time offender, the defence will also apply if he/she actively contributes to (1) the prevention, disclosure or investigation of crimes committed by an organised group, or (2) the identification of co-participants in an organised group. The defence applies to offences punishable by a maximum of five years’ imprisonment. It is therefore only available to some bribery offences, such as bribe-taking by persons empowered to exercise public functions (Article 311(1)) but not by officials or senior officials (Article 311(2) and (3)). It is also available for bribe-giving to persons empowered to exercise public functions and officials (Article 312(1) and (2)) but not senior officials (Article 311(3)). Intermediaries (Article 313) also qualify.¹⁵

The “effective regret” defence raises some questions. In either case, there is no requirement that the offender reports to the authorities forthwith. The level of co-operation can also be minimal. A first-time offender can raise the

defence triggered by merely admitting guilt to the police. Even a repeat offender can benefit from the provision by “actively contributing to the identification” of other criminals. In both cases, there is no requirement that the person who actively repents provide further assistance, *e.g.* by providing testimony in court.

Finally, an extortion defence is available to bribe-givers. Article 312, Note 2 stipulates that a person who pays a bribe because of extortion by a person empowered to perform public functions (but again not by an official or a senior official) is exempt from liability. For the defence to succeed, the bribe-giver must report the matter to the authorities voluntarily.

There does not appear to be a defence of small facilitation payments, *i.e.* “grease payments” or small payments to induce an official to perform routine governmental action. However, as noted above, the CC provides a small gifts defence which may permit some facilitation payments, according to Kazakh officials.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

International standards also require criminalisation of bribery of officials of foreign states and public international organisations. In 2007, Kazakhstan amended CC Article 311, Note 4 to include “officials of foreign states and international organisations” in order to criminalise active and passive foreign bribery.

Kazakhstan should be commended for criminalising foreign bribery, but the offence as it stands raises some issues. First, the offence does not define “officials of foreign states”. The CC definition for domestic bribery in Article 307, Note 2 cannot be transplanted without modification to the foreign bribery context. Many aspects of the definition in Note 2 refer specifically to Kazakhstan, *e.g.* “members of the Parliament and Maslikhats”, “public servants in accordance with the legislation of the Republic of Kazakhstan”. Second, even if such a transplant was possible, the definition of an official would suffer from the same deficiencies as in the domestic bribery context identified above. Third, there is no definition of a “foreign state”. It is therefore unclear whether the term covers “all levels and subdivisions of government, from national to local.” Also unclear is whether it includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.¹⁶

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Kazakhstan does not impose liability against legal persons for any criminal offences, including domestic and foreign bribery. Parliamentary

Committees rejected a draft law prepared by Kazakh authorities to establish such liability.¹⁷ Article 534 of the Code on Administrative Offences ambiguously suggests an administrative fine is available for bribery without clarifying whether it is against a legal person or the head/director of the legal person. Administrative liability also does not appear to arise for bribery committed by the legal person's representatives and employees.¹⁸ At the time of this report, Kazakh authorities were preparing a draft Law on "Making Amendments and Addenda to Some legislative Acts of the Republic of Kazakhstan on the Imposition of Criminal Liability of Legal Persons". Kazakh authorities expect the Bill to be enacted in 2010.

JURISDICTION TO PROSECUTE BRIBERY

Kazakhstan has jurisdiction to prosecute bribery offences that take place in its territory. This is defined to include acts that begin, continue or end in the territory of Kazakhstan (CC Article 6). This would appear to cover bribery offences that take place both wholly and partly in Kazakhstan.

Nationality jurisdiction is also available under the CC. Kazakhstan can prosecute its nationals who commit bribery offences under the CC while outside Kazakhstan, unless a foreign court has sentenced the national for the crime. Dual criminality is required, i.e. the conduct in question must be a crime in the place where it occurred. If convicted, the penalty imposed must not exceed the maximum punishment under the law of the place where the crime occurred (CC Article 6(1)).

Kazakhstan may also prosecute non-nationals for crimes outside Kazakhstan if the crime is directed against Kazakhstan's interest or if the acts are covered by an international treaty to which Kazakhstan is party (CC Article 6(2)). Whether this applies to bribery cases is not clear.

SANCTIONS FOR BRIBERY

The available punishment for the CC bribery offences is shown in the table below. Sanctions are increased for aggravated offences, i.e. for repeat offences, bribery in order than an official commits a crime, offences committed as part of a criminal organisation, or a bribe exceeding 500 monthly calculation indices in value. Extortion is also an aggravating factor for passive bribery.

Offence	Sentence	Sentence for aggravated offence
Bribe-taking by a person empowered to exercise public functions (Article 311(1))	Fine between 700 to 2 000 monthly calculation indices, or the offender's wages for 7 months to 1 year; or Imprisonment of up to 5 years and disqualification from holding certain positions or engaging in certain activities for 5 years; confiscation may also be imposed.	Imprisonment of 7 to 12 years; and Confiscation.
Bribe-taking by an official, or by a person empowered to exercise public functions who performs illegal actions (Article 311(2))	Imprisonment of 3 to 7 years; Disqualification from holding certain positions or engaging in certain activities for 7 years; and Confiscation may also be imposed.	
Bribe-taking by a person holding senior public office (Article 311(3))	Imprisonment of 5 to 10 years; Disqualification from holding certain positions or engaging in certain activities for 7 years; and Confiscation may also be imposed.	
Bribe-giving by a person empowered to exercise public functions (Article 312(1))	Fine between 200 to 500 monthly calculation indices, or the offender's wages for 2 to 5 months; or Imprisonment of up to 3 years.	Imprisonment of 7 to 12 years (but 10 to 15 years when a bribe exceeds 2 000 monthly calculation indices); and Confiscation.
Bribe-giving by an official, or by a person empowered to exercise public functions who performs illegal actions (Article 312(2))	Fine between 700 to 2 000 monthly calculation indices, or the offender's wages for 7 months to 1 year; or Imprisonment of up to 5 years.	
Bribe-giving by a person holding senior public office (Article 312(3))	5-10 years' imprisonment; Up to 7 years' disqualification from office or specified activity, and Confiscation may also be imposed.	

Offence	Sentence	Sentence for aggravated offence
Intermediaries (Article 313)	Fine between 100 to 300 monthly calculation indices, or the offender's wages for 1 to 3 months; or Imprisonment of up to 2 years.	Fine between 500 to 1 000 monthly calculation indices, or the offender's wages for 5 months to 1 year; or Imprisonment of up to 4 years.

The maximum sanctions are largely adequate except for intermediaries. The non-aggravated offence for intermediaries under Article 313 only attracts a maximum punishment of 700 to 2 000 monthly calculation indices, or the offender's wages for 5 to 7 months; or imprisonment of up to 2 years. Given the prevalence of intermediaries in bribery, especially in international business transactions, the available sanctions are not effective, proportionate or dissuasive.

Confiscation is governed by CC Article 51. When confiscation is available, a court may confiscate the bribe and the (direct and indirect) proceeds of bribery. Confiscation may also be ordered against a non-*bona fide* third party. There are some limits, however. As noted in the table, confiscation is not available for some offences, such as giving bribes to a person empowered to exercise public functions or an official. It is also not available against an intermediary. Courts would therefore be unable to disgorge the benefits that many bribery intermediaries obtain through agent fees and commissions. However, Kazakh authorities indicated that a draft law has been prepared which, if enacted, would provide for confiscation in these cases. In addition, whether a court can confiscate tainted property that has been intermingled with untainted property is not clear, according to the ACN. There are also no provisions to allow confiscation of equivalent value when the property subject to confiscation is not available (*e.g.* because it has been spent).¹⁹

As noted above, when Kazakhstan invokes nationality jurisdiction to prosecute an individual for bribery, the penalty imposed must not exceed the maximum punishment under the law of the place where the crime occurred. If this foreign jurisdiction does not provide effective, proportionate and dissuasive sanctions for bribery, the actual sanctions imposed in Kazakhstan will suffer from the same deficiency.

The availability of administrative sanctions is uneven. As the table above shows, under the CC, disqualification from holding certain positions or engaging in certain activities is available for non-aggravated bribe-taking but not for the aggravated offences, intermediation, or giving bribes to a person empowered to exercise public functions or an official. There is no guidance on what types of office or activities are subject to disqualification. Under Article 45 of the Administrative Code, a person who commits an administrative offence may also be banned from receiving a licence, permit or certificate, or be suspended or prohibited from being an “individual entrepreneur”. Whether active bribery always amounts to an administrative offence is unclear. Additional administrative sanctions, such as debarment from seeking public procurement contracts, do not appear to be available.

Statistics on the actual sanctions imposed for bribery are not available. It is therefore not possible to assess whether the sanctions imposed for bribery are effective, proportionate and dissuasive in practice.

TOOLS FOR INVESTIGATING BRIBERY

The general search and seizure provisions are used to obtain information and records from banks and financial institutions. To conduct a search and seizure, an investigator must prepared a “motivated resolution” that is then approved by a prosecutor (Criminal Procedure Code (CPC) Articles 230-232)). There are no summary procedures for obtaining bank records, *e.g.* production orders or subpoenas. Kazakh authorities stated that Article 50(7)(b) of the Law on “Banks and Banking Activity” overrides bank secrecy rules in criminal investigations. Supporting case law was not provided.

It appears that tax secrecy rules could affect the gathering of tax evidence in bribery cases. Article 557(3) of the Code on “Taxes and Other Obligatory Payments to the Budget” specifies instances in which tax authorities are required to produce information or documents that are otherwise subject to tax secrecy rules. These include the production of information and documents to courts and law enforcement officials in the investigation of tax crimes but not bribery cases. The Financial Police and the Tax Service signed a Joint Order in 2005 governing the communication and co-ordination of the two bodies.

The freezing of property and bank accounts is available under CPC Article 161. An investigator, with the approval of a prosecutor or a court, may freeze and seize property of a suspect, defendant or any person that may be the subject of eventual confiscation. Information is not available on the effectiveness of this provision in practice, or whether the account holder is notified of the application for the freezing order. Kazakh officials added that

Article 51 of the Law on “Banks and Banking Activities” may be applicable in some cases.

Some special investigative techniques are available in bribery cases. CPC Articles 235 to 237 allow for the interception of mail, email, telephone and other electronic communications. Investigators may also eavesdrop and make audio or video recordings of conversations. All of these means of investigation require the approval of a prosecutor. There is no information on the availability of undercover police operations and controlled deliveries.

Kazakhstan may seek international co-operation in bribery investigations. All offences qualify for the seeking of extradition and MLA; there are no minimum-penalty thresholds (CPC Articles 523 and 529). One limitation to extradition is that the CPC only allows Kazakhstan to seek extradition of “a person who committed a crime in the territory of the Republic of Kazakhstan and left its territory” (CPC Article 529(2)). Kazakh authorities therefore cannot seek extradition of someone who has committed a crime extraterritorially.

Regarding co-operating offenders, as mentioned above under the defence of “effective regret”, certain offenders may be absolved from criminal liability if he/she reports the crime to the authorities. The defence may be triggered if an offender admits guilt or contributes to the discovery of a crime; there is no requirement to co-operate thereafter, *e.g.* by providing testimony at trial. As noted earlier, effective regret may also be a mitigating factor at sentencing. Apart from “effective regret”, there do not appear to be means to secure the co-operation of offenders, *e.g.* through plea bargaining.

ENFORCEMENT OF BRIBERY OFFENCES

The Prosecutor General is responsible for prosecuting bribery cases. Since 2003, the Agency of the Republic of Kazakhstan for the Fight against Economic and Corruptive Crime has been responsible for investigating bribery cases.²⁰

Kazakhstan provided very limited enforcement statistics that consists only of convictions for bribe-giving, bribe-taking and intermediation. Statistics on investigations, prosecutions, sanctions (including confiscation) are not available.

These limited statistics do seem to indicate that, at least until 2008, the number of convictions for bribe-giving were consistently and substantially lower than that for bribe-taking. The reason for this discrepancy is not clear. Kazakh authorities stated that one explanation may be that bribe-givers are exculpated under the “extortion” defence in CC Article 312 Note 2 (see above). They did

not, however, provided confirmatory statistics on the frequency at which this defence is raised.

Offence	2003	2004	2005	2006	2007 (4 months)	2008 (10 months)	2009 (10 months)
Bribe-taking (Article 311)	142	99	102	154	41	139	187
Bribe-giving (Article 312)	4	31	70	104	13	129	189
Intermediaries (Article 313)	3	2	8	4	4	-	-

RECOMMENDATIONS FOR A WAY FORWARD

Kazakhstan has made significant efforts in criminalising bribery offences. To further enhance compatibility with international standards, Kazakhstan could consider addressing the following issues. The ACN has also recommended that Kazakhstan take action on most of these issues. Encouragingly, efforts may already be under way. For example, Kazakh authorities indicated that, at the time of this Report, the Finance Police expected to form a working group with representative of relevant government bodies to study the implementation of UNCAC Articles 15, 16 and 18.

Elements of the Active and Passive Domestic Bribery Offences

Kazakhstan's general bribery offences CC Articles 311 and 312 already meet several aspects of international standards, such as express coverage of bribery through intermediaries. To further improve the bribery offences, Kazakhstan could consider addressing the following areas. Kazakh authorities indicated that the 2008-2010 Action Plan for the implementation of State Anti-Corruption Program 2006-2010 called for a review of some of these issues, such as the coverage of "promising" and "offering" a bribe in the CC offences.:

- (a) Express coverage of offering, promising and soliciting a bribe;
- (b) Express coverage of bribes given for the benefit of any third party;
- (c) A broad definition of public officials that covers (i) persons who are paid or unpaid, (ii) persons who perform legislative and judicial

functions, (iii) persons who perform a public function or provide a public service generally, (iv) persons who perform public functions in a public agency or enterprise, and (v) all civil servants and local self-government employees;

- (d) Express coverage of non-material bribes;
- (e) Whether a bribe is affected by the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage; and
- (f) The scope of the defence of “effective regret”, *e.g.* whether an offender should be required report forthwith and to testify at trial.

Bribery of Foreign Public Officials

Kazakhstan should be commended for extending its domestic active bribery offence to cover foreign public officials and officials of public international organisations. The offence is not restricted to bribery in international business transactions and thus goes beyond international standards. However, the shortcomings in Kazakhstan’s domestic bribery offence also apply to the foreign bribery offence. These shortcomings therefore need to be remedied to ensure that its foreign bribery offence is effective. Kazakhstan should also ensure that the definition of foreign public officials covers:

- (a) All levels and subdivisions of government, from national to local;
- (b) Not only foreign countries, but also any organised foreign area or entity, such as an autonomous territory or a separate customs territory; and
- (c) (i) Persons who are paid or unpaid, (ii) persons who perform legislative and judicial functions, (iii) persons who perform a public function or provide a public service generally, (iv) persons who perform public functions in a public agency or enterprise, and (v) all civil servants and local self-government employees.

Liability of Legal Persons for Bribery

Establishing liability against legal persons for domestic and foreign bribery would bring Kazakhstan in line with international standards.

Sanctions for Bribery

The maximum punishment available for the CC bribery offences (with the exception of intermediaries in Article 313) are broadly in line with international standards. To ensure that the entire scheme of sanctions is effective, proportionate and dissuasive, Kazakhstan could address the following issues:

- (a) Maximum available penalties for intermediating bribery (Article 313);
- (b) The availability of confiscation (i) in all cases of bribe-giving, taking and intermediation; (ii) confiscation of tainted property that has been intermingled with untainted property; and (iii) confiscation of equivalent value when the property subject to confiscation is not available;
- (c) The availability of administrative sanctions in all cases of bribe-giving, taking and intermediation, including disqualification from holding certain positions or engaging in certain activities, and disbarment from seeking public procurement contracts;
- (d) Statistics on the actual sanctions (including confiscation) imposed in bribery cases; and
- (e) Whether sanctions imposed in practice are effective, proportionate and dissuasive.

Tools for Investigating Bribery

Some basic tools for investigating bribery are available in Kazakhstan, as are some covert investigative techniques such as wiretapping. To enhance the ability of law enforcement to investigate bribery, the following matters could be addressed in the context of bribery investigations:

- (a) Obtaining information and records from banks and financial institutions, particularly simplified procedures *e.g.* production orders or subpoenas;

- (b) Whether tax secrecy rules impede access to relevant information and documents in bribery investigations;
- (c) The ability to conduct police undercover operations and sting operations;
- (d) Seeking extradition of persons who committed a crime outside Kazakh territory; and
- (e) Offering offenders reduced sentences in exchange for co-operation, and plea bargaining.

Enforcement of Bribery Offences

To properly assess whether bribery offences are enforced effectively in practice, Kazakhstan could maintain more detailed statistics on the investigation, prosecution, conviction and sanctions for bribery offences.

RELEVANT LAWS AND DOCUMENTATION

Monitoring Reports of the OECD Anti-Corruption Network for Eastern Europe and Central Asia: www.oecd.org/document/17/0,3343,en_36595778_36595861_37187921_1_1_1_1,00.html

Eurasian Group on Combating Money Laundering and Financing of Terrorism: www.eurasiangroup.org

NOTES

- ¹ OECD (2007), *Fighting Corruption in Transition Economies: Kazakhstan* and OECD (2007), *Monitoring Report: Kazakhstan*, hereinafter referred to as the *ACN Report* and *ACN Monitoring Report* respectively (www.oecd.org/document/17/0,3343,en_36595778_36595861_37187921_1_1_1_1,00.html).
- ² Supreme Court of Kazakhstan, Resolution of the Plenary Board No. 9 of 22 December 1995.
- ³ ACN Report, pp. 22 and 25.
- ⁴ ACN Monitoring Report, p. 24.
- ⁵ ACN Report, pp. 111-112.
- ⁶ Supreme Court Resolution No. 9 of 22 December 1995, para. 8.

- ⁷ For example, OECD Convention Article 1 requires Parties to criminalise the offering, giving and promising of a bribe to a foreign official. All three modes of committing the offence have equal status. UNCAC Articles 15 and 16 take the same approach. See also ACN Report, p. 22; and ACN Monitoring Report, p. 24.
- ⁸ ACN Report, p. 23; and ACN Monitoring Report, p. 24.
- ⁹ Law of the Republic of Kazakhstan dated 7 December 2009 on "Making amendments and addenda to some legislative acts of the Republic of Kazakhstan on issues of further strengthening the fight against corruption".
- ¹⁰ See ACN Report, p. 23; and ACN Monitoring Report, p. 22.
- ¹¹ Supreme Court of Kazakhstan, Decision No. 9 of the Plenary Session, 22 December 1995.
- ¹² ACN Report, pp. 22-23; and ACN Monitoring Report, p. 22.
- ¹³ OECD Anti-Bribery Convention, Commentary 7.
- ¹⁴ CC Article 311 Note 2 and Article 312 Note 1.
- ¹⁵ "Effective regret" can also be a mitigating factor at sentencing rather than a complete defence (CC Article 53).
- ¹⁶ See OECD Anti-Bribery Convention, Article 1(4)(b) and Commentary 18.
- ¹⁷ ACN Monitoring Report, p. 26.
- ¹⁸ ACN Report p. 25.
- ¹⁹ Criminal Code, Article 51. See also ACN Report pp. 23-24 and ACN Monitoring Report, pp. 25 and 27.
- ²⁰ ACN Report, pp. 146-148.

Criminalisation of Bribery in Korea

Criminal Act
(Provided by the Anti-Corruption and Civil Rights
Commission of Korea)

Article 129 (Acceptance of Bribe and Advance
Acceptance)

(1) A public official or an arbitrator who receives, demands or promises to accept a bribe in connection with his duties, shall be punished by imprisonment for not more than five years or suspension of qualifications for not more than ten years.

Article 130 (Bribe to a Third Parson)

(1) A public official or an arbitrator who causes, demands or promises a bribe to be given to a third party on acceptance of an unjust solicitation in connection with his duties shall be punished by imprisonment for not more than five years or suspension of qualifications for not more than ten years.

Article 133 (Offer, etc. of Bribe)

(1) A person who promises, delivers or manifests a will to deliver a bribe as stated in Articles 129 through 132 shall be punished by imprisonment for not more than five years or by a fine not exceeding KRW 20 million.

Foreign Bribery Prevention Act

Article 3

1. Any person, promising, giving or offering a bribe to a foreign public official in relation to his/her official business in order to obtain improper advantage in the conduct of international business transactions, shall be subject to a maximum of five years' imprisonment or a fine up to KRW 20 million. In the event that the profit obtained through the offence exceeds a total of KRW 10 million, the person shall be subject to a maximum of five years' imprisonment or a fine up to twice the amount of the profit.

INTRODUCTION

The Korean legal system derives primarily from continental civil law with some elements of Anglo-American law. Korea ratified the UNCAC and the

OECD Anti-Bribery Convention in February 2008 and January 1999 respectively. Korea joined the APG in 1998 and the FATF in 2009. Korea's domestic bribery offences have not been externally reviewed. However, its foreign bribery offence and related enforcement issues have been examined extensively under the OECD Convention's monitoring mechanism. To avoid duplication, this report will draw heavily on the OECD's monitoring reports. It will also refer to FATF/APG evaluation reports where appropriate.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Korea's general domestic bribery offences are found in the Criminal Act (CA). The general active and passive domestic bribery offences are in Articles 133 and 129 respectively. Additional articles deal with specific situations such as bribes paid to third party beneficiaries (Article 130) and aggravated cases in which an official takes "improper action" (Article 131). A separate offence of acceptance of bribes through good offices (Article 132) may also apply in some cases.

The domestic bribery offences partially meet international standards regarding the different modes for committing the offences. For passive bribery, international standards require coverage of soliciting and accepting of bribes. Article 129 meets this standard by explicitly referring to "receives, demands or promises to accept a bribe". For active bribery, international standards require offences to cover giving, offering, and promising to give a bribe. Article 133 covers a person who promises, delivers or manifests a will to deliver a bribe. Offering to bribe is not explicitly included. The notion of "manifesting a will to deliver a bribe" covers some types of offering a bribe, though not an offer that has been sent but is not received by an official.¹

A separate offence deals with bribes given to third party beneficiaries. The general passive bribery offence in CA Articles 129 does not refer to these cases. Instead, Article 130 creates a separate offence for a public official who "causes, demands or promises a bribe to be given to a third party on acceptance of an unjust solicitation". The general active bribery offence (Article 133) covers bribes given to third party beneficiaries by referring to Article 130. There is also case law confirming the coverage of third party beneficiaries.²

The third party beneficiary offence in Article 130 raises one minor concern, however. The provision only covers bribe solicitations that are "unjust"; this implies that "just" solicitations are not criminal. The difference between "just" and "unjust" is unclear. The Article 129 general passive bribery offence does not draw a distinction between "just" and "unjust" solicitations. Korea

states that the term “unjust” is interpreted to broadly cover undue and illegal solicitations. Furthermore, if a public official is the actual beneficiary of the bribe, then the offence is covered by Article 129 and the issue of whether a solicitation is “unjust” does not arise.

Case law confirms that the CA offences cover bribery through intermediaries despite the absence of express language. For example, the Supreme Court has upheld the conviction of a person who gave a bribe through his wife to the branch chief of a state-owned bank.³

Less clear is the question of which types of public officials are covered by the domestic bribery offences. Under international standards, bribery offences must cover any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.⁴ The CA offences cover bribery of “arbitrators” and “public officials”. The latter term appears throughout the CA but is not defined. Under Article 4 of the Act on the Aggravated Punishment, etc. of Specific Crimes, the President may designate the executive officers of certain state-owned or controlled enterprises to be government officials. Despite this clarification, it is wholly unclear whether the definition of officials in the CA is sufficiently broad to meet international standards.

International standards also require broad coverage of acts or omissions in relation to the performance of official duties. The CA domestic bribery offences cover an official who accepts, solicits etc. a bribe “in connection with his/her duties”. Korea explains that this phrase broadly covers any duties performed according to custom, a superior’s order, or prescribed laws and rules. “Duties” also include past, present and future duties. The term “connection” is also interpreted broadly, requiring only the acceptance or solicitation of the bribe to “bear a relationship” with the official’s duties.

Nevertheless, it is not entirely clear that the CA domestic bribery offences cover any use of the public official’s position or office, or acts or omissions outside the official’s competence. For example, it is not clear that the offences cover a case where an executive of a company bribes a senior official of a government, in order that this official use his/her office – though acting outside his/her competence – to make another official award a contract to that company.⁵ In such a case, making another official award a contract is, arguably, not in connection with the bribed official’s duties.

Bribery offences must also cover both pecuniary and non-pecuniary bribes. The CA bribery offences do not expressly cover both categories. However, case law confirms that bribes may include money, goods, and other pecuniary advantages, as well as intangible benefits (such as business opportunities or sexual relations) that satisfy the demand or desire of another person.⁶

There are other concerns over the definition of a bribe, however. Under international standards, the definition of a bribe should not be affected by the value of the advantage, its results, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.⁷ The CA bribery offences are silent on these points.

The definition of a bribe must also not be affected by perceptions of local custom.⁸ The Supreme Court has held that benefits given because of social customs or necessity arising from a personal relationship are not bribes. A payment or gift offered as a social courtesy is therefore not a crime.⁹ However, subsequent rulings have clarified that whether a benefit is a bribe must be determined based on factors such as the official's specific duties, the relationship between the public duties and a person providing the benefit, the background and timing when the benefit is given, and the type and amount of the benefit.¹⁰

Despite this ruling on CA Article 20, another line of Supreme Court jurisprudence provides a similar defence of a payment or a gift offered as a "social courtesy". The scope and impact of this defence remains unclear.¹¹ Korean authorities state that a payment or gift of any value offered as a social courtesy is nevertheless a bribe insofar that the payment or gift is offered to benefit a public official in relation to his/her duties. No case law was cited in support of this position.

The CA domestic bribery offences do not contain other defences to bribery often found in other jurisdictions. For example, there are no express defences of small facilitation payments, solicitation or "effective regret".

BRIBERY OF FOREIGN PUBLIC OFFICIALS

Active foreign bribery is covered under Article 3 of the 1998 Foreign Bribery Prevention Act (FBPA). The provision has been extensively reviewed under the monitoring mechanism of the OECD Anti-Bribery Convention and thus need not be discussed in detail here. The 2004 Phase 2 and 2007 Follow-up Reports noted the following issues:

- (a) Korea's foreign bribery offence does not expressly cover a bribe that is transmitted directly to a third party. The OECD Working Group on Bribery accordingly recommended that Korea clarify this situation. As of 2007, Korea expected the issue to be studied by a Special Subcommittee on International Criminal Affairs under the Ministry of Justice and by an Anti-corruption Norms Review Task Force at the government level.¹²
- (b) Regarding the definition of "foreign public official", FBPA Article 3 covers bribery of an executive or employee of an enterprise in which a foreign government holds over 50% of its subscribed capital or exercises "*de facto* or effective controlling power over its overall management, including the decision of major business and the appointment or dismissal of its executives", and if the executive or employee exercises a public function for a foreign government. The Working Group decided to follow up whether this definition would cover officials of enterprises that the government (1) indirectly controls, (2) controls the majority of votes attaching to shares issued by the enterprise, and (3) can appoint a majority of the members of the legal person's administrative or managerial body or supervisory board.¹³
- (c) The definition of "foreign public official" also does not specifically cover North Korean officials. Korea stated that bribery of North Korean officials may be covered by other statutes in certain cases. The Working Group decided to follow up this issue as practice develops.¹⁴
- (d) The FBPA provides a small facilitation payments defence. Under Article 3(2)(b), it is not a crime when a "small pecuniary or other advantage is promised, given or offered to a foreign public official engaged in ordinary and routine work, in order to facilitate the legitimate performance of the official's business." The Working Group was concerned about the breadth of this defence and decided to follow up the issue.¹⁵
- (e) As with the domestic bribery offence, there were questions over whether the FBPA allows payments or gifts offered as a social courtesy, and bribes that are offered but not received or accepted by an official. The Working Group also decided to follow up these issues.¹⁶

Korea does not have a specific passive foreign bribery offence, though Korean authorities state that CA Article 357(1) covers this crime. This provision prohibits "a person who, administering another's business, receives property or obtains pecuniary advantage from a third person in response to an illegal

solicitation concerning his/her duty.” This offence may cover some forms of passive foreign bribery but it nevertheless falls short of international standards in several respects. For example, a person holding legislative or judicial office¹⁷ is unlikely to be considered someone who is “administering another’s business”. The offence does not cover *non-pecuniary* bribes, or an official accepting a bribe *without solicitation*. The offence also raises the issues concerning “illegal solicitation” and “in connection with an official’s duty” described above.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Korea imposes liability against legal persons for foreign but not domestic bribery. Under FBPA Article 4, a legal person is liable if (a) its representative, agent, employee or other individual working for the legal person commits foreign bribery, and (b) if the legal person failed to pay due attention or exercise proper supervision to prevent the offence.

The liability of legal persons for foreign bribery has been extensively reviewed under the monitoring mechanism of the OECD Anti-Bribery Convention and thus need not be discussed in detail here. The 2004 Phase 2 and 2007 Follow-up Reports noted the following issues:

- (a) Under FBPA Article 4, corporate liability arises only if a natural person bribes “for the benefit” of the legal person. The Working Group on Bribery decided to follow up whether this provision applies when a representative, agent etc. of one legal person bribes for the benefit of another legal person in the same enterprise group.¹⁸
- (b) There is no liability under the FBPA if a legal person “has paid due attention or exercised proper supervision to prevent” the foreign bribery offence. The Working Group decided to follow up the operation of this defence, *e.g.* who in the person is required to pay due attention or exercise proper supervision, and whether the company must operate a full compliance programme. The Group also questioned whether the defence could allow a person with operational and management authority to (i) commit foreign bribery personally, (ii) order a lower level employee to do so, and (iii) fail to stop foreign bribery of which he/she is aware.¹⁹

JURISDICTION TO PROSECUTE BRIBERY

The CA provides jurisdiction to prosecute natural persons for domestic and foreign bribery. Under Article 2, Korea has jurisdiction to prosecute persons

for crimes committed “in the territory of the Republic of Korea”. Korea states that this provision is interpreted to cover crimes committed partly in Korean territory. Korea also has jurisdiction to prosecute Korean nationals for domestic bribery committed outside Korea (CA Article 3).

Different jurisdictional rules apply for prosecuting legal persons for foreign bribery. Korea has territorial jurisdiction to prosecute a legal person only if there is such jurisdiction to prosecute the natural person who committed the crime. If a company’s representative, agent, or employee etc. bribes a foreign official outside Korea - a common method for committing foreign bribery - then there would be no territorial jurisdiction to prosecute the representative etc. or the company. The OECD Working Group on Bribery therefore decided to follow up this issue. There are also conflicting views over whether and when nationality jurisdiction to prosecute legal persons is available.²⁰ During this Thematic Review, the Korean authorities state that CA Articles 2 and 3 are of general application; these provisions thus allow the prosecution under the FBPA of foreign bribery that takes place outside Korea.

SANCTIONS FOR BRIBERY

Foreign and domestic bribery are punishable by the following maximum sanctions:

Offence	Sentence available
Active domestic bribery (CA Article 133)	Up to 5 years’ imprisonment or a KRW 20 million fine (approx. EUR 12 000 or USD 17 000).
Passive domestic bribery (CA Article 129)	Up to 5 years’ imprisonment, subject to the following: <ul style="list-style-type: none"> • Minimum 1 year’s imprisonment if the bribed official commits an improper act; • Minimum 5 years’ imprisonment if the bribe is between KRW 10 million and 50 million (approx. EUR 6 000 and 30 000, or USD 8 500 and 42 500);²¹ • Imprisonment for at least 10 years or life if the bribe is greater than KRW 50 million (approx. EUR 30 000 or USD 42 500).²²
Passive domestic bribery through an intermediary (CA Article 130)	
Active foreign bribery – natural persons (FBPA Article 3)	Up to 5 years’ imprisonment or a KRW 20 million fine (approx. EUR 12 000 or USD 17 000). The maximum fine increases to twice the profit earned from the offence if the profit exceeds KRW 10 million (approx. EUR 6 000 or USD 8 500).

Offence	Sentence available
Active foreign bribery – legal persons (FBPA Article 4)	Maximum fine of KRW 1 billion (approx. EUR 60 000 or USD 85 000). The maximum fine increases to twice the profit earned from the offence if the profit exceeds KRW 500 million (approx. EUR 30 000 or USD 42 500).

As noted above, the maximum fine in foreign bribery cases varies depending on the profits derived from the offence. Questions have been raised over the ease with which such profits could be quantified. The Working Group on Bribery has therefore decided to follow up this issue.²³

Confiscation is complicated by a myriad of legislative provisions that deal with the subject:

- (a) Under CA Article 48, a court in domestic bribery cases may confiscate a thing (1) used or was sought to be used in the commission of a crime, (2) produced by or acquired by means of criminal conduct, or (3) received in exchange for a thing under (1) and (2). A conviction is not necessary (CA Article 49). On its face, this Article would allow confiscation of a bribe, and the direct and indirect proceeds of bribery in domestic bribery cases. Article 48 does not appear to apply to foreign bribery cases,²⁴ though the Korean authorities took a contrary view during this Thematic Review.
- (b) CA Article 134 deals specifically with confiscation in domestic bribery cases and provides that a court shall confiscate a bribe that has been received or will be given.
- (c) The FBPA deals with confiscation of bribes (but not proceeds of foreign bribery), though the precise scope of this power is unclear. Article 5 provides for confiscation of a bribe if “the offender under this Act [...] is in possession of the bribe given in the commission of an offence as prescribed in this Act or that the bribe is obtained by a person other than the offender, with knowledge, after the offence has been committed”. Since the FBPA deals only with active foreign bribery, “an offender under this Act” refers to a briber, not a bribed foreign official. In other words, confiscation is possible under Article 5 only if the offender (i.e. briber) is in possession of the bribe. However, Article 5 also requires that the bribe must have been “given in the commission of” foreign bribery; to meet this requirement, the bribe would be in the foreign official’s possession. According to the Korean authorities, Article 5 will be used to confiscate a bribe that has been returned by the foreign

public official to the briber. For bribes that are in the possession of a foreign public official, CA 48 and 134 would be used for confiscation.

- (d) The Act on Special Cases Concerning Confiscation and Recovery of Stolen Assets (ASCCC) entered into force in 2008. Under Article 3, a court may confiscate “properties of corruption”, which is defined to include criminal proceeds and properties derived proceeds. However, the provision only applies to certain listed offences, including CA Articles 129-133 and FBPA Article 3(1). Crucially, active foreign bribery by legal persons (FBPA Article 4) is excluded.
- (e) Article 8 of the Proceeds of Crime Act (POCA) further allows confiscation of “criminal proceeds”, properties derived from criminal proceeds, and intermingled properties in domestic bribery cases. For foreign bribery, a court may confiscate “funds or properties relating to” the offence. On its face, POCA Article 8 may be invoked when a person is convicted of bribery (and not only money laundering).

Where property subject to confiscation is not available, some of these provisions permit a court to confiscate the value corresponding to the property in question (CA Article 134, ASCCC Article 5 and POCA Article 10). There is no comparable provision in the FBPA, however.

Some administrative sanctions are available. A conviction for domestic passive bribery disqualifies an individual for public office for up to ten years (Articles 129(1), 130 and 131(4)). Bribers are barred from seeking public procurement contracts for up to two years.²⁵

TOOLS FOR INVESTIGATING BRIBERY

Prosecutors and investigators in bribery cases must obtain a judicial search warrant to gather financial and other information from banks and financial institutions.²⁶ Production orders are not available. There is some indication that warrants may be difficult to obtain in money laundering cases. Whether the same is true of bribery cases is not known. A procedure exists for obtaining a warrant after a search and seizure, but this is rarely used when obtaining documents from financial institutions.²⁷ A court order or warrant overrides bank secrecy.²⁸ Professionals such as lawyers and accountants may resist seizure of things obtained in the course of their practice.²⁹

The Korean authorities indicate that tax secrecy rules do not impede the gathering of evidence in bribery cases. Prosecutors and investigators can obtain documents and information concerning a taxpayer from tax authorities.

Some special investigative techniques are available. The Korean authorities indicate that “entrapment” is available under Article 199 Criminal Procedure Act and case law. Controlled deliveries are available in drug but not bribery investigations.³⁰ In active and passive bribery cases, investigators may use techniques such as email interception, secret surveillance, video recording, undercover police operations, listening and bugging. Under Article 5 of the Protection of Communications Secrets Act, wiretapping is available in investigations of active domestic bribery, but not active foreign bribery.

Freezing of assets is available in bribery cases. A court may issue a “preservation order” if there are reasonable grounds to believe that it is necessary to freeze property that may be subject to confiscation. Preservation orders are available before the institution of criminal proceedings.³¹

International assistance is available in bribery cases. Investigations and trials of all crimes, including bribery, qualifying for mutual legal assistance (MLA) from a foreign country. Dual criminality is required. For extradition, Korea provides extradition to a foreign country if the conduct underlying the extradition request, had it occurred in Korea, is punishable in Korea by imprisonment of at least one year or life. A foreign country from which Korea seeks extradition may impose a similar requirement by reason of reciprocity. In any event, all Korean bribery offences would meet this threshold.³² Korea may seek extradition or MLA regardless of whether there is a treaty in force with the foreign country in question.

There is no information on whether Korean authorities may rely on co-operative offenders, informants or witnesses when investigating and prosecuting bribery cases. Plea bargaining is not available for bribery or any types of criminal offences. However, the Supreme Prosecutors' Office unveiled a plan in 2009 to implement a plea bargaining system through legislation.³³

ENFORCEMENT OF BRIBERY OFFENCES

The Public Prosecutors' Office and the National Police Agency are responsible for criminal prosecutions and investigations of all crimes, including bribery. The Anti-Corruption and Civil Rights Commission, Korea's specialised anti-corruption agency, does not conduct criminal investigations or prosecutions.

The Korean authorities provided statistics on the number of domestic bribery investigations and prosecutions but not convictions and sanctions. Both the FATF and the OECD have suggested that Korea should maintain more complete statistics. A 2009 FATF report noted that the number of confiscations and the value confiscated were low, given the size of the Korean economy.³⁴

Year	Investigation commenced			Result of investigation									Transfer	Investigation pending
	Total	Investigation from previous years	New investigation	Prosecution			Non-prosecution							
				Formal indictment (with pre-trial detention)	Formal indictment (without pre-trial detention)	Summary indictment	Acquittal	Indictment deferred	Non-criminality	No right of arraignment	Dismissal	Indictment suspended ²		
2006	1,425	169	1,256	200	278	144	275	134	0	44	92	39	98	121
2007	1,417	122	1,295	165	305	111	215	195	0	21	97	25	89	194
2008	1,582	205	1,377	205	403	173	245	160	0	30	167	30	20	149
2009	2,147	156	1,991	306	530	233	263	175	0	50	112	35	108	335
2010 (to July)	2,610	322	2,288	182	431	167	368	445	0	17	128	37	138	697

Note:

1. The figures in the table indicate the number of persons.
2. "Indictment suspended" includes the cases where the investigation cannot be closed due to the unknown whereabouts of reference persons or accusers.
3. Figures relate to relevant bribery offences, i.e. acceptance of bribes, acceptance of bribes through a third party, acceptance of bribes through good offices, offering of bribes, and bribery offences under the Act on the Aggravated Punishment etc. of Specific Crimes

Available data on foreign bribery cases indicate that sanctions in practice may be inadequate. As of 2007, Korea had registered nine convictions for bribery of foreign public officials. Only two have resulted in jail sentences, both of which were suspended. The fines that have been imposed were relatively small. In one case, a company received a fine of only KRW 100 million fine (approx. EUR 60 000 or USD 85 000), even though the bribes were almost five times greater, and the contracts in question were worth KRW 20 billion (approx. EUR 12 million or USD 17 million). For the remaining eight convictions, all of which were against individuals, the largest fine imposed was KRW 10 million (approx. EUR 6 000 or USD 8 500). This prompted the OECD Working Group on Bribery to recommend that Korea take steps to ensure that the actual fines for foreign bribery are effective, proportionate and dissuasive.³⁵

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

The active and passive domestic bribery offences in CA Articles 129 to 133 already meet many requirements found in international standards, *e.g.* the different modes of committing the passive bribery offences, and bribery through intermediaries. Korea could strengthen these offences by addressing the following issues:

- (a) An offer to bribe that is sent but is not received by a public official;
- (b) The meaning of “unjust” solicitations in CA Article 129;
- (c) Whether the CA covers bribery of any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law;
- (d) Bribery in order that an official uses his/her position outside his/her authorised competence; and
- (e) Whether the definition of a bribe is affected by factors such as the value of the bribe, its results, the tolerance by local authorities, and the alleged necessity of the bribe, whether the briber was the best qualified bidder, and whether the payment or gift is offered as a social courtesy.

Bribery of Foreign Public Officials

As a Party to the OECD Anti-Bribery Convention, Korea has an active foreign bribery offence that meets many requirements of the Convention. Korea could consider addressing the following issues that have been identified by the OECD Working Group on Bribery:

- (a) A bribe that is transmitted directly to a third party;
- (b) Whether the foreign bribery offence covers bribery of North Korean officials, and executives or employees of enterprises which the government (i) *indirectly* controls, (ii) controls the majority of votes attaching to shares issued by the enterprise, and (iii) can appoint a majority of the members of the legal person's administrative or managerial body or supervisory board; and
- (c) The defences of small facilitation payments defence and payments or gifts offered as a social courtesy.

Liability of Legal Persons for Bribery

To fully meet international standards, Korea should establish the liability of legal persons for domestic bribery. For foreign bribery, such liability is available. Korea could consider addressing two issues concerning foreign bribery that have been identified by the OECD Working Group on Bribery:

- (a) Bribery committed by a representative, agent etc. of one legal person for the benefit of another legal person in the same enterprise group; and
- (b) The scope of the defence of due attention or proper supervision to prevent foreign bribery.

Jurisdiction for Prosecuting Bribery

Korea has territorial jurisdiction to prosecute domestic and foreign bribery cases, and nationality jurisdiction to prosecute natural persons for foreign bribery. To strengthen its jurisdictional regime, it could consider addressing the scope of territorial and nationality jurisdiction to prosecute legal persons for foreign bribery.

Sanctions for Bribery

The maximum available punishments against natural and legal persons for bribery offences are largely in line with international standards. To ensure an effective regime in practice, Korea could consider addressing:

- (a) Quantification of the profits derived from a foreign bribery offence; and
- (b) The overlapping provisions on confiscation, and whether the overall regime permits the confiscation of the bribe and the direct and indirect proceeds of bribery, or property of equivalent value, against natural and legal persons in all cases of domestic and foreign bribery.

Tools for Investigating Bribery

Korean bribery investigators have some essential tools at their disposal, but Korea could consider some additional issues:

- (a) Production orders for obtaining financial and other information from banks and financial institutions;
- (b) Means of obtaining documents and information concerning a taxpayer from tax authorities;
- (c) The impact of bank and tax secrecy rules on the gathering of banking and tax records and information;
- (d) Availability of wiretapping in investigations of active foreign bribery; and
- (e) The use of co-operative offenders, informants and witnesses when investigating and prosecuting bribery cases, and plea bargaining.

Enforcement of Bribery Offences

To ensure the effective enforcement of its bribery offences, Korea could consider the following issues:

- (a) Statistics on the number of convictions and sanctions (including confiscation) for domestic and foreign bribery;

- (b) The use of confiscation as a sanction in all cases of bribery; and
- (c) The level of sanctions imposed in practice against natural and legal persons for foreign bribery.

RELEVANT LAWS AND DOCUMENTATION

Ministry of Justice: www.moj.go.kr

Ministry of Government Legislation: www.moleg.go.kr

Anti-Corruption and Civil Rights Commission: www.acrc.go.kr

OECD monitoring reports on Korea: www.oecd.org/daf/nocorruption

FATF (2009), *Mutual Evaluation Report: Korea*: www.fatf-gafi.org

NOTES

- ¹ OECD (2004), *Phase 2 Report: Korea*, para. 99.
- ² For example, see Supreme Court Decision 1955.10.18, 55 Do 235. See also OECD (1999), *Phase 1 Report: Korea*, section 1.1.7; and OECD (2004), *Phase 2 Report: Korea*, para. 99.
- ³ Supreme Court decision (1996.12.6, 96 Do 144). See also OECD (1999), *Phase 1 Report: Korea*, section 1.1.5.
- ⁴ See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ⁵ See OECD Convention, Article 1(4)(c) and Commentary 19.
- ⁶ Supreme Court Decision 1995.9.25, 95 Do 1269. See also OECD (1999), *Phase 1 Report: Korea*, section 1.1.4.
- ⁷ OECD Anti-Bribery Convention, Commentary 7.
- ⁸ OECD Anti-Bribery Convention, Commentary 7.
- ⁹ Supreme Court Case No. 3579 (2001). See also OECD (2004), *Phase 2 Report: Korea*, paras. 87-89.
- ¹⁰ Supreme Court Case 2005 Do 4737 (February 24, 2006). See also OECD (2007), *Korea: Follow-Up Report on the Implementation of the Phase 2 Recommendations*.
- ¹¹ Supreme Court Case No. 4288 Hyungsang 129 (1955). See also OECD (2004), *Korea: Phase 2 Report*, para. 89.

- ¹² OECD (2004), *Phase 2 Report: Korea*, para. 106; OECD (2007), *Korea: Follow-Up Report on the Implementation of the Phase 2 Recommendations*, para. 8.
- ¹³ *Ibid.*, paras. 101-102 and Commentary following para. 105; OECD (2007), *Korea: Follow-Up Report on the Implementation of the Phase 2 Recommendations*.
- ¹⁴ OECD (2004), *Phase 2 Report: Korea*, paras. 103-105.
- ¹⁵ *Ibid.*, paras. 91-92.
- ¹⁶ *Ibid.*, paras. 89 and 98-100.
- ¹⁷ See definition of public official above.
- ¹⁸ *Ibid.* paras. 112-114.
- ¹⁹ *Ibid.* paras. 115-117.
- ²⁰ *Ibid.* para. 118.
- ²¹ Act on the Aggravated Punishment, etc. of Specific Crimes, Article 2.
- ²² *Ibid.*
- ²³ *Ibid.* paras. 127-128.
- ²⁴ The OECD Phase 2 Report on Korea noted that the proceeds of foreign bribery cannot be confiscated, which implied that CA Article 48 did not apply in foreign bribery cases (*ibid.* para. 129). Korea has since enacted legislation to confiscate proceeds of foreign bribery in some cases (see below).
- ²⁵ Acts on Contracts to which the State Is a Party, Article 27, and the Enforcement Decree under the Act, Article 76.
- ²⁶ Criminal Procedural Act, Articles 106, 109 and 215.
- ²⁷ FATF (2009), *Mutual Evaluation Report: Korea*, paras. 128-131.
- ²⁸ Act on Real Name Financial Transactions and Guarantee of Secrecy, Article 4.
- ²⁹ Criminal Procedure Act, Article 112.
- ³⁰ FATF (2009), *Mutual Evaluation Report: Korea*, para. 230.
- ³¹ POCA Article 12. See also FATF (2009), *Mutual Evaluation Report: Korea*, paras. 126-127.
- ³² Act on International Judicial Mutual Assistance in Criminal Matters, Articles 29 and 33; Extradition Act, Articles 6 and 42; applicable treaties and foreign legislation may impose additional conditions for extradition and MLA.
- ³³ Korea Times (1 September 2009), "Plea Bargaining" (www.koreatimes.co.kr/www/news/opinion/2009/11/202_37595.html).
- ³⁴ FATF (2009), *Mutual Evaluation Report: Korea*, paras. 141 and 143; OECD (2004), *Phase 2 Report: Korea*, para. 130 and following Commentary.
- ³⁵ OECD (2004), *Phase 2 Report: Korea*, paras. 125-130; OECD (2006), *Follow-up Report on the Implementation of the Phase 2 Recommendations: Korea*, para. 9 and Annex II.

Criminalisation of Bribery in Kyrgyzstan

Criminal Code of the Kyrgyz Republic Article 310. Bribe-taking (remuneration)

(1) Bribe-taking by a functionary, in person or through an intermediary, in the form of money, securities, or other assets or property benefits, not stipulated before, for actions (inaction) in favour of a bribe-giver or the persons he represents, if the functionary then takes actions (inaction) which are part and parcel of the functionary's official powers, or if the latter, by virtue of his official position may further such actions (inaction), shall be punishable by a fine in the amount of 200 to 500 minimum monthly wages or by deprivation of liberty for a term of up to 3 years with disqualification to hold specified offices or to engage in specified activity for a term of up to 3 years.

(2) The acts envisaged in the first part of the present Article, if it has been committed:

- 1) by an official holding government post;
- 2) repeatedly;
- 3) on a large scale;
- 4) for illegal action (inaction),

shall be punishable by deprivation of liberty for a term of 3 to 8 years with disqualification to hold specified offices or to engage in specified activity for a term of up to 3 years with confiscation of property.

Note. A sum of money, the value of securities, other assets, or property benefits exceeding 200 minimum monthly wages, established by the legislation of the Kyrgyz Republic at the time of committing a crime, shall be deemed by a bribe on a large scale.

Article 311. Bribe-Taking (graft)

(1) Bribe-taking by a functionary, in person or through an intermediary, in the form of money, securities, or other assets or property benefits, stipulated before, for actions (inaction) in favour of a bribe-giver or the persons he represents, if the functionary then takes actions (inaction) which are part and parcel of the functionary's official powers, or if the latter, by virtue of his official position may further such actions (inaction), and likewise for general patronage, connivance at work, shall be punishable by deprivation of liberty for a term of 5

to 8 years with disqualification to hold specified offices or to engage in specified activity for a term of up to 3 years with confiscation of property.

- (2) The same act committed:
- 1) by a group of persons in a preliminary conspiracy;
 - 2) by an organized group;
 - 3) by a functionary holding a responsible post;
 - 4) repeatedly;
 - 5) on a large scale,

Shall be punishable by deprivation of liberty for a term of 7 to 12 years with disqualification to hold specified offices or to engage in specified activity for a term of up to 3 years with confiscation of property.

Article 314. Bribe-Giving

(1) Bribe-giving to a functionary, in person or through a mediator, shall be punishable by arrest for a term of 3 to 6 months or by deprivation of liberty for a term of up to 3 years.

- (2) The same act committed:
- 1) repeatedly;
 - 2) on a large scale;
 - 3) in the interest of an organized group, as well as giving a bribe for committing knowingly illegal action (inaction),

shall be punishable by deprivation of liberty for a term of 3 to 8 years.

Note 1. Mediator-accomplice shall be recognized a person who contributed to achievement and implementation of an agreement on receiving or giving bribes to another person.

2. A person, who is a mediator-accomplice in receiving or giving bribe to another person shall be released from criminal liability if he has informed on his own free will the body authorized to institute criminal proceedings about the fact of bribe-giving.

3. A person, who has given a bribe shall be released from criminal liability if a functionary extorted the bribe from the bribe-giver or if the person has informed of his own free will the body possessing the right to institute criminal proceedings about the fact of bribe-giving. (As amended by Law of the Kyrgyz Republic of February 13, 2006, #57)

INTRODUCTION

The Kyrgyz legal system has roots in Soviet and continental law. Kyrgyzstan has been a State Party to UNCAC since 16 September 2005. It is a member of the Eurasian Group on Combating Money Laundering and Financing of Terrorism (EAG). Since 2004, Kyrgyzstan's criminal bribery offences have been externally reviewed under the Monitoring Process of the OECD Anti-Corruption Network for Eastern Europe and Central Asia (ACN).¹ To avoid duplication, this report will refer to the ACN's monitoring reports and the EAG's mutual evaluation reports whenever appropriate.

ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Kyrgyzstan's general active and passive domestic bribery offences are found in Articles 310, 311 and 314 of the Criminal Code (CC). Article 314 deals with bribe-giving. Articles 310 and 311 both deal with bribe-taking (passive bribery). The two offences are identical except in the following respects:

- (a) Article 310 deals with bribe-taking that is "not stipulated before", which essentially means "without prior agreement". Article 311 deals with the bribery that is "stipulated before", i.e. with prior agreement. Such premeditated bribes under Article 311 may be given "for general patronage" and "connivance at work";
- (b) Article 311 deals with bribe-taking involving a group of persons or conspiracy; and
- (c) Article 311 carries a heavier maximum penalty, ostensibly because the additional elements in the offence are considered aggravating factors.

Additional offences may apply to particular cases of bribery. CC Article 303 establishes an offence of "corruption", but the term is vague and unclear, and hence the offence has never been applied.² Other offences deal with bribery in specific situations, such as taking bribes in return for bestowing a government post (Article 312) and other forms of official misconduct (e.g. abuse of official powers). This report will focus on the general bribery offences in CC Articles 310-311 and 314 but will refer to the additional offences if necessary.

International standards generally require coverage of three modes of active domestic bribery, namely offering, giving, and promising a bribe. CC Article 314 only covers giving. Offering and promising a bribe are not covered. According to Kyrgyz authorities, offering or promising a bribe is not an offence.

It is also not a crime if an offer of a bribe is made but either not received by an official, or is rejected by the official.³

As for passive domestic bribery, international standards generally demand coverage of accepting and soliciting a bribe. CC Articles 310-311 cover only “bribe-taking”, which likely includes accepting a bribe but not soliciting (i.e. asking for) a bribe. Drawing an analogy with offering and promising a bribe, the soliciting of a bribe could conceivably constitute an attempt to take a bribe.

The treatment of a bribe offer/solicitation as only an attempt to commit active/passive bribery is significant. International instruments consider an offer/solicitation of a bribe to be full, complete offences, regardless of whether the offer/solicitation is accepted.⁴ Hence, even if one assumes that the Kyrgyz Criminal Code covers offer and solicitation as attempt crimes, it would nevertheless be a departure from accepted international standards.

International standards also require coverage of a person who uses an intermediary to offer, give, solicit etc. a bribe. The passive bribery offences in CC Articles 310-311 expressly cover bribe-taking “in person or through an intermediary”. Active bribery under CC Article 314 covers bribe-giving “in person or through a mediator”. A note at the end of the provision adds that a “mediator-accomplice shall be recognized a person who contributed to achievement and implementation of an agreement on receiving or giving bribes to another person.”

International standards also require that bribery offences cover bribes given to a public official for the benefit of a third party, or directly to a third party upon the instructions of the public official. The CC general bribery offences do not go so far. According to a Guidance of the Supreme Court of 27 September 2003, it is a crime only if a bribe is received or given to an official or his relatives or “close persons”.⁵

An effective bribery offence must also have a broad definition of “public official” that includes any person holding legislative, executive, administrative or judicial office, irrespective of seniority, and whether appointed or elected, permanent or temporary, paid or unpaid. The offence must also cover any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined and applied in the domestic law, and any other person defined as a “public official” in the domestic law.

The definition of a public official (or “functionary”, as used in the CC) is found not in the legal provisions but an explanatory note under CC Article 304. The definition includes persons who represents the government on a permanent

or temporary basis, or by special authority; or who exercises organisational, regulatory, administrative, controlling or audit functions in state bodies, local self-government bodies, governmental and municipal institutions, and the armed forces. The note also states that “civil servants and local self-government employees who are not included into the category of officials shall bear criminal responsibility under the relevant Articles of the present Chapter.”

The CC definition of a public official differs from international standards in several respects. Notably missing are legislators and the judiciary. Also absent are persons who perform a public function or provide a public service generally. The coverage of unpaid officials and persons who perform public functions in a public agency or enterprise is unclear. Some civil servants and local self-government employees are also missing from the definition, given the statement that certain relevant Articles apply to civil servants and local self-government employees who are not considered “officials”.⁶ The Kyrgyz authorities state that the CC would be interpreted to cover a wide range of officials, according to a commentary on the CC. No supporting case law was provided.

To be effective, bribery offences must also broadly cover acts or omissions in relation to the performance of official duties, including any use of the public official’s position or office, and acts or omissions outside the official’s competence. The CC bribery offences seem to meet this requirement. Articles 310-311 cover a bribed official who performs acts or omissions that are “part and parcel of [the official’s] official powers”, or who uses his official position to bring about or promote such acts or omissions. According to the Kyrgyz authorities, Article 304 (offence acting beyond statutory powers) could also apply to these cases.

International standards require coverage of bribes of both a material and non-material nature. The Kyrgyz authorities acknowledge that the CC bribery offences (apart from Article 311) fall short in this regard, covering only material, economic benefits, namely “money, securities, or other assets or property benefits”.⁷ Also, the Kyrgyz authorities assert that the definition of a bribe is not affected by the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage. No supporting case law was provided.

Several defences to bribery are available. The Notes to Article 314 provide a defence of “effective regret”. A bribe-giver is released from criminal liability if he/she voluntarily informs the authorities of the crime. The same applies to an intermediary acting for a bribe-giver or taker. There is no requirement that the offender reports the crime to the authorities without delay.

The Notes also provide that a bribe-giver is absolved of criminal responsibility if a public official extorted the bribe from him/her. This defence is separate from “repentance” as a mitigating factor at sentencing, or the defence of “voluntary renunciation” of a crime before its commission (CC Article 29), according to the Kyrgyz authorities. Finally, the Kyrgyz authorities indicate that it is a defence to bribery that an advantage was small and was given to induce officials to perform non-discretionary routine tasks such as issuing licenses or permits, i.e. a small facilitation payment. The authorities did not indicate the statutory basis of this defence.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

International standards also require criminalisation of bribery of officials of foreign states and public international organisations. The CC Article 304 bribery offences are clearly deficient in this regard. It is therefore not a crime in Kyrgyzstan to bribe an official of a foreign state or a public international organisation in the conduct of international business.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Kyrgyzstan does not impose liability against legal persons for any criminal offences, including bribery. Civil and administrative liability of legal persons is also not available. There appears to be no constitutional impediment to creating criminal liability of legal persons for bribery. The Kyrgyz authorities acknowledge that the absence of liability of legal persons is a significant shortcoming. As of July 2008, Kyrgyzstan was drafting laws to create administrative liability of legal persons for breach of anti-money laundering and terrorist financing legislation,⁸ but it is not clear whether such liability would extend to bribery offences.

JURISDICTION TO PROSECUTE BRIBERY

Kyrgyzstan has jurisdiction to prosecute bribery offences that take place “within the Kyrgyz Republic”. It also has jurisdiction to prosecute offences that are completed or prevented within its territory (CC Article 5). It is not clear whether this covers a situation where a substantial part of the crime occurs in Kyrgyzstan but the crime is completed outside, e.g. a briber who offers a bribe to a Kyrgyz official in Kyrgyzstan but delivers the bribe outside.

Kyrgyzstan can also prosecute Kyrgyz nationals who commit bribery offences under the CC while outside Kyrgyzstan, unless a foreign court has sentenced the national for the crime. There is no dual criminality requirement,

i.e. the conduct in question need not be a crime in the place where it occurred (CC Article 6).

SANCTIONS FOR BRIBERY

The available punishment for the CC bribery offences is shown in the table below. Sanctions are increased for aggravated offences, i.e. for repeat offences, bribery in order than an official commits a crime, or a bribe exceeding 200 times the minimum monthly wages in value. The following are also aggravating factors: bribe-taking committed by a senior official, bribery committed by a group of persons (Article 311 only) or in the interest of an organized group (Article 314 only).

Offence	Sentence	Sentence for aggravated offence
Article 310 Bribe-taking (remuneration)	Fine of 200-500 times the minimum monthly wage, or Up to 3 years' imprisonment and up to 3 years' disqualification from office or specified activity	3-8 years' imprisonment Up to 3 years' disqualification from office or specified activity, and Confiscation of property
Article 311 Bribe-taking (graft)	5-8 years' imprisonment Up to 3 years' disqualification from office or specified activity, and Confiscation of property	7-12 years' imprisonment Up to 3 years' disqualification from office or specified activity, and Confiscation of property
Article 314 Bribe-giving	Up to 3 years' imprisonment	3-8 years' imprisonment

As noted in the table, Articles 310 and 311 specifies that confiscation is mandatory upon conviction for bribe-taking (except for non-aggravated bribe-taking under Article 310). There is no corresponding provision for bribe-giving (Article 314). CC Article 52 in turn provides that a court may confiscate property that was used or intended to be used as an instrument, or was obtained as a result of crime. This arguably allows confiscation of both the bribe and the direct proceeds of bribery,⁹ but possibly not indirect proceeds.

Other provisions render this confiscation regime somewhat less clear. Article 88 of the Criminal Procedure Code states that a court shall confiscate property "illegally obtained" and property "received as a bribe". The provision also describes "instrumentality" and "proceeds of crime" differently from the CC. A more recent law on anti-money laundering provides yet another inconsistent definition of proceeds of crime.¹⁰ As well, Article 314 on its face suggests

confiscation is not available against bribe-givers. But this appears to contradict Supreme Court Guidance No. 15 of 27 September 2003 which requires mandatory confiscation against bribe-givers.¹¹ Finally, Kyrgyz authorities indicated during this thematic review that neither the bribe nor the proceeds of bribery can be confiscated.

What does seem clear is that none of these provisions allows confiscation of property from third persons, *e.g.* those who hold property on behalf of an offender. The Kyrgyz authorities assert that courts may confiscate proceeds that has been transferred to fictitious persons for concealment, but did not provide supporting authority for this position. They also do not permit confiscation of indirect proceeds (*i.e.* the proceeds of proceeds). A court also cannot order a fine of equivalent value in lieu of confiscation.¹² The Kyrgyz authorities acknowledge that there are significant gaps in its confiscation legislation.

Additional administrative sanctions may be available. The CC provides that upon conviction for bribe-taking, a person is disqualified from holding certain office or engaging in certain activities for up to three years. There is no guidance on what types of office or activities that is subject to disqualification. The penalty does not apply to convicted bribe-givers. Additional administrative sanctions, such as debarment from public procurement, are not available, according to Kyrgyz authorities.

Statistics on the actual sanctions imposed for bribery are not available. It is therefore not possible to assess whether the sanctions imposed for bribery are effective, proportionate and dissuasive in practice.

TOOLS FOR INVESTIGATING BRIBERY

The Kyrgyz authorities indicate that investigators in bribery cases can obtain information and records directly from banks and financial institutions. The procedure for obtaining such information is through the Criminal Procedure Code general provisions for search and seizure. In other words, a prosecutor may issue a warrant to search and seize bank records if there are reasonable grounds to believe that the documents are relevant to the investigation (CPC Article 184). There are no summary procedures for obtaining bank records, *e.g.* production orders or subpoenas.

A further potential obstacle is Kyrgyz statutes on bank and commercial secrecy. These laws do not allow investigative bodies to obtain bank records before criminal proceedings are formally commenced. This creates a “Catch-22” situation since the authorities often do not have sufficient evidence to

commence criminal proceedings unless they have copies of bank records.¹³ Recent legislative amendments relaxed bank secrecy rules and gave the Kyrgyz financial intelligence unit greater access to bank information. Unfortunately, law enforcement bodies investigating bribery cases do not appear to benefit from these new provisions.¹⁴

Kyrgyz authorities indicate that investigators in bribery cases can obtain information and records from tax authorities and have done so in the past. No information was provided on the legislative basis for accessing tax information, or on the role of tax secrecy legislation.

Concerns have also been expressed over the ability to freeze and seize bank accounts and assets. Two provisions deal with this issue. CPC Articles 119 and 142 allow an investigator or a court to “arrest” property of an accused/suspect that may be subject to confiscation. Some types of property are excluded from seizure, *e.g.* property that is vitally essential for the accused/suspect and his/her dependents. In addition, Article 56 of the Law on Banks and Banking Activity also allows a court or an investigator (with a prosecutor’s approval) to arrest bank accounts. One significant obstacle is that an application to freeze or seize property can only be made upon notice to the property owner. There are also questions over whether law enforcement is adequately empowered to identify and find property that is subject to confiscation.¹⁵

Some covert investigative techniques are available in bribery cases. CPC Article 188 allows a prosecutor to issue a warrant to intercept “telephone conversations and conversations with utilisation of other communication means”. CPC Article 187 permits a prosecutor to order the seizure of letters telegrams, parcels and other mail items. It is not clear whether these provisions allow interception of electronic communications such as email and chat conversations. The Kyrgyz authorities also state that other forms of covert investigative techniques are available, such as undercover police operations, controlled deliveries, secret surveillance via video or audio recording, and listening and bugging devices. However, the statutory basis for these measures is unclear.¹⁶

Kyrgyzstan has limited ability to seek international co-operation in bribery investigations. All offences qualify for the seeking of extradition and MLA; there are no minimum-penalty thresholds. More problematic is the requirement that there be an applicable international agreement.¹⁷ Kyrgyzstan’s recent ratification of the UNCAC should assist in this regard.¹⁸ A further limitation to extradition is that the CPC only allows the seeking of extradition of “a citizen of the Kyrgyz Republic having committed crime on the territory of the Kyrgyz

Republic.” Kyrgyz authorities therefore cannot seek extradition of a non-Kyrgyz national or a Kyrgyz national that has committed a crime extraterritorially.

Regarding co-operating offenders, as mentioned above under the defence of “effective regret”, an intermediary or a bribe-giver may be absolved from criminal liability if he/she reports the crime to the authorities (Notes to CC Article 314). On its face, the provision only requires the intermediary/bribe-giver to report the crime; there is no requirement to co-operate thereafter, *e.g.* by providing testimony at trial. The provision also does not apply to bribe-takers. In a bribery scheme involving multiple officials, there is thus no means for securing the co-operation of one official in the investigation or prosecution of others. Finally, plea bargaining in bribery cases is not available, according to Kyrgyz authorities.

ENFORCEMENT OF BRIBERY OFFENCES

The general law enforcement bodies, such as the bodies of the Ministry of the Interior, are responsible for criminal bribery investigations in Kyrgyzstan. The Prosecutor General is responsible for prosecutions. The National Agency of Kyrgyz Republic for Preventing Corruption, Kyrgyzstan’s anti-corruption agency, does not have criminal investigative and prosecutorial responsibilities.

The 2005 ACN Report (pp. 17-18) noted that “despite the high level of bribery, only 88 criminal cases against 97 persons were fully investigated and referred to court in 2003 (23 cases involved 26 persons by the public prosecution authorities). In this context, evident discrepancy between the actual level of corruption in the country and the prosecution and conviction rates for bribery and corruption-related offences remain a matter of serious concern.” The Kyrgyz authorities could not provide more recent statistics.

RECOMMENDATIONS FOR A WAY FORWARD

Kyrgyzstan has made significant efforts in criminalising bribery offences. To further enhance compatibility with international standards, Kyrgyzstan could consider addressing the following issues.

Elements of the Active and Passive Domestic Bribery Offences

Kyrgyzstan’s general bribery offences CC Articles 310-311 and 314 already meet some aspects of international standards, such as express coverage of bribery through intermediaries. To further improve the bribery offences, Kyrgyzstan could consider addressing the following areas:

- (a) Express coverage of offering, promising and soliciting a bribe;
- (b) Express coverage of bribes given for the benefit of any third party, not only an official's relatives or close persons;
- (c) A broad definition of public officials that covers (i) persons who are paid or unpaid, (ii) persons who perform legislative and judicial functions, (iii) persons who perform a public function or provide a public service generally, (iv) persons who perform public functions in a public agency or enterprise, and (v) all civil servants and local self-government employees;
- (d) Express coverage of non-material bribes;
- (e) Whether a bribe is affected by the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage; and
- (f) The scope of the defences of small facilitation payments and "effective regret".

Bribery of Foreign Public Officials

To bring its criminal into line with international standards, Kyrgyzstan should enact an offence to criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Establishing liability against legal persons for bribery would bring Kyrgyzstan in line with international standards.

Jurisdiction for Prosecuting Bribery

As with other jurisdictions, Kyrgyzstan has jurisdiction to prosecute bribery that takes place or is completed within its territory. Kyrgyzstan may wish to address whether there is jurisdiction to prosecute bribery where a substantial part of the offence takes place in Kyrgyzstan but the overall offence is completed outside.

Sanctions for Bribery

The maximum punishment available for the CC bribery offences are broadly in line with international standards. To ensure that the entire scheme of sanctions is effective, proportionate and dissuasive, Kyrgyzstan could address the following issues:

- (a) Confiscation in bribery cases, particularly (i) availability of confiscation for bribe-giving (Article 314) and non-aggravated bribe-taking (remuneration) (Article 310); (ii) ability to confiscate both the bribe and the direct and indirect proceeds of bribery for all CC bribery offences; (iii) harmonisation of the statutory provisions concerning confiscation in the CC, CPC, and law on anti-money laundering; (iv) confiscation of property from third parties, e.g. those who hold property on behalf of an offender; (v) confiscation of indirect proceeds; and (vi) imposing a fine equivalent in value when confiscation is not possible;
- (b) Additional administrative sanctions for bribery, such as disbarment from public procurement;
- (c) Maintaining statistics on the actual sanctions (including confiscation) imposed in bribery cases; and
- (d) Whether sanctions imposed in practice are effective, proportionate and dissuasive.

Tools for Investigating Bribery

Some basic tools for investigating bribery are available in Kyrgyzstan, as are some covert investigative techniques such as wiretapping. To enhance the ability of law enforcement to investigate bribery, the following matters could be addressed in the context of bribery investigations:

- (a) Obtaining information and records from banks and financial institutions, particularly (i) simplified procedures e.g. production orders or subpoenas; and (ii) availability of bank information and records during the early stages of an investigation before criminal proceedings are formally commenced;
- (b) Whether bank and tax secrecy rules impede access to relevant information and documents in bribery investigations;

- (c) Ability to freeze and seize assets and bank accounts without notice to the asset owner or account holder; and the ability of law enforcement to identify, trace and seize property subject to confiscation;
- (d) Interception of electronic communications;
- (e) Extradition and MLA in the absence of an applicable international agreement; and extradition of non-Kyrgyz nationals, and Kyrgyz nationals who have committed crime extraterritorially;
- (f) Means to secure the co-operation of bribe-takers in an investigation or prosecution; and
- (g) Plea bargaining in bribery cases.

Enforcement of Bribery Offences

To properly assess whether bribery offences are enforced effectively in practice, Kyrgyzstan could consider maintaining more detailed statistics on the investigation, prosecution, conviction and sanctions for bribery offences.

RELEVANT LAWS AND DOCUMENTATION

Monitoring Reports of the OECD Anti-Corruption Network for Eastern Europe and Central Asia: www.oecd.org/document/17/0,3343,en_36595778_36595861_37187921_1_1_1_1,00.html

Eurasian Group on Combating Money Laundering and Financing of Terrorism: www.eurasiangroup.org

NOTES

¹ OECD (2005), *Fighting Corruption in Transition Economies: The Kyrgyz Republic* and OECD (2007), *Monitoring Report: Kyrgyzstan*, hereinafter referred to as the *ACN Report* and *ACN Monitoring Report* respectively (www.oecd.org/document/17/0,3343,en_36595778_36595861_37187921_1_1_1_1,00.html).

² See also ACN Report at p. 20.

³ ACN Report at p. 20.

- ⁴ For example, OECD Convention Article 1 requires Parties to criminalise the offering, giving and promising of a bribe to a foreign official. All three modes of committing the offence have equal status. UNCAC Articles 15 and 16 take the same approach.
- ⁵ ACN Report at p. 20.
- ⁶ See also ACN Report at p. 20.
- ⁷ ACN Report at p. 19.
- ⁸ EAG (2008), *First Mutual Evaluation of Kyrgyzstan: Second Progress Report*, Annex 2.
- ⁹ ACN Report at pp. 21-22.
- ¹⁰ Anti-Money Laundering and Combating the Financing of Terrorism Law, Article 2. See ACN Monitoring Report at p. 22.
- ¹¹ ACN Report at p. 22.
- ¹² ACN Report at p. 21; EAG (2007), *First Mutual Evaluation / Detailed Assessment Report: Kyrgyz Republic*, paras. 154-155.
- ¹³ ACN Report at pp. 22-23 and ACN Monitoring report at pp. 23-24.
- ¹⁴ See ACN Monitoring Report at pp. 23-24; EAG (2007), *First Mutual Evaluation / Detailed Assessment Report: Kyrgyz Republic*, paras. 332 and 335. For instance, the Law on Combating Terrorist Financing and the Legalisation (Laundering) of Proceeds of Crime, Article 8 allows banks to provide information “on *suspicious transactions* ... to the authorized state body in compliance with the *requirements established by this Law* shall not constitute the divulcation of the official, commercial or bank secrecy” (emphasis added). The provision thus appears to apply only to suspicious transaction reporting under the enactment and not, for example, to a bribery investigation.
- ¹⁵ EAG (2007), *First Mutual Evaluation / Detailed Assessment Report: Kyrgyz Republic*, paras. 150-173.
- ¹⁶ Under the Law on Operational and Detective Activities, controlled deliveries are available in at least narcotics investigations. See EAG (2007), *First Mutual Evaluation / Detailed Assessment Report: Kyrgyz Republic*, para. 239.
- ¹⁷ ACN Monitoring Report, p. 24; CPC Articles 425 and 431. However, during the Initiative’s 2007 thematic review, Kyrgyzstan indicated that extradition and MLA were available in the absence of a treaty (ADB/OECD (2007), *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 193).
- ¹⁸ Kyrgyzstan is also party to a Commonwealth of Independent States Convention on Legal Assistance and Legal Relationship in Civil, Family and Criminal Matters, nine bilateral MLA treaties, and four bilateral extradition treaties.

Criminalisation of Bribery in Macao, China

Penal Code of Macao, China
(Unofficial translation provided by the
Commission Against Corruption of Macao, China)

Article 337

Passive corruption to perform illicit acts

1. A public servant who, directly or through an intermediary, with his consent or ratification, solicits or accepts, for himself or for a third party, an undue advantage or a promise of such an advantage, pecuniary or non-pecuniary, to act or refrain from acting in breach of his official duties, shall be liable to imprisonment for 1 to 8 years.
2. If the act is not performed, the offender shall be liable to imprisonment for a maximum term of 3 years or a fine.¹
3. No punishment shall be inflicted if the offender, before the performance of the act, voluntarily rejects the offer or promise he has accepted, or returns the advantage, or, in case of fungible goods, its value.

Article 338

Passive corruption to perform licit acts

1. A public servant who, directly or through an intermediary, with his consent or ratification, solicits or accepts, for himself or for a third party, an undue advantage or a promise of such an advantage, pecuniary or non-pecuniary, to act or refrain from acting not in breach of his official duties, shall be liable to imprisonment for a maximum term of 2 years or a fine of up to 240 days.
2. Paragraph 3 of the preceding article is correspondingly applicable herein.

Article 339

Active corruption

1. Any person, directly or through an intermediary, with his consent or ratification, gives or promises an undue advantage, pecuniary or non-pecuniary, to a public servant or to a third party with the public servant's knowledge, with the purpose stated in article 337, shall be liable to imprisonment for a maximum term of 3 years or a fine.
2. If the purpose is as stated in the preceding article, the offender shall be liable

to imprisonment for a maximum term of 6 months or a fine of up to 60 days.

3. The provision stated in b) of article 328 is correspondingly applicable herein.

INTRODUCTION

Macao, China's legal system is largely based on the continental civil law system. Its criminal bribery offences have not been externally reviewed. The UNCAC applies to Macao, China by reason of P.R. China's ratification. Macao, China has been a member of the APG since 2001.

ELEMENTS OF THE ACTIVE AND PASSIVE BRIBERY OFFENCES

Macao, China's criminal bribery offences are found in its Penal Code. Passive bribery to perform illicit and licit acts is covered by Articles 337 and 338 of the Penal Code respectively. Active bribery to perform licit or illicit acts is dealt with under Article 339.

International standards generally require coverage of three modes of committing active domestic bribery, namely offering, giving, and promising a bribe. In the Portuguese version of Article 339, the verb "dar" in Portuguese legal language includes the concepts of "give" and "offer", and this interpretation is supported by practice. "Offering" a bribe is not expressly mentioned. Macao, China authorities also cited case law to show that the offence covers offers to bribe, bribes that are made but not received, and bribes that are rejected by an official.²

As for passive domestic bribery, international standards generally demand coverage of solicitation and acceptance of a bribe. Articles 337 and 338 explicitly cover both situations. As noted above, case law indicates that the offence is complete once the official solicits or requests the bribe to an individual, regardless of whether the individual agrees to pay.

Commensurate with established international standards, the Penal Code active and passive bribery offences expressly cover bribes given, solicited, etc. "directly or through an intermediary". The offences also explicitly include bribes given to or solicited for a public official or a third party.

A public official (or public servant) is defined as an official in the public administration or other public authorities, regardless of whether he/she holds the position permanently or temporarily, or for remuneration or not. Also expressly covered are legislative officials, judges, and local government

officials. According to Macao, China authorities, the definition also includes persons in management or supervisory roles and employees of certain types of enterprises, such as government-owned enterprises; enterprises that has received public funds as capital; enterprises in which the government has a majority shareholding; concessionaires of public utilities; and government-sanctioned monopolies (Penal Code Article 336). There are no government-owned casinos in Macao, China. Casino employees were considered public officials prior to the liberalisation of the casino industry in 2002. The CCAC takes the view that this continues to be the case post-2002. Macao, China authorities confirmed that the Penal Code definition of public official does not cover public officials of P.R. China or Hong Kong, China.

International standards also require broad coverage of acts or omissions in relation to the performance of official duties, including any use of the public official's position or office, and acts or omissions outside the official's competence. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official award a contract to that company.³

This raises two issues for the offences in Articles 337-339. First, these offences do not expressly cover bribery in order to influence an official's exercise of discretion. Fortunately, courts have interpreted the offences to cover these cases.⁴ Second, Articles 337-339 refer to an official acting in breach (or not in breach, in the case of Article 338) of his/her *official duties*. Indeed, Macao, China authorities have confirmed that the Penal Code bribery offences do not cover an official who acts outside his/her authorised competence or the *de facto* powers of his/her office. In other words, the offences do not cover bribery to a public official, in order that this official acts outside his/her competence and uses his/her office to influence another official award a contract to the briber. Macao, China's domestic bribery offences are thus narrower than international standards in this respect.

The Penal Code broadly defines a bribe as an "undue advantage, whether in property or not". Both pecuniary and non-pecuniary bribes are thus covered. Macao, China authorities cited case law to show that the definition of a bribe is not affected by factors such as the result of the bribe⁵ or whether the briber was the best qualified bidder.⁶ It is unclear whether the definition is affected by other factors such as the value of the bribe, the perceptions of local custom towards bribery, the tolerance by local authorities, or the alleged necessity of the bribe. According to the Macao, China authorities, courts have applied these factors in determining a bribe.

Regarding defences, the Macao, China authorities indicate that there is no defence of small facilitation payments, i.e. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits. This is commendable, even though not all international conventions prohibit such a defence. On the other hand, a person may be subject to less or no punishment for active bribery if he/she committed the crime so that a close relative avoids criminal sanctions (Penal Code Articles 339(3) and 328(b)).

Three additional defences to bribery are of note. First, Penal Code Article 337(3) provides a defence of “effective regret”. If an official accepts or solicits a bribe but later voluntarily rejects or returns the bribe, before performing the act, the court may decide to convict but not to punish the official. The meaning of “voluntarily” is not completely clear. This defence is not available for active bribery. Second, under Penal Code Article 68(1), a person guilty of active bribery to perform a licit act may escape punishment if the crime is minor in nature, the offender has provided compensation for the crime, and punishment is not necessary to deter the offender from committing further crimes. Finally, under Penal Code Article 68(3) and Article 7(1) of Law No. 10 of 2000 establishing the Commission against Corruption, a person may not be charged or punished if he/she “helps effectively in the search of evidence which may be decisive in establishing the elements of the crime, especially the identification of other individuals to be held responsible.” There is no definition of what amounts to “effective” search of evidence or what is “decisive” in proving the case. For all three defences, a preliminary hearing judge makes the final decision on whether the conditions for invoking the defence have been met (Penal Procedural Code Article 262). None of the defences requires the offender to report the crime to law enforcement authorities. There are no examples or case law showing how these provisions operate, according to the Macao, China authorities.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

The Macao authorities confirmed that Macao, China does not have an offence of bribery of foreign public officials or officials of public international organisations in the conduct of international business. The absence of such an offence is particularly problematic since, as noted above, the Penal Code domestic bribery offence does not cover bribery of public officials of P.R. China or Hong Kong, Bribery of officials of these jurisdictions is therefore not a crime in Macao, China.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Legal persons cannot be held liable for bribery in Macao, China. There are no legal or constitutional obstacles to establishing liability of legal persons

for bribery, and Macao, China had begun the process of doing so as of March 2009. Corporate liability is available for other offences, such as money laundering.

JURISDICTION TO PROSECUTE BRIBERY

The Macao, China authorities have indicated that they have territorial jurisdiction to prosecute active and passive domestic bribery that takes place wholly or partly in Macao, China.

As for extraterritorial jurisdiction, Macao, China states that there is jurisdiction to prosecute a crime committed wholly outside its territory if the offender resides in Macao, China or the victim of the crime resides in Macao, China. This is akin to *active* and *passive* “nationality” jurisdiction, with nationality substituted by “residence” since Macao, China is not a state. The Macao, China authorities could not provide judicial decisions that explain whom the “victim” is when a Macao, China official solicits or receives a bribe. In one case, the prosecution argued that all members of society would be victims in a crime of corruption, but the court’s judgment did not comment on this point.⁷

It thus remains possible that the courts in Macao, China would ultimately adopt a narrow interpretation of “victim” in a bribery case. In other civil law jurisdictions, courts have held that there are no victims to the crime of bribery,⁸ or that the “victim” is the person from whom a bribe is solicited,⁹ or a competitor who has lost a business opportunity to the briber.¹⁰ If Macao, China courts adopt a similarly narrow interpretation of “victim”, then a Macao, China official could conceivably evade prosecution by soliciting a bribe while outside of Macao, China.

Active nationality jurisdiction to prosecute bribery would alleviate these difficulties. This refers to jurisdiction to prosecute a Macao, China resident for active or passive bribery of a Macao, China official committed wholly outside of Macao, China territory. At present, such jurisdiction is not available in Macao, China.

SANCTIONS FOR BRIBERY

The Penal Code bribery offences are subject to the following sanctions:

Offence	Sentence available
Article 337(1): Passive bribery to perform illicit acts, and the illicit act was in fact performed	Imprisonment for 1 to 8 years

Offence	Sentence available
Article 337(2): Passive bribery to perform illicit acts, and the illicit act was in fact not performed	Imprisonment of up to 3 years or a maximum fine of MOP 3.6 million (approx. EUR 358 000 or USD 459 000)
Article 338: Passive bribery to perform licit acts	Imprisonment of up to 2 years or a fine of up to MOP 2.4 million (approx. EUR 239 000 or USD 306 000)
Article 339(1): Active bribery to perform illicit acts	Imprisonment of up to 3 years or a maximum fine of MOP 3.6 million (approx. EUR 358 000 or USD 459 000)
Article 339(2): Active bribery to perform licit acts	Imprisonment of up to 6 months or a maximum fine of MOP 600 000 (approx. EUR 60 000 or USD 77 000)

In addition, a court may confiscate upon conviction a reward given directly or indirectly to a person (or a non-*bona fide* third party beneficiary) for committing a crime. Confiscation may also apply to a thing, right or benefit derived directly or indirectly from a crime (Penal Code Article 103). According to Macao, China, these provisions would allow a court to confiscate of a bribe and the proceeds of bribery, including any revenue generated from a contract obtained through bribery. If the thing subject to confiscation is not available, a court may impose a monetary sanction of equivalent value. Administrative sanctions, such as debarment from public procurement and disqualification from public subsidies or financial support, are not available.

Statistics were not available on the severity of sanctions. Statistics on confiscation suggest that this sanction has not been regularly imposed. Confiscation was ordered only once in 2004-2008 despite 13 convictions for active or passive bribery during this period.

TOOLS FOR INVESTIGATING BRIBERY

Investigative authorities must obtain either a search warrant or the consent of the account holder in order to obtain information from banks and other financial institutions. All types of account information are available. A warrant overrides any bank secrecy that applies (Financial System Act, Article 80). The warrant must be executed pursuant to the procedure described in the Penal Procedure Code. According to Macao, China authorities, it usually takes one or two days to obtain a court order, after which a financial institution may take between a few days to two months to produce the information. In urgent cases, information may be produced within a few days. According to Macao,

China authorities, client records of casinos are not subject to secrecy rules and are thus available to bribery investigators.

Tax information may also be obtained in a bribery investigation. The constituting statute of the Commission against Corruption requires all government departments – including tax authorities – to provide the Commission with relevant information and documentation upon demand. The Commission may also attend any government body or entity without notice and inspect relevant documents. According to the Macao, China authorities, the Commission has exercised these powers to obtain tax information in the past.

The Penal Procedure Code Articles 163-171 allows the pre-trial seizure. Article 163 allows seizure of any object used or intended to be used to commit an offence, which constituted the proceeds, profit, price or reward of an offence, which was left by the perpetrator at the scene of the offence, or which is evidence of an offence. Article 166 allows a court to order seizure of funds or other financial assets that are related to the commission of a crime, are important to an investigation, or constitute material evidence. However, a 2007 APG report remarked that Macao, China lacks the ability to freeze a bank account quickly, i.e. without judicial intervention.¹¹

Macao, China authorities state that covert investigative techniques are available in bribery cases, including interception of communications, secret surveillance, and undercover police operations. Article 7 of the statute constituting the Commission against Corruption further provides that the Commissioner may authorise a person to accept a bribe or a bribe solicitation in the course of an investigation. It is not clear whether there is a comparable provision to authorise a person to give or offer a bribe (i.e. a controlled a delivery).

International co-operation is likely available for all bribery offences¹² except active bribery to perform a licit act. Macao, China may provide extradition (or surrender of fugitive offenders, as it is known in Macao, China) for offences punishable by up to one year's imprisonment. Macao, China's legislation does not impose a similar threshold of one-year's imprisonment for seeking extradition, but a foreign state may do so on the basis of reciprocity. If this occurs, then Macao, China may seek extradition for all Penal Code bribery offences except active bribery to perform a licit act, which has a maximum punishment of 6 months' imprisonment or a fine. There are no comparable thresholds for seeking mutual legal assistance (MLA) in Macao, China's legislation. Nevertheless, with a maximum punishment of 6 months' imprisonment, the offence of active bribery to perform a licit act will not qualify for MLA under many treaties and legislation of foreign countries.

The availability of plea bargaining is not completely clear. According to Macao, China authorities, plea bargaining is not available in corruption cases. However, as noted above, a person may not be charged or punished if he/she “helps effectively in the search of evidence which may be decisive in establishing the elements of the crime, especially the identification of other individuals to be held responsible” (Law Establishing the Commission against Corruption Article 7). This provision in effect allows an offender to obtain prosecutorial immunity in return for co-operation with the authorities. A preliminary hearing judge decides whether the conditions for invoking the defence have been met (Penal Procedural Code Article 262). As mentioned earlier, there is no definition of what amounts to an “effective” search of evidence or evidence “decisive” to an investigation. Thus, in practical terms, there may be wide discretion in applying this provision.

ENFORCEMENT OF BRIBERY OFFENCES

Macao, China’s Commission Against Corruption (CCAC) and the Procuratorate are responsible for criminal bribery investigations (Commission Against Corruption Act, Articles 4 and 11). The latter is also responsible for criminal bribery prosecutions. The CCAC may also investigate money laundering when the predicate offence is a crime of bribery over which the CCAC has jurisdiction to investigate.

Macao, China provided detailed statistics on its enforcement of bribery offences from 2004 to 2008. The data shows that there were on average 13 active and 16.4 passive bribery investigations per year, and 18 active and 10.6 passive bribery cases were submitted by the investigative authorities for prosecution. However, the number of actual prosecutions was significantly lower, with only 2.4 active and 0.4 passive bribery cases per year on average. There were only two convictions for passive bribery and nine for active bribery over the five-year period.

Active domestic bribery	2004	2005	2006	2007	2008	Average
Investigations	10	7	10	30	8	13
Preliminary investigations	5	4	2	5	2	3.6
Sent to prosecutor	3	1	5	54	27	18
Convictions**	0	0	2	0	7	1.8
Suspended or deferred proceedings**	0	0	0	0	0	0
Acquittals**	0	0	1	0	2	0.6
Sanctions (imposed)	0	0	2	0	7	1.8
Sanctions (suspended)	0	0	0	0	0	0
Confiscation imposed	0	0	0	0	0	0
Passive domestic bribery						
Passive domestic bribery	2004	2005	2006	2007	2008	Average
Investigations	16	9	12	36	9	16.4
Preliminary investigations	4	5	4	7	4	4.8
Sent to prosecutor	8	5	14	19	7	10.6
Convictions**	0	0	2	0	2	0.8
Suspended or deferred proceedings**	0	0	0	0	0	0
Acquittals**	0	0	0	0	0	0
Sanctions (imposed)	0	0	2	0	2	0.8
Sanctions (suspended)	0	0	0	0	0	0
Confiscation imposed	0	0	0	0	1	0.2

Other corrupt practices by public officials*	2004	2005	2006	2007	2008	Average
Investigations	72	90	49	40	32	56.6
Preliminary investigations	71	43	32	26	26	39.6
Sent to prosecutor	23	28	19	9	10	17.8
Convictions**	7	9	10	4	12	8.4
Suspended or deferred proceedings**	0	0	0	0	0	0
Acquittals**	2	2	0	0	1	1
Sanctions (imposed)	7	9	10	4	12	8.4
Sanctions (suspended)	5	7	8	4	4	5.6

* Refers to offences such as abuse of power, embezzlement, forgery and fraud that are committed by public officials.

** The number of prosecutions is the sum total of convictions, suspended proceedings and acquittals.

RECOMMENDATIONS FOR A WAY FORWARD

Macao, China's has enacted a scheme for criminalising the bribery of public officials. The Penal Code bribery offences and provisions in other statutes dealing with enforcement contain several modern features that meet many aspects of international standards on the criminalisation of bribery. To strengthen this scheme, Macao, China could consider addressing the following issues.

Elements of the Active and Passive Domestic Bribery Offences

Macao, China's bribery offences in the Penal Code already meet many requirements found in international standards, *e.g.* express coverage of bribery through intermediaries and bribes provided to third party beneficiaries, and a broad definition of public officials. Nevertheless, Macao, China could consider addressing the following issues:

- (a) Bribery in order that an official uses his/her position outside his/her authorised competence;
- (b) Clarification that the definition of a bribe is not affected by factors such as the value of the bribe, the perceptions of local custom

towards bribery, the tolerance by local authorities, or the alleged necessity of the bribe;

- (c) The appropriateness of the various defences to bribery, including (i) bribery committed so that a close relative avoids criminal sanctions, and (ii) the defences of effective regret.

Bribery of Foreign Public Officials

To bring its criminal into line with international standards, Macao, China should enact an offence to criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business. In particular, Macao, China should criminalise the bribery of public officials of P.R. China and Hong Kong, China.

Liability of Legal Persons for Bribery

Macao, China cannot impose liability against legal persons for bribery. There is no legal or constitutional impediment to doing so, and corporate liability is available for offences such as money laundering. Macao, China could therefore consider establishing corporate liability for all bribery offences, and ensure that legal persons are subject to effective, proportionate and dissuasive sanctions for bribery.

Jurisdiction for Prosecuting Bribery

As with other jurisdictions, Macao, China has jurisdiction to prosecute bribery that takes place wholly or partly in its territory. However, Macao, China may wish to address the following issues:

- (a) Clarification of the meaning of “victim” under the passive nationality jurisdiction principle; and
- (b) Active nationality jurisdiction to prosecute natural and legal persons for bribery.

Sanctions for Bribery

The maximum available punishment for the Penal Code bribery offences are largely in line with international standards. The only exception is active bribery to perform licit acts, which is punishable by imprisonment of up to 6 months or a maximum fine of MOP 600 000 (approx. EUR 60 000 or USD 77 000). While this crime is arguably less serious than other bribery

offences, it can nonetheless apply to situations of significant gravity, *e.g.* paying high-level officials a bribe of millions of dollars in order that a construction permit or investment authorisation is issued for a multi-million dollar project.

Macao, China could consider addressing the following issues:

- (a) The sufficiency of the maximum sanctions available for active bribery to perform licit acts;
- (b) The availability of administrative sanctions for bribery, *e.g.* debarment from public procurement, disqualification from public subsidies or financial support;
- (c) Whether confiscation is sufficiently used in cases of active and passive bribery; and
- (d) Statistics on the severity of sanctions for bribery.

Tools for Investigating Bribery

The basic tools for investigating bribery are available in Macao, China, as are special investigative techniques such as interception of communications and undercover operations. To enhance the ability of law enforcement to investigate bribery, Macao, China could consider addressing the following matters in the context of bribery investigations:

- (a) A simplified procedure for obtaining documents from financial institutions, *e.g.* through a summons or production order;
- (b) A simplified and prompt procedure to freeze bank and other financial accounts;
- (c) Authorising a person to give or offer a bribe (i.e. a controlled delivery) in the course of an investigation;
- (d) Ability to seek the surrender of fugitive offenders (extradition) and MLA for an offence of active bribery to perform licit acts;
- (e) Availability of plea bargaining in bribery cases; and
- (f) Providing more detailed guidance on when immunity from prosecution may be granted to an offender who co-operates with the authorities in an investigation or prosecution.

Enforcement of Bribery Offences

Macao, China maintains detailed statistics on its enforcement of bribery offences. The data from 2004-2008 show that the number of actual prosecutions is significantly lower than the number of cases submitted for prosecution. To improve its enforcement capabilities, Macao, China may wish to address the following issues:

- (a) Consider the reasons for its relatively low rate of prosecutions and conviction for bribery; and
- (b) Make all bribery offences qualify as predicate offences for money laundering.

RELEVANT LAWS AND DOCUMENTATION

Penal and Penal Procedure Codes (Chinese and Portuguese only): en.io.gov.mo/Legis

Law No. 10 of 2000 Establishing the Commission against Corruption of the Macao Special Administrative Region: www.ccac.org.mo/en

Website of the Macao, China Courts with select judgments from (Chinese and Portuguese only): www.court.gov.mo

NOTES

¹ According to paragraph 2 of article 45 of the Penal Code of Macao, China, the fine amount for each day varies from MOP 50 to MOP 10 000 and is fixed by the court depending on the economic and financial situation as well as the personal burden of the convict. If a provision does not specify the number of maximum number of days of fine that can be imposed, then the maximum is 360 days as indicated in Penal Code Article 45(1).

² Judgment No. 36/2007 (30 January 2008), Court of Final Appeal, p. 413; CCAC Press Release 5 May 2009.

³ See OECD Convention, Commentary

⁴ Reasons for sentence in Case No. 36/2007 (30 January 2008) and Case No. 53/2008 (22 April 2009), Court of Final Appeal, pp. 394-395 and 399-401.

⁵ Case No. 36/2007 (30 January 2008), Court of Final Appeal, in which the Court stated the offence is passive bribery is complete once an official

solicits the bribe, regardless of whether the individual pays the official, or whether the official is influenced by the bribe (pp. 394-401).

⁶ Case No. 450/2008 (30 October 2008), Court of Second Instance, pp. 20-21.

⁷ Reasons for Sentence in Case No. 230/2007 (26 July 2007), Court of Second Instance, footnote 2.

⁸ See *OECD Phase 2 Report: Greece* at footnote 36.

⁹ This is Italy's interpretation of "victim" (*OECD Phase 2 Report: Italy* at para. 128).

¹⁰ This is Portugal's definition of "victim" (*OECD Phase 2 Report: Portugal* at para. 110).

¹¹ APG (2007), *Mutual Evaluation Report: Macao, China*, para. 210.

¹² Subject to any restrictions in an applicable treaty or foreign legislation.

Criminalisation of Bribery in Malaysia

Malaysian Anti-Corruption Commission Act (From the Malaysia Attorney General's Chambers)

Section 21 (Bribery of officer of public body)

Any person who offers to an officer of any public body, or being an officer of any public body solicits or accepts, any gratification as an inducement or a reward for –

- (a) the officer voting or abstaining from voting at any meeting of the public body in favour of or against any measure, resolution or question submitted to the public body;
- (b) the officer performing or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any official act;
- (c) the officer aiding in procuring or preventing the passing of any vote of the granting of any contract or advantage in favour of any person; or
- (d) the officer showing or forbearing to show any favour or disfavour in his capacity as such officer.

commits an offence, notwithstanding that the officer did not have the power, right or opportunity so to do, show or forbear, or accepted the gratification without intending so to do, show or forbear, or did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the affairs of the public body.

Section 22 (Bribery of foreign public officials)

Any person who by himself, or by or in conjunction with any other person gives, promises or offers, or agrees to give or offer, to any foreign public official, or being a foreign public official, solicits, accepts or obtains, or agrees to accept or attempts to obtain, whether for the benefit of that foreign public official or of another person, any gratification as an inducement or reward for, or otherwise on account of –

- (a) the foreign public official using his position to influence any act or decision of the foreign state or public international organisation for which the official performs any official duties;

(b) the foreign public official performing, having done or forborne to do, or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any of his official duties; or

(c) the foreign public official aiding in procuring or preventing the granting of any contract for the benefit of any person.

commits an offence, notwithstanding that the foreign public official did not have the power, right or opportunity so to do, show or forbear, or accepted the gratification without intending so to do, show or forbear, or did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the scope of his official duties.

Penal Code

Section 161 (Public servant taking gratification other than legal remuneration in respect of an official act)

Whoever, being or expecting to be a public servant, accepts or obtains, agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Government, or with any member of the Cabinet or of Parliament or of a State Executive Council or Legislative Assembly, or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both.

Section 165 (Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant)

Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

INTRODUCTION

Malaysia ratified the UNCAC in September 2008. It has been a member of the APG since 2000. Malaysia is also a member of the International Association of Anti-Corruption Agencies and the Asia-Pacific Economic Cooperation Anti-Corruption and Transparency Experts Task Force. The Malaysian legal system is based primarily on English common law. Its criminal bribery offences have not been externally reviewed.

Malaysia's main bribery offences are found in the Malaysian Anti-Corruption Commission Act (MACCA). MACCA Sections 21 and 22 deal with domestic and foreign bribery respectively. Additional (and more dated) domestic bribery offences are found in the Penal Code (PC). Passive domestic bribery is covered by Sections 161 (public servant taking a gratification) and 165 (public servant obtaining a valuable thing without consideration). Active bribery constitutes an offence of abetting a public servant to commit passive bribery (PC Sections 109 and 116) covers active domestic bribery. According to Malaysian authorities, bribery offences are generally prosecuted under the MACCA rather than the PC. Nevertheless, this report will discuss the PC offences since they continue to remain in force. As will be seen below, there is considerable overlap among the various domestic bribery offences and inconsistencies in the elements of the offences. Additional offences in MACCA Sections 16, 17, 18 and 23 are not bribery offences *per se* but may apply to cases of bribery in some instances. This report will refer to these additional offences where appropriate.

Bribery may also be covered by other corruption offences such as accepting gratification to induce a public official (MACCA Section 16, and PC Sections 162 and 163), bribery of agents (MACCA Section 17), and using office or position for gratification (MACCA Section 23). Additional statutes may cover bribery of specific types of officials.¹ This report focuses on the main domestic bribery offences in MACCA Section 21 and PC Sections 109, 161 and 165 but will touch upon other corruption offences where appropriate.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

International standards require active bribery offences to expressly cover giving, offering or promising a bribe. MACCA Section 21 only refers to offering a bribe, not giving or promising. By contrast, the MACCA accepting gratification (Section 16) and foreign bribery (Section 22) offences expressly cover giving, promising and offering. This would suggest that "offer" does not include giving

and promising. Otherwise, promising and giving in Sections 16 and 22 would be redundant.

As for the PC, active domestic bribery is covered indirectly through the crime of abetment;² there is no specific offence of active bribery. Abetting bribery arguably covers at least some types of offering and promising a bribe, e.g. a bribe that is offered but rejected constitutes abetting bribery.³ However, it is unclear whether a bribe that is offered but not received by an official is an offence. Malaysia states that Section 21 MACCA covers these situations but did not provide supporting case law.

In any event, criminalising active bribery through the abetment offence falls short of international standards. International instruments require giving, offering, and promising bribes to be full, complete offences.⁴ A general offence of abetting the commission of a crime does not meet this standard. Furthermore, all three modes of active bribery are of equal gravity. That is not the case in Malaysia, since abetting bribery attracts lighter punishment than the full offence (see below).

Turning to passive bribery, three offences are applicable. First, MACCA Section 21 deals with officers of public bodies who solicit or accept a gratification as an inducement or reward for certain acts. Second, Penal Code Sections 161 covers a public servant who accepts or obtains gratification as a motive or reward for a certain act. This act, however, does not in fact have to be performed; it is sufficient if the official represents that the act has been or will be performed.⁵

Third, Section 165 may apply to passive bribery under certain circumstances. It covers a public servant who accepts, obtains etc. any valuable thing without consideration or for inadequate consideration from a person concerned in any proceeding or business transacted by the public servant. Mere acceptance of the valuable thing suffices; there is no further requirement that the thing was a motive or reward for the recipient official's acts. Section 165 is thus broader than Section 161 in this regard. But from another perspective, it is narrower as it only applies to bribers who have proceedings or business involving the bribed official, or a connection with the official's functions. There is no such limitation to Section 161.

International standards require passive bribery offences to cover accepting and soliciting a bribe. MACCA Section 21 clearly meets this requirement. PC Sections 161 and 165 contain the words "accept or obtains, agrees to accept, or attempts to obtain". Soliciting is not expressly covered, but may be considered an attempt to obtain.

International standards require coverage of bribery through intermediaries. PC Section 165 covers bribes “from any person whom [the official] knows to be interested in or related to the [briber] so concerned”. Whether this covers intermediaries would depend on how broadly this provision is interpreted. On the other hand, MACCA Section 21 and PC Section 161 do not expressly refer to intermediaries. Comparison can again be made with the MACCA Section 22 foreign bribery offence, which expressly covers a person who by him/herself “or by or in conjunction with any other person” gives, offers or promises an official a bribe. The additional language in the foreign bribery offence suggests that MACCA Section 21 and PC Section 161 may not cover bribery through intermediaries.

There is also uncertainty and inconsistency regarding bribes given to third party beneficiaries. MACCA Section 21 does not contain language to this effect, unlike the offences of foreign bribery (Section 22) and accepting gratification (Section 16). PC Sections 161 and 165 meet this requirement by expressly referring to officials who accept, obtain etc. a bribe “for himself or for any other person”.

International standards require bribery offences to cover a broad range of public officials, namely any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.⁶

The MACCA covers bribery of “officers of a public body”. This is defined as a member, officer, employee or servant of a public body, and includes a member of the administration, member of Parliament, member of a State Legislative Assembly, judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds, and a person who is incorporated as a corporation sole that is also a public body. A public body includes the federal government, state government, local authorities, and their departments, services and undertakings. Also included are companies or subsidiaries over which a public body has controlling power or interest, and various registered societies and trade unions. While this definition is broad, judges of Magistrates’ and Sessions Court are notably missing. Some may argue that these judges are covered as “persons receiving remuneration from public funds”. But this would beg the question of why judges of other courts (and indeed most other enumerated officials) are expressly mentioned in the definition. According to Malaysian authorities, “officers of public bodies” does not include the King or Sultans of Peninsular Malaysian states, but does

include members of the government of the federal territory of “Wilayah Persekutuan”. The Malaysian authorities were unsure whether the definition covers Governors of Sabah and Sarawak in East Malaysia.

The PC takes a rather different approach by listing a series of relatively narrow functions performed by officials. Section 21 defines a “public servant” by enumerating several specific categories of officials. These include commissioned military officers; judges, jurors, arbitrators, and other persons empowered by law to perform adjudicative functions; court officers charged with certain duties, such as investigations; officials responsible for preventing offences, bringing offenders to justice, or protecting public health, safety and convenience; officials dealing with the Government’s pecuniary interests, property, contracts, or revenue; and officials assessing or levying taxes.

The PC definition of “public servants” also falls short of international standards. Persons holding legislative office are clearly missing. Non-commissioned officers and lower ranked military personnel are not covered. There is no mention of public agencies and public enterprises. Some categories also cover only officials of “the Government”, which is defined as “the Government of Malaysia and of the States and any person lawfully performing executive functions of Government under any written law” (PC Section 6). Whether this necessarily covers local government officials is not entirely clear.

International standards for the criminalisation of bribery also require broad coverage of acts or omissions in relation to the performance of official duties. This includes any use of the public official’s position or office, and acts or omissions outside the official’s scope of competence. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official or private individual award a contract to that company.⁷

Malaysia’s bribery offences appear to be narrower. MACCA Section 21 covers an official who (a) votes or abstains from voting in a public body; (b) performs or abstains from performing any *official act*; (c) votes for or grants a contract; or (d) shows favour or disfavour *in his/her capacity* as a public officer. All four means of committing the offence refer to acts within the official’s competence.

PC 161 also has shortcomings in this respect. The offence deals with a public servant who (a) does or forbears from doing any *official act*; (b) shows favour or disfavour to any person in the exercise of his/her *official functions*; or (c) renders any service or disservice to certain public officials. Arguably, only

category (c) deals with acts outside the official's competence, but it may fall short of international standards in two respects. First, it is unclear whether "rendering a service or disservice" to another official includes using one's office to make another official perform the act for which the bribe was intended. Second, the definition does not seem to cover an official who acts outside his/her competence and uses his/her office to influence a private individual.⁸

On the other hand, PC 165 may cover acts outside the official's competence. The offence merely requires an official to accept a thing with inadequate or no consideration from someone who has dealings with the government. The offence is unconcerned with what act, if any, the official performs as *quid pro quo* for the thing received.

International standards require coverage of bribes of both a monetary and non-monetary nature. The term "gratification" in the PC is not restricted to pecuniary gratifications, or to gratifications estimable in money.⁹ The MACCA contains a lengthy definition of "gratification" that includes both monetary and non-monetary things, such as employment, office, service or favour. Both statutes therefore cover non-monetary bribes. PC Section 165 deals the giving of "any valuable thing" to an official; it thus appears to cover only things of value and not all non-monetary benefits.

Neither the PC nor the MACCA, however, indicates whether an offence of bribery is committed regardless of the value of the "gratification", its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder. Malaysian authorities assert that the value of a gratification is not a consideration in the prosecution of offence for bribery under MACCA. No supporting authority was provided.

The MACCA Part VI allows certain inferences to be drawn when proving some elements of the bribery offences. The mere giving, accepting etc. of a gratification raises a rebuttable presumption that the gratification was an inducement, reward or motive for the official's act or omission. The acceptance of a valuable thing also raises a rebuttable presumption that the recipient

The PC and MACCA do not contain specific defences to domestic bribery. There are no defences of solicitation, small facilitation payments (i.e. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits), or "effective regret" (i.e. an offender who voluntarily reports his/her crime to the authorities).

BRIBERY OF FOREIGN PUBLIC OFFICIALS

MACCA Section 22 criminalises active and passive foreign bribery. The language of the offence follows that found in international instruments fairly closely, and thus the offence already meets many aspects of international standards. For example, the offence covers all the essential modes of the offence (offer, promise, give, solicit and accept a bribe), as well as bribery through intermediaries and bribery that benefits third parties. The offence is not limited to foreign bribery in international business transactions and hence goes beyond international standards in this respect.

Nevertheless, it could be useful to clarify two aspects of the offence:

- (a) The term “foreign public official” as defined in MACCA Section 3 does not clearly cover persons performing public functions for a public enterprise or public agency.¹⁰ The Malaysian authorities state that the definition is not exhaustive because Section 3 provides that “foreign public official” includes certain prescribed classes of officials. Even if this is correct, there remains no confirmation that the definition includes persons performing public functions for a public enterprise or public agency.
- (b) There is no definition of a “foreign country”. Hence, it is unclear whether the term (i) includes all levels and subdivisions of government, from national to local, and (ii) is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.¹¹

LIABILITY OF LEGAL PERSONS FOR BRIBERY

In theory, Malaysia can impose criminal liability against legal persons for bribery. The MACCA and PC bribery offences apply to any “person”. For the MACCA, “person” includes “a body of persons, corporate or unincorporated” (Interpretation Acts 1948 and 1967, Section 3). For the PC, the same term “includes any company or association or body of persons, whether incorporated or not” (PC Section 11).

Whether corporate criminal liability for bribery is actually imposed in practice is wholly unclear. There is no reported case law in which a company has been prosecuted for a criminal offence. Nothing in the Penal Code indicates when a company is considered to have committed a crime. There is no guidance on when the acts or omissions of a natural person may be attributed

to a legal person, whose acts or omissions may trigger liability, or whether the conviction of a natural person is a prerequisite to convicting a legal person.

Should Malaysian courts be confronted with the issue of liability of legal persons, they may well apply U.K. case law, given the country's common law history. The leading case is the well-known U.K. House of Lords decision in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153. The principle is commonly known as the "identification" doctrine. Under *Tesco*, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company's "directing mind and will".¹²

The limits of the identification doctrine in cases of complex corporate crimes such as bribery are now well-documented. Prosecutors, law enforcement officials, and academics in the U.K. have denounced the *Tesco* regime as ineffective and unsatisfactory for bribery offences. The problem is at least three-fold. First, the identification theory requires guilty intent be attributed to a very senior person in the company. Liability is unlikely to arise when bribery is committed by a regional manager or even relatively senior management, let alone a salesperson or agent, even if the company benefitted from the crime. Second, there is also no liability even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, the identification theory requires the requisite criminal intent to be found in a single person with the directing mind and will; aggregating the states of mind of several persons in the company will not suffice. This ignores the realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.¹³

An effective regime of liability of legal persons for bribery must address these limitations. The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.¹⁴ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when persons with the highest level managerial authority (i) offers, promises or gives a bribe to an

official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

PC Section 2 provides territorial jurisdiction to prosecute MACCA and PC bribery offences which are committed “within Malaysia”. The Malaysian authorities state that they have jurisdiction to prosecute offences that take place “partly” in Malaysia. However, they did not provide supporting authority or legislation, or explain what part or how much of an offence must take place in Malaysia before territorial jurisdiction arises.

Malaysia also has jurisdiction to prosecute its citizens and permanent residents for offences committed “without and beyond the limits of Malaysia”. Dual criminality is not required, i.e. the act or omission subject to prosecution need not be an offence at the place where it occurred (MACCA Section 66 and PC Section 4(1)(b)).

Malaysia does not appear to have nationality jurisdiction to prosecute legal persons. As noted above, MACCA Section 66 and PC Section 4(1)(b) provides nationality jurisdiction to prosecute only “citizens” and “permanent residents”. Only natural and not legal persons can be “citizens”. “Permanent resident” is defined as “a person who has permission granted without limit of time under any federal law to reside in Malaysia, and includes a person treated as such under any written law relating to immigration” (Courts of Judicature Act 1964, Section 3). This definition appears to contemplate only natural and not legal persons.

SANCTIONS FOR BRIBERY

The following table summarises the maximum available sanctions for the bribery offences in the PC, MACCA and the statutes that deal with bribery of specific types officials.

Offence	Maximum sentence available
MACCA Offences	
Active and passive domestic bribery (MACCA Section 21)	Imprisonment of 20 years and a fine of (1) MYR 10 000 (approx. EUR 2 000 or USD 3 000) or

Offence	Maximum sentence available
Active and passive foreign bribery (MACCA Section 22)	(2) at least five times the value of the gratification offered, promised or given, whichever is higher
PC Section 161 - Taking gratification in respect of an official act	
Passive domestic bribery (PC Section 161)	Imprisonment of three years and/or an unlimited fine
Active domestic bribery / abetment – Official accepts bribe (PC Sections 109)	
Active domestic bribery / abetment – Official refuses bribe (PC Sections 116)	Imprisonment of nine months and/or an unlimited fine
PC Section 165 – Obtaining valuable thing without adequate consideration	
Passive domestic bribery (PC Section 165)	Imprisonment of two years and/or an unlimited fine
Active domestic bribery / abetment (Sections 109)	Imprisonment of six months and/or an unlimited fine

Offence	Maximum sentence available
Statutes covering bribery of specific officials	
Active and passive domestic bribery of customs officials (Customs Act Section 235)	Imprisonment of five years and/or a fine of MYR 10 000 (approx. EUR 2 000 or USD 3 000)
Passive bribery of excise officers (Excise Act Section 78)	
Passive bribery of parliamentarians (Houses of Parliament (Privileges and Powers) Act 1952 Section 9(d))	Fine of MYR 1 000 (approx. EUR 200 or USD 300)

The maximum available sanctions against natural persons are largely effective, proportionate or dissuasive, with some exceptions: (1) active domestic bribery where the official refuses the bribe (PC Sections 109 and 116), (2) passive bribery of parliamentarians under the Houses of Parliament (Privileges and Powers) Act, and (3) obtaining a valuable thing without adequate consideration (PC Section 165) and abetting this offence (Sections 109).

The maximum available sanctions against legal persons under the MACCA do not meet international standards. A maximum fine of five times the

value of the bribe will, in many instances, be substantially smaller than the profits derived from a contract obtained through bribery. Such a maximum sanction is therefore not effective, proportionate or dissuasive.

It should also be noted that multiple offences could apply to the same case. For instance, a case of bribery of an excise officer could be covered by the Customs Act, the two PC offences, and MACCA Section 21. This is an important question since these offences provide significantly different maximum punishments. The MACCA takes precedence over a Customs Act bribery offence (MACCA Section 3, definition of “prescribed offence”). In other cases, a prosecutor has discretion to decide with which offence to proceed, according to Malaysian authorities,

The MACCA permits confiscation though the precise scope of this power is not clear. Section 40 allows a court to confiscate “any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence”. This should allow a court to confiscate a bribe as property used in the commission of an offence. The confiscation of the proceeds of bribery is less clear. The “subject matter of the offence” is not defined and hence may not necessarily cover the direct and indirect proceeds (i.e. the proceeds of proceeds) of bribery. Other provisions in MACCA (e.g. Section 24(b)) suggest that “the subject matter of the offence” refers only to the “gratification”, i.e. bribe.¹⁵

MACCA allows confiscation both with or without a conviction. A court will order confiscation if the bribery offence is proved against an accused, or if the offence is not proved but a court is satisfied that the accused is not the true and lawful owner of the property and no other person is entitled to the property as a purchaser in good faith for valuable consideration (MACCA Section 40(1)). Confiscation without a conviction (i.e. civil forfeiture) is also available if it is proven that property had been obtained as a result of or in connection with a MACCA bribery offence (MACCA Section 41).

If the property subject to confiscation has been disposed of or cannot be traced, a court shall order the accused to pay a sum “equivalent to the amount of the gratification” received by the accused (MACCA Section 40(2)). Since “gratification” in the bribery offence refers to the bribe, it appears that a fine cannot be imposed as a substitute for confiscating the proceeds of bribery accruing to a briber.

Confiscation is also available for the PC offences under the CPC. Under Section 407, a court may confiscate seized property at the conclusion of a trial if it sees fit to do so. Instrumentalities and (direct and indirect) proceeds of crime

may be seized (Section 407(5)).¹⁶ If the property subject to confiscation is not available, there are no provisions to allow a court to confiscate property of equivalent value or impose a fine in lieu of confiscation.

Confiscation may also be available under anti-money laundering legislation. A court may confiscate “the subject-matter” of a money laundering offence. MACCA and PC bribery offences qualify as predicate offences for money laundering.¹⁷

The availability of administrative sanctions for bribery is unclear. According to Malaysian authorities, Treasury Guidelines and administrative direction bar persons convicted of bribery from holding public office. No information was provided on the length of this prohibition or whether it applies to only certain public offices. The PC and MACCA do not contain provisions to disqualify persons convicted of bribery from engaging in certain activities, *e.g.* serving as a company director. There was also no information on whether a convicted briber may be debarred from seeking government procurement contracts.

TOOLS FOR INVESTIGATING BRIBERY

The MACCA contains a range of investigative tools for bribery cases. However, these tools are available to investigators of the Malaysian Anti-Corruption Commission (MACC) as well as other Malaysian law enforcement officials (MACCA Section 70).

The MACCA contains special provisions for obtaining documents and information from banks and financial institutions. If the Public Prosecutor or an MACC Commissioner is satisfied that it is necessary to obtain such documents or information, he/she may authorise an MACC officer to inspect and take copies of any banker’s book, bank account or any document belonging to or in the possession, custody or control of the bank. The provision overrides bank secrecy rules by requiring banks to produce such documents and information while granting them immunity from proceedings for doing so (MACCA Section 35(5)).

These means to obtain financial documents are useful, but they do not apply to financial institutions in Labuan, Malaysia’s offshore financial centre. At the end of 2005, Labuan had over 250 banks and insurance, trust and leasing companies.¹⁸ The MACCA provisions for seeking bank documents apply only to entities “licensed under the Banking and Financial Institutions Act 1989, or any other financial institution established or licensed under any other written law [...]”. “Financial institution” is in turn defined as “any person, which, in fact,

lawfully or unlawfully, carries on any banking business or finance company business as defined in the Banking and Financial Institutions Act 1989". Since Labuan financial institutions are governed by a separate statutory scheme,¹⁹ they would appear to fall outside the MACCA. The MACCA thus takes a different approach from Malaysia's anti-money laundering legislation, which explicitly refer to offshore financial institutions.²⁰

To obtain information from Labuan financial institutions, Malaysian bribery investigators must resort to a more cumbersome procedure than the one in MACCA Section 35(5)). According to Malaysian authorities, the MACC must write to the Labuan Offshore Financial Services Authority (LOFSA). The LOFSA will then request the relevant information from the Labuan financial institution in question pursuant to Section 28B of the Labuan Offshore Financial Services Authority Act. One drawback to this arrangement is that the LOFSA is not obliged to act on behalf of the MACC. The involvement of the LOFSA can also introduce delay.

Production of non-banking related documents is governed by a separate, more streamlined provision in the MACCA. Section 30 allows an MACC investigator to order a person to produce any book, document, records, accounts or computerized data. Prior authorisation from the Public Prosecutor or an MACC Commissioner is not required, unlike with banking documents. The person to whom an order is given must produce the requested document or information, notwithstanding any rule on secrecy (MACC Section 30(6)).

There are no special provisions in the MACCA for obtaining information and records about a taxpayer from the tax authorities. The Malaysian authorities explain that tax authorities will comply with request from the MACC to obtain information about a taxpayer. It is unclear whether MACCA Section 30 provides the statutory basis for MACC to demand such information, or how tax secrecy rules are overridden.

MACCA Section 31(1) also provides for search warrants. The Public Prosecutor may issue a warrant if there is reasonable cause to suspect that evidence will be found, including documents, books or other types of information. A warrant may also be issued by an officer of the MACC of the rank of Chief Senior Assistant Commissioner or above as authorised by the Public Prosecutor. Individuals may also be compelled to provide a list of their property (MACCA Section 36).

More limited provisions are available under the CPC. Section 50 allows a court or police officer to issue a summons to order the production of any property or document. Warrants to search and seize evidence are available

under Sections 54 and 56. Unlike the MACCA, the PC does not contain provisions on bank and tax secrecy.

Several provisions in MACCA deal with the freezing of assets. Section 37(1) allows the Public Prosecutor to freeze any movable property (which includes funds) in the possession, custody or control of a bank. Other provisions allow freezing of immovable property (Section 38) and money, shares, securities and other financial instruments in the possession of an individual (Section 34(6)). The Public Prosecutor may also order a person in Malaysia who holds in a foreign country property that is the subject matter of a bribery offence (MACCA Section 39). Anti-money laundering (AML) legislation contains comparable freezing provisions for cases of laundering of bribery proceeds.²¹ The freezing provisions in both the MACCA and the AML legislation also apply to bribery offences under the PC, according to Malaysian authorities.

MACCA provides several special investigative techniques to MACC officers. The Public Prosecutor or a senior MACC officer may authorise an MACC investigator to intercept mail, emails, and other telecommunications. Intercepted evidence is admissible at trial (MACCA Section 43). *Agent provocateurs* are also available (MACCA Section 52). Malaysian authorities have used controlled deliveries.²² The Malaysian authorities state that MACC investigators may also use other techniques such as listening and bugging devices, secret surveillance, and video recording. However, the legal basis for using these techniques is unclear.

International co-operation is available in bribery cases. Malaysia can seek extradition and some types of mutual legal assistance (MLA) if the offence in question is punishable by one year's imprisonment or death. All MACCA and PC bribery offences qualify. Other types of MLA are available for all criminal investigations.²³

Malaysian laws do not deal specifically with co-operating offenders. There are no provisions allowing offenders to co-operate with the authorities in return for a lesser sentence. Malaysian legislation is also silent on plea bargaining, though there were reports that the government was contemplating legislative amendments to address this issue.²⁴ The Malaysian authorities indicate that plans are afoot to address these matters through legislation.

ENFORCEMENT OF BRIBERY OFFENCES

The MACC has jurisdiction to investigate the bribery offences in the MACCA and PC. Other Malaysian law enforcement authorities may also investigate bribery offences under both statutes (MACCA Section 70), though

they may not be able to use the investigative tools provided by the MACCA. The MACC may also prosecute MACCA and PC bribery offences, since the MACC Chief Commissioner has the status of a Deputy Public Prosecutor (MACCA Section 5(6)). However, the prosecution of all bribery offences can be instituted only with the consent of the Public Prosecutor (MACCA Section 58). The Public Prosecutor is the Attorney General of Malaysia (CPC Section 376).

The Malaysian authorities did not provide enforcement statistics on bribery offences. Some limited data is available from other sources. In the first half of 2009, the MACC made 268 arrests.²⁵ Another source states that in the same period, the MACC opened 533 investigations, forwarded 254 cases to its prosecution division, and took 104 cases to court, including 14 new cases.²⁶ These statistics are not sufficiently extensive for assessing Malaysia's enforcement efforts.

A 2007 APG report provided the following statistics on seizure and forfeiture under the predecessor legislation to the MACCA.

	2002	2003	2004	2005	2006
Number of cases	33	16	25	23	16
Value of property seized (MYR)	449 000	925 000	593 000	5 132 000	464 000
Value of property forfeited (MYR)	-	-	100	86 100	110 500
Value of property returned (MYR)	-	-	-	-	-

APG concluded that “freezing and confiscation of property in money laundering, corruption, narcotics and Customs Act matters are being used, and that orders have been sought at a healthy rate. Amounts actually forfeited are rather low, but this can be attributed to the slow rate of progress of criminal and civil matters through the courts.”²⁷

RECOMMENDATIONS FOR A WAY FORWARD

Malaysia has made significant efforts in criminalising bribery offences. To further enhance compatibility with international standards, it could consider addressing the following issues.

Elements of the Active and Passive Domestic Bribery Offences

Malaysia's active and passive domestic bribery offences already meet several requirements found in international standards. They could be strengthened if Malaysia addresses the following issues:

- (a) The overlapping bribery offences in the MACCA, PC and other specific statutes including the Customs Act, Excise Act and Houses of Parliament (Privileges and Powers);
- (b) Specific language in all bribery offences covering (i) giving, offering and promising a bribe, (ii) accepting and soliciting a bribe, (iii) bribery through an intermediary; and (iv) bribes given to third party beneficiaries;
- (c) Definition of a “public official” that expressly covers all persons performing legislative functions; persons holding unpaid or temporary office; and all persons who perform a public function, including for a public agency or public enterprise, or who provide a public service;
- (d) Bribery in order that a public official uses his/her position outside his/her authorised competence; and
- (e) Non-monetary bribes, and whether the definition of bribes is affected by its value, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder.

Bribery of Foreign Public Officials

Malaysia is commended for enacting an offence of bribery of foreign public officials. The offence covers not only active but also passive bribery, and hence goes beyond what is required under international standards. Malaysia could strengthen its foreign bribery offence by addressing the following issues:

- (a) Bribery of persons performing public functions for a foreign public enterprise or public agency; and
- (b) A definition of “foreign country” that explicitly covers all levels and subdivisions of government, from national to local, and which is not limited to states, but includes any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

Liability of Legal Persons for Bribery

International standards require that legal persons be held liable for bribery. While this may be possible under Malaysia’s Penal Code and MACCA, it is unclear whether liability has been imposed in practice. To improve the

effectiveness of this regime, Malaysia could consider whether its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when persons with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Jurisdiction for Prosecuting Bribery

In addition to territorial jurisdiction, Malaysia also has nationality jurisdiction to prosecute natural persons for bribery. This is in line with international standards. To ensure its overall jurisdictional basis for prosecuting bribery is sufficiently broad, Malaysia could address the follow matters:

- (a) Providing nationality jurisdiction to prosecute legal persons for bribery; and
- (b) Jurisdiction to prosecute bribery offences that take place partly in Malaysia.

Sanctions for Bribery

The maximum available punishment for bribery offences in Malaysia is largely in line with international standards. To ensure an effective regime in practice, Malaysia could consider addressing:

- (a) Ensuring that the maximum available sanctions for (1) all domestic bribery offences, and (2) all bribery offences against legal persons, are effective, proportionate and dissuasive;
- (b) Confiscation of both the direct and indirect proceeds of bribery for all bribery offences;
- (c) Confiscation or fines of equivalent value if the bribe or the proceeds of bribery cannot be confiscated; and

- (d) Additional administrative sanctions for bribery, such as disqualification from engaging in certain activities and debarment from seeking public procurement contracts.

Tools for Investigating Bribery

Malaysia has some powerful investigative tools for bribery cases, such as production orders for obtaining documents and information from financial institutions. Some additional matters for consideration include:

- (a) Obtaining documents and information from financial institutions in Labuan;
- (b) Ability to obtain from the tax authorities information and documents about taxpayers that may be subject to tax secrecy;
- (c) The legal basis for special investigative techniques in bribery investigations, such as secret surveillance, video recording, listening and bugging devices; and
- (d) Plea bargaining and reduced sentences for co-operating offenders.

Enforcement of Bribery Offences

To properly measure the effectiveness of its criminalisation of bribery, Malaysia should maintain detailed statistics on investigations, prosecutions, convictions, and sanctions (including confiscation) for active and passive domestic and foreign bribery.

RELEVANT LAWS AND DOCUMENTATION

Malaysian Anti-Corruption Commission: www.sprm.gov.my

Laws of Malaysia, Attorney General's Chambers: www.agc.gov.my

APG (2007), *Evaluation Report: Malaysia*: www.apgml.org

NOTES

¹ For example, see Excise Act, Section 78; Customs Act, Section 137; and Houses of Parliament (Privileges and Powers), Section 9(d).

- ² See Illustrations (a) of Penal Code Sections 109 and 116.
- ³ PC Section 109, Illustration (a).
- ⁴ For example, OECD Convention Article 1 requires Parties to criminalise the offering, giving and promising of a bribe to a foreign official. All three modes of committing the offence have equal status. UNCAC Articles 15 and 16 take the same approach.
- ⁵ Penal Code Section 161, Illustrations, para. (c).
- ⁶ See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ⁷ See OECD Convention, Commentary 19.
- ⁸ It is unclear whether this would be covered by a broad interpretation of Penal Code Section 162 (Taking gratification, in order, by corrupt or illegal means, to influence public servant) and Section 163 (Taking gratification, for exercise of personal influence with public servant).
- ⁹ Note to PC Section 161.
- ¹⁰ OECD Anti-Bribery Convention, Article 1(4)(a) and Commentary 14; UNCAC Article 2(b).
- ¹¹ OECD Anti-Bribery Convention, Article 1(4)(b) and Commentary 18.
- ¹² U.K. Law Commission Report, *Reforming Bribery* (2008) at para. 6.26.
- ¹³ See U.K. Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ¹⁴ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ¹⁵ In addition, a 2007 APG report considered an identical provision in the predecessor to MACCA and recommended that Malaysia specifically provide for confiscation of indirect proceeds of bribery (APG (2007), *Mutual Evaluation Report on Malaysia*, paras. 238 and 264).
- ¹⁶ See also APG (2007), *Mutual Evaluation Report on Malaysia*, para. 241.
- ¹⁷ Section 55, Anti-Money Laundering and Anti-Terrorism Financing Act 2001. See also APG (2007), *Mutual Evaluation Report on Malaysia*, paras. 232-236 and 243-244.
- ¹⁸ APG (2007), *Mutual Evaluation Report on Malaysia*, para. 61.
- ¹⁹ For example, the Offshore Banking Act 1990, the Offshore Insurance Act 1990, and the Labuan Offshore Trusts Act 1996.
- ²⁰ Anti-Money Laundering and Anti-Terrorism Financing Act 2001, Section 3, definition of “financial institution”.
- ²¹ Anti-Money Laundering and Anti-Terrorism Financing Act 2001, Part VI.
- ²² APG (2007), *Mutual Evaluation Report on Malaysia*, para. 343.

- ²³ Extradition Act 1992, Section 32; Mutual Assistance in Criminal Matters Act 2002, Section 2 and Part II.
- ²⁴ The Malaysian Bar (2008), "Government ready to consider plea bargaining in criminal cases" (www.malaysianbar.org.my).
- ²⁵ MACC website (www.sprm.gov.my).
- ²⁶ Bernama.com (16 July 2009), "MACC Investigates 533 Corruption Cases Since January" (www.bernama.com).
- ²⁷ APG (2007), *Mutual Evaluation Report on Malaysia*, para. 259.

Criminalisation of Bribery in Mongolia

Criminal Code

Article 268 Receiving of a bribe

268.1. Receiving of a bribe by an official exclusively in view of his/her official post for a support or connivance in office, a favorable solution of issues within his/her competence, or for a performance or a failure to perform in the interests of the person giving the bribe of any action which this person should have or could have performed using his/her official post, with or without an advance promise to do so shall be punishable by a fine equal to 51 to 250 amounts of minimum salary or imprisonment for a term of up to 5 years with deprivation of the right to hold specified positions or engage in specified business for a term of up to 3 years.

Article 269 Giving of a bribe

269.1. Giving of a bribe to an official in person or through an intermediary shall be punishable by a fine equal to 51 to 250 amounts of minimum salary or imprisonment for a term of up to 3 years.

269.2. The same crime committed repeatedly, by a person who previously was sentenced for this crime, by an organized group, or a criminal organization shall be punishable by imprisonment for a term of more than 5 to 8 years.

Note: A person who voluntarily confesses to a competent authority giving of the bribe shall be released from criminal liability.

Article 270 Intermediation in bribery

270.1. Intermediation in bribery shall be punishable by a fine equal to 5 to 50 amounts of minimum salary or by incarceration for a term of 1 to 3 months.

270.2. The same crime committed repeatedly, by a person who was previously sentenced for bribery, as well as by way of using one's official position shall be punishable by a fine equal to 51 to 250 amounts of minimum salary with deprivation of the right to hold specified positions or engage in specified business for a term of up to 3 years or by imprisonment for a term of up to 5 years.

Note: A person who voluntarily reports to the competent authority about Intermediation in bribery shall be released from criminal liability.

INTRODUCTION

Mongolia ratified the UNCAC in January 2006. It has been a member of the APG since 2004. The Mongolian legal system is based primarily on the continental civil law system but with vestiges of the Soviet legal system. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Mongolia's main domestic bribery offences are found in the Criminal Code. Articles 268 and 269 deal with passive and active bribery respectively, while Article 270 deals with "intermediation" in bribery. Additional offences in the Criminal Code, such as abuse of authority (Articles 263 to 266) may apply to cases of bribery. The Law on Anti-Corruption does not create any criminal bribery offences, though parts of the Law are relevant to the enforcement of bribery offences. This report will focus on the offences in Articles 268 to 270, but will refer to the additional offences and the Law on Anti-Corruption where appropriate.

Under international standards, active bribery offences must cover giving, offering and promising a bribe, while passive bribery offences must cover accepting and soliciting a bribe. Criminal Code Article 269 only covers the giving of a bribe, while Article 268 only covers receiving a bribe. Offering, promising and soliciting a bribe are thus not expressly included.¹ The offences of preparing or attempting bribery (Articles 30-32) arguably cover these additional modes of bribery, but there is no case law confirming this view. Also unclear is whether the Criminal Code covers incomplete bribery offences, such as when a bribe is offered but rejected or not received by an official.

International standards require coverage of bribery through intermediaries. The Criminal Code active bribery offences clearly cover this situation. Article 269 expressly covers the giving of a bribe "in person or through an intermediary", while Article 270 creates a specific offence for a person who acts as an intermediary. However, the Criminal Code Article 268 passive bribery offence does not expressly refer accepting or receiving a bribe through an intermediary.

Effective bribery offences must also cover bribes given not only to an official, but to a third party with the agreement of the official. The Criminal Code bribery offences are silent in this regard. Whether the offences cover bribes given to third party beneficiaries is thus unclear.

International standards require active and passive bribery offences to cover a broad range of public officials, namely any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.²

It is not clear whether the Criminal Code bribery offences meet this standard. The offences refer to bribery of “an official” but do not define this term. The Law on Anti-Corruption contains a definition of officials to which the Law applies, but it is unclear whether this definition also applies to the Criminal Code. In any event, the definition in the Law on Anti-Corruption falls short of international standards. It only covers “officials holding political, administrative or special office of the state”; “managers and administrative officials of state or locally-owned legal persons, or legal persons with state or local equity”; the National Council Chairperson and the General Director of public radio and television; “managers and executive officers of non-governmental organisations, temporarily or permanently performing particular state functions in compliance with legislation; and electoral candidates. This definition does not include officials performing legislative or judicial functions. The Law also does not cover *all* persons who perform public functions or who provide a public service, *e.g.* persons in non-governmental organisations who perform state functions but who are not managers and executive officers of the organisation. On the other hand, the Law exceeds international standards through its coverage of the bribery of “electoral candidates”.

International standards for the criminalisation of bribery also require broad coverage of acts or omissions in relation to the performance of official duties. This includes any use of the public official’s position or office, and acts or omissions outside the official’s scope of competence. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official or private individual award a contract to that company.³ Another example may be an official who accepts a briber in order to obtain and divulge state secrets in areas not falling within his/her competence.

It is not totally clear that the Criminal Code bribery offences cover acts outside an official’s competence. The Section 268 passive bribery offences cover a bribe given (a) “in view of [the official’s] official post for a support or connivance *in office*”, (b) in return for “a favourable solution of issues *within his/her competence*”, or (c) “for a performance or a failure to perform in the

interests of the person giving the bribe of any action which this person should have or could have performed *using his/her official post*". Absent judicial interpretation to the contrary, items (a) to (c) *prima facie* refer to matters within the official's competence. The active bribery offences in Criminal Code Articles 269 and 270 are also ambiguous since they are silent on this issue.

International standards further require bribery offences to cover both monetary and non-monetary bribes. Whether the Criminal Code meets this requirement is also unclear since it does not expressly define the scope of a "bribe". The Law on Anti-Corruption defines "benefit" to mean "material or non-material benefits". But as noted earlier, it is not clear that this definition in the Law applies to the Criminal Code.

The Criminal Code provides a defence of "effective regret" for active bribery. Notes to Articles 269 and 270 state that "A person who voluntarily confesses to a competent authority giving of the bribe shall be released from criminal liability." However, the provision does not require a person to confess without undue delay after the crime has occurred. Nor does it require the person in question to further co-operate with or testify for the authorities. In addition, since confiscation is not available for bribery offences (see below), a briber who "effectively regrets" could retain any benefits that he/she obtains through bribery.

The Criminal Code does not appear to provide additional defences to bribery. There are no express defences of solicitation or small facilitation payments (i.e. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits).

BRIBERY OF FOREIGN PUBLIC OFFICIALS

There are no express active or passive foreign bribery offences in Mongolia. As noted earlier, the Criminal Code does not define the term "officials" in the bribery offences. Absent clear language, the Criminal Code offences likely do not cover foreign public officials. As such, it is not a crime in Mongolia to bribe officials of foreign governments or public international organisations in the conduct of international business.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Mongolia does not impose criminal liability against legal persons for bribery or any other crimes. Criminal Code Article 8 states that only "physical persons" can be subjected to criminal liability. However, the Constitution does not prohibit criminal liability against legal persons.

JURISDICTION TO PROSECUTE BRIBERY

Mongolia has jurisdiction over bribery committed in its territory. Criminal Code Section 13 states that “persons who have committed crimes in the territory of Mongolia shall be subject to the criminal liability under this Code.” However, it is unclear whether territorial jurisdiction is extended to offences that take place partly in Mongolia.

The Criminal Code also provides for nationality jurisdiction. Article 14 states that the Code applies to “a citizen of Mongolia or a stateless person permanently residing in Mongolia” for crimes committed abroad. Other persons may also be prosecuted under the Criminal Code for acts committed outside Mongolia if an applicable international treaty so provides.

SANCTIONS FOR BRIBERY

Active and domestic bribery in the Criminal Code are punishable as follows:

Passive bribery (Article 268)	Up to 5 years' imprisonment or a fine of 51 to 250 times the statutory minimum salary
Active bribery (Article 269)	Up to 3 years' imprisonment or a fine of 51 to 250 times the statutory minimum salary
	For repeat offenders or persons who are members of an organised group or criminal organisation, the offence is punishable by imprisonment of 5 to 8 years.
Intermediating bribery (Article 270)	1-3 months' imprisonment or a fine of 5 to 50 times the statutory minimum salary
	For repeat offenders or a person who uses his/her official position, the offence is punishable by a fine of 51 to 250 times the statutory minimum salary.

The maximum available sanctions are largely effective, proportionate and dissuasive as required under international standards, with perhaps two qualifications. First, the maximum punishment for intermediating bribery appears inadequate. The offence is generally punishable by only 1-3 months' imprisonment or a fine of up to 50 times the minimum wage. Furthermore, imprisonment does not appear to be available for the aggravated form of the offence (repeated offender or use of official position). Second, it is unclear

whether fines and imprisonment are *alternative* punishments, or whether they can be imposed concurrently.

Confiscation is not an available sanction for active and passive bribery under the Criminal Code. Article 49 states that confiscation is available only for particular offences that specifically so prescribe; the bribery offences in Articles 268-270 do not do so. Confiscation is an available sanction for other economic crimes such as embezzlement.

Confiscation is available for laundering the proceeds of bribery only if certain aggravating factors are present, *e.g.* a repeat offender, an offender who is a member of a criminal organisation, the crime involved the use of office, or the offender obtained “a large income” (Criminal Code Articles 163 and 49). A 2007 APG report found that these confiscation provisions “do not clearly cover proceeds of, instrumentalities used in, or intended to be used in, the commission of any money laundering [...] or other predicate offences.” The provisions also “do not clearly set out that they apply to, profits, income or other benefits generated from the proceeds of crime.” There are no provisions for imposing fines of equivalent value when confiscation is not possible, *e.g.* when the property subject to confiscation has been spent.⁴

Administrative sanctions may be available in addition to criminal sanctions. Passive bribery under the Criminal Code Article 268 may attract a ban on holding “specified positions” or engaging in “specified business” for up to three years. Intermediating bribery under Article 270 may also result in a similar ban. However, what amounts to “specified positions” and “specified business” is not defined. Active bribery under Criminal Code Article 269 does not attract any administrative sanctions, such as a ban on seeking government procurement contracts.

TOOLS FOR INVESTIGATING BRIBERY

There are no summary procedures for bribery investigators to obtain documents and information possessed by private individuals, companies, banks, financial institutions or the tax authorities. Such evidence is available only through a search warrant issued by a prosecutor under the Criminal Procedure Law (CPL) Article 132. A warrant may be used to gather documents subject to bank secrecy (Banking Law of Mongolia, Article 7(2)(3), but whether it also overrides tax secrecy is unclear.

Freezing of property is available but limited by the absence of confiscation as a sanction for bribery. Criminal Code Article 49(2) allows seizure of items, but only those subject to confiscation. Even when freezing is available,

the mechanism for doing so is not clear, *e.g.* whether investigators can seek freezing on an *ex parte* basis.⁵

Limited special investigative techniques are available. The Controlled Operations Law does not specifically allow controlled deliveries or undercover operations (*e.g.* “sting” operations). Mongolian authorities, however, believe that such operations could be conducted.⁶ Information was not available on whether bribery investigators can use other special investigative techniques, such as wiretapping, listening and bugging devices, secret surveillance, video recording, and email interception.

Extradition is available in bribery cases, but possibly only *vis. Mongolian* citizens. CPL Article 404 allows Mongolian authorities to seek extradition of a Mongolian citizen who has committed a crime in Mongolia before leaving the country. Extradition is possible in the absence of an applicable treaty.⁷ There are no comparable provisions for seeking the extradition of non-Mongolian citizens, however.

Some forms of mutual legal assistance (MLA) are also available in bribery cases. Article 398 allows investigators to seek a range of MLA, *e.g.* interrogation of witnesses, search and seizure, and taking of testimony. MLA may be sought in the absence of an applicable treaty.⁸ Some types of assistance, such as freezing of assets, confiscation and document production, do not appear to be available.

The ability to secure the co-operation of other offenders is unclear. The CPL does not specifically deal with the provision of immunity in return for assistance or plea bargaining. As noted above, the “effective regret” defence in the Criminal Code requires an offender to confess to a crime but does not require him/her to further assist the authorities or to testify. In addition, “effective regret” is an “all-or-nothing” defence that results in complete immunity to an offender; reduced sentences in return for co-operation are not available.

ENFORCEMENT OF BRIBERY OFFENCES

The Mongolian Anti-Corruption Agency is specifically charged with investigating bribery cases (Anti-Corruption Law Article 15). Statistics on the number of investigations, prosecutions, convictions and sanctions of bribery are not available.

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

Mongolia's active and passive domestic bribery offences meet some requirements found in international standards, *e.g.* bribery through intermediaries. Mongolia could strengthen these offences by addressing the following issues:

- (a) Express language covering offering, promising and soliciting a bribe, bribes given to third party beneficiaries, and (for passive bribery) bribery through intermediaries;
- (b) Definition of "public official" in the Criminal Code that expressly covers all persons holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; all persons performing a public function, including for a public agency or public enterprise, or provides a public service; and all persons defined as a "public official" under domestic law;
- (c) More specific language covering the situation where a bribe is given or taken in order that a public servant use his/her position outside his/her authorised competence;
- (d) Coverage of monetary and non-monetary bribes;
- (e) Incomplete offences, such as when a bribe is offered to but rejected or not received by an official; and
- (f) Requiring an offender who relies on a defence of "effective regret" to assist the authorities and to testify in proceedings against other offenders.

Bribery of Foreign Public Officials

To bring its criminal bribery offences in line with international standards, Mongolia should criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Mongolia should consider establishing criminal liability against legal persons for bribery as required under international standards.

Jurisdiction for Prosecuting Bribery

In addition to territorial jurisdiction, Mongolia also has nationality jurisdiction to prosecute natural persons for bribery. This is in line with international standards. To ensure its overall jurisdictional basis for prosecuting bribery is sufficiently broad, Mongolia could address its jurisdiction to prosecute bribery offences that take place partly in Mongolia.

Sanctions for Bribery

With the exception of the offence of intermediating bribery, the maximum available punishment against natural persons for bribery offences in Mongolia is largely in line with international standards. To ensure an effective regime in practice, Mongolia could consider addressing:

- (a) The maximum available sanctions for intermediating bribery;
- (b) Clarification of whether fines and imprisonment are alternative sanctions;
- (c) Confiscation of bribes, as well as the direct and indirect proceeds of bribery;
- (d) The availability of fines of equivalent value to the property subject to confiscation if, for example, the bribe or proceeds thereof have disappeared; and
- (e) Additional administrative sanctions for bribery, such as blacklisting and debarment from public procurement.

Tools for Investigating Bribery

Mongolia has some useful investigative tools for bribery cases but could consider some additional matters:

- (a) The ability to obtain bank and other documents through a subpoena or production order;

- (b) The availability of information and documents subject to tax secrecy;
- (c) Freezing of property and accounts on an *ex parte* basis;
- (d) Special investigative techniques in bribery investigations, such as wiretapping, email interception, secret surveillance, video recording, listening and bugging devices, undercover police operations, and controlled deliveries;
- (e) Extradition of non-Mongolian citizens;
- (f) The ability to seek a full range of MLA; and
- (g) Plea bargaining and provision of immunity in return for assistance and testimony.

Enforcement of Bribery Offences

To properly measure the effectiveness of its criminalisation of bribery, Mongolia should maintain statistics on investigations, prosecutions, convictions, and sanctions for active and passive domestic bribery.

RELEVANT LAWS AND DOCUMENTATION

Criminal Code of Mongolia: www.unhcr.org/refworld/pdfid/3ed919fd4.pdf

Law on Anti-Corruption: www.mongolianriverresources.mn/DOWNLOAD/laws/Anti-corruption.pdf

Additional Mongolian legislation: www.asianlii.org/mn/legis/laws

NOTES

¹ Mongolia has confirmed this deficiency in its self-assessment under the UNCAC. See UNODC (2009), *Compliance with the United Nations Convention against Corruption: Report by the Secretariat*, CAC/COSP/2009/9, para. 48.

² See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.

- ³ See OECD Convention, Commentary 19.
- ⁴ APG (2007), *Mutual Evaluation Report: Mongolia*, paras. 157-158.
- ⁵ APG (2007), *Mutual Evaluation Report: Mongolia*, para. 162.
- ⁶ APG (2007), *Mutual Evaluation Report: Mongolia*, para. 224.
- ⁷ Subject to additional conditions in an applicable treaty and/or the legislation of the foreign requested state.
- ⁸ Subject to additional conditions in an applicable treaty and/or the legislation of the foreign requested state.

Criminalisation of Bribery in Nepal

**Prevention of Corruption Act, 2059 (2002 A.D)
(Unofficial Translation Provided by the
Nepal Commission for the Investigation of Abuse
of Authority)**

3.(1) Whoever, being, or expecting to become, a public servant accepts or agrees to accept graft amounting as follows for himself or for any other person in consideration of his performing or having performed or of forbearing to perform or having forborne to perform any act pertaining to his office or the related act or in consideration of favoring or disfavoring or causing or not causing a loss or of having favored or disfavored or having caused or not caused a loss to any person while carrying out his official functions, shall be liable to a punishment of imprisonment as follows and of a fine as per the amount involved depending on the degree of the offense.

[...]

(3) Whoever gives a graft to a public servant or any other person in order to do or forbear to do any function pursuant to sub-Section (1) or (2), shall be liable to a punishment pursuant to sub-Section (1) depending on the degree of the offense committed.

INTRODUCTION

As of September 2009, Nepal has signed but has not yet ratified the UNCAC. It has been a member of the APG since 2002. Nepal's legal system is based on the English common law but with some Hindu legal concepts. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE BRIBERY OFFENCES

In Nepal, active and passive domestic bribery is covered mainly by Sections 3(1) and (3) of the Prevention of Corruption Act, 2059 (2002 A.D.) (PCA). This report will focus primarily on these provisions. The PCA contains additional offences that address specific types of official misconduct that could also cover bribery, *e.g.* acceptance of goods or services for free or below

market value (Section 4), taking gifts (Section 5) or commissions (Section 6), and obtaining illegal benefits (Section 7). This report will also address these offences where appropriate.

International standards generally require coverage of three modes of committing active bribery, namely offering, giving, and promising a bribe. Section 3(3) PCA covers only the giving of a bribe explicitly. There is no case law to clarify whether the provision also covers promising and offering a bribe. The offence of attempting to bribe arguably covers offering to bribe, though the maximum punishment for this offence is punishable only by half of that for giving a bribe. There is also no case law on bribes that are made but not received, or bribes that are rejected by an official.

As for passive domestic bribery, international standards generally demand coverage of solicitation or acceptance of a bribe. Section 3(1) PCA speaks of a person who “accepts or agrees to accept” a bribe. Similar language is found under the offences of accepting goods or services below market value (Section 4 PCA) and accepting gifts (Section 5 PCA). There is thus no explicit mention of soliciting a bribe, though the situation is arguably covered by an attempt to accept a bribe. However, as with attempting to give a bribe, that maximum punishment for attempting to accept a bribe is only half of that for the completed offence.

The PCA general bribery offences do not appear to address bribes given, solicited, etc. through an intermediary. Sections 3(1) and 3(3) do not contain express language to this effect. The treatment of third party beneficiaries (i.e. someone other than the official) is clearer. Section 3(1) explicitly covers a public servant who accepts a bribe “for himself or for any other person”, while Section 3(3) covers the giving of a bribe “to a public servant or any other person”.

The PCA’s definition of a public official is fairly broad. It covers, among others, persons appointed, nominated or elected under an oath to His Majesty, His Majesty’s government or to public institutions. Public institutions include local bodies; government-owned or controlled enterprises; and commissions, organisations, corporate etc. established by the government. The definition also encompasses anyone holding office of public responsibility with or without remuneration. However, there is no express mention of legislative officials. Judicial officials are also not mentioned, although the offences do cover the bribery of “persons appointed as an arbitrator or any other person appointed in the same position pursuant to the prevailing laws to resolve or adjudicate any dispute” (Section 2(b)(2)).

International standards also require broad coverage of the act or omission performed by an official in return for a bribe. Nepal's active and passive bribery offences broadly cover any act "pertaining to [the official's] office". They also specifically cover bribes to induce officials, while performing their official functions, to show favour or disfavour, or to cause or prevent a loss, for the briber or another person. In sum, the language in these provisions should cover acts or omissions in relation to the performance of official duties. The term "to show favour or disfavour" should also cover bribery to influence discretionary making, *e.g.* the award of a public procurement contract.

However, it appears that these offences do not cover all uses of a public official's position or office, including acts or omissions outside the official's competence. For instance, the offences do not cover an executive of a company who bribes a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official award a contract to that company.¹

The nature of a bribe is defined in Section 2 PCA, which states that a "graft" includes "cash, goods or any type of gain or benefit and the term also includes bribe". On its face, this definition arguably covers non-monetary bribes. But according to Nepalese authorities, there are no provisions which expressly cover bribes of a non-monetary nature, though officials have been punished under administrative codes of conduct for taking such benefits. Nepalese authorities also state that whether an act is bribery does not depend on the perceptions of local customs towards the giving of an advantage. It does depend on, however, other factors such as the value of the advantage, its results, the tolerance of bribery by local authorities, the necessity of giving advantages, and whether the briber is the best qualified bidder. International standards such as the OECD Convention prohibit the consideration of such factors.

It should be noted that the active and passive bribery offences in the PCA go beyond what is required in most international anti-corruption instruments in some respects. For instance, both offences cover bribery of persons "expecting to become" public servants, as well as giving advantages as a reward for acts or omissions already performed by an official.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

It is not an offence in Nepal to bribe officials of foreign countries or public international organisations in the conduct of international business. The definition of officials in the PCA refer only to Nepalese officials.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Section 23 of the PCA provides that “In case any firm, company or corporate body commits any act that is deemed to be an offence under this chapter, the partners at the time of commission of the act in case of a firm and the person acting as the principal official in case of a company or a corporate body shall be deemed to have committed offence.” “Principal official” includes the chairman, board members, general managers, managing directors, or other officials working in the same capacity.

However, Section 23 does not appear to impose liability against a legal person for bribery. The provision imposes liability against a legal person’s partners or principal officers, not the legal person itself. Furthermore, it is unclear how a firm, company or corporate body can *commit* an act deemed to be an offence. The PCA does not provide any guidance on how to attribute the acts or omissions of a natural person to a legal person. Also unclear is whether liability arises when the principal official of one company bribes for the benefit of another company within the same conglomerate.

JURISDICTION TO PROSECUTE BRIBERY

Section 1(2) PCA provides that the PCA “shall be extended throughout the Kingdom of Nepal and applicable to all Nepalese citizens, public servants residing anywhere outside the Kingdom of Nepal and to the non-Nepalese citizens residing in foreign countries having committed any act that may be deemed to be corruption under this Act.”

Nepalese authorities clarified that Section 1(2) PCA only provides a limited jurisdictional basis for prosecuting bribery. There is clearly jurisdiction to prosecute bribery offences that occur wholly on Nepalese soil, since the PCA is extended throughout Nepal. What is not clear is whether there is also jurisdiction to prosecute offences that take place only partly in Nepal, *e.g.* when some elements of the offence occur abroad.

Other jurisdictional bases are also somewhat unclear. The wording of Section 1(2) PCA (that the PCA is “applicable to all Nepalese citizens”) arguably provides jurisdiction to prosecute Nepalese nationals for bribery offences committed anywhere, including outside of Nepal.² Jurisdiction may also be available to prosecute Nepalese officials who commit passive bribery while outside of Nepal (since the PCA is applicable to “public servants residing anywhere outside the Kingdom of Nepal”). There may also be jurisdiction to prosecute non-Nepalese nationals residing in foreign countries who bribe Nepalese officials (passive personality jurisdiction).

SANCTIONS FOR BRIBERY

The general active and passive bribery offences in Section 3 PCA are punishable by different ranges of sentences “as per the amount involved depending on the degree of the offence”.

Amount Involved	Imprisonment	Amount Involved	Imprisonment
Under NPR 25 000 (approx. under EUR 235)	3 months or less	NPR 1 to 2.5 million (approx. EUR 9 400 to 23 500)	30-48 months
NPR 25 000 to 50 000 (approx. EUR 235 to 470)	3-4 months	NPR 2.5 to 5 million (approx. EUR 23 500 to 47 000)	4-6 years
NPR 50 000 to 100 000 (approx. EUR 470 to 940)	4-6 months	NPR 5 to 10 million (approx. 47 000 to 94 000)	6-8 years
NPR 100 000 to 500 000 (approx. EUR 940 to 4 700)	6-18 months	Over NPR 10 million (approx. over EUR 94 000)	8-10 years
NPR 500 000 to 1 million (approx. EUR 4 700 to 9 400)	18-30 months		

It is not entirely clear to what “amounts involved” refers, *e.g.* to the amount of a bribe, or the value of a contract obtained through bribery. It is also unclear what the range of sentence would be if a monetary value cannot be assigned to a bribe. A court may also impose a fine in addition to imprisonment, but there is no indication what the range of fine may be or how it may be determined.

In addition to imprisonment and fines, a court shall confiscate property “earned” through corruption (Section 47 PCA).³ This provision likely allows the confiscation of bribes and the direct proceeds of bribery. Whether indirect proceeds (*i.e.* the proceeds of proceeds) are also covered is not known. There are no provisions to allow a court to impose a fine equivalent in value to property that is subject to confiscation. It is thus unclear whether any additional sanctions are available when confiscation is not possible, *e.g.* when the property that is subject to confiscation has been spent or converted.

The PCA does not expressly provide for administrative sanctions, *e.g.* blacklisting or debarment from participating in government procurement contracts.

TOOLS FOR INVESTIGATING BRIBERY

Chapter 3 PCA provides basic investigative powers to law enforcement agencies in bribery cases. These include the power to order a government body or official to produce relevant documents and to respond to inquiries. Investigators may also search and seize any relevant evidence (Sections 28 and 30 PCA).

The Commission for the Investigation of Abuse of Authority (CIAA) has additional investigative powers under its constituting statute. The CIAA may order any office or individual to produce relevant documents or materials (Section 19(1)) and to answer questions (Section 19(2)). Public officials who are ordered to produce evidence cannot claim immunity from disclosure (Section 19(9)). This would supposedly override any secrecy rules, such as those for tax records. There are no comparable provisions to expressly override bank secrecy. However, the CIAA may freeze a transaction or account at a bank or financial institution (Section 23a). Information was not available on how often these techniques are used or whether there are obstacles to their usage, such as delays in obtaining evidence.

Some covert investigative techniques are available under the CIAA Rules 2002. Although there are no provisions dealing with surreptitious surveillance generally, Section 30 of the Rules allows the CIAA to arrange the delivery of a bribe to an official. Section 41 allows investigators to use “scientific and communication equipment and devices as may be necessary according to the order of the CIAA.” This includes the use of wiretapping, video recording, and listening and bugging devices, according to Nepalese authorities. Whether these methods have in fact been used in bribery investigations is not known.

Extradition but not mutual legal assistance (MLA) is available in bribery cases. The Extradition Act allows Nepal to seek extradition of a person who has committed a criminal offence, including bribery (subject to other restrictions in an applicable treaty or foreign legislation). The availability of MLA is unclear. As of 2007, Nepal did not have MLA legislation. It thus could not provide MLA, while its ability to seek MLA was unclear.

There are also procedures to encourage persons who participated in an offence to co-operate with the authorities. An offender who assists in an investigation may receive a reduced sentence or even complete immunity from

prosecution. Proceedings may be re-instituted against the offender if he/she later becomes uncooperative, or if his/her evidence is not corroborated by other proofs (Sections 55 PCA and 19(15) CIAA Act).

ENFORCEMENT OF BRIBERY OFFENCES

The CIAA has jurisdiction over criminal bribery investigations. Prosecutions are conducted by a “government prosecutor or an attorney appointed by the Commission in coordination with the Office of the Attorney General” (CIAA Act 1991, Sections 14 and 35).

Only statistics for the total number of cases handled by the CIAA are available; there are no statistics that pertain specifically to bribery.

	2003/4	2004/5	2005/6	2006/7	2007/8
Investigations	3 118	3 709	3 353	2 976	2 135
Prosecutions	98	113	114	115	70
Convictions	N/A	97	89	140	95
Suspended/Deferred Proceedings	N/A	N/A	N/A	N/A	N/A
Acquittals	N/A	9	20	31	32

RECOMMENDATIONS FOR A WAY FORWARD

Nepal’s scheme for criminalising bribery is relatively modern and meets many aspects of international standards on the criminalisation of bribery. To strengthen this scheme, Nepal could consider addressing the following issues.

Elements of the Active and Passive Domestic Bribery Offences

Nepal’s general bribery offences in the PCA already contain some aspects found in international standards, *e.g.* coverage of pecuniary and non-pecuniary bribes, and several modes of active and passive bribery. In some respects, the offences even go beyond what is required in international standards. To improve the bribery offences, Nepal could consider addressing the following areas:

- (a) Express inclusion of additional modes of committing bribery PCA, such as promising, offering and soliciting a bribe;

- (b) Incomplete offences, such as when a bribe is offered but not received by an official, or when an official rejects a bribe;
- (c) Express coverage of bribery through intermediaries;
- (d) Express definition of a public official that covers legislative and judicial officials;
- (e) Bribery in order that an official uses his/her position outside his/her authorised competence;
- (f) Definition of a “gratification” to include non-monetary benefits; and
- (g) Ensuring that the giving of an advantage is a crime regardless of the value of the advantage, its results, the tolerance of bribery by local authorities, the necessity of giving advantages, and whether the briber is the best qualified bidder.

Bribery of Foreign Public Officials

To bring its criminal into line with international standards, Nepal should enact an offence to criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Whether Section 23 PCA imposes liability against a legal person (as opposed to the legal person’s officers and partners) for bribery is unclear. Nepal may wish to expressly address this matter through new and clearer legislation. A new scheme of liability should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

A scheme of liability should also address the following:

- (a) Legal persons responsible for active bribery are given effective, proportionate and dissuasive criminal and/or non-criminal sanctions, including monetary sanctions and confiscation; and
- (b) Liability does not depend on the conviction of a natural person for the crime.

Jurisdiction for Prosecuting Bribery

Despite the wording of Section 1(2) PCA, Nepalese authorities have confirmed that the provision only provides for jurisdiction to prosecute its bribery committed in Nepal. To ensure an adequate jurisdictional basis for prosecuting bribery, Nepal could consider addressing or clarifying the following issues:

- (a) Jurisdiction to prosecute active and passive bribery that is committed partly in Nepal; and
- (b) Jurisdiction to prosecute Nepalese nationals for active and passive bribery committed outside Nepal.

Sanctions for Bribery

Bribery offences under the Penal Code are punishable by imprisonment of up to ten years, which is in line with international standards. To ensure sanctions for bribery are effective, proportionate and dissuasive, Nepal could address or clarify the following issues:

- (a) Whether “the amount involved” in a bribery case relates to the value of a bribe or the value of fruits of bribery (*e.g.* contract awarded);
- (b) The range of fines available for bribery offences;
- (c) Confiscation of property obtained indirectly from a bribery offence;
- (d) The availability of fines equivalent in value to property that is subject to confiscation; and
- (e) The availability of blacklisting and debarment from public procurement as sanctions for bribery under the Penal Code.

Tools for Investigating Bribery

Nepal has a fairly broad range of tools for investigating bribery cases, ranging from production orders and search warrants to wiretapping and controlled deliveries. The express legislative provision overriding secrecy of government information (e.g. tax records) is commendable. Statistics on the total number of cases handled by CIAA were available, though data specific to bribery cases were not. Addressing the following matters in the context of bribery investigations could improve Nepal's enforcement capabilities:

- (a) Overriding bank secrecy when obtaining evidence from banks and financial institutions;
- (b) Maintain statistics on the use of various investigative techniques; and
- (c) The ability to seek MLA for all bribery offences.

Enforcement of Bribery Offences

In order to properly assess whether its bribery offences are adequately and effectively enforced in practice, Nepal should maintain statistics on investigations, prosecutions, convictions of bribery for both natural and legal persons, as well as the number and nature of sanctions imposed in bribery cases, including confiscation.

RELEVANT LAWS AND DOCUMENTATION

The Prevention of Corruption Act, 2059 (2002 A.D.) and other relevant legislation are available from the Commission for the Investigation of Abuse of Authority: www.ciaa.gov.np

NOTES

- ¹ See OECD Convention, Commentary
- ² However, the Nepalese authorities have indicated in their response to a questionnaire that nationality jurisdiction is not available.
- ³ Section 29b of the CIAA Act 1991 contains a similar provision and may also be applicable.

Criminalisation of Bribery in Pakistan

Penal Code

Section 161 (Public servant taking gratification other than legal remuneration in respect of an official act)

Whoever, being or expecting to be a public servant, accepts or obtains, agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Federal, or any Provincial Government or Legislature or with any public servant, as such, shall be punished with imprisonment of either description for a term which may extend to three years or with fine or with both.

Section 165 (Public servant obtaining valuable thing, without consideration from person concerned in proceeding or business transacted by such public servant)

Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself, or for any other person, any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

165-A (Punishment for abetment of offences defined in Sections 161 and 165)

Whoever abets any offence punishable under Section 161 or Section 165 shall, whether the offence abetted is or is not committed in consequence of the abetment, be punished with the punishment provided for the offence.

107. Abetment of a thing

A person abets the doing of a thing, who:

First: Instigates any person to do that thing; or

Secondly: Engages with one or more other person or, persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, And in order to the doing of that thing; or

Thirdly: Intentionally aids, by any act or illegal omission, the doing of that thing.

**National Accountability Ordinance
(From the Pakistan National Accountability
Bureau: www.nab.gov.pk)**

Section 9 (Corruption and corrupt practices)

(a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices-

(i) if he accepts or obtains from any person or offers any gratification directly or indirectly, other than legal remuneration, as a motive or reward such as is specified in section 161 of the Pakistan Penal Code (Act XLV of 1860) for doing or for-bearing to do any official act, or for showing or for-bearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person; or

(ii) if he accepts or obtains or offers any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or likely to be, concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with his official functions or from any person whom he knows to be interested in or related to the person so concerned;

[...]

(iv) if he by corrupt, dishonest, or illegal means, obtains or seeks to obtain for himself, or for his spouse or dependents or any other person, any property, valuable thing, or pecuniary advantage;

[...]

(xii) If he aids, assists, abets, attempts or acts in conspiracy with a person or a holder of public office, accused of an offence as provided in clauses (i) to (xi)

INTRODUCTION

Pakistan ratified the UNCAC in August 2007. It is a member of the APG. The Pakistani legal system is based primarily on English common law with some Islamic legal elements. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Pakistan's main bribery offences are found in the Penal Code 1860 and the National Accountability Ordinance (NAO). Active bribery is covered under Section 165-A, while passive bribery may be covered by five separate offences in Penal Code Sections 161, 165 and NAO Section 9(1)(a)(i)-(ii) and (iv). As will be seen below, there is considerable overlap among these five passive bribery offences, as well as inconsistencies in the elements of the offences and available defences. This report focuses on these offences but will touch upon other corruption offences in the Penal Code and NAO where appropriate.

Penal Code Section 165-A covers active domestic bribery indirectly through the act of abetment;¹ there is no specific offence of active bribery. Framing active bribery through the act of abetment falls short of international standards, which require more specific language criminalising the intentional offering, promising or giving of a bribe. The NAO Section 9(a)(i) criminalises active bribery by covering "any other person" who "offers any gratification directly or indirectly".

International standards also require active bribery offences to expressly cover giving, offering or promising a bribe. The Penal Code abetment offence does not do so expressly, though its explanatory notes indicate that offering a bribe is an offence, regardless of whether the official accepts the offer.² The notes do not refer to giving or promising a bribe, however. Similarly, the active bribery offence in NAO Section 9(a)(i) expressly covers "offering" a bribe but not "giving" or "promising". Finally, a bribe that is offered but not received by a public servant is not an offence under the Penal Code but is an offence under NAO Section 9(a)(i), according to Pakistani authorities.

Penal Code Section 161 applies to passive bribery. The Section covers a public servant who "accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person any gratification whatever, other than legal remuneration, as a *motive or reward*" for a certain act of the recipient official. This act, however, does not in fact have to be performed; it is sufficient if the official represents that the act has been or will be performed.³

Section 165 may also apply to passive bribery under certain circumstances. It covers a public servant who accepts, obtains, agrees to accept, or attempts to obtain any valuable thing without consideration or for inadequate consideration from a person concerned in any proceeding or business transacted by the public servant. Mere acceptance of the valuable thing suffices; there is no further requirement that the thing was a motive or reward for the recipient official's acts. Section 165 is thus broader than Section 161 in this regard. But from another perspective, it is narrower as it only applies to bribers who have proceedings or business involving the bribed official. There is no such limitation to Section 161.

Passive bribery is also covered by the offence of corruption in NAO Section 9. Sections 9(1)(a)(i) and (ii) which cover similar (though arguably not identical) conduct as Penal Code Sections 161 and 165 (see below) but provides a heavier penalty. NAO Section 9(1)(a)(iv) also conceivably applies to passive bribery. That provision establishes a separate offence of obtaining or seeking to obtain property, valuable thing or pecuniary advantage by corrupt, dishonest or illegal means.

International standards require passive bribery offences to cover accepting and soliciting a bribe. Sections 161 and 165 contain the words "accept or obtains, agrees to accept, or attempts to obtain". Soliciting is not expressly covered, but may be considered an attempt to obtain. By contrast, NAO Sections 9(a)(i) and (ii) do not cover solicitation. These two provisions only speak of an official who "accepts or obtains" a bribe. This should be compared with NAO Section 9(a)(iv), which covers solicitation by expressly referring to an official who "obtains or seeks to obtain" a bribe.

The treatment of bribery through intermediaries is unclear and inconsistent. The CC active bribery abetment offence is silent, as is the passive bribery offence under NAO Section 9(a)(iv). The Penal Code passive bribery offences refer to bribes accepted, obtained etc. "from any person", which does not clearly cover bribes given through an intermediary. On the other hand, NAO Section 9(a)(i) expressly covers intermediaries by referring to bribes accepted or obtained "directly or indirectly". NAO Section 9(a)(ii) may also cover some intermediaries, as it includes bribes provided by a person "interested in or related to the [briber]".

There is also uncertainty and inconsistency regarding bribes given to third party beneficiaries. The passive bribery offences under NAO Section 9(a)(iv) and Penal Code Sections 161 and 165 expressly cover third party beneficiaries, since they cover officials who accepts, obtains etc. a bribe "for himself or for any other person". The NAO's other passive bribery offences in

Sections 9(a)(i) and (ii) are silent, as is the active bribery abetment offence. Pakistani authorities assert that NAO Sections 9(a)(i) and (ii) cover third party beneficiaries by reason of NAO Sections 9(a)(xii) but did not provide supporting case law. This position is doubtful for two reasons. First, it would render the phrase “for himself or any other person” in NAO Section 9(a)(iv) redundant. Second, NAO Sections 9(a)(xii) would not cover situations such as when an official directs a bribe to be paid to a political party as a donation, and the party does not know that the donation is a bribe. In such a case, the official cannot be said to have aided, assisted, abetted, attempted or acted in conspiracy with the third party beneficiary, namely the political party.

International standards require active and passive bribery offences to cover a broad range of public officials, namely any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.⁴ International standards thus take a broad functional approach. “Public official” is defined through broad, general categories of functions performed by officials.

The Penal Code takes a somewhat different approach by listing a series of relatively narrow functions performed by officials. Section 21 defines a “public servant” by enumerating several specific categories of officials. These include commissioned military officers; judges, jurors, arbitrators, and other persons empowered by law to perform adjudicative functions; court officers charged with certain duties, such as investigations; officials responsible for preventing offences, bringing offenders to justice, or protecting public health, safety and convenience; officials dealing with the Government’s pecuniary interests, property, contracts, or revenue; officials assessing or levying taxes; and a person who is empowered to prepare, publish, maintain or revise an electoral roll, or to conduct an election or part of an election.

This definition of “public servants” in the Penal Code falls short of international standards. Persons holding legislative office are clearly missing. Non-commissioned officers and lower ranked military personnel are not covered. There is no mention of public agencies and public enterprises. Some categories also cover only officials of “the Government”, which is defined as “persons authorised by law to administer executive Government in Pakistan, or in any part thereof” (Section 17). Whether this necessarily covers officials of Provincial and local governments is not entirely clear.

The NAO contains a separate, different definition of public officials. Section 5(m)(iv) defines “holder of public office” to include a person “holding, or has held, an office or post in the service of Pakistan or any service in connection with the affairs of the Federation, or of a Province, or of a local council.” Also included are persons currently or previously in the management of corporations, banks or other institutions or organisations established, controlled or administered by or under the Federal or Provincial Government. Sections 5(m)(i)-(iii) and (v) also lists certain persons that are holders of public office, e.g. past (but not present) President of Pakistan and Provincial Governors; past and present Prime Minister, members of Parliament and provincial legislature, federal and provincial Ministers; past Chairmen and Vice Chairmen of a zila council, and municipal committees or corporations etc. For the armed forces, NAO Section 5(m)(iv) defines public officials also include current and past members of the armed forces who holds or has held a post or office in any public corporation, bank, financial institution, undertaking or other organisation established, controlled or administered by or under the Federal and Provincial Governments. Bribery of members of the armed forces may also be dealt with under the Pakistan Army Act, according to the Pakistani authorities.

This definition is broader than the one in the Penal Code but still falls short. The general category of officials in Section 5(m)(iv) only covers persons in the “management” of state-owned or controlled enterprises. Employees who are not managers but nevertheless perform public functions or provide a public service are excluded. Civilian employees of the armed forces are not covered. The coverage of judges is questionable. Furthermore, Sections 5(m)(i)-(iii) and (v) suggest that current President and Provincial Governors, as well as current Chairmen and Vice Chairmen of local and municipal bodies, fall outside the NAO bribery offences. Pakistani authorities stated that the bribery provisions under the Penal Code and the NAO apply to bribery of (1) police, (2) customs officials, (3) education authorities, and (4) officials at all levels of government, i.e. the provinces, Federally Administered Tribal Areas, and territories. No supporting statute or case law was cited.

International standards for the criminalisation of bribery also require broad coverage of acts or omissions in relation to the performance of official duties. This includes any use of the public official’s position or office, and acts or omissions outside the official’s scope of competence. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official or private individual award a contract to that company.⁵

The offences in Penal Code Section 161 and NAO Section 9(a)(i) may be narrower. They deal with bribery whereby a public servant (or holder of public office) (a) does or forbears from doing any *official act*; (b) shows favour or disfavour to any person in the exercise of his/her *official functions*; or (c) renders or attempts to render any service or disservice to any person with the Central or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company or with any public servant. Thus, only category (c) appears broad enough to include acts or omissions outside the official's scope of competence. Nevertheless, category (c) may fall short of international standards in two respects. First, it is unclear whether "rendering a service or disservice" to another official includes using one's office to make another official perform the act for which the bribe was intended. Second, the definition does not seem to cover an official who acts outside his/her competence and uses his/her office to influence a private individual.⁶

As for the remaining passive bribery offences in the NAO, Section 9(a)(ii) deals with an official who is concerned in any proceeding or business transacted involving the briber. The offence thus only deals with acts within the bribed official's official competence. On the other hand, Section 9(a)(iv) does not refer to acts performed by the bribed official, and therefore covers acts both within and beyond the official's competence.

The bribery offences in the PC and NAO cover bribery of a public official in order to allow the commission of an illegal act. Hence, the offences would prohibit a drug trafficker from bribing a Pakistani police officer to avoid arrest.

The NAO Section 14 allows certain inferences to be drawn when proving some elements of the bribery offences. The mere giving, accepting etc. of a gratification raises a rebuttable presumption that the gratification was a motive or reward for the official's act or omission. However, such an inference is available only for the active bribery offence in Penal Code Section 165-A and the passive bribery offences under NAO Sections 9(a)(i), (ii) and (iv). The inference cannot be drawn for the passive bribery offences under Penal Code Sections 161 and 165.

The Penal Code bribery offences cover bribes of both a monetary and non-monetary nature. An explanatory note to Section 161 states that "The word 'gratification' is not restricted to pecuniary gratifications, or to gratifications estimable in money." The NAO uses the same term "gratification" but does not provide a definition; presumably the definition in the Penal Code applies. Neither statute provides further information on whether the definition of "gratification" is affected by its value, its results, the perceptions of local custom,

the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder.

There is one specific defence to domestic bribery. Under the Penal Code Section 165-B, a person is not guilty of bribing a domestic official if he/she was “induced, compelled, coerced, or intimidated to offer or give any such gratification”. Pakistani authorities stated that this would not apply to a person who believes that it is necessary to bribe to win a public procurement contract. The NAO does not contain a comparable defence. Neither the Penal Code nor the NAO contains express defences of small facilitation payments, i.e. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits. Pakistani authorities add that the defence in PC Section 81 (act done without intention to cause harm) would not apply to bribery of local leaders to obtain their neutrality in armed conflicts between the Government and other parties.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

There are no express active or passive foreign bribery offences in Pakistan. Foreign public officials are not included in the Penal Code’s definition of “public servant” or the NAO’s definition of “holder of public office”. As such, none of the bribery offences in these statutes concern bribery of officials of foreign governments or public international organisations in the conduct of international business.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

In theory, Pakistan can impose criminal liability against legal persons for bribery. Section 2 of the Penal Code provides that every person shall be liable to punishment under the Code. Section 11 defines “person” as including “any Company or Association or body of persons, whether incorporated or not”. NAO Section 5(o) contain similar language.

Whether corporate criminal liability for bribery is actually imposed in practice is unclear. There is no reported case law in which a company has been prosecuted for a criminal offence. The National Accountability Bureau (NAB) is responsible for investigating and prosecuting bribery offences in Pakistan. According to a 2009 APG report, the NAB has never prosecuted a legal person and is unlikely to do so under the current practice:

[NAB has] never prosecuted a body corporate in its own capacity and that they have never considered it or considered it possible. They have all however agreed that there is nothing in the law itself

or in the general principles that prevents such prosecution. The omission is just a matter of practice and lack of understanding of the possibility of such direct prosecution of the corporation. On this basis, investigative agencies are unlikely to pursue criminal liability against legal persons according to the current practice in Pakistan.⁷

The lack of awareness of prosecuting legal persons is, at least in part, due to the lack of guidance in the Penal Code. Nothing in the Code indicates when a company is considered to have committed a crime. There is no indication when the acts or omissions of a natural person may be attributed to a legal person, whose acts or omissions may trigger liability, or whether the conviction of a natural person is a prerequisite to convicting a legal person.

Should Pakistani courts be confronted with the issue of liability of legal persons, they may well apply U.K. case law, given the country's common law history. The leading case is the well-known U.K. House of Lords decision in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153. The principle is commonly known as the "identification" doctrine. Under *Tesco*, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company's "directing mind and will".⁸

The limits of the identification doctrine in cases of complex corporate crimes such as bribery are now well-documented. Prosecutors, law enforcement officials, and academics in the U.K. have denounced the *Tesco* regime as ineffective and unsatisfactory for bribery offences. The problem is at least three-fold. First, the identification theory requires guilty intent be attributed to a very senior person in the company. Liability is unlikely to arise when bribery is committed by a regional manager or even relatively senior management, let alone a salesperson or agent, even if the company benefitted from the crime. Second, there is also no liability even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, the identification theory requires the requisite criminal intent to be found in a single person with the directing mind and will; aggregating the states of mind of several persons in the company will not suffice. This ignores the realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.⁹

An effective regime of liability of legal persons for bribery must address these limitations. The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.¹⁰ These standards are instructive for meeting the

comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

Pakistan has jurisdiction over bribery committed in its territory. Section 1 of the Penal Code states that the Code “shall take effect throughout Pakistan”. Similarly, NAO Section 4 provides that the Act “extends to the whole of Pakistan”. However, it is unclear whether territorial jurisdiction is extended to offences that only take place partly in Pakistan.

The Penal Code and NAO also provide for nationality jurisdiction. Penal Code Section 4 states that the Code applies to any offence committed by any Pakistani citizen in any place beyond Pakistan. NAO Section 4 states the Ordinance “applies to all citizens of Pakistan”. Neither statute requires dual criminality, i.e. the act or omission in question need not be an offence in the place where it occurs.

The Penal Code and NAO further provide that they apply to “persons in the service of the Pakistan” outside of Pakistan.” This would provide extraterritorial jurisdiction to prosecute non-Pakistani nationals in the service of the Pakistan Government who commit bribery.

Nationality jurisdiction is not extended to prosecute legal persons for bribery; Pakistani companies are not included as “citizens” under the Penal Code or NAO.

SANCTIONS FOR BRIBERY

Active and domestic bribery in the Penal Code under Sections 161, 165 and 165A are punishable by imprisonment of up to three years and/or a fine. The offence of corruption under NAO Section 9 is punishable by imprisonment of up to 14 years and/or a fine. There is no maximum limit to the fine that may be imposed, as long as the fine is not excessive (Penal Code Section 63). Under the NAO, a fine must also be not less than the gain derived by the offender from the offence (NAO Section 11).

Confiscation is available under the NAO, Anti-Money Laundering Ordinance (AMLO) and the Penal Code. Upon conviction for corruption under the NAO, a court may confiscate the “pecuniary resources” of the official that is “disproportionate to the known sources of his income or which are acquired by money obtained through corruption and corrupt practices, whether in his name or in the name of any of his dependents”. This also applies to property held beneficially for the official (NAO Sections 10 and 5(da)). The provision only applies upon a person’s conviction for the offence of corruption under the NAO; it is therefore unavailable against convicted bribers because the NAO does not address active bribery.

Confiscation may also be available under the AMLO. Upon conviction for laundering the proceeds of a bribery offence (whether under the Penal Code and NAO), a court shall forfeit the proceeds (AMLO Section 9). Proceeds is defined as “any property derived or obtained directly or indirectly” from the bribery (AMLO Section 2(r)).¹¹

Finally, Code of Penal Procedure Section 517 allows a court to confiscate any property “regarding which any offence appears to have been committed, or which has been used for the commission of any offence”. An explanatory note to the section states that the provision covers property “originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.” The provision thus appears to cover both direct and indirect proceeds.

None of these confiscation provisions allow a court to impose a fine of equivalent value to the property subject to forfeiture, e.g. when the property is not available because it has been expended or converted.

Administrative sanctions may be available in addition to criminal sanctions. Under NAO Section 15, a person convicted of corruption ceases to hold public office and is disqualified from holding office for 10 years. He/she is

also prohibited from seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or statutory or local authority. As well, persons convicted of corruption are barred from receiving any “loans, advances or other financial accommodation” by any state-owned or controlled bank or financial institution for 10 years. Since these measures only apply to persons convicted of corruption under the NAO, they are unavailable to convicted bribers. Information was not available on whether a convicted briber may be debarred from seeking government procurement contracts.

Like criminal sanctions, civil and administrative sanctions against legal persons are theoretically available but are not applied in practice. According to the 2009 APG report,

[E]ven in instances where corporations were found to be involved in the commission of a corrupt practice [...] there was no liaison with [securities] or other regulatory body to invoke the application of sanctions under the regulatory framework to penalise the criminal acts attributable to the corporation.¹²

TOOLS FOR INVESTIGATING BRIBERY

As will be seen below, investigative tools available in bribery cases are mainly found in the NAO. But as mentioned earlier, the NAO contains passive but not active bribery offences. If the authorities are only investigating a briber but not an official (*e.g.* because the official has died or has already been convicted), then it is doubtful that the investigative tools in the NAO are available. If not, then investigators may have to resort to the much more limited tools in the Code of Criminal Procedure (CCP).

The NAO permits investigators to access documents and information possessed by private individuals or companies, including banks and financial institutions. The National Accountability Bureau (NAB) is responsible for investigating bribery offences in the NAO. Under NAO Section 19, the Bureau may demand information or documents from any persons. It may also request banks and financial institutions to provide information relating to any person, including entries in the institution’s books and transaction information. The power to demand information is available “notwithstanding anything contained in any other law”; this presumably overrides any applicable bank secrecy legislation.

NAB investigators may also obtain tax information. The NAO Section 27 authorises the NAB to demand any documents or information from any

government department. If a question of secrecy arises, the NAB Chairman has the final say. This would appear to allow the NAB to obtain information protected by tax secrecy.

The CCP provides some additional tools. Under Section 94, a Court may issue a summons requiring a person to produce specified documents. For documents or things in the custody of a bank or banker, the prior permission in writing of the High Court Division is required. Search warrants are available under Section 96.

Freezing of property is available under the NAO and the Anti-Money Laundering Ordinance (AMLO). The NAO also permits the NAB Chairman or a Court to freeze the property of an accused or property held beneficially by another person on behalf of the accused. A freezing order by the NAB Chairman is valid for 15 days unless confirmed by a Court. The accused or an interested third party may object to the freezing order (NAO Sections 12-13). AMLO Sections 8 and 9 also allow for “attachment”. The CCP does not contain provisions on freezing property.

The availability of special investigative techniques is not completely certain. NAO Section 19 states that the NAB Chairman may seek an order from the High Court to conduct “surveillance” of a suspect “through such means as may be necessary in the facts and circumstances of the case”. It is not entirely clear whether this allows the full range of special investigative techniques, including wiretapping, listening and bugging devices, secret surveillance, video recording, email interception, undercover police operations (e.g. “sting” operations), or controlled deliveries. NAO Section 19 does indicate, however, that evidence gathered under that provision is admissible in legal proceedings under the NAO. The CCP allows for the opening of mail and parcels, but otherwise does not provide for any special investigative techniques.

Extradition is available in bribery cases. Bribery is an extradition offence under the Extradition Act, 1974.¹³ Under the Act, Pakistan will grant extradition to a foreign state with which it does not have a treaty only if the conduct in question is punishable by death or at least 12 months’ imprisonment (Section 5(2)(b)). When Pakistan seeks extradition in the absence of a treaty, the requested foreign state may impose a similar threshold on the basis of reciprocity. Fortunately, all bribery offences in Pakistan meet this requirement.

Mutual legal assistance (MLA) is also available in some cases. NAO Section 21 allows the NAB to seek from a foreign state a range of assistance, including the taking of evidence, production of documents and articles, search and seizure, freezing and confiscation of assets, and transfer of persons in

custody to assist in an investigation or prosecution. A Court may also issue a commission to take witness testimony from abroad (CCP Sections 503-508A). The NAB has expressed difficulty in obtaining MLA because of evidentiary and language requirements, and delay.¹⁴

Several provisions in the NAO deal with co-operating offenders. First, if an offender voluntarily offers to give up any assets or gains acquired from bribery *prior* to the authorisation of an investigation against him/her, then the NAB Chairman may accept the offer and discharge the person of all liability (NAO Section 25(a)). There is no requirement that the offender assist the authorities in an investigation, prosecution or trial. According to the NAB, the Chairman will reject an offer from an offender in corruption cases of a serious nature.¹⁵

Second, if an offender makes a similar offer after the authorisation of an investigation or the commencement of a trial, the NAB Chairman may still accept the offer but on such conditions as he/she sees fit. The agreement must also be approved by a Court (NAO Section 25(b)). The provision is also silent on whether the offender must assist or testify for the authorities, and it is unclear whether providing assistance is one of the conditions that the NAB Chairman may impose. In practice, the offender is required to submit an affidavit accepting his/her guilt and offering to return all gains acquired from the crime. The NAB takes the view that the offender is convicted under the NAO and is thus subject to the mandatory administrative sanctions described above (disqualification from public office and state financial aid).

A third provision allows for plea bargaining. At any stage of an investigation or trial, the NAB Chairman may grant an offender a full or conditional pardon in return for the offender's "full and true disclosure" of his/her knowledge of an offence. The offender is required to submit to examination by a Magistrate and testify at trial. In the case of a conditional pardon, the offender may be given a penalty. The offender may subsequently be tried for the offence if he/she fails to co-operate fully or breaches a condition specified in the pardon (NAO Section 26).

In 2007, there were 92 cases under NAO Section 25 in which offenders voluntarily returned gains acquired through corruption totalling PKR 2.05 billion (approx. USD 24.7 million or EUR 17.3 million). Offenders agreed in 2008 and the first half of 2009 to return PKR 25.7 billion (approx. USD 310 million or EUR 217 million) and PKR 10.4 billion (USD 125 million or EUR 87.8 million) respectively. These figures represent all corruption crimes, not only bribery. Statistics for plea bargaining under NAO Section 26 were not available.¹⁶

ENFORCEMENT OF BRIBERY OFFENCES

The NAB has jurisdiction to conduct criminal investigations into bribery offences under the NAO, while the Prosecutor General Accountability prosecutes such cases (NAO Section 8 and 22). The NAO is silent on who has jurisdiction to investigate and prosecute Penal Code bribery offences. Presumably, the responsibility falls upon the general law enforcement and prosecutorial authorities.

	Total Received / Commenced	Processed	Taken to Next Stage	Convicted	Acquitted	Withdrawn
2007						
Complaints	17160	17160	892	-	-	-
Inquiries	869	930	263	-	-	-
Investigations	426	416	236	-	-	-
Prosecutions	308	351	105	32	40	20
2008						
Complaints	13148	13148	688	-	-	-
Inquiries	542	583	151	-	-	-
Investigations	268	275	151	-	-	-
Prosecutions	168	240	81	11	24	35
2009 Jan.- Jun.						
Complaints	2982	2947	292	-	-	-
Inquiries	438	445	79	-	-	-
Investigations	235	239	93	-	-	-
Prosecutions	94	161	78	12	9	15

The NAB's Web site only contains enforcement statistics since 2007.¹⁷ The data are divided into the sequential stages of a case: complaint received, initial inquiry, formal investigation, and prosecution. The figures represent all corruption crimes, i.e. not only bribery but also embezzlement etc. For this

reason, they provide some indication of the NAB's enforcement capabilities, but are of limited use in assessing the enforcement of bribery offences.

Recovery of Funds							
Voluntary Return							
	No. of Cases	Agreed Amount			Recovered Amount (million)		
		PKR	USD	EUR	PKR	USD	EUR
2007	52	1454	17.5	13.2	1543*	18.6	14.0
2008	34	1102	13.3	10.0	911	11.0	8.2
2009	09	434	5.2	3.9	517*	6.2	3.9
Plea Bargain							
2007	37	287	3.5	2.6	229	2.7	2.1
2008	23	389	4.7	3.5	265	3.2	2.4
2009	14	849	10.2	7.7	842	10.2	7.6

* Includes amounts outstanding from previous years

Statistics on the sanctions imposed (apart from recovered assets) are not available. The NAB's 2007 Annual Report describes some significant cases and the sanctions imposed,¹⁸ but the number of cases is not sufficient to draw conclusions about sanctions imposed in bribery cases.

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

Pakistan's active and passive domestic bribery offences meet many requirements found in international standards, e.g. the different modes of committing the passive bribery offences, and third party beneficiaries. Pakistan could strengthen these offences by addressing the following issues:

- (a) A specific offence criminalising active domestic bribery that expressly covers giving, offering and promising a bribe, and bribery through an intermediary;
- (b) Express language covering active and passive domestic bribery through an intermediary;

- (c) Definition of “public servant” that expressly covers persons performing legislative functions; persons holding unpaid or temporary office; and all persons who perform a public function, including for a public agency or public enterprise, or provide a public service;
- (d) More specific language covering the situation where a bribe is given or taken in order that a public servant use his/her position outside his/her authorised competence;
- (e) “Gratifications” of a small value; and
- (f) Incomplete offences, such as when a bribe is offered to but not received by an official.

Bribery of Foreign Public Officials

To bring its criminal bribery offences in line with international standards, Pakistan should criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Pakistan’s Penal Code broadly includes “any Company or Association or body of persons, whether incorporated or not” in its definition of “persons”. However, it is unclear whether legal persons have been held criminally liable for bribery in Pakistan. To improve the effectiveness of this regime, Pakistan could consider whether its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Pakistan could also consider addressing the following issues:

- (a) Whether corporate liability depends on the conviction of a natural person for the crime; and
- (b) The lack of prosecutions of legal persons in practice.

Jurisdiction for Prosecuting Bribery

In addition to territorial jurisdiction, Pakistan also has nationality jurisdiction to prosecute natural persons for bribery. This is in line with international standards. To ensure its overall jurisdictional basis for prosecuting bribery is sufficiently broad, Pakistan could address the follow matters:

- (a) Providing nationality jurisdiction to prosecute legal persons for bribery; and
- (b) Jurisdiction to prosecute bribery offences that take place partly in Pakistan.

Sanctions for Bribery

The maximum available punishment against natural persons for bribery offences in Pakistan is largely in line with international standards. To ensure an effective regime in practice, Pakistan could consider addressing:

- (a) The relationship between fines and the various provisions on confiscation;
- (b) Confiscation of both the direct and indirect proceeds of bribery, and the availability of fines of equivalent value to the property subject to confiscation if, for example, the bribe or proceeds thereof have disappeared;
- (c) The use of confiscation in practice, especially against bribers; and
- (d) Additional administrative sanctions for bribery, such as blacklisting and debarment from public procurement.

Tools for Investigating Bribery

Pakistan has some useful investigative tools for bribery cases, such as the power to obtain documents and information from financial institutions through a summons process. Pakistan could consider some additional matters:

- (a) The availability of the investigative tools in the NAO in investigations of offences under the Penal Code;
- (b) Ability to obtain from the tax authorities information and documents subject to tax secrecy;
- (c) Special investigative techniques in bribery investigations, such as wiretapping, email interception, secret surveillance, video recording, listening and bugging devices, undercover police operations, and controlled deliveries;
- (d) Granting of pardon on the condition that an offender testifies at the trial of another accused; and
- (e) Plea bargaining for a reduced sentence when an offender cooperates with the authorities.

Enforcement of Bribery Offences

To properly measure the effectiveness of its criminalisation of bribery, Pakistan should maintain statistics on investigations, prosecutions, convictions, and sanctions for active and passive domestic bribery.

RELEVANT LAWS AND DOCUMENTATION

National Accountability Bureau: www.nab.gov.pk

NOTES

¹ See also Illustrations (a) of Penal Code Sections 109 and 116.

² Illustrations (a) of Penal Code Sections 109 and 116.

³ Penal Code Section 161, Illustrations, para. (c).

⁴ See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.

⁵ See OECD Convention, Commentary 19.

⁶ It is unclear whether this would be covered by a broad interpretation of Penal Code Section 162 (Taking gratification, in order, by corrupt or illegal means, to influence public servant) and Section 163 (Taking gratification, for exercise of personal influence with public servant).

- ⁷ APG (2007), *Mutual Evaluation Report: Pakistan*, para. 234.
- ⁸ U.K. Law Commission Report, *Reforming Bribery* (2008) at para. 6.26.
- ⁹ See U.K. Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ¹⁰ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ¹¹ APG has noted that the application of Section 9 is complicated by Section 17(5). The latter provides that, under a Section 9 forfeiture order, the state may only retain “property involved in money laundering”, an undefined term. If this term refers only to instrumentalities of crime, as APG believes, then the scope of Section 9 forfeiture orders would be significantly reduced (APG (2009), *Mutual Evaluation Report: Pakistan*, paras. 292-296).
- ¹² APG (2007), *Mutual Evaluation Report: Pakistan*, para. 236.
- ¹³ An applicable treaty or foreign legislation may impose additional conditions.
- ¹⁴ National Accountability Bureau (2008), *Annual Report 2007*, p. 70.
- ¹⁵ National Accountability Bureau (2008), *Annual Report 2007*, p. 22.
- ¹⁶ National Accountability Bureau (2008), *Annual Report 2007*, p. 33; 2008 figures were taken from the NAB Web site, www.nab.gov.pk.
- ¹⁷ National Accountability Bureau (2008), *Annual Report 2007*, pp. 29-50; 2008 and 2009 statistics were taken from the NAB Web site, www.nab.gov.pk.
- ¹⁸ National Accountability Bureau (2008), *Annual Report 2007*, pp. 95-104.

Criminalisation of Bribery in Palau

(From www.paclii.org)

**Palau National Code Annotated
Title 17**

Chapter 7, Section 701

Bribery

701. Every person who shall unlawfully and voluntarily give or receive anything of value in wrongful and corrupt payment for an official act done or not done, to be done or not to be done, shall be guilty of bribery, and upon conviction thereof shall be imprisoned for a period of not more than five years, and shall be fined three times the value of the payment received; or, if the value of the payment cannot be determined in dollars, shall be imprisoned for a period of not more than five years, and fined not more than \$1,000.00.

INTRODUCTION

The Republic of Palau (Palau) acceded to UNCAC in March 2009. It has been a member of the APG since 2002. Palau's legal system is based on common law (as understood and applied in the United States) and customary laws.¹ Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE BRIBERY OFFENCES

Palau's main bribery offence is found in Section 701, Chapter 7, of the Palau National Code Annotated (PNCA). The offence covers aspects of both active and passive bribery; however, as will be discussed in the ensuing sections of this report, the provision contains a number of features that fall short of international standards for the criminalisation of bribery.

International standards for the criminalisation of active domestic bribery cover the promise, offering and giving of a bribe to a public official. Section 701 is limited and only covers the "giving" of a bribe. A promise or offer of a bribe is not expressly covered, nor is there case law available to confirm that these modes of committing active bribery are covered in Palau. There is also no case

law to clarify whether the offence covers bribes that are made but not received, and bribes that are rejected by an official.

Passive domestic bribery should cover the acceptance or solicitation of a bribe by a public official. Section 701 covers the receiving of a bribe, but does not cover the requesting or solicitation of a bribe. Section 701 therefore falls short of international standards for passive domestic bribery.

International standards require the criminalisation of bribery through intermediaries. Accordingly, a public official who solicits or accepts a bribe from a third party intermediary, or an individual who gives a bribe to a third party to in turn give to the public official, should be covered. Section 701 does not expressly cover such forms of indirect bribery and it is unclear whether intermediaries would be covered by the wording “every person”. Section 701 also does not expressly cover third party beneficiaries of bribes.

Bribery offences generally must cover any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.² Section 701 does not specifically refer to “public officials” but covers “every person”. This term is undefined in the PNCA and it is therefore unclear whether it would broadly cover all requisite forms of public officials to meet international standards.

The Section 701 bribery offence deals with bribery in order that official acts are done or not done, or to be done or not to be done. This appears to cover an official who receives a bribe to perform or to breach his/her duty. However, it is unclear whether the term “official act” would also cover an official who uses his/her position outside his/her authorised competence (e.g. an official who uses his/her position to influence another official to provide an undue advantage to the briber). Case law is not available to clarify this point.

Section 701 refers to a bribe as “anything of value”. While the term is undefined, it appears to cover bribes of both a pecuniary and non-pecuniary nature. However, the term “value” applied renders unclear whether the definition of a bribe may be affected by its value or by its results. There is also no information on whether the definition of a bribe may also be affected by the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe or whether the briber is the best qualified bidder.

Section 701 covers bribery that is committed “unlawfully”. Regarding the mental element of the offence, Section 701 also covers bribery that is committed “voluntarily”. However, the scope of the terms “unlawfully” and “voluntarily” in relation to bribery is unclear. The PNCA does not contain some defences to bribery that are commonly found in other jurisdictions. There are no express defences of small facilitation payments, solicitation or “effective regret”.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

Foreign bribery is not expressly criminalised in Palau. While Section 701 refers to the giving or receiving of a bribe by “every person” for “an official act”, which could conceivably include official acts of foreign public officials, the offence does not expressly criminalise the bribery of officials of foreign countries or public international organisations.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Palau does not appear to impose liability against legal persons for corruption offences.³

The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.⁴ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

Palau can exercise territorial jurisdiction for acts done or omitted to be done within its territory. It is unclear whether Palau can exercise jurisdiction for acts that only partly take in Palau, or where no elements of the offence take place in its territory; for example, when a briber calls an official while in Palau to arrange a meeting, but subsequently meet and give a bribe to the official outside Palau. It is also uncertain whether Palau can exercise jurisdiction on the basis of nationality.

SANCTIONS FOR BRIBERY

The bribery offence under Section 701 of the PNCA is punishable by imprisonment for a period of not more than five years and a fine amounting to three times the value of the payment of the bribe received. If the value of the payment of the bribe cannot be determined in United States dollars, the offence is punishable for a period of not more than five years and a fine not more than USD 1 000. These sanctions are generally commensurate with international standards.

Confiscation of the bribe and the proceeds of bribery may be available in some cases. Bribery is a predicate offence to money laundering. Section 3 of the Money Laundering and Proceeds of Crime Act (MLPCA) defines a money laundering offence as including “the acquisition, possession, or control of property by any person who knows that the property constitutes the proceeds of crime”. “Proceeds of crime” is further defined as “any property or economic advantage derived from a crime”; this would include bribery. Upon a conviction for money laundering, the Supreme Court may confiscate “property forming the subject of the offence, including income and other benefits there from” (Section 33 MLPCA).⁵ This would allow confiscation of a bribe and the proceeds of bribery. It should be noted, however, that confiscation is available upon a conviction for laundering the proceeds of bribery and not bribery *per se*.

It is unclear whether administrative (disciplinary) sanctions apply for public officials who take or solicit bribes. It is also unclear whether other forms of administrative sanctions such as debarment from public procurement are available. While the Ministry of Finance has reportedly been working on developing provisions for blacklisting companies that have demonstrated dishonesty⁶, it is uncertain whether such sanctions are now available or applied in practice.

Statistics are not available on the actual sanctions (including confiscation) that have been imposed for bribery in practice.

TOOLS FOR INVESTIGATING BRIBERY

The Bureau of Public Safety, Division of Criminal Investigations (BPS, DCI) is responsible for investigating criminal cases, including bribery.⁷ General search and seizure provisions are provided under Title 18 (Criminal Procedure) of the PNCA. These provisions are available for investigating bribery offences. Sections 303 to 305 set out the procedure for obtaining search and seizure warrants. Such warrants are issued on the basis of a sworn affidavit of probable cause filed with the Supreme Court. Property for which a search warrant may be issued includes *inter alia* property which is prohibited by law; property necessary to be produced as evidence, and; property designed or intended to be used or which has been used to commit a criminal offence (Section 304, Title 18, PNCA). The term “property” is defined as including documents, books, papers and any other tangible objects (Section 304(b)). This would allow police to seize (physical) records held by financial and other institutions for evidentiary purposes.⁸

The BPS, DCI, through the Office of the Attorney General (OAG), can also compel the production of banking records. While not expressly listed in PNCA, these records would include transaction records, account files, business correspondence and other records.⁹

Other investigative tools are available for money laundering offences, and can be used to investigate laundering the proceeds of bribery. The MLPCA allows the Financial Intelligence Unit (FIU) or the OAG to monitor bank accounts; access computer systems, networks and servers; place under surveillance or tap telephone lines, fax machines, or electronic transmission or communication facilities; electronically record acts and behaviour or conversations, and; inspect communications of notarial and private deeds or of bank, financial, and commercial records (Section 24). These tools are only available when evidence exists constituting probable cause that the targets are suspected of participating in money laundering offences. If not, the FIU or the OAG will need a warrant issued by the Supreme Court.¹⁰ Section 26 of the MLPCA (Disallowance of Bank Secrecy) states that banking or professional secrecy laws may not be invoked as grounds for refusal to provide information.¹¹ It is unclear whether investigators may also have access to tax records and whether any secrecy laws may apply. However, these investigative tools under the MLPCA are only available for investigating money laundering and not bribery *per se*.

Other special investigative techniques also appear to be available in the context of money laundering offences. Section 25 of the MLPCA provides for “undercover operations and controlled delivery”. It is unclear whether other

practices, such as plea negotiations, the use of co-operative informants or witnesses, and immunity from prosecution for persons who co-operate in corruption investigations and prosecutions, are available or used in practice.

International assistance is available for investigating bribery. Section 1311 (Title 18) of the PNCA¹² states that Palau may seek mutual legal assistance in any investigation or proceeding in relation to a serious offence. A “serious offence” is defined as an offence against “any law of the Republic which is a criminal offence punishable by imprisonment for more than one year” (Section 1302(p)). Bribery, under Section 701 of the PNCA, is punishable by a maximum of five years’ imprisonment and thus falls within this threshold.

ENFORCEMENT OF BRIBERY OFFENCES

The BPS, DCI is responsible for investigating criminal cases, including bribery,¹³ while the Attorney General has conduct of bribery prosecutions.

Statistics on the number of investigations, prosecutions and convictions of bribery are not available. The Bureau of Public Safety does not keep statistics on investigations and seizures to any of the predicate offences for money laundering, including bribery.¹⁴

RECOMMENDATIONS FOR A WAY FORWARD

Palau has already made some significant efforts in criminalising bribery offences. To further enhance compatibility with international standards, Palau could consider the following.

Elements of the Active and Passive Domestic Bribery Offences

Section 701 of the PNCA covers certain aspects of both active and passive domestic bribery. However, to improve its bribery offence, Palau could consider addressing the following areas:

- (a) Express language covering additional modes of committing bribery, such as the promise and offer of a bribe; the request or solicitation of a bribe; third party beneficiaries, and; bribery through the use of intermediaries;
- (b) Incomplete offences, such as when a bribe is offered to but not received by an official, or when an official rejects a bribe;

- (c) Express language covering all requisite forms of public officials, including persons holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid, and; any person performing a public function, including for a public agency or public enterprise, or provides a public service;
- (d) Bribery in order that an official uses his/her position outside his/her authorised competence;
- (e) Express language covering the definition a bribe (“anything of value”), which is not affected by its value or results, the perceptions of local customs, the tolerance by local authorities, the alleged necessity of the bribe or whether the briber is the best qualified bidder.

Bribery of Foreign Public Officials

To bring its criminal bribery offences into line with international standards, Palau should expressly criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Palau does not impose liability against legal persons for corruption offences. Should Palau consider establishing a system imposing liability against legal persons for bribery, it may wish to take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects a wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when persons with the highest level of managerial authority (i) offer, promise or give a bribe to an official; (ii) direct or authorise a lower level person to offer, promise or give a bribe to an official; or (iii) fail to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Jurisdiction for Prosecuting Bribery

To ensure its overall jurisdictional basis for prosecuting bribery is sufficiently broad, Palau could address the follow matters:

- (a) Providing territorial jurisdiction to prosecute acts of bribery that partly take place in Palau, and in cases where no elements of the offence take place in its territory, e.g. when a briber calls an official while in Palau to arrange a meeting, but subsequently meet and give a bribe to the official outside Palau;
- (b) Exercise jurisdiction on the basis of nationality;
- (c) Providing nationality jurisdiction to prosecute legal persons for bribery.

Sanctions for Bribery

The bribery offence Section 701 of the PNCA is punishable by a maximum of 5 years' imprisonment and a fine amounting to three times the value of the bribe; if the latter cannot be determined, the offence is punishable for by a maximum of 5 years' imprisonment and a fine of not more than USD 1 000. The maximum term for imprisonment is in line with international standards. To ensure sanctions for bribery are effective, proportionate and dissuasive, Palau could address the following issues:

- (a) The sufficiency of the maximum fine for bribery;
- (b) The availability and/or application of administrative (disciplinary) sanctions, such as debarment from public procurement.

Tools for Investigating Bribery

Palau has a good range of investigative tools at its disposal under Title 18 of the PNCA and under the MLPCA. Palau could improve its ability to investigate bribery cases by addressing the following issues:

- (a) Make available the same special investigative tools found under the MLPCA for the investigation of bribery offences;
- (b) The availability, and formalising in writing practices (if they exist), such as plea negotiations with a defendant, and reliance on co-operative informants and witnesses;

- (c) Granting immunity from prosecution persons who co-operate in corruption investigations and prosecutions.

Enforcement

Statistics are an essential tool for evaluating whether a scheme of criminalising bribery is effective. Palau could therefore consider maintaining full and current statistics on investigations, prosecutions, convictions of bribery. It could also maintain statistics on the number and nature of sanctions imposed in bribery cases, including confiscation.

RELEVANT LAWS AND DOCUMENTATION

Laws were provided directly by the Republic of Palau.

IMF/APG (2009), Mutual Evaluation Report: Palau: www.apgml.org/documents/docs/17/Palau%202008.pdf

NOTES

- ¹ See: Asian Development Bank (2007), *Palau: Policies for Sustainable Growth, Chapter V: Issues Relating to Palau's Legal System and Property Rights*, Asian Development Bank, July 2007, available at: www.adb.org/Documents/Reports/PSA/PAL/default.asp
- ² See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ³ See: ADB/OECD (2007), *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, 2007, p. 238, available at: www.oecd.org/dataoecd/28/47/37900503.pdf
- ⁴ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ⁵ The IMF has concluded that this provision allows confiscation of the proceeds and instruments of crime. See: IMF (2009), *Palau: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism*, International Monetary Fund, Washington DC, January 2009.
- ⁶ See: Transparency International (2004), *National Integrity Systems: Transparency International Country Study Report: Republic of Palau*,

Transparency International, 2004, at p. 36, available at:
[www.transparency.org](http://www.transparency.org/content/download/1698/8541/file/palau.pdf)

⁷ IMF (2009), *Palau: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism*, International Monetary Fund, Washington DC, January 2009, at p. 57.

⁸ *Ibid.*, p. 59.

⁹ *Ibid.*, p. 59.

¹⁰ *Ibid.*, p. 58.

¹¹ *Ibid.*, p. 83.

¹² Also titled: Mutual Legal Assistance in Criminal Matters Act (2001).

¹³ IMF (2009), *Palau: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism*, International Monetary Fund, Washington DC, January 2009, at p. 57.

¹⁴ *Ibid.*, p. 61.

Criminalisation of Bribery in Papua New Guinea

(From: Pacific Islands Legal Information
Institute - www.paclii.org)

Criminal Code 1974

Part III

Offences Against the Administration of Law and Justice and Against Public Authority

Section 87 Official Corruption

- (1) A person who—
- (a) being—
- (i) employed in the Public Service, or the holder of any public office; and
 - (ii) charged with the performance of any duty by virtue of that employment or office, (not being a duty touching the administration of justice),

corruptly asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on account of any thing done or omitted to be done, or to be done or omitted to be done by him in the discharge of the duties of his office; or

- (b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on or for any person, any property or benefit on account of any such act or omission on the part of a person in the Public Service or holding a public office,

is guilty of a crime.

Penalty: Imprisonment for a term not exceeding seven years, and a fine at the discretion of the court.

Section 97B Bribery of Member of Public Service

- (1) A person who offers to a person employed in the Public Service, or being a person employed in the Public Service, solicits or accepts a gratification as an inducement or reward for—
- (a) the person employed in the Public Service voting or abstaining from

voting at any meeting in favour of or against any measure; or

- (b) the person employed in the Public Service performing or abstaining from performing or aiding in procuring or hindering the performance of an official act; or
- (c) the person employed in the Public Service aiding in procuring or preventing the passing of any vote or granting of any contract in favour of any person; or
- (d) the person employed in the Public Service showing or refraining from showing any favour or disfavour in his capacity as a person employed in the Public Service,

is guilty of an offence.

Penalty: A fine at the discretion of the Court or imprisonment for a term not exceeding seven years, or both.

Part II

Offences Against Public Order

Section 61 Member of the Parliament Receiving Bribes

(1) A member of the Parliament who asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on any understanding that his vote, opinion, judgement, or action in the Parliament, or any Committee of the Parliament will—

- (a) be influenced by it; or
- (b) be given in any particular manner or in favour of any particular side of any question or matter,

is guilty of a crime.

Penalty: Imprisonment for a term not exceeding seven years.

(2) A person who commits an offence against Subsection (1) is disqualified from sitting or voting as a member of the Parliament for seven years.

Part III

Offences Against the Administration of Law and Justice and Against Public Authority

Section 62 Bribery of Member of the Parliament

(1) A person who—

- (a) in order—

(i) to influence a member of the Parliament in his vote, opinion, judgment or action on any question or matter arising in the Parliament or in any Committee of the Parliament; or

(ii) to induce a member to absent himself from the Parliament or from a Committee of the Parliament,

gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, any property or benefit to, on, or for the member, or to, on, or for, any other person...

is guilty of a crime.

Penalty: Imprisonment for a term not exceeding seven years.

Section 119 Judicial Corruption

(2) A person who –

(a) being the holder of a judicial office, corruptly asks, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on account of anything done or omitted to be done, or to be done or omitted to be done, by him in his judicial capacity; or

(b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on, or for any person holding judicial office, or to, on, or for any other person, any property or benefit on account of any such act or omission on the part of a person holding the judicial office,

Is guilty of a crime.

Penalty: Subject to subsection (3), imprisonment for a term not exceeding 14 years, and a fine at the discretion of the court.

Section 120 Official Corruption not Judicial but Relating to Offences

(1) A person who –

(a) being a justice not acting judicially, or being a person employed in the Public Service in any capacity not judicial for the prosecution or detention or punishment of offenders, corruptly asks, receives or obtains, or agrees or attempts to receive or obtain any property or benefit for himself or any other person, on account of anything done or omitted to be done, or to be done or omitted to be done, by him, with a view to–

(i) corrupt or improper interference with the due administration of

justice; or

(ii) the procurement or facilitation of the commission of an offence; or

(iii) the protection of an offender or intending offender from detection or punishment; or

- (b) corruptly gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on, or for any person, any property or benefit on account of any such act or omission on the part of the justice or other person so employed,

is guilty of a crime.

Penalty: Imprisonment for a term not exceeding 14 years, and a fine at the discretion of the court.

INTRODUCTION

Papua New Guinea (PNG) acceded to the UNCAC in July 2007. It has been a member of the APG since 2008. PNG's legal system is based on English common law. Its criminal bribery offences have not been externally reviewed. However, PNG's implementation of UNCAC (Chapters III and IV) will be reviewed in the first phase of the new UNCAC Review Mechanism.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

PNG's general active and passive domestic bribery offences are found in the Criminal Code (the Code). In addition, bribery of various types of officials is covered in at least five other statutes.¹ Many of these offences, including those within the Code itself, overlap. As will be discussed in the ensuing sections of this report, it is unclear which offence would apply to acts that fall within the ambit of more than one statute. This report will focus on the Code but will refer to the other offences where relevant.

To meet international standards, active domestic bribery should cover the promise, offering and giving of a bribe to a public official. Sections 62, 87(1)(b), 97B, 119 and 120 of the Code all address active domestic bribery. Sections 62, 87(1)(b), 119 and 120 are commensurate with international standards on the *actus reus* of active domestic bribery. However, Section 97B is limited in that it only covers the "offering" of a bribe. It is unclear whether incomplete offences, such as when a bribe is offered to but not received by an official, or when an official rejects a bribe, are covered under PNG law.

As for passive domestic bribery, international standards generally demand coverage of the solicitation or acceptance of a bribe by a public official. All of the bribery offences under the Code cover the solicitation and acceptance of bribes. While some of the offences apply different wording, the two modes of committing passive domestic bribery remain covered. For example, Section 61 covers those who “ask, receive or obtain, or agree or attempt to receive or obtain” a bribe. Section 87(a) covers public officials who “corruptly ask, receive or obtain, or agree or attempt to receive or obtain” a bribe. Similarly, Sections 119 and 120 cover judicial office holders and public servants employed in the prosecution, detention or punishment of offenders who “corruptly ask, receive or obtain, or agree or attempt to receive or obtain” a bribe. The request or solicitation of a bribe, while not expressly referred to under these provisions, would be covered by the wording “ask or attempt to obtain”.

Indirect forms of bribery, for example through the use of intermediaries, are not expressly covered by the bribery offences under the Code or by the other statutes.

PNG laws cover bribes that benefit third parties. The active and passive bribery offences under Sections 61, 62, 87, 119 and 120 of the Code cover bribes that benefit “any other person”.

International standards generally require bribery offences to cover persons holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service, and; any person defined as a public official under domestic law.² The offences in Part III of the Code (including Official Corruption under Section 87 and Bribery of a Member of the Public Service under Section 97B) apply to a “person employed in the Public Service”. This is defined in Section 83A as follows:

“person employed in the Public Service” includes:

- (a) a member of any of the State Services established under or by authority of Section 188 (Establishment of the State Services) of the Constitution; and
- (b) a constitutional office-holder as defined in Section 221 (Definitions) of the Constitution;

- (c) a member of or person employed by a constitutional institution, being an office or institution established or provided for by the Constitution, including the Head of State, a Minister or the National Executive Council; and
- (d) a member of the National Parliament or of a provincial assembly; and
- (e) a person employed under the Official Personal Staff Act 1980 or the Parliamentary Members' Personal Staff Act 1988; and
- (f) a person employed by a provincial government; and
- (g) a member, officer or employee of a body or corporation established by statute.

Section 188 (Establishment of State Services) of the Constitution, establishes the following State Services:

- (a) the National Public Service; and
- (b) the Police Force; and
- (c) the Papua New Guinea Defence Force; and
- (d) the Parliamentary Service.

Section 221 of the Constitution defines the following as Constitutional Office Holders:

- (a) a Judge; or
- (b) the Public Prosecutor or the Public Solicitor;
- (c) the Chief Magistrate; or
- (d) a member of the Ombudsman Commission; or
- (e) a member of the Electoral Commission; or

- (f) the Clerk of the Parliament; or
- (g) a member of the Public Services Commission; or
- (h) the Auditor-General; or
- (i) the holder of any other office declared by an Organic Law or an Act of the Parliament to be a constitutional office for the purposes of this Part.

While the Code covers a wide range of public officials, it is unclear whether persons who are unpaid, performing a public function or providing a public service are covered.

International standards also require broad coverage of the act or omission performed by an official in return for a bribe. In this regard, the bribery offences under the Code are limited in that they seem to only cover acts or omissions undertaken in official capacity. These provisions do not cover acts or omissions outside of the public official's competence.

Concerning the requisite mental element, Sections 87, 119 and 120 of the Code require a bribe to be given or obtained "corruptly", an undefined term. There are a number of cases in PNG that discuss the meaning of the term "corruptly". For example, *State v. Toamara*, [1989] PGNC 103 and *State v. Mataio*, [2004] PGNC 239. In the latter case, Davini J. states:

As to the charges, whether the accused "corruptly" received the K150.00 or not, must be determined by the court. I discuss the definition of the word "corruptly" both as applied in the common law jurisdictions and in Papua New Guinea.

In Carters Criminal Law of Queensland Sixth Edition at paragraph 84 (pg. 135), the word "corruptly" is defined and discussed. It states:

A person acts "corruptly" if he offers a fee or reward deliberately and with the intention that the person to whom the offer is made should enter into a corrupt bargain even if the offeror himself has no intention of carrying out the transaction and accepting the favour which he

has sought. (see *R v. Smith* [1960] 1 All ER 256; 44 Cr App R 55; [1960] 2 QB 423). In *R v Wellburn, Nurdin and Randel* (1979) 69 Cr App R 254 it was held that a recorder had correctly directed the jury that "corruptly" was a simple English adverb which meant purposely doing an act which the law forbade as tending to corrupt. In *R v. Small* (1903) 5 WALR 85 where on a charge of an attempt to bribe a detective officer on a specified date, evidence of a similar attempt on an earlier date was held to have been rightly admitted.

The word "corruptly" is also discussed in the text "Criminal Law and Practice of Papua New Guinea" by Chalmers Weisbrot Injia and Andrews at p. 223 where they refer to the case *State v. Jackson Tina Toamara* [1988-89] PNGLR 253. In that case, Brunton A.J. said:

The meaning of the word "corruptly" in law is confused. It is an undefined adverb... There is one line of English cases which says that "corruptly" means dishonestly... There is another line of English cases which says that "corruptly" does not mean dishonestly but in purposely doing an act which the law forbids"... The ordinary meaning of the adverb "corruptly" is wider than "dishonestly". Dishonestly may certainly be an ingredient of corruption, but the concept is wider. Corruption can be achieved by pollution, subversion, or the undermining of a concept, institution, or material. When the word "corruptly" is used with persons, as in s. 120(l) – "A person who... corruptly ... receives" – then the ordinary use of the word implies immorality, depravity and dishonesty. When the word is linked with the taking of bribes, "corruptly" is closer to dishonesty as a concept than it is to immorality or depravity... [T]he State... must prove an element of dishonesty. Dishonestly is a somewhat firmer concept than corruptly, although it, too, is an underlined adverb, and can lead itself to circularity.

The same word has been used in U.K. criminal statutes on corruption.³ U.K. case authorities interpreting this term are unclear and in “impressive disarray”. Some interpret “corruptly” to mean “doing an act that the law forbids as tending to corrupt”, while others require further proof that the accused acted dishonestly.⁴ Recent reform proposals in the U.K. by the Law Commission, the Government and a Parliamentary Joint Committee all favour eliminating the concept of “corruptly”.⁵ The U.K. Bribery Act 2010 accordingly rejected this concept. For similar reasons, the OECD Working Group on Bribery has also recommended that another country replace the term “corruptly” in its foreign bribery offence with a clearer concept.⁶

The bribery provisions within the Code apply different terminology in reference to a bribe. Sections 61, 62, 87, 119 and 120 apply the terms “property or benefit”, whereas Section 97B applies the term “gratification”. “Property” is defined as including “every thing, animate or inanimate, capable of being the subject of ownership” (Section 1 of the Code). “Benefit” is undefined within the Code, but likely covers bribes of both a pecuniary and non-pecuniary nature. The term “gratification” is defined as including money, loans, reward or an interest in property; an office or employment; a payment of or release from a loan or liability; valuable consideration of any kind⁷; forbearance to demand money or money’s worth; aid, a vote, consent or influence; a service, favour or advantage of any description whatsoever, or an offer or promise of any kind of gratification (Section 1 of the Code). This clearly covers bribes of both a pecuniary and non-pecuniary nature. However, it remains unclear whether the definition of a bribe is affected by its value, its results, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder.

The bribery offences under PNG law do not contain defences to bribery that are commonly found in other jurisdictions. For example, there are no express defences of small facilitation payments, solicitation or “effective regret”.

As mentioned above, at least five other statutes in PNG contain criminal bribery offences. These offences mainly deal with bribery of specific types of officials, and only cover active bribery. The wording applied in these offences is generally similar among them, but differs greatly from the wording of the bribery offences within the Code. For example, the word “corruptly” applied in a number of the bribery provisions within the Code is not applied in these other statutes. Moreover, while Section 97B of the Code only applies the word “offer”, the bribery offences within these other statutes generally apply the wording “gives or procures to be given, or offers or promise to give or procure to be given” a bribe. Furthermore, the bribery offences within the Code itself overlap. For example, Section 87(1)(b) and 97B both address active bribery of members of

the public service. As will be discussed below, these overlapping bribery offences are particularly problematic as the sanctions differ for the various offences.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

Foreign bribery is not an offence in PNG. The active bribery offences under the Code appear to only apply to domestic public officials and would therefore not cover bribery of officials of foreign governments or public international organisations in the conduct of international business.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

It appears that legal persons can be held liable for bribery in PNG. While the term “person” is undefined under the Code, the IA defines “person” as including “a corporation sole, and a body politic or corporate”. However, whether and how corporate criminal liability for bribery would be imposed in practice is unclear. There is no reported case law in which a company has been prosecuted for a criminal offence.

Should PNG courts be confronted with the issue of liability of legal persons, they may well apply U.K. case law, given its common law history. The leading case is the U.K. House of Lords decision in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153. The principle is commonly known as the “identification” doctrine. Under *Tesco*, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company’s “directing mind and will”.⁸

The limits of the identification doctrine in cases of complex corporate crimes such as bribery are now well-documented. Prosecutors, law enforcement officials, and academics in the U.K. have denounced the *Tesco* regime as ineffective and unsatisfactory for bribery offences. The problem is at least three-fold. First, the identification theory requires guilty intent be attributed to a very senior person in the company. Liability is unlikely to arise when bribery is committed by a regional manager or even relatively senior management, let alone a salesperson or agent, even if the company benefitted from the crime. Second, there is also no liability even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, the identification theory requires the requisite criminal intent to be found in a single person with the directing mind and will; aggregating the states of mind of several persons in the company will not suffice. This ignores the

realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.⁹

It has been observed that an effective regime of liability of legal persons must address these limitations. The OECD Working Group on Bribery has recognised minimum standards for meeting the requirement in the OECD Anti-Bribery Convention for establishing the liability of legal persons for the offence of bribery of a foreign public official.¹⁰ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when persons with the highest level of managerial authority (i) offer, promise or give a bribe to an official; (ii) direct or authorise a lower level person to offer, promise or give a bribe to an official; or (iii) fail to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

Territorial jurisdiction to prosecute bribery is provided under Section 12 of the Code which states that the Code “applies to every person who is in Papua New Guinea at the time of his doing any act or making any omission which constitutes an offence”. Territorial jurisdiction also applies to offences that partly take place in PNG (Section 12.2 of the Code). Jurisdiction also extends to offences procured or counselled by persons outside of PNG and who later come into PNG (Section 13 the Code), and offences procured in PNG to be committed outside PNG (Section 14 of the Code). While the term “person” is undefined under the Code, the IA defines “person” as including legal persons. PNG may therefore be able to exercise jurisdiction to prosecute legal persons. It is unclear whether PNG can exercise jurisdiction on the basis of nationality.

SANCTIONS FOR BRIBERY

Domestic bribery offences in PNG are punishable by the following sanctions:

Offence	Sanctions
Passive bribery by Member of Parliament (Section 61 of the Code)	Maximum imprisonment of 7 years, and disqualification from sitting or voting as a Member of Parliament for 7 years.
Active bribery of Member of Parliament (Section 62 of the Code)	Maximum imprisonment of 7 years
Active and passive bribery of member of public service or public office holder (Section 87 of the Code)	Maximum imprisonment of 7 years and a fine at the discretion of the court
Active bribery of member of public service (Section 97B of the Code)	A fine at the discretion of the court or maximum 7 years imprisonment or both
Active and passive bribery by judicial office holder (Section 119 of the Code)	Maximum imprisonment of 14 years and a fine at the discretion of the court
Active and passive bribery constituting official corruption (not judicial but relating to offences) (Section 120 of the Code)	Maximum imprisonment of 14 years and a fine at the discretion of the court

The sanctions for bribery under PNG law are commensurate with international standards. However, as mentioned above, there is a number of overlapping bribery offences with different levels of punishment. For example, both active and passive bribery involving a judge could conceivably fall under both Sections 87 and 119 of the Code but the sanctions differ significantly (maximum imprisonment of 7 years plus a fine in contrast to maximum imprisonment of 14 years plus a fine). Furthermore, the active bribery by a member of the Public Service could fall under both Sections 87(1)(b) or 97B of the Code where, again, the sanctions differ. Bribery under Section 87 is punishable by both imprisonment and a fine, whereas under Section 97B there is a possibility that the offence could be punished by a fine alone. Finally, the bribery provisions found in the five other statutes concerning specific categories of public officials all carry different levels of sanctions, varying from the imposition of a fine (Food Sanitation Act, Liquor Licensing Act, Public Health Act) to a maximum of six months' imprisonment in some cases (Public Health Act, Food Sanitation Act) or a maximum of five years' imprisonment in other cases (Excise Act, Customs Act).

The Proceeds of Crime Act 2005 (POCA) allows confiscation of proceeds of bribery. Upon conviction, a Court can order forfeiture of “tainted property” (Section 58 POCA). “Tainted property” is defined as “proceeds of an offence; property used in, or in connection with, the commission of an offence; or, property intended to be used in, or in connection with, the commission of an offence” (Section 3 POCA). “Proceeds”, which is defined as “property that is wholly derived or realised, whether directly or indirectly, from the commission of the offence; or, partly derived or realised, whether directly or indirectly, from the commission of the offence” (Section 10 POCA), covers the bribe and both the direct and indirect proceeds of bribery. Section 62(3) of the Code also provides for forfeiture of property in relation to the bribery offence under Section 62. Confiscation against legal persons may be available; while the term “person” is undefined in POCA and the Code, its definition in the IA includes legal persons. There is also a non-conviction based regime for the recovery of assets under Sections 39 and 59 of the POCA.

Where confiscation is not possible or practicable because the property cannot be found; has been transferred to a bona fide third party; is located outside of PNG, or; has been mingled with other property and cannot be divided without difficulty, a Court can order payment to the State of an amount equal to the value of the property, part or interest (Section 81 POCA). A Court can also issue a pecuniary penalty order against a person convicted of bribery and who has derived benefits from the commission of the offence (Section 84 POCA).

The passive bribery offence under Section 61 of the Code also provides for disqualification from sitting as a Member of Parliament for 7 years. The Organic Law on the Duties and Responsibilities of Leaders (OLDRL), which addresses bribery as constituting misconduct in office, also provides for the administrative sanction of dismissal from office (Sections 5 and 11). Information is not available on whether additional administrative sanctions including debarment from seeking public procurement contracts, are available for bribery.

TOOLS FOR INVESTIGATING BRIBERY

PNG’s Search Act 1977 (SA) provides limited investigative tools for bribery cases. Section 6 allows a court to issue a warrant to search anything to which there is reasonable grounds to believe an offence has been committed; intended to be used to commit an offence, or; likely to afford evidence of the commission of an offence. Section 10 allows the seizure of anything stolen or unlawfully obtained; used or intended to be used in the commission of an offence, or; will provide evidence of an offence.

The POCA provides a much wider range of investigative tools in bribery cases. Under Section 154, a magistrate may issue a production order to allow investigators to obtain “property-tracking documents” if there are reasonable grounds to believe that an indictable offence has been committed, which includes bribery. “Property-tracking documents” are defined as documents relevant to identifying, locating or quantifying property of a person who committed the offence; any document necessary for the transfer of property of a person who committed the offence; tainted property in relation to the offence, or; any document necessary for the transfer of tainted property in relation to the offence. This could therefore be used to obtain relevant financial and other information from financial institutions. A court may also issue a monitoring order that would require financial institutions and “cash dealers” to provide information about transactions conducted during a particular period (POCA Section 161). Secrecy laws do not override search and seizure provisions of POCA; Section 156(2) states that “a person required by a production order to produce or make available a document is not excused from doing so on the ground that producing the document or making it available... would be in breach of an obligation (whether imposed by an Act or otherwise) not to disclose the existence of contents of the document”. The disclosure of protected information or production of a protected document is also expressly authorised when under compulsion or obligation of law under Section 52(6) of the Bank and Financial Institutions Act (2000). However, it does not appear that investigators can access tax records in bribery investigations (Section 9 Income Tax Act (1959)).

Sections 38 and 39 of POCA allow for the freezing of property. A court may issue a restraining order over “tainted property” if a person has been charged or convicted of bribery; it is proposed that he/she be charged with bribery, or; the person is suspected of committing bribery. These provisions also allow a court to restrain property that is controlled by a defendant but held by another individual.

The interception of communications is authorised under the Protection of Private Communications Act 1973 (PPCA). Under Section 15, a Judge may issue a warrant for the interception of communications for the detection or prevention of serious offences. “Serious offences” include those that are punishable by death or imprisonment for a term of at least seven years. Accordingly, the bribery offences under PNG law fall within this category. It is uncertain whether other special investigative techniques, such as the use of secret surveillance, video recording, undercover police operations, or controlled deliveries are available. There are also no express provisions on plea negotiations, immunity for co-operating offenders and sentence reduction mechanisms or the use of co-operative informants, and it is not clear whether such tools are used in practice.

International assistance is available in bribery cases. PNG may request mutual legal assistance (MLA) under the Mutual Assistance in Criminal Matters Act 2005 (MACMA). Subject to dual criminality, PNG may also seek extradition for offences for which the maximum penalty is death or imprisonment for a period of not less than 12 months (Section 7 Extradition Act 2005). Bribery offences would thus qualify.¹¹

ENFORCEMENT OF BRIBERY OFFENCES

The PNG Police (Royal Papua New Guinea Constabulary Force) is responsible for criminal bribery investigations. Committal proceedings are undertaken by the Police Prosecution Unit within the RPNGC. Indictments are presented by the Office of the Public Prosecutor.

Statistics on investigations, prosecutions, convictions, and sanctions for passive and active domestic bribery in PNG are not available at the time this Review was conducted.

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

PNG's active and passive domestic bribery offences meet many requirements found in international standards; for example, by covering a wide range of public officials, and third party beneficiaries of bribes. PNG could strengthen its domestic bribery offences by addressing the following issues:

- (a) The overlapping domestic bribery offences in several statutes and within the Code;
- (b) Express language covering all modes of committing active bribery by the "offer, promise or giving" of a bribe to a public official;
- (c) Incomplete offences, such as when a bribe is offered to but not received by an official, or when an official rejects a bribe;
- (d) Bribery through the use of intermediaries;
- (e) Bribery of any unpaid public officials, persons performing a public function, and persons providing a public service. ;

- (f) Bribery in order that an official use his/her position or office, or performs acts or omissions outside the official's competence;
- (g) The definition of giving, accepting etc., a bribe "corruptly"; and
- (h) Whether the definition of a bribe is affected by the value of the bribe, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best-qualified bidder.

Bribery of Foreign Public Officials

To bring its criminal bribery offences in line with international standards, PNG should criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

PNG may hold legal persons liable for bribery; while "person" is undefined within the Code, the IA defines "person" as including legal persons. However, the application of corporate liability for bribery in practice remains unclear. To improve the effectiveness of its regime, PNG could consider whether its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects a wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when persons with the highest level of managerial authority (i) offer, promise or give a bribe to an official; (ii) direct or authorise a lower level person to offer, promise or give a bribe to an official; or (iii) fail to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Jurisdiction for Prosecuting Bribery

PNG has territorial jurisdiction to prosecute domestic bribery. Territorial jurisdiction also applies to offences that only partly take place in PNG. To further strengthen the ambit of its jurisdiction, PNG could consider clarifying the following:

- (a) The application of nationality jurisdiction;
- (b) Jurisdiction for prosecuting legal persons.

Sanctions for Bribery

The sanctions for bribery in PNG are largely commensurate with international standards. To ensure an effective sanctions regime in practice, the PNG could consider addressing:

- (a) The range of fines available against natural persons for bribery;
- (b) The range of fines available against legal persons for active bribery;
- (c) Confiscation against legal persons; and
- (d) Additional administrative sanctions for bribery, such as debarment from public procurement.

Tools for Investigating Bribery

PNG investigators have a range of investigative tools at their disposal, particularly under POCA and the PPCA. To improve its ability to investigate bribery cases, PNG could consider some additional investigative mechanisms:

- (a) Special investigative techniques such as secret surveillance, video recording, listening and bugging devices, undercover police operations, and controlled deliveries;
- (b) The ability to access tax records;
- (c) The use of co-operative offenders, informants and witnesses in bribery cases; and
- (d) Plea bargaining in bribery cases.

Enforcement of Bribery Offences

To properly measure the effectiveness of its criminalisation of bribery, PNG should maintain statistics on investigations, prosecutions, convictions, and sanctions for passive and active domestic bribery.

RELEVANT LAWS AND DOCUMENTATION

All PNG legislation and judicial decisions is available at: www.paclii.org

NOTES

- ¹ These include: Customs Act (1951), s. 154; Excise Act (1954), s. 73; Liquor Licensing Act (1963), s. 115; Public Health Act (1973), s. 12, and; Food Sanitation Act (1991), s. 40.
- ² See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ³ Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Act 1906.
- ⁴ See OECD (1999), *Phase 1 Report: United Kingdom*, Section 1.1.2; U.K. Law Commission (2008), *Reforming Bribery*, para. 2.33; D. Lanham, "Bribery and Corruption", *Essays in Honour of J C Smith* (1987) 92 at p. 104.
- ⁵ The U.K. Law Commission (2008), *Reforming Bribery* (Law Com No. 313); U.K. ministry of Justice (March 2009), *Bribery: Draft Legislation*, Cm 7570; Joint Committee on the Draft Bribery Bill (July 2009), *Report on the Draft Bribery Bill*, HL Paper 115-I/HC 430-1.
- ⁶ See OECD (2006), *Phase 2 Report: New Zealand* at paras. 156-161.
- ⁷ "Valuable consideration" is defined under Section 97E of the Code as including "any real or personal property, money, loan, office, place, employment, agreement to give employment, benefit or advantage whatsoever, commission or rebate, payment in excess of the actual value of the goods or service, deduction or percentage, bonus or discount, forbearance to demand money or money's worth or valuable thing, detriment, loss or responsibility given, suffered or taken, the refraining from carrying out or doing something which lawfully should be carried out or done and the acceptance of any of the foregoing which shall be deemed the receipt of valuable consideration".
- ⁸ U.K. Law Commission Report, *Reforming Bribery* (2008) at para. 6.26.
- ⁹ See U.K. Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ¹⁰ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ¹¹ Subject to additional conditions in an applicable treaty.

Criminalisation of Bribery in Philippines

Revised Penal Code Title VII (Crimes Committed by Public Officers)

Article 203. Who Are Public Officers

For the purpose of applying the provisions of this and the preceding titles of this book, any person who, by direct provision of the law, popular election or appointment by competent authority, shall take part of the performance of public functions in the Government of the Philippine Islands, or shall perform in said Government or in any of its branches public duties as an employee, agent or subordinate official, of any rank or class, shall be deemed to be a public officer.

Article 210. Direct bribery

Any public officer who shall agree to perform an act constituting a crime, in connection with the performance of his official duties, in consideration of any offer, promise, gift or present received by such officer, personally or through the mediation of another, shall suffer the penalty of prision mayor in its medium and maximum periods and a fine [of not less than the value of the gift and] not less than three times the value of the gift in addition to the penalty corresponding to the crime agreed upon, if the same shall have been committed.

If the gift was accepted by the officer in consideration of the execution of an act which does not constitute a crime, and the officer executed said act, he shall suffer the same penalty provided in the preceding paragraph; and if said act shall not have been accomplished, the officer shall suffer the penalties of prision correccional, in its medium period and a fine of not less than twice the value of such gift.

If the object for which the gift was received or promised was to make the public officer refrain from doing something which it was his official duty to do, he shall suffer the penalties of prision correccional in its maximum period and a fine [of not less than the value of the gift and] not less than three times the value of such gift.

In addition to the penalties provided in the preceding paragraphs, the culprit shall suffer the penalty of special temporary disqualification.

The provisions contained in the preceding paragraphs shall be made applicable to assessors, arbitrators, appraisal and claim commissioners, experts or any other persons performing public duties. (As amended by Batas Pambansa Blg.

871, May 29, 1985)

Article 211. Indirect bribery

The penalties of prison correccional in its medium and maximum periods, and public censure shall be imposed upon any public officer who shall accept gifts offered to him by reason of his office.

Article 212. Corruption of public officials

The same penalties imposed upon the officer corrupted, except those of disqualification and suspension, shall be imposed upon any person who shall have made the offers or promises or given the gifts or presents as described in the preceding articles.

INTRODUCTION

The Philippine legal system is based on Spanish and Anglo-American law and thus has both civil and common law influences. The Philippines has been a State Party to UNCAC since 8 November 2006. Its criminal bribery offences were externally reviewed under the UNCAC's Pilot Review Programme. The Philippines has been a member of the APG since 1997.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

The Philippines' general active and passive domestic bribery offences are found in Articles 210-212 of the Revised Penal Code (RPC). Article 210 contains three passive bribery offences. These cover a public officer who receives a bribe to (a) commit a crime, (b) commit an act that is not a crime, and (c) refrain from performing his/her duty. Article 211 deals with a public officer who merely accepts a gift offered to him/her by reason of his/her office. Article 212 creates an offence for a person who offers, promises or gives a bribe to a public officer, i.e. active bribery.

Additional offences may apply to particular cases of bribery. The 1960 Anti-Graft and Corrupt Practices Act (AGCPA) Sections 3 and 4 contain additional offences of corruption that deal with specific situations, e.g. bribery in connection with the issuance of permits or licenses and with a Government contract in which a public officer is required to intervene. Presidential Decree No. 46 of 1972 prohibits the giving of gifts on any occasion to public officials because of the official's position. The offence of plunder in the Plunder Law (Act 7080) may apply to an official who takes a series of bribes. These additional offences may overlap with the general bribery offences in the RPC in many

cases. When overlaps occur, it is unclear how they would be resolved. This report will focus on the RPC offences but will refer to the additional offences if necessary.

International standards generally require coverage of three modes of active domestic bribery, namely offering, giving, and promising a bribe. On its face, RPC Article 212 covers all three. However, Philippine Courts have held that the active bribery offence is complete only if a public officer *accepts* the bribe.¹ If an offer or a promise of a bribe has been made but has not been accepted by the official (*e.g.* because the official rejects or has not received the offer), then the offeror/promisor is only guilty of *attempting* to bribe.²

As for passive domestic bribery, international standards generally demand coverage of solicitation and acceptance of a bribe. RPC Article 210 covers an official who *agrees* to perform an act or omission in consideration of a bribe. In other words, an agreement (offer and acceptance) with the briber is required. Article 210 thus covers two situations (a) an official who accepts an offer of a bribe and thus agrees to perform an act or omission, and (b) an official who solicits a bribe from a person, and the person agrees to pay the bribe. But as with the active bribery offence, an official who solicits a bribe but is rejected is guilty only of attempted passive bribery, not the full offence.

Most of the Philippines's other passive bribery offenses also seem to exclude a *mere* solicitation (*i.e.* one that has not been accepted). For instance, RPC Article 211 punishes a public officer who *accepts* gifts offered to him/her by reason of his/her office. On its face, the provision does not cover who *solicits* gifts. The Plunder Act Section 1(d)(2) covers the "receiving" of a bribe, while the wording in Section 1(d)(4) is "obtaining, receiving or accepting". Neither of these provisions appears to include a *mere* solicitation. By contrast, AGCPA Sections 3(b) and (c) prohibit a public officer from "requesting or receiving" an advantage. Merely requesting (*i.e.* soliciting) an advantage completes the full offence; the request/solicitation need not be accepted.

The treatment of a mere offer/solicitation as only an attempt to commit active/passive bribery is significant. International instruments consider a mere offer/solicitation of a bribe to be full, complete offences, regardless of whether the offer/solicitation is accepted.³ Even if an offer/solicitation is covered by an offence of attempted bribery, it must be subject to effective, proportionate and dissuasive sanctions. To this extent, this aspect of the Philippine bribery offences is a departure from accepted international standards.

International standards also require coverage of a person who uses an intermediary to offer, give, solicit etc. a bribe. RPC Articles 210 and 212

(general active and passive bribery offences) meet this requirement, since they cover bribes offered, accepted etc. “personally or through the mediation of another”. The Philippine authorities indicate that an intermediary can be anyone who acts for and on behalf of another, including a lawyer, employee, agent, accountant, or contractor. It is unclear, however, whether the term “mediation” implies active involvement, and would thus exclude an intermediary who was an unwitting tool.

However, the requirement of an agreement between the briber and the officer could add complications. Bribers often use intermediaries in order to distance him/herself from the crime, and deliberately avoid knowing the details about the specific act of bribery. In some cases, he/she may not even know the identity of the official, let alone the amount of the bribe or act performed by the official as *quid pro quo*. Given this lack of knowledge, one could plausibly argue that there was no meeting of the minds between the principal and the official, and hence no agreement.⁴

The coverage of bribery through intermediaries under other offences is uneven. Several do so satisfactorily by covering bribes given, solicited etc. “directly or indirectly”, e.g. AGCPA Sections 3(b) and (c), Plunder Act Section 1(d)(2) and 1(d)(4), Presidential Decree No. 46 of 2007. However, RPC Article 211 does not contain any language that would cover intermediaries.

International standards also require that bribery offences cover bribes given to a public official for the benefit of a third party, or directly to a third party upon the instructions or agreement of the public official. It is not clear that the RPC bribery offences meet these requirements since they do not include language to this effect. The RPC is different from the offences under AGCPA Sections 3(b) and (c), which expressly cover an officer who requests or receives an advantage “for himself or for another”.

The RPC defines a “public officer” as any person who, by direct provision of the law, popular election or appointment by competent authority, performs (1) public functions of the Philippine Government, (2) public duties as an employee, agent or subordinate official, of any rank or class in the Government or its branches, and (3) assessors, arbitrators, appraisal and claim commissioners, experts, and any other persons performing public duties. Noticeably missing are officials who perform legislative or judicial functions. It is also unclear whether the definition covers persons who perform a public function for a public agency or public enterprise, or provides a public service. The definitions in the AGCPA, Plunder Law and the Presidential Decree No. 46 seem similarly limited. The RPC also does not make clear that it applies to officials of local governments, unlike the AGCPA.

International standards also require broad coverage of acts or omissions in relation to the performance of official duties, including any use of the public official's position or office, and acts or omissions outside the official's competence. The RPC offences expressly cover an official who acts in connection with the performance of his duties, or who refrains from performing his duties. The offences fall short of expressly covering acts or omissions outside an official's competence. However, the Philippine authorities referred to dated U.S. case law for the proposition that the RPC offences cover acts and omissions in excess of the public officer's power, jurisdiction or authority. The only condition is that the act or omission is not so foreign to the official's duties as to lack colour of authority.⁵

The offences in RPC Articles 210 and 212 do not define a bribe, but merely refer to "any offer, promise, gift or present". The Philippine authorities state that the bribe may be money, property, services or anything of value. Referring again to dated U.S. jurisprudence, the Philippine authorities state that a bribe includes reinstatement of an official's friend who had been dismissed.⁶ RPC Article 211 is narrower; it only refers to a "gift".

The Philippine authorities assert that the definition of a bribe is not affected by the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage. No supporting case law was provided. It should be noted, however, that the AGCPA Section 14 provides that "unsolicited gifts or presents of small or insignificant value offered or given as a mere ordinary token of gratitude or friendship according to local customs or usage" do not amount to an offence under that Act. There is no corresponding provision in the RPC.

It is also no defence to bribery under the RPC that an advantage was small and was given to induce officials to perform non-discretionary routine tasks such as issuing licenses or permits, i.e. a small facilitation payment. In addition, the AGCPA Section 3(c) specifically covers bribery in relation to the issuance of Government permits and licenses, while Section 3(j) deals with officials who knowingly issue licenses or permits to unqualified applicants. But as noted above, the AGCPA provides a defence of gifts of small value given in accordance to local customs.

Under the RPC, a briber cannot claim a defence that the official had solicited a bribe from him/her. Relying on U.S. jurisprudence, the Philippine authorities stated that bribery occurs when a person gives an advantage voluntarily. If the person did so because of force or intimidation, he/she has not committed a crime but has been robbed.⁷

The defence of “effective regret” is also available. A bribe-giver may be immune from prosecution for any bribery offences if he/she voluntarily provides information about the offence, and testifies in proceedings against the public official or employee, or against a principal, accomplice or accessory. Several conditions must be met: the information must refer to past acts of bribery; the information and testimony must be necessary for the conviction of the public official; the state does not have the information or testimony; the information or testimony can be corroborated on material points; and the bribe-giver does not have a conviction for a crime involving moral turpitude.⁸ The defence appears to be available even if the bribery has benefited from the bribery transaction (*e.g.* received a government contract).

BRIBERY OF FOREIGN PUBLIC OFFICIALS

It is not an offence to bribe public officials of foreign governments or public international organisations in the conduct of international business. The definition of public officials in the RPC and other statutes refer only to Philippine public officials.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

The Philippines does not have criminal liability against legal persons for bribery or other crimes. According to the Philippine authorities, only natural persons can be held liable criminally because of the “highly personal nature of the criminal responsibility”. A corporation can only act through its officers or incorporators who answer for their own criminal acts.⁹ However, there are no constitutional obstacles to creating corporate criminal liability. Indeed, legal persons may be held liable for money laundering under the Anti-Money Laundering Act.¹⁰

JURISDICTION TO PROSECUTE BRIBERY

The RPC is enforceable “within the Philippine Archipelago” (RPC Article 2). The Philippine authorities add that all bribery offences committed within the Philippine territory may be prosecuted in its courts subject to the rules on venue. What is not clear, however, is the extent of Philippine jurisdiction to prosecute bribery cases that take place *partly* in its territory.

As for extraterritorial jurisdiction, the RPC applies to persons, who “while being public officers or employees, should commit an offence in the exercise of their functions” (RPC Article 2). This arguably could apply to a public official who commits passive bribery while outside Philippine territory. However, there is no corresponding provision for a person who bribes a Philippine official while

outside the country. The RPC does not provide nationality jurisdiction for bribery or other crimes.

SANCTIONS FOR BRIBERY

The available punishment for the RPC bribery offences is shown in the table below. Statistics on the actual sanctions imposed are not available.

Offence	Sentence available	Sentence for an offer/ solicitation not accepted
Articles 210 & 212: Active and passive bribery to commit a crime	Imprisonment from 8 years plus one day to 12 years, and A fine of at least 3 times the value of the bribe	Imprisonment from 6 months plus 1 day to 2 years plus 4 months; and A fine of at least 1.5 times the value of the bribe
Articles 210 & 212: Active and passive bribery to commit a non-criminal act that was in fact carried out	Imprisonment from 2 years, 4 months plus one day to 4 years and 2 months, and A fine of at least twice the value of the bribe	Imprisonment from 4 months plus one day to 6 months, and A fine of at least the value of the bribe
Articles 210 & 212: Active and passive bribery to commit a non-criminal act that was in fact not carried out	Imprisonment from 4 years, two months plus one day to 6 years, and A fine of at least 3 times the value of the bribe	Imprisonment from 6 months plus one day to 2 years and 4 months, and A fine of at least 1.5 times the value of the bribe
Articles 210 & 212: Active and passive bribery to refrain from doing something within the official's duties	Imprisonment from 2 years, four months, plus one day to 4 years and 2 months	Imprisonment from 1 month plus 1 day to 4 months
Articles 211 & 212: Giving and receiving gifts offered by reason of the official's office		

As noted above, a mere offer/solicitation of bribery constitutes attempted active/passive bribery only, not the full bribery offence. Attempt crimes are subject to lower maximum penalties (RPC Articles 51, 61, 71 and 75). The lesser sanctions for a mere offer/solicitation raises two questions. First, as noted above, international instruments consider offering/soliciting a bribe as full offences, just like giving, promising, and accepting a bribe. All are considered to be of equal status and gravity. Second, the maximum punishment in the

Philippines for attempted bribery may be below international standards. For example, bribery to commit a non-criminal act that was in fact not carried out is punishable by only 6 months' imprisonment, while bribery to refrain from doing something within the official's duties is punishable by imprisonment of 2 years and 4 months.

Confiscation is also available. RPC Article 45 provides that every penalty imposed for the commission of a felony (such as bribery) "shall carry with it forfeiture of the proceeds of the crime and the instruments or tools with which it was committed." Forfeiture may also be ordered against public officials under Act No. 1379 on Forfeiture of Property Unlawfully Acquired by a Public Officer. The Philippine authorities indicated that a bribe that is given, offered or promised may be confiscated. They could not confirm, however, whether the proceeds of bribery (i.e. the advantage obtained by a briber) can be confiscated. A court cannot impose a fine in an equivalent amount when confiscation is not possible, *e.g.* when the property has been expended, unlike under the Act 9160 on Money Laundering.

Additional administrative sanctions may be available. Officials convicted under RPC Article 210 are disqualified from holding public office and practising a profession or calling for the duration of the sentence (RPC Article 31). They may also be subject to further administrative and disciplinary sanctions under the Code of Conduct and Ethical Standards. A convicted official is also deprived of all retirement or gratuity benefits (AGCPA Section 13). The Philippine authorities did not indicate whether a convicted individual can be debarred from seeking public procurement contracts.

TOOLS FOR INVESTIGATING BRIBERY

Investigators in corruption cases have access to information and records from banks and other financial institutions. Such records and information are generally subject to absolute confidentiality rules. But in bribery cases, a competent court may order disclosure if (a) a pending case has been filed with the court, (b) the account to be examined is clearly identified, (c) examination is limited to the subject matter of the pending case, (d) the bank personnel and account holder are notified and may attend the inspection, and (e) the examination covers only the account in the pending case.¹¹

These conditions and procedure for obtaining banking records are generally more complex than those found in many other jurisdictions. The requirement that a pending case be already filed with the court would preclude the availability of bank records during the early stages of an investigation. That this could hamper a bribery investigation has been recognised in other

jurisdictions.¹² The requirement to clearly identify a specific account – as opposed to, say, the name of an account holder – can also pose difficulties to an investigation. In addition, restricting the examination to the subject matter and the specific account in the case has the salutary effect of preventing fishing expeditions. However, it could also preclude the disclosure of information relevant to the investigation, such as additional accounts held by the same person at the same bank. The application for a court order and the need to wait for the account holder to attend the examination could engender delay. Not surprisingly, the Philippine authorities indicate that it takes at least 10 days to obtain bank records and information.

Money laundering investigations face similar obstacles. The Anti-Money Laundering Commission (AMLC) may obtain a court order to inquire into or examine any deposit or investment with any bank or financial institution if there are probable cause to believe that the deposit or investment is related to a money laundering offence (Anti-Money Laundering Act Section 11). A recent Supreme Court decision¹³ held that court orders under this section cannot be issued *ex parte* except for certain predicate offences (which does not include bribery). Legislation has been drafted to rectify this situation.¹⁴

Tax information is available under a simpler procedure. Tax records are generally subject to confidentiality, but the Ombudsman may request the tax return of a current or former public official who is under investigation. In the request to the tax authorities, the Ombudsman must specify the name and docket number of the case. If the tax return of a private natural or legal person is also sought, the Ombudsman must explain the relevance or connection to the investigation. Before the document is released, the Office of the Commissioner of Internal Revenue must give its clearance.¹⁵

There nevertheless appears to be limits to this procedure for obtaining tax information. The power of access has only been granted to the Ombudsman as part of its function to check the lifestyles of public officials. Other law enforcement and prosecutorial agencies investigating bribery do not appear to have the same powers. Even for the Ombudsman, only tax returns are available, not other potentially relevant documents, *e.g.* invoices, correspondence, written statements. Furthermore, tax returns are available only when investigating a current or former public official. They may not be available when an investigation targets only a private individual and not a public official, *e.g.* because the public official has deceased.

Some covert investigative techniques are available in bribery cases. The police may conduct undercover operations in the nature of entrapment. Entrapment occurs when an undercover officer catches a criminal committing a

crime,¹⁶ *e.g.* when the undercover officer poses as a private individual and is solicited to pay a bribe by a public official. Entrapment operations have been used in bribery investigations.¹⁷ Secret surveillance through video recording is also available in bribery investigations. Wiretapping, listening and bugging devices are available for investigating certain crimes but not bribery, even if one party to a conversation consents.¹⁸

The only means of freezing bank accounts and other assets during an investigation is under Act 9160 on Money Laundering. The Anti-Money Laundering Council may issue a freezing order if there is probable cause to believe that a deposit or similar account is related to an “unlawful activity”, a term defined to include offences under the AGCPA but not the RPC bribery offences. A freezing order is effective for 15 days, during which the account holder may challenge the order. The freezing order can be extended by court order beyond the initial 15 days.

The Philippines has limited ability to seek international co-operation in bribery investigations. There is no general legislation governing the seeking of mutual legal assistance (MLA). For countries with which the Philippines has an applicable MLA treaty (*e.g.* UNCAC and bilateral MLA), the treaty is applied directly to seek assistance. For countries with which the Philippines has no treaty relations, it is likely that only MLA that does not require judicial intervention is available.¹⁹ Extradition may be even more limited since the Philippines may only grant extradition to treaty partners. Because of the principle of reciprocity, foreign countries may also require a treaty before granting extradition to the Philippines. The Philippines also has even fewer treaty partners for extradition than MLA since it does not accept the UNCAC as a treaty basis for extradition.²⁰

As mentioned above under the defence of “effective regret”, a bribe-giver may be granted immunity from prosecution for bribery if he/she voluntarily provides information about the offence, and testifies in proceedings against the public official or employee, or against a principal, accomplice or accessory. Several conditions must be met. However, the provision of immunity appears to be available only to a bribe-giver, not to a recipient. Hence, in a bribery scheme involving multiple public officials, immunity would not be available to obtain the testimony of one corrupt official against another.

The Revised Rules of Criminal Procedure contain a second means of seeking the testimony of a co-operating offender. When two or more persons are jointly charged with the commission of an offence, the prosecution may apply to the court at the end of its case for one or more of the accused to be discharged with his/her consent. The discharged accused is then to testify on

behalf of the prosecution against other accused in the same trial. A court will discharge the accused only if it is satisfied that his/her testimony is absolutely necessary; there is no other direct evidence available; the testimony of the accused can be substantially corroborated in its material points; the accused does not appear to be the most guilty; and the accused have not been convicted previously of an offence involving “moral turpitude”. It should be noted, however, that this provision is only available at trial, not during an investigation. It also cannot be used to seek the co-operation of individuals who are tried separately from the accused.

Plea bargaining is available in the Philippines, as the provisions on immunity described above would suggest. The Ombudsman Act Section 11(4)(c) also vests prosecutors with this power. In addition, an accused, with the consent of the prosecutor and the “offended party”, may plead guilty to a lesser included offence.²¹ However, this provision provides no guidance on the factors that a prosecutor should consider before consenting. As well, there is no information on whether the prosecution may agree to seek a lighter sentence in return for a plea to the same, reduced or lesser included charges by the accused. Also unclear is whether a court must accept such a plea bargain.

ENFORCEMENT OF BRIBERY OFFENCES

Under the Constitution, the Ombudsman investigates corruption allegations against any public official or employee (except for members of Parliament, the judiciary). When criminal charges are justified in these cases, the Ombudsman also conducts the prosecution.

Limited annual enforcement statistics are available from the Ombudsman’s annual reports and a 2009 APG report.²² The data shows that there are large numbers of complaints and prosecutions annually. But without more detailed data on the number of convictions and the sanctions imposed (including forfeiture), it is difficult to assess the effectiveness of the Philippines’ enforcement efforts.

Corruption Offences*	2003	2004	2005	2006	2007
Complaints Received	N/A	N/A	N/A	8 000	11 651
Criminal Investigations Commenced	5 412	4 645	4 537	N/A	4 332
Criminal Information Filed	1 369	1 211	1 145	515	555
Trials	N/A	N/A	N/A	N/A	171
Convictions	N/A	N/A	N/A	N/A	94

Conviction Rate	N/A	23%	33%	19%	55%
Administrative penalties (reprimand, suspension, dismissal)	N/A	468	454	213	344

* The data is for all criminal corruption offences, not only active and passive bribery.

RECOMMENDATIONS FOR A WAY FORWARD

The Philippines has made significant efforts in criminalising bribery offences. To further enhance compatibility with international standards, the Philippines could consider the following.

Elements of the Active and Passive Domestic Bribery Offences

The Philippines' general bribery offences are found in the RPC Articles 210-212. Some aspects of these offences already meet international standards. To further improve the bribery offences, the Philippines could consider further addressing the following areas:

- (a) Streamlining the bribery offences in different statutes so as to eliminate inconsistent definitions and overlapping applications;
- (b) For the active bribery offence, the coverage of offering to bribe through the offence of attempt and the requirement of proving an acceptance;
- (c) For the passive bribery offence, the requirement of proving an agreement between the briber and the official;
- (d) For bribery through an intermediary, express coverage in all RPC bribery offences; and the effect of requiring proof of an agreement on such cases; and the coverage of bribery through intermediaries who are unwitting tools and do not play an active role;
- (e) Express coverage of bribery in which an advantage is provided to a third party beneficiary;
- (f) Express coverage of bribery of officials who perform legislative or judicial functions, persons who perform a public function for a public agency or public enterprise, and persons who provide a public service;

- (g) Whether a bribe is affected by the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage; as well as the defence of small facilitation payments.

Bribery of Foreign Public Officials

To bring its criminal into line with international standards, the Philippines should enact an offence to criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

The Philippines should consider establishing criminal liability against legal persons for bribery as required under international standards.

Jurisdiction for Prosecuting Bribery

As with other jurisdictions, the Philippines has jurisdiction to prosecute bribery that takes place wholly in its territory. Nevertheless, the Philippines may wish to address the following issues:

- (a) Jurisdiction to prosecute bribery that takes place partly in the Philippines; and
- (b) Jurisdiction to prosecute Philippine nationals (natural and legal persons) for bribery committed outside Philippines territory.

Sanctions for Bribery

With the exception of a mere offer/solicitation of a bribe, the maximum punishment for the RPC bribery offences are generally effective, proportionate and dissuasive under international standards. Further issues that could be addressed include:

- (a) Whether sanctions for a mere offer/solicitation of a bribe is effective, proportionate and dissuasive;
- (b) Confiscation of the proceeds of bribery;

- (c) Imposing a fine equivalent in value when confiscation is not possible;
- (d) Additional administrative sanctions for bribery, such as disbarment from public procurement;
- (e) Maintaining statistics on the actual sanctions imposed in bribery cases; and
- (f) Whether sanctions imposed in practice are effective, proportionate and dissuasive.

Tools for Investigating Bribery

The basic tools for investigating bribery are available in the Philippines, as are some covert investigative techniques. To enhance the ability of law enforcement to investigate bribery, the following matters could be addressed in the context of bribery investigations:

- (a) Simplified procedure for obtaining information and records from banks and financial institutions, including before a case is filed in court;
- (b) Ability of all law enforcement agencies involved in bribery investigations to obtain information from the tax authorities, including but not limited to tax returns;
- (c) Availability of additional covert investigative techniques in bribery investigations, *e.g.* wiretapping, listening and bugging devices;
- (d) Freezing of bank and other accounts in bribery investigations;
- (e) The ability to seek extradition and MLA in bribery cases, including from countries with which the Philippines do not have treaty relations;
- (f) Providing immunity to officials who take bribes in return for their assistance in an investigation or prosecution; and
- (g) Availability of and guidelines on plea bargaining.

Enforcement of Bribery Offences

The available statistics show that the Ombudsman receives a large number of complaints annually, many of which result in prosecutions. To properly assess the effectiveness of the enforcement of bribery offences, the Philippines could consider maintaining more detailed statistics on the investigation, prosecution, conviction and sanctions for bribery offences, including cases handled outside the Ombudsman's office.

RELEVANT LAWS AND DOCUMENTATION

Relevant laws on anti-corruption, including the Revised Penal Code and the Anti-Graft and Corrupt Practices Act, are available from the Office of the Ombudsman: www.ombudsman.gov.ph.

NOTES

- ¹ However, the full offence is complete once a public officer *accepts* the offer of a bribe; there is no need for the officer to actually *receive* the bribe, *e.g.* physically receive the money.
- ² *People v. Quing Lee*, 62 Phil 959; *Pozar v. C.A., et al.*, G.R. 62439, 23 October 1984; *Formilleza v. Sandiganbaya et al.* G.R. 75160, 18 March 1988.
- ³ For example, OECD Convention Article 1 requires Parties to criminalise the offering, giving and promising of a bribe to a foreign official. All three modes of committing the offence have equal status. UNCAC Articles 15 and 16 take the same approach.
- ⁴ The foreign bribery offences of some Parties to the OECD Anti-Bribery Convention also require proof of an agreement ("corruption pact"), *e.g.* France (case law), Italy, Luxembourg, and Turkey. In some cases, one may have to prove that the public official knew that the briber intended to obtain an act or omission in return for an unlawful advantage (see OECD (2006), *Mid-Term Study of Phase 2 Reports*, paras. 102-7; OECD (2007), *Phase 2 Report: Turkey*, paras. 164-5). In Luxembourg, offering a bribe with an aim to conclude a corruption pact is considered an offence. In Italy, concerns about proof of a corruption pact were alleviated by case law (OECD (2004), *Phase 2 Report: Italy*, paras. 121-123).
- ⁵ *Glover v. State*, 109 Ind. 391, 10 NE 282 (1887); *Gunning v. People*, 189 Ill. 165, 59 NE 494, 82 Am. St. Rep. 443 (1901). In the latter case, an individual was not guilty of bribing a tax assessor since the indictment did not allege

- that the property in question was within the assessor's authority (Hall (2005), *General Principles of Criminal Law*, 2nd ed., p. 595).
- 6 *People ex rel Dickinson v. Van De Carr*, 87 App. Div. 386, NYS 41 18 NY Cr. 31 (1903).
- 7 *People v. Francisco*, 45 Phil 819 (1924); *U.S. v. Flores*, 19 Phil. 178; *U.S. v. Sope*, 75 Phil 810.
- 8 Presidential Decree No. 749 of 1975.
- 9 *West Coast Life Ins. Co. v. Vs Hurd*, (1914) 27 Phil 401; *People v. Campos*, C.A., 40 OG Sup. 12.
- 10 See APG (2009), *Mutual Evaluation Report: Philippines*, para. 213.
- 11 Act No. 1405, Section 2, and *Marquez v. Desierto*, G.R. 135882, 27 June 2001.
- 12 For instance, the power to obtain documents, including bank records, through an expedited summary process was recently extended to the early stages of foreign bribery investigations in the U.K. The purpose of the extension was to vest investigators with the ability to seek information necessary to vet a case at its early stage in order to decide whether a more thorough investigation is warranted. See OECD (2008), *Phase 2 bis Report: United Kingdom* at para. 225.
- 13 *AMLC v. Hon. Antonio M. Eugenio*, G.R. No. 174629, 14 February 2008.
- 14 APG (2009), *Mutual Evaluation Report: Philippines*, para. 247.
- 15 Presidential Executive Order 251 of 25 November 2003.
- 16 *People v. Agustin*, 168 SCRA 716.
- 17 For example, in *Pelgrino v. People of the Philippines*, G.R. 136266 13 August 2001.
- 18 Republic Act No. 4200.
- 19 For non-treaty partners, the Philippines can only render MLA that does not require judicial intervention. These non-treaty partners will therefore likely only provide the same type of assistance because of the principle of reciprocity (see ADB/OECD Anti-Corruption Initiative for Asia and the Pacific (2007), *Mutual Legal Assistance, Extradition and Recovery of Proceeds of Corruption in Asia and the Pacific*, p. 253).
- 20 *Ibid.* See also www.unodc.org.
- 21 Revised Rules of Criminal Procedure, Rule 116.
- 22 APG (2009), *Mutual Evaluation Report: Philippines*, para. 80.

Criminalisation of Bribery in Samoa

(From: Pacific Islands Legal Information Institute:
www.paclii.org)

Crimes Ordinance 1961

Section 35 Official Corruption

35. Every one commits the offence of official corruption and is liable to imprisonment for a term not exceeding 5 years who –

- a) Being the holder of any office, whether judicial or otherwise, in the service of the independent State of Western Samoa, corruptly accepts or obtains, or agrees to accept or attempts to obtain, for himself or any other person any bribe – that is to say, any money or valuable consideration whatever – on account of anything done or to be afterwards done by him in his official capacity; or
- b) Corruptly gives or offers to any person holding any such office or to any other person any such bribe as aforesaid on account of any such act.

Police Service Act 1977

Section 35(a) Bribing, etc., Member of Police Service

35. Every person who, not being a member of the Police Service:

- b) Gives or offers or promises to give any member of the Police Service, any bribe, pecuniary or otherwise, or makes any agreement with any member of the Police Service to induce him or her in any way to forgo his or her duty;

Commits an offence and is liable to imprisonment for a term not exceeding 6 months or to a fine not exceeding 2 penalty units.

Legislative Assembly Powers and Privileges Ordinance 1960

Section 19 Influencing Members

19. Any person who offers to the Speaker or to any member or officer of the Assembly any bribe, fee, compensation, reward, or benefit of any kind in order to influence him or her in his or her conduct as such member or officer, or for or in respect of the promotion of or opposition to any bill, motion, matter, or thing submitted or intended to be submitted for the consideration of the Assembly shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding 2 years.

Section 20 Acceptance of Bribes by Members

20. Any member of the Assembly who accepts or agrees to accept or obtains or attempts to obtain for himself or herself, or for any other person, any bribe, fee, compensation, reward, or benefit of any kind for speaking, voting, or acting as such member or for refraining from so speaking, voting, or acting or on account of his or her having so spoken, voted, or acted or having so refrained shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding 2 years.

Excise Tax Domestic Administration Act 1984

Section 54 Bribing, Influencing or Resisting Officer

54. Every person who:

- (a) Corruptly gives or offers or agrees to give any bribe to any officer with intent to influence any officer in respect of any act or omission by the officer in the discharge of his or her duty...

commits an offence and shall be liable on conviction therefor to a fine not exceeding 50 penalty units or to imprisonment for a term not exceeding 5 years, or both.

Section 56 Penalty for Abuse of Authority

56. Every officer who:

- (a) Corruptly accepts or obtains, or agrees or offers to accept, or attempts to obtain any bribe for himself or herself or any other person in respect to any act done or omitted, or to be done or omitted in the discharge of his or her duty...

commits an offence and shall be liable on conviction therefor to imprisonment for a term not exceeding 5 years.

International Criminal Court Act 2007

Section 17 Corruption of Judge etc.-

17. (1) A Judge who, in Samoa or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for themselves or any other person in respect of an act –

- (a) done or omitted to be done by that Judge in the Judge's judicial capacity; or
- (b) to be done or to be omitted to be done by that Judge in the Judge's judicial capacity, shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding 7 years.

(2) A Judge, Registrar, Deputy Registrar, Attorney General, Assistant Attorney General, or the Prosecutor or Deputy Prosecutor who, in Samoa or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for himself or herself or any other person in respect of an act –

- (a) done or omitted to be done by that Judge, Registrar, Deputy Registrar, Attorney General, Assistant Attorney General, or the Prosecutor or Deputy Prosecutor, in the person's official capacity (other than an act or omission to which subsection (1) applies); or
- (b) to be done or to be omitted to be done by that Judge, Registrar, Deputy Registrar, Attorney General, Assistant Attorney General, or the Prosecutor or Deputy Prosecutor in the person's official capacity (other than an act or omission to which subsection (1) applies),

shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding 3 years.

Section 18 Bribery of Judge etc.-

18. (1) Every person who, in Samoa or elsewhere, corruptly gives or offers, or agrees to give, a bribe to any person with intent to influence a Judge in respect of any act or omission by that Judge in the Judge's judicial capacity shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding 3 years.

(2) Every person who, in Samoa or elsewhere, corruptly gives or offers, or agrees to give, a bribe to any person with intent to influence a Judge or the Registrar or the Deputy Registrar, Attorney General, Assistant Attorney General, or the Prosecutor or Deputy Prosecutor or in respect of an act or omission by that Judge, Registrar, Deputy Registrar, Attorney General, Assistant Attorney General, or the Prosecutor or Deputy Prosecutor in the person's official capacity (other than an act or omission to which subsection (1)

applies) shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment to a term not exceeding 3 years.

**Section 19 Corruption and Bribery of Official of
ICC-**

19. (1) An official of the ICC who, in Samoa or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, a bribe for themselves or any other person in respect of an act –

- (a) done or omitted to be done by that officer in the person's official capacity; or
- (b) to be done or to be omitted to be done by that officer in the person's official capacity,

shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding 3 years.

(2) Every person who, in Samoa or elsewhere, corruptly gives or offers, or agrees to give, a bribe to any person with intent to influence an official of the ICC in respect of an act or omission by that officer in the person's official capacity shall be guilty of an offence and shall be liable, on conviction after trial on indictment, to imprisonment for a term not exceeding 3 years.

INTRODUCTION

As of October 2010, Samoa has not signed nor acceded to UNCAC. It has been a member of the APG since 2000. Samoa's legal system is based on English common law with some local customary law. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Samoa's main active and passive domestic bribery offences are found under Section 35 of the Crimes Ordinance 1961 (CO). The active (but not passive) bribery of police officers is covered separately under Section 35(a) of the Police Service Act 1977 (PSA). The active and passive bribery of members of the Legislative Assembly are also covered separately under Sections 19 and 20 of the Legislative Assembly Powers and Privileges Ordinance 1960 (LAPPO). Active and passive bribery offences are also found under Sections 54 and 56 of the Excise Tax (Domestic Administration) 1984 (ETDA) in relation to officers within the Department of Customs, and Sections 17, 18, and 19 of the International Criminal Court Act 2007 (ICCA) in relation to Judges and ICC

officials. This report will focus on the offences under the CO and will refer to other laws where appropriate.

The fact that various laws cover the active and passive bribery of separate and distinct groups of public officials renders unclear the scope of application of the CO. As outlined above, different statutes cover bribery of: police officers (for active bribery under the PSA); members of the Legislative Assembly (under the LAPPO); customs officers (under the ETDA), and; Judges and ICC officials (under the ICCA). Bribery of a particular official may therefore fall under one of these statutes and the CO. While Section 8 of the CO states that “where an act or omission constitutes an offence under this Ordinance and under any other Ordinance, the offender may be prosecuted and punished under this Ordinance or under that other Ordinance”, it provides no guidance on the priority that overlapping offences should take regarding application. This is especially important because, as will be discussed in more depth in following sections, the levels of punishment vary between the laws; for example, active bribery under the LAPPO is punishable by imprisonment for a term not exceeding two years, whereas active bribery under the CO is punishable by imprisonment for a term not exceeding five years. Also, Sections 17(1) and 17(2) of the ICCA both address passive bribery of a judge but carry significantly different levels of punishment (a maximum of seven years imprisonment under the former, and a maximum of three years imprisonment under the latter).

International standards for the criminalisation of active domestic bribery cover the promise, offering and giving of a bribe to a public official. Apart from the active bribery of a police officer under Section 35(a) of the PSA, none of Samoa’s active bribery offences cover all three situations. Section 35(b) of the CO criminalises “everyone who corruptly gives or offers” a bribe. Similar language is also applied under Section 54 of the ETDA and Sections 18 and 19 of the ICCA. The active domestic bribery offences under the CO, ETDA and ICCA therefore do not expressly cover the “promising” of a bribe. In relation to the active bribery of members of the Legislative Assembly, the LAPPO only covers the “offering” of a bribe. It is unclear whether incomplete offences, such as when a bribe is offered but not received by a public official, or when a public official rejects a bribe, are covered by these laws.

Passive domestic bribery offences should cover the acceptance or solicitation of a bribe by a public official. Section 35(a) of the CO deals with passive domestic bribery and criminalises everyone who, being the holder of any office, “corruptly accepts or obtains, or agrees to accept or attempts to obtain” any bribe. Commensurate with international standards, the requesting or soliciting of a bribe is covered by the wording “attempts to obtain”. The same

language is also applied under the passive bribery offences in the LAPPO, ETDA and the ICCA.

International standards for the criminalisation of bribery require coverage of bribery through intermediaries and bribes that benefit third parties. Section 35 of the CO does not expressly cover indirect bribery through the use of intermediaries and it is unclear whether this is covered by the wording “everyone”. The same applies for the bribery provisions within the PSA, LAPPO, ETDA and the ICCA, all of which apply similar language. Case law is also not available to confirm whether bribery through intermediaries is covered. Third party beneficiaries are covered for both active and passive domestic bribery under the CO; Sections 35(a) and 35(b) respectively include bribes taken or given “for any other person”. Sections 17 and 18 of the ICCA also expressly cover bribes taken or given “for any other person” or “for any person” respectively. The bribery provisions within the PSA, LAPPO and ETDA do not expressly cover third party beneficiaries.

Bribery offences generally must cover any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.¹ The bribery offences under the CO cover “holders of any office, whether judicial or otherwise, in the service of the independent State of Western Samoa”. The CO does not further specify which persons are included in this group and it is unclear whether the term “holders of office” limits its ambit based on the seniority of the position, or whether it includes persons employed on a temporary or unpaid basis, and those performing a public function. The definition does not appear to cover employees of state-owned or state-controlled companies and enterprises, or companies receiving state aid. Furthermore, the offences also do not appear to cover officials at the local/“village” level; for example, village chiefs who may exercise public functions, such as “making rules governing the development and use of village land for the betterment of the village”.² It is therefore unclear whether Section 35 of the CO covers the requisite categories of public officials to meet international standards. As active bribery of police officers is addressed separately under the PSA, it is unclear whether police officers would also fall within the ambit of the CO and be considered “holders of office.” If not, passive bribery by police officers would not be addressed under Samoan law.

International standards also require broad coverage of acts or omissions in relation to the performance of official duties for which the bribe is paid. The CO covers bribes taken or given “on account of anything done or to be

afterwards done by him in his official capacity". This provision is limited in that it only covers bribery of public officials in respect of an act or omission by the public official in his/her capacity as an official. Similar language is also applied in the PSA, LAPPO, ETDA and ICCA. The offences therefore do not appear to cover any use of the public official's position or office, nor do they appear to cover a public official who acts outside his/her competence to, for example, influence another public official or a private individual, or to engage in acts such as divulging confidential information or State secrets.

Concerning the requisite mental element, the bribery offences under the CO, ICCA and ETDA require a bribe to be "corruptly" accepted or given. This term is undefined in the laws and there is no Samoan case law available to confirm its interpretation. Other jurisdictions also apply the term "corruptly" in their bribery offences; for example, the term has been used in U.K. criminal statutes on corruption.³ U.K. case authorities interpreting this term are also unclear. Some interpret "corruptly" as "doing an act that the law forbids as tending to corrupt", while others require further proof that the accused acted dishonestly.⁴ Recent reform proposals in the U.K. by the Law Commission, the Government and a Parliamentary Joint Committee, all favour eliminating the concept of "corruptly".⁵ The U.K. Bribery Act 2010 accordingly rejected this concept. For similar reasons, the OECD Working Group on Bribery has also recommended that another country replace the term "corruptly" in its foreign bribery offence with a clearer concept.⁶

To meet international standards, bribery offences should cover bribes of both a pecuniary and non-pecuniary nature. The CO defines a "bribe" as "any money or valuable consideration whatever", whereas the other laws do not expressly define the term "bribe". Pecuniary advantages are covered by the CO definition, and reference to "valuable consideration whatever" should cover non-pecuniary advantages. The term "valuable", however, renders unclear whether the definition of a bribe is affected by its value or results. In contrast, the LAPPO includes in addition to the term "bribe", "fee, compensation, reward or benefit of any kind", which appears sufficiently broad to meet international standards. However, it is unclear whether both definitions are affected by the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best-qualified bidder. Also, as noted above, the application of the term "corruptly" under the CO could theoretically allow for the payment of advantages acceptable or tolerated under local customs to be considered legal.

The bribery offences under the CO, PSA, ETDA, ICCA and LAPPO do not provide for any defences. There are no express defences of small facilitation payments (e.g. payments to officials to induce them to perform non-

discretionary routine tasks such as issuing licenses or permits), solicitation (i.e. no active bribery offence takes place if the official requested the bribe) or “effective regret” (i.e. the individual who offered, promised or gave the bribe reports this fact to the law enforcement authorities before or after the official provides the advantage). However, the application of the term “corruptly” in the bribery offences arguably allows small facilitation payments.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

Except for the narrow provisions within the ICCA, Samoa does not criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business. The offence of “official corruption” under Section 35 of the CO applies to holders of any office “in the service of the Independent State of Western Samoa”. This clearly does not cover officials of foreign governments or public international organisations. The LAPPO, PSA and ETDA are also restricted to the designated domestic public officials. Section 18 of the ICCA constitutes a foreign bribery offence confined to Judges and other officials with the International Criminal Court.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

It appears that legal persons may be held liable for certain forms of bribery in Samoa under the PSA, LAPPO, ETDA and ICCA. It does not appear that liability for legal persons is covered under the CO. While Section 35 of the CO refers to “everyone”, the term is undefined under the Act. Also, the Acts Interpretation Act 1974 (AIA) does not expressly define the term “everyone”. The PSA, LAPPO, ETDA and ICCA apply the terms “any” or “every person”. The ETDA expressly defines “person” as including “a corporation solo, and also a body of persons, whether corporate or unincorporate” (Section 2 ETDA). While the PSA, LAPPO and ICCA do not expressly define the term, the AIA applies the same definition of “person” as the ETDA, which would arguably also apply to the bribery offences within these laws.

Should Samoa be confronted with the issue of liability of legal persons, they may apply U.K. or New Zealand case law, given its common law history. The leading case is the U.K. House of Lords decision in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153. Under *Tesco*, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company’s “directing mind and will”.⁷ This principle is commonly known as the “identification” doctrine.

The limits of the identification doctrine in cases of complex corporate crimes such as bribery is now well-documented. Prosecutors, law enforcement officials, and academics in the U.K. have denounced the *Tesco* regime as ineffective and unsatisfactory for bribery offences. The problem is at least three-fold. First, the identification theory requires guilty intent be attributed to a very senior person in the company. Liability is unlikely to arise when bribery is committed by a regional manager or even relatively senior management, let alone a salesperson or agent, even if the company benefitted from the crime. Second, there is also no liability even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, the identification theory requires the requisite criminal intent to be found in a single person with the directing mind and will; aggregating the states of mind of several persons in the company will not suffice. This ignores the realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.⁸

An effective regime of liability of legal persons for bribery must address these limitations. The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.⁹ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

Section 3(2) of the CO states that the “Ordinance applies to any act or omission or event which occurs in Samoa or any other place”. It therefore appears that Samoa can exercise universal jurisdiction for all offences within

the CO. For the bribery offences under the ICCA, Samoa can exercise nationality, territorial and extra-territorial jurisdiction on the basis of the passive personality principle (Section 24 ICCA). The extension of jurisdiction to legal persons is unclear.

SANCTIONS FOR BRIBERY

The table below sets out the sanctions for the bribery offences under the CO, PSA, ETDA, LAPPO and ICCA.

Offence	Sanction
Active and passive bribery under the CO (Section 35)	Imprisonment for a term not exceeding five years.
Active bribery under the PSA (Section 35 a)	Imprisonment for a term not exceeding six months or to a fine not exceeding two penalty units (approximately WSR 200 or USD 80 or EUR 500).
Active bribery under the ETDA (Section 54)	Imprisonment for a term not exceeding five years, and/or a fine not exceeding fifty penalty units (approximately WST 5 000 or USD 2 000 or EUR 1 300).
Passive bribery under the ETDA (Section 56)	Imprisonment for a term not exceeding five years.
Active and passive bribery under the LAPPO (Sections 19 and 20)	Imprisonment for a term not exceeding two years.
Passive bribery of a Judge under the ICCA (Section 17(1))	Imprisonment for a term not exceeding seven years.
Passive bribery of a Judge, Registrar, Deputy Registrar, Attorney General, Prosecutor or Deputy Prosecutor under the ICCA (Section 17(2))	Imprisonment for a term not exceeding three years.
Active bribery of a Judge under the ICCA (Section 18(1))	Imprisonment for a term not exceeding three years.
Active bribery of a Judge, Registrar, Deputy Registrar, Attorney General, Prosecutor or Deputy Prosecutor under the ICCA (Section 18(2))	Imprisonment for a term not exceeding three years.
Passive bribery of an ICC official under the ICCA (Section 19(1))	Imprisonment for a term not exceeding three years.

Offence	Sanction
Active bribery of an ICC official under the ICCA (Section 19(2))	Imprisonment for a term not exceeding three years.

As mentioned in para. 3, the overlapping bribery offences in Samoa carry varying levels of punishment, and it is unclear which provision would apply under what circumstances. For example, certain active and passive bribery offences could fall under both the LAPPO and the CO; however, the punishment under the CO is imprisonment for a term not exceeding five years and under the LAPPO, imprisonment for a term not exceeding two years. The length of imprisonment under the latter would also be insufficient to meet international standards, as would the length of imprisonment for active bribery under the PSA, which carries a maximum of six months imprisonment. Furthermore, Sections 17(1) and 17(2) of the ICCA both address passive bribery of a judge but carry significantly different levels of punishment (a maximum of seven years imprisonment under the former, and a maximum of three years imprisonment under the latter). It is also unclear whether administrative sanctions, such as debarment from seeking public procurement contracts, may be imposed in Samoa.

The Proceeds of Crime Act 2007 (POCA) provides for conviction-based confiscation of proceeds of bribery. Section 6 defines “proceeds” as “property wholly or partly derived or realised, whether directly or indirectly, from a serious offence”. This includes (a) property into which any property derived or realised from the offence is later successively converted, transformed or intermingled; (b) income, capital or other economic gains derived or realised from that property at any time since the offence; (c) property wholly or partly derived from a disposal or other dealing with proceeds of the serious offence or wholly or partly acquired using proceeds of the serious offence, including because of a previous application of this section, and; (d) property that is proceeds of crime and has been credited to an account or disposed of or otherwise dealt with. A “serious offence” means an offence against any law of Samoa that would constitute unlawful activity or against the law of a foreign State, subject to dual criminality.

Payment in lieu of forfeiture is also provided for under the POCA; Section 24 states that “where the Court is satisfied that a forfeiture order should be made against the property of a person, but that the property cannot be made subject to such an order... the Court may order the person to pay the State an amount equal to the value of the property.” The POCA also provides for the imposition of pecuniary penalty orders to confiscate any benefits (property or any advantages) derived from the commission of an offence (Sections 28 to 36).

Confiscation against legal persons is possible; the POCA defines “person” as meaning “any entity, natural or juridical, including, amongst others, a corporation, partnership, trust or estate, joint stock company, association, syndicate, joint venture or other unincorporated organisation or group, capable of acquiring rights or entering into obligations”. Accordingly, confiscation could be applied against legal persons for offences within the PSA, LAPPO, ETDA and ICCA. As the CO does not apply to legal persons, confiscation for offences committed under the CO is not available.

Statistics on sanctions that have actually been imposed (including confiscation) are not available.

TOOLS FOR INVESTIGATING BRIBERY

The Criminal Procedure Act 1972 (CPA) provides limited investigative tools for bribery cases. Section 83 provides for general search and seizure powers in respect to an offence, including evidence of an offence and anything that is intended to be used to commit an offence.

The POCA provides a wider range of investigative tools, which are not confined to only money laundering cases. Under Section 37, a Judge or Registrar may issue a warrant to search and seize “tainted property” and evidential material relating to a serious offence. “Tainted property” means proceeds of crime or an instrument, whether the property is situated within or outside Samoa. Section 66 provides for production orders against persons suspected of having possession or control of property tracking documents. However, this is limited to where a person “has been convicted of, charged with, or about to be charged with, a serious offence” and therefore does not appear to be available during the early stages of an investigation. Under Section 74 of the POCA, a court may also issue a monitoring order requiring financial institutions to provide information about transactions conducted during a particular period through an account held by a particular person. Bank secrecy is not grounds for refusal of a production order under Section 66(6)(b). The ability to access tax records is uncertain, as well as the application of any tax secrecy laws.

The POCA also allows for the freezing of property. A court may issue a restraining order over “realisable property” held by a defendant or by a person other than the defendant (POCA Section 46). “Realisable property” includes any property held by a person who has been convicted or charged with a serious offence; property held by a person to whom a person is convicted or charged has directly or indirectly made a gift, and; property under the effective

control of the person convicted or charged with a serious offence. It therefore does not appear possible to obtain a pre-charge freezing order.

Certain special investigative techniques are provided under the Police Powers Act 2007 (PPA); Section 3 provides for surveillance and wiretapping. However, these investigative techniques appear to be limited to investigations of organised crime under Section 3A. It is also uncertain whether investigators can engage in other forms of covert operations, such as “sting operations”, where members of law enforcement offer the suspect an opportunity to commit a crime in order to gather evidence, or the use of “controlled deliveries”, in which a pre-arranged delivery of money is delivered to the suspect in a monitored setting in order to identify the persons involved in the commission of an offence. There are also no express provisions on plea negotiations, immunity and sentence reduction mechanisms or the use of co-operative informants, and it is not clear whether such tools are used in practice.

International assistance is available in bribery cases. Under the Mutual Assistance in Criminal Matters Act (MACMA), Samoa may seek mutual legal assistance (MLA) in relation to a “serious offence”, which includes bribery. Under POCA, MLA is also available for the proceeds of corruption. Extradition is available under the Extradition Act (EA) for offences punishable by at least 12 months’ imprisonment or death, and subject to dual criminality. The bribery offences under the CO, ETDA, LAPPO and ICCA thus qualify.¹⁰

ENFORCEMENT OF BRIBERY OFFENCES

The Police Service of Samoa is responsible for criminal bribery investigations, while the Attorney General has conduct of bribery prosecutions.

Statistics on investigations, prosecutions, convictions, and sanctions for passive and active domestic bribery in Samoa are not available.

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

Samoa’s active and passive domestic bribery offences meet many requirements found in international standards; for example, they cover all modes of committing passive domestic bribery and include third party beneficiaries. However, to further strengthen its bribery offences, Samoa may wish to address the following issues:

- (a) Address the lack of clarity arising from the overlapping offences;

- (b) Express language covering all three modes of committing active bribery (offering, promising and giving) under the CO, LAPPO, ETDA, and ICCA;
- (c) Incomplete offences, such as when a bribe is offered but not received by a public official, or when a public official rejects a bribe;
- (d) Clearer language covering bribery of any person performing a public function, including for a public agency or public enterprise, or provides a public service;
- (e) Bribery in order that an official use his/her position or office, or performs acts or omissions outside his/her authorised competence;
- (f) Express language covering additional forms of committing bribery, such as through intermediaries;
- (g) The definition of “corruptly” giving or accepting a bribe;
- (h) Whether the definition of a bribe is affected by the value of the bribe, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder.

Bribery of Foreign Public Officials

To bring its criminal bribery offences in line with international standards, Samoa should criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Samoa appears to hold corporations criminally liable for bribery under the LAPPO, ETDA, PSA and ICCA. However, to further strengthen its liability of legal persons regime for bribery, Samoa could consider:

- (a) Liability of legal persons for all forms of bribery;
- (b) The same test for liability of legal persons be applied to all forms of bribery, and consider whether its system for imposing corporate liability takes one of two approaches:

- (i) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects a wide variety of decision-making systems in legal persons.
- (ii) Alternatively, liability is triggered when persons with the highest level of managerial authority (1) offer, promise or give a bribe to an official; (2) direct or authorise a lower level person to offer, promise or give a bribe to an official; or (3) fail to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Jurisdiction for Prosecuting Bribery

It appears that Samoa broadly has universal jurisdiction to prosecute the bribery offences under the CO. Samoa may wish to consider the application of territorial and nationality jurisdiction to legal persons to further strengthen the ambit of its jurisdiction.

Sanctions for Bribery

The maximum available punishment against natural persons for bribery offences in Samoa is largely in line with international standards. Samoa also importantly provides for confiscation, including confiscation against legal persons. To further strengthen its sanctions regime for bribery, Samoa could consider addressing:

- (a) The range of fines available against legal persons for active bribery;
- (b) Additional administrative sanctions for bribery, such as debarment from public procurement.

Tools for Investigating Bribery

Samoa has a range of investigative tools available for the investigation of bribery under the CO, POCA and PPA. However, Samoa could further improve its ability to investigate bribery cases by addressing the following issues

- (a) The availability of pre-charge freezing orders;

- (b) The ability to engage in covert operations such as “sting” operations or the use of “controlled deliveries”;
- (c) The ability to search tax records and the application of any tax secrecy laws;
- (d) The availability of, and formalising in writing, practices such as plea negotiations with a defendant, reliance on co-operative informants or witnesses, and granting immunity from prosecution to persons who co-operate in corruption investigations or prosecutions.

Enforcement of Bribery Offences

To properly measure the effectiveness of its criminalisation of bribery, Samoa should maintain statistics on investigations, prosecutions, convictions, and sanctions for passive and active domestic bribery.

RELEVANT LAWS AND DOCUMENTATION

All Samoan legislation is available at: www.paclii.org

NOTES

- ¹ See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ² See: AusAID (2008), *Making Land Work*, Chapter 10: Resolving Land Disputes in Samoa, AusAID, 2008, at p. 206, *available at*: www.ausaid.gov.au/publications/pdf/MLW_VolumeTwo_CaseStudy_10.pdf
- ³ Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Act 1906.
- ⁴ See OECD (1999), *Phase 1 Report: United Kingdom*, Section 1.1.2; UK Law Commission (2008), *Reforming Bribery*, para. 2.33; D. Lanham, “Bribery and Corruption”, *Essays in Honour of J C Smith* (1987) 92 at p. 104.
- ⁵ The UK Law Commission (2008), *Reforming Bribery* (Law Com No. 313); UK Ministry of Justice (March 2009), *Bribery: Draft Legislation*, Cm 7570; Joint Committee on the Draft Bribery Bill (July 2009), *Report on the Draft Bribery Bill*, HL Paper 115-I / HC 430-1.
- ⁶ See OECD (2006), *Phase 2 Report: New Zealand* at paras. 156-161.
- ⁷ UK Law Commission Report, *Reforming Bribery* (2008) at para. 6.26.

- ⁸ See UK Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ⁹ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ¹⁰ Subject to additional conditions in an applicable treaty.

Criminalisation of Bribery in Singapore

**Prevention of Corruption Act
(From Singapore Statutes Online –
statutes.agc.gov.sg)**

Section 5 (Punishment for corruption)

Any person who shall by himself or by or in conjunction with any other person

—

(a) corruptly solicit or receive, or agree to receive for himself, or for any other person; or

(b) corruptly give, promise or offer to any person whether for the benefit of that person or of another person,

any gratification as an inducement to or reward for, or otherwise on account of

—

(i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed; or

(ii) any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body is concerned,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 5 years or to both.

**Section 6 (Punishment for corrupt transactions
with agents)**

If -

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;

(b) any person corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or

forbearing to do, or for having done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

[...]

he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding SGD 100 000 or to imprisonment for a term not exceeding 5 years or to both.

Section 12 (Bribery of member of public body)

A person —

(a) who offers any gratification to any member of a public body as an inducement or reward for —

(i) the member's voting or abstaining from voting at any meeting of the public body in favour of or against any measure, resolution or question submitted to that public body;

(ii) the member's performing, or abstaining from performing, or his aid in procuring, expediting, delaying, hindering or preventing the performance of, any official act; or

(iii) the member's aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or

(b) who, being a member of a public body, solicits or accepts any gratification as an inducement or a reward for any such act, or any such abstaining, as is referred to in paragraph (a) (i), (ii) and (iii),

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding SGD 100 000 or to imprisonment for a term not exceeding 7 years or to both.

Penal Code

Section 161 (Public servant taking a gratification, other than legal remuneration, in respect of an official act)

Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Government, or with any Member of Parliament or the Cabinet, or with any public servant, as such, shall be punished with imprisonment for a term which may extend to 3 years, or with fine, or with both.

Section 165 (Public servant obtaining any valuable thing, without consideration, from person concerned in any proceeding or business transacted by such public servant)

Whoever, being a public servant, accepts or obtains, or agrees to accept or attempts to obtain, for himself or for any other person, any valuable thing, without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceedings or business transacted, or about to be transacted, by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with both.

Section 109 (Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment)

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

INTRODUCTION

Singapore ratified the UNCAC in November 2009. It has been a member of the FATF and APG since 1992 and 1997 respectively. The Singaporean

criminal legal system is based primarily on statute and case law interpreting the statute. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Singapore's main domestic bribery offences are found in Sections 5 and 6 of the Prevention of Corruption Act (PCA). Bribery may also be covered by other offences. PCA Section 10 covers corruption relating to tenders, while Sections 11 and 12 deal with bribery of Members of Parliament (MPs) and public bodies respectively. The Penal Code also deals with passive bribery in Sections 161 to 165.¹ Customs Act Section 138 covers active and passive bribery of customs officials. This report focuses on the main domestic bribery offences in PCA Sections 5, 6 and 12, and PC Sections 161 and 165, but will touch upon the other corruption offences where appropriate.

International standards require active bribery offences to expressly cover giving, promising and offering a bribe. According to Singaporean authorities, PCA Sections 5(b) and 6(b) deal with active domestic bribery. PCA Section 5(b) covers a person who “gives, promises or offers” a benefit. Section 6(b) uses different language, covering a person who “gives or agrees to give or offers” a “gratification”. On its face, “promising” a bribe is missing. PCA Sections 11 (bribery of an MP) and 12 (bribery of members of public bodies) are narrower, covering only “offering” a gratification. However, the definition of “gratification” in PCA Section 2(e) states that a “gratification” includes “any offer, undertaking or promise of any ‘gratification’”. The PCA offences therefore cover all three modes of committing active bribery.

Passive bribery is mainly dealt with by PCA Sections 5(a) and 6(a), though additional provisions may apply. As mentioned above, PCA Sections 10 to 12 deal with passive bribery relating to tenders, MPs and members of public bodies. PC Section 161 covers a public servant who accepts or obtains gratification as a motive or reward for a certain act of the recipient official. This act, however, does not in fact have to be performed; it is sufficient if the official represents that the act has been or will be performed.

Section 165 may also apply to passive bribery under certain circumstances. It covers a public servant who accepts, obtains etc. any valuable thing without consideration or for inadequate consideration from a person concerned in any proceeding or business transacted by the public servant. Mere acceptance of the valuable thing suffices; there is no further requirement that the thing was a motive or reward for the recipient official's acts. Section 165 is thus broader than Section 161 in this regard. But from another perspective, it

is narrower as it only applies to bribers who have proceedings or business involving the bribed official, or a connection with the official's functions. There is no such limitation to Section 161.

International standards require passive bribery offences to cover "accepting" and "soliciting" a bribe. PCA Section 5(a) covers "solicit" and "receive". PCA Sections 6(a) as well as PC Sections 161 and 165 contain the words "accept or obtains, agrees to accept, or attempts to obtain", as do the offences relating to customs officers. Soliciting is not expressly covered, but may be considered an attempt to obtain. PCA Sections 11 and 12(b) use the words "solicit or accept".

International standards require coverage of bribery through intermediaries. PCA Section 5 deals with intermediaries by expressly covering a person who by him/herself "or by or in conjunction with any other person" gives, offers or promises an official a bribe. Singapore's other bribery offences do not contain similar language. However, according to the Singaporean authorities, these other offences also cover intermediaries, since they do not expressly require a briber to give an undue advantage directly to an official. Singaporean authorities add that intermediaries (as opposed to the briber) can also be prosecuted under PC Section 165 and PCA Section 29 (abetting an offence under the PCA).

Regarding bribes given to third party beneficiaries, PCA Sections 5 and 6(a), and PC Sections 161 and 165 expressly refer to officials who accept, obtain etc. a bribe "for himself or for any other person". PCA Sections 6(b), 11 and 12, however, do not contain comparable language. These offences nevertheless cover third party beneficiaries, according to the Singaporean authorities.

International standards require bribery offences to cover a broad range of public officials, namely any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a "public official" under domestic law.²

Singapore's bribery offences meet international standards on the definition of public official, according to Singaporean authorities. PCA Section 5 covers giving, promising or offering any gratification to "any person" and is not limited to public officials. PCA Section 6 covers bribery of "agents", which is defined as "any person employed by or acting for another, and includes a

trustee, administrator and executor, and a person serving the Government or under any corporation or public body” (PCA Section 2). “Government” is defined not in the PCA but in the PC as “any person lawfully performing executive functions of the Government under any law”. Singaporean authorities state that this definition of “agent” includes persons performing judicial functions, as well as persons who perform a public function in a public enterprise outside the realm of public health, utility, and revenue administration. As noted above, bribery of MPs is covered separately in PCA Section 11.

The PC takes a rather different approach by listing a series of relatively narrow functions performed by officials. Section 21 defines a “public servant” by enumerating several specific categories of officials. These include military officers; judges, jurors, arbitrators, and other persons empowered by law to perform adjudicative functions; court officers charged with certain duties, such as investigations; officials responsible for preventing offences, bringing offenders to justice, or protecting public health, safety and convenience; officials dealing with the Government’s pecuniary interests, property, contracts, or revenue; and members of the Public and Legal Service Commissions. The definition does not mention military personnel below the rank of officer and persons working for public agencies and public enterprises. According to the Singaporean authorities, if a public official who has committed bribery falls outside the definition of “public servant” in the PC, he/she would be prosecuted under the PCA.

International standards for the criminalisation of bribery also require broad coverage of acts or omissions in relation to the performance of official duties. This includes any use of the public official’s position or office, and acts or omissions outside the official’s scope of competence. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official or private individual award a contract to that company.³

The Singaporean authorities state that Singapore’s bribery offences meet this international standard. PCA Section 6 covers an agent/official who acts “in relation to his principal’s affairs or business”, but this does not limit the offence to acts within the official’s competence, according to the Singaporean authorities. In addition, PCA Section 5 covers situations where the official uses his/her position that is not in relation to his principal’s affairs or business. As for the PC, if there are shortcomings in Sections 161 and 165, then the case would be prosecuted under the PCA, according to Singaporean authorities.

International standards require coverage of bribes of both a monetary and non-monetary nature. The PC and PCA offences refer to giving, offering etc. a “gratification”. The PC states that this term “is not restricted to pecuniary gratifications, or to gratifications estimable in money”.⁴ The PCA contains a lengthy definition of “gratification” that includes both monetary and non-monetary things, such as employment, office, service or favour. Both statutes therefore cover non-monetary bribes. Unlike these provisions, PC Section 165 deals the giving etc. of “any valuable thing”; it thus appears to cover only things of value and not all non-monetary benefits.

International standards also require that the definition of “gratification” not be affected by its value, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best qualified bidder. The PC and the PCA do not expressly address these factors. PCA Section 23 does provide, however, that evidence showing that any gratification is customary in a profession, trade, vocation or calling is inadmissible in court proceedings. Singaporean authorities add that there have been no cases in which a court has allowed corrupt dealings because they were necessitated in the course of business or by a particular situation. Regarding the best-qualified bidder, the Singaporean authorities referred to PCA Section 9(2). Under that provision, when a person is charged with corruption of agents under PCA Section 6, and it is proved that he/she gave, offered etc. a gratification to an agent as an inducement or reward for doing an act etc., then he/she is guilty even if the agent had no power, right or opportunity or that the act, favour or disfavour was not in relation to his/her principal’s affairs or business.

Unlike the PC, the PCA Section 6 offence requires a gratification to be given, offered etc. “corruptly”. The same term has been used in U.K. criminal statutes on corruption.⁵ U.K. case authorities interpreting this term are unclear and in “impressive disarray”. Some interpreted “corruptly” to mean “doing an act that the law forbids as tending to corrupt”, while others required further proof that the accused acted dishonestly.⁶ Recent reform proposals in the U.K. by the Law Commission, the Government and a Parliamentary Joint Committee all favour eliminating the concept of “corruptly”.⁷ The U.K. Bribery Act 2010 rejected the concept accordingly. For similar reasons, the OECD Working Group on Bribery has also recommended that another country replace the term “corruptly” in its foreign bribery offence with a clearer concept.⁸

The Singaporean authorities state that there are no such problems with term “corruptly” in Singapore. Singaporean courts have held that “corruptly” requires there to be a “corrupt element” in the transaction and a “corrupt intention” on the part of the person giving or receiving the gratification.

Singaporean courts scrutinise the facts of each case to decide whether a gratification is given or received “corruptly”.⁹

The PC and PCA do not contain some defences to domestic bribery that are often found in other jurisdictions. There are no defences of solicitation, small facilitation payments (i.e. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits), or “effective regret” (i.e. an offender who voluntarily reports his/her crime to the authorities).

Another issue is whether the PCA Section 6 offence contains an implicit “principal consent” defence. Under the general principles of the law of agency, the informed consent of the principal to the agent’s actions is a defence to the agent’s liability for breach of trust. In the U.K., where a similar offence of bribery of agents was in force until 2010, some officials and prosecutors opined that a principal’s consent to the acceptance of a bribe by an agent was a defence.¹⁰ International standards, however, do not permit such a defence. The PCA Section 6 offence does not provide a “principal consent” defence, according to Singaporean authorities.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

International standards require coverage of bribery of foreign public officials in international business transactions. The definition of foreign public officials, similar to domestic bribery, should include any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law. In addition, the definition must also cover officials of public international organisations.¹¹

The Singaporean authorities state that foreign bribery is criminalised in Singapore not by a specific offence but by PCA Sections 6 and 37. PCA Section 6 deals with the corruption of agents. As noted above, the definition of agents does not specifically cover public officials but, according to Singapore, is sufficiently broad to do so. PCA Section 37 deals with nationality jurisdiction. The provision states that the provisions of the PCA “have effect, in relation to citizens of Singapore, outside as well as within Singapore; and where an offence under this Act is committed by a citizen of Singapore in any place outside Singapore, he may be dealt with in respect of that offence as if it had been committed within Singapore.” Since this provision applies only to Singaporean citizens, it is unclear whether it would be an offence under PCA

Sections 6 and 37 for a non-Singaporean national residing in Singapore to bribe a foreign public official while outside Singapore.

The Singaporean authorities state that the PCA foreign bribery offence does not contain the same limitations as a similar offence in the U.K. The U.K. Prevention of Corruption Act 1906 contains an offence similar to PCA Section 6 that – until 2002 - also did not refer to foreign agents or foreign public officials. Despite initial assertions to the contrary, U.K. officials ultimately acknowledged that the pre-2002 legislation may not cover foreign bribery. The statute was eventually amended in 2002 to add express references to foreign public officials.¹²

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Singapore can impose criminal liability against legal persons for bribery. The PCA and PC bribery offences apply to any “person”, which includes any company, association or body of persons, whether incorporated or not (Interpretation Acts, Section 2 and PC Section 11). The Singaporean authorities state that companies have been charged and convicted for corruption. They did not provide details of these convictions or elaborate whether these cases involved bribery of public officials or private-sector corruption. There was no information on the legal rules and principles that determine when liability arises, or when and how a crime of bribery is attributed to a legal person.

JURISDICTION TO PROSECUTE BRIBERY

Singapore has territorial jurisdiction to prosecute bribery. PC Section 2 states that “every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he is guilty within Singapore.” The PCA does not contain a comparable provision, but presumably PC Section 2 applies to the Act. There is no information on the jurisdiction to prosecute offences that take place partly in Singapore.

Singapore also has nationality jurisdiction to prosecute bribery. As noted above, Singaporean citizens may be prosecuted for offences in the PCA that are committed outside Singapore (PCA Section 37). The PC takes a different approach, providing jurisdiction to prosecute only “public servants” who are citizens or permanent residents for offences committed abroad. Neither the PCA nor the PC requires dual criminality, i.e. the act or omission subject to prosecution need not be an offence at the place where it occurred.

Singapore does not appear to have nationality jurisdiction to prosecute legal persons for bribery. The extraterritorial jurisdiction provisions under the PCA and PC only apply to “citizens” and “permanent residents”, and hence only natural persons.

SANCTIONS FOR BRIBERY

The following table summarises the maximum available sanctions for the bribery offences in the PCA, PC and the statutes that deal with bribery of specific types officials.

Offence	Maximum sentence available
PCA Offences	
Active and passive bribery (PCA Sections 5 and 6)	<ul style="list-style-type: none"> • Imprisonment of five years and/or a fine of SGD 100 000 (approx. EUR 50 000 or USD 72 000) • Imprisonment of seven years and/or a fine of SGD 100 000 (approx. EUR 50 000 or USD 72 000) if the transaction in relation to which the offence was committed was a contract or a contract proposal with the Government (PCA Section 7)
Corruptly procuring withdrawal of tenders, bribery of MPs or members of a public body (PCA Sections 10-12)	Imprisonment of seven years and/or a fine of SGD 100 000 (approx. EUR 50 000 or USD 72 000)
Active bribery committed by legal persons (PCA Sections 5-6 and 10-12)	A fine of SGD 100 000 (approx. EUR 50 000 or USD 72 000)
PC Section 161 - Taking gratification in respect of an official act	
Passive domestic bribery (PC Section 161)	Imprisonment of three years and/or an unlimited fine
Active domestic bribery / abetment – Official accepts bribe (PC Sections 107 and 109)	
Active domestic bribery / abetment – Official refuses bribe (PC Sections 107 and 116)	

Offence	Maximum sentence available
PC Section 165 – Obtaining valuable thing without adequate consideration	
Passive domestic bribery (PC Section 165)	Imprisonment of two years and/or an unlimited fine
Active domestic bribery / abetment – Official accepts bribe (PC Sections 107 and 109)	
Active domestic bribery / abetment – Official refuses bribe (PC Sections 107 and 116)	Imprisonment of six months and/or an unlimited fine
Statutes covering bribery of specific officials	
Customs Act, Section 138	Imprisonment of three years and/or a fine of SGD 5 000 (approx. EUR 2 500 or USD 3 600)

Multiple offences could apply to the same case. For instance, a case of bribery of a customs officer could be covered by the Customs Act, the two PC offences, and PCA Section 6. The Interpretation Act Section 40 provides that where any act or omission constitutes an offence under two or more written laws, the offender shall, unless a contrary intention appears, be liable to be prosecuted and punished under any one of those written laws but shall not be liable to be punished twice for the same offence. However, the different bribery offences provide significantly different maximum punishments. The question therefore remains whether an offender is entitled to the benefit of the offence with more lenient punishment. The Singaporean authorities state that the prosecutor has discretion to proceed with any applicable charges regardless of the prescribed maximum punishment.

The PCA allows confiscation against a bribed official. Under PCA Section 13, where a court convicts a person for accepting a gratification, it shall impose a financial penalty equivalent to the monetary value of the gratification. PCA Section 14 further allows a principal (*e.g.* the Government) to commence civil proceedings to recover the value of the gratification, even if the agent/official has not been convicted.

Confiscation of an instrumentality of an offence is also available under the CPC Section 386. A court may confiscate any property “regarding which any offence is or was alleged to have been committed or which appears to have been used for the commission of any offence”. A conviction is not required.

Confiscation may cover property originally in the possession or control of a property, as well as any property into or for which it has been converted or exchanged, and anything acquired by such conversion or exchange.

Additional confiscation is available under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefit) Act (CDSA). Under CDSA Section 5, where a person is convicted of one or more “serious offences”, and the court is satisfied that the person derived benefits from criminal conduct, then the court shall confiscate the benefits on the application of the Public Prosecutor. “Serious offences” includes the PCA and PC bribery offences but not the bribery offences in the Customs Act. Abetting an offence of PC Section 161 or 165 is also not listed as a serious offence, and hence the application of CDSA Section 5 to active bribery under the PC is unclear.

When CDSA Section 5 is applicable, confiscation may go beyond the proceeds of the offence of which a person has been convicted. A court shall confiscate the “benefits derived from criminal conduct”, which is defined as “any property or interest therein [...] held by the person *at any time*, being property or interest therein disproportionate to his known sources of income, and the holding of which cannot be explained to the satisfaction of the court” (CDSA Sections 5(6) and 8(1)). An explanation by the person that property was derived from criminal conduct is not admissible (CDSA Sections 5(8) and 9(6)). If the convicted person acquires additional property after the court has ordered confiscation, the court may increase the confiscation order by that amount (CDSA Section 10(6)). Finally, confiscation under the CDSA is additional to the punishment that a person receives for committing bribery (CDSA Section 5(3)).

Regarding administrative sanctions, the Singaporean authorities state that there are administrative measures to debar persons convicted of corruption from seeking government procurement contracts or from holding office. Singapore also states that Article 45 of the Constitution provides that a person may not be a Member of Parliament if he/she has been convicted of an offence and sentenced to imprisonment for not less than one year or to a fine of not less than SGD 2 000 and has not received a free pardon.

TOOLS FOR INVESTIGATING BRIBERY

The PCA contains special provisions for obtaining documents and information from banks and financial institutions. If the Public Prosecutor is satisfied that there are reasonable grounds to suspect that an offence under the PCA has been committed, he/she may order production of information or documents pertaining to any account, including bank, share, purchase or expense accounts (PCA Section 18).

However, PCA Section 18 production orders are not available for investigating bribery offences under the PC, though other provisions may apply. For PC (as well as PCA) bribery offences committed by “a person in the service of the Government”, PCA Section 20 allows the Public Prosecutor to order inspection of a banker’s book relating to that person and his/her family, trustee or agent. “Banker’s book” includes ledgers, account books etc. and any document used in the ordinary course of a bank’s business. Another provision, PCA Section 21, allows the Public Prosecutor to require a bank manager to provide copies of the accounts of a person in the service of Government, or his/her immediate family members.

While useful, PCA Sections 20 and 21 can be used only to obtain the bank information of an official and not that of a suspected briber. To obtain the latter, resort must be had to PCA Section 18. Alternatively, CPC Section 58 allows a court to issue a summons or order for the production of any document or thing. The provision can be used for any types of documents from any individual or institution. But where the documents sought are banker’s books, production must be made to a police officer of the rank of inspector or higher, save at the bank’s place of business.

Two points may be noted about these means of obtaining documents and information. First, the scheme for obtaining banking documents and information is somewhat fragmented. There are four different provisions, each of which has different requirements, and under which different types of information are available. Second, obtaining non-bank documents through a CPC Section 58 summons or production order is less cumbersome as it does not involve a senior police officer or the Public Prosecutor. This “dual-track approach” has prompted the FATF, in assessing a similar scheme under the CDSA, to recommend that Singapore streamline the procedure for obtaining bank records.¹³

As for tax information, PCA section 21(1)(d) allows the Public Prosecutor to require the Comptroller of Income Tax to furnish information relating to a government official and his/her near relations. There is no comparable provision for obtaining the tax information of a suspected briber. It is unclear whether a summons or production order under CPC Section 58 or CDSA Section 30 can be used for this purpose.

Search warrants may be available when using a production order to obtain documents and information is impractical or unfeasible. PCA Section 22 allows a Magistrate or the Director of the Corrupt Practices Investigation Bureau to issue a warrant to search and seize evidence. CPC Section 61 also provides for search warrants.

The CDSA and CPC provides for the freezing of assets. CDSA Section 15 allows a court to issue a restraint order, but only after proceedings have been instituted for a serious offence, such as bribery, or if a person has been officially informed that he/she may be prosecuted. To freeze assets without notifying a suspect or commencing proceedings, Singapore authorities rely on CPC Section 68. However, this provision can only be used to seize property that will constitute evidence of a crime; it does not clearly include all instrumentalities and intended instrumentalities of crime or “substitute property for instrumentalities”.¹⁴ Whether it covers indirect proceeds may also be unclear.

According to the Singaporean authorities, Singapore law does not restrict law enforcement agencies from using special investigative techniques if it is appropriate and necessary to do so. Techniques such as controlled deliveries, surveillance and undercover operations are used in money laundering investigations.¹⁵ There is no information on whether similar techniques have been used in bribery cases. Legislation provides for interception of telecommunications (such as telephone and email) in kidnapping cases¹⁶ but not for bribery. There is no information on statutory provisions governing other techniques such as the use of listening and bugging devices, and video recording.

International co-operation is generally available in bribery cases. Singapore may seek extradition (1) from a Commonwealth country if the offence in question is listed and punishable by at least 12 months imprisonment, (2) from Malaysia if the offence is punishable by at least 6 months imprisonment, and (3) from any other foreign country if the offence is listed in the Act.¹⁷ PC and PCA bribery offences generally meet these requirements. As for mutual legal assistance (MLA), Singapore may seek assistance to investigate either all offences or serious offences, depending on the nature of the assistance sought. Serious offences include those scheduled under the CDSA. The PCA and PC bribery offences thus qualify.

PCA Section 35 deals with co-operating offenders. Where two or more persons are charged with a PCA or PC bribery offence, a court may require one of the persons to testify for the prosecution. If, in the court’s opinion, the person makes “true and full discovery” of all things as to which he/she is examined, he/she will receive immunity from prosecution for the matters to which his/her testimony relates. This is an “all-or-nothing” provision, however. It only allows total immunity, not a reduced sentence in return for the offender’s testimony. In addition, there are no provisions in Singaporean law allowing offenders to assist the authorities in an investigation in return for a lesser sentence. Singaporean legislation is also silent on plea bargaining.

Regarding plea bargaining, the Singaporean authorities state that a court may take into consideration charges against an accused that are not before the court. The court cannot sentence the accused on these additional charges but can issue a penalty order equivalent in value to any gratification received under PCA Section 13(1). The Singaporean authorities also stated that plea negotiations may involve a reduced charge (if available) for an accused who pleads guilty. In any event, sentencing is ultimately a matter for the courts, having regard to the applicable law and sentencing benchmarks. The prosecution may address the court on sentence, however. According to the Singaporean authorities, the prosecution does not, as a matter of practice, ask an accused to testify against other persons in return for a reduced charge or other form of leniency since such an arrangement would affect the weight of his/her testimony.

ENFORCEMENT OF BRIBERY OFFENCES

The Corrupt Practices Investigation Bureau (CPIB) is the principal body for investigating PCA offences and corruption-related PC offences. The Singaporean authorities state that the CPIB can also investigate any “seizable offence” under any written law which may be disclosed in the course of an investigation under the PCA. Prosecutions are conducted by the Public Prosecutor, who is the Attorney General (CPC Section 336). Prosecutions for PCA offences may only be instituted with the consent of the Public Prosecutor (PCA Section 33).

	2004	2005	2006	2007	2008
Investigations	266	362	365	323	239
Persons Charged	156	118	181	105	173
Persons Convicted	172	126	114	107	152
Suspended or deferred proceedings	N/A	N/A	N/A	N/A	N/A
Acquittals	5	5	2	3	3

The Singaporean authorities provided the following enforcement statistics. It is not clear whether the data pertains only to bribery of public officials, or whether other types of corruption offences (such as private-sector corruption) are included. Also unclear is whether the statistics include foreign bribery investigations, prosecutions and convictions. There was also no information on enforcement of bribery offences against legal persons. Statistics on sanctions have not been provided during this Thematic Review. Data provided to the FATF regarding asset freezing and confiscation suggested that

the amount of money being frozen and seized seemed low. The FATF also recommended that Singapore maintain statistics that distinguish between cases involving freezing/seizure and confiscation for money laundering and for predicate offences.¹⁸

RELEVANT LAWS AND DOCUMENTATION

Singapore Statutes Online: statutes.agc.gov.sg

Corrupt Practices Investigation Bureau: www.cpiib.gov.sg

NOTES

- ¹ Unlike other jurisdictions that have a similar Penal Code, Singapore does not rely on the offence of abetment in PC Sections 109 and 116 to meet international standards on active bribery. Active bribery is covered exclusively by the PCA.
- ² See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ³ See OECD Convention, Commentary 19.
- ⁴ Note to PC Section 161.
- ⁵ Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Act 1906.
- ⁶ See OECD (1999), *Phase 1 Report: United Kingdom*, Section 1.1.2; UK Law Commission (2008), *Reforming Bribery*, para. 2.33; D. Lanham, "Bribery and Corruption", *Essays in Honour of J C Smith* (1987) 92 at p. 104.
- ⁷ The UK Law Commission (2008), *Reforming Bribery* (Law Com No. 313); UK Ministry of Justice (March 2009), *Bribery: Draft Legislation*, Cm 7570; Joint Committee on the Draft Bribery Bill (July 2009), *Report on the Draft Bribery Bill*, HL Paper 115-1 / HC 430-1.
- ⁸ See OECD (2006), *Phase 2 Report: New Zealand* at paras. 156-161.
- ⁹ *P.P. v. Khoo Yong Hak*, [1995] 2 S.L.R. 283.
- ¹⁰ OECD (2008), *Phase 2bis Report: United Kingdom*, paras. 36-41.
- ¹¹ See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ¹² OECD (2008), *Phase 2bis Report: United Kingdom*, paras. 20-22 and 44-46.
- ¹³ FATF (2008), *Mutual Evaluation Report: Singapore*, paras. 151 and 166.
- ¹⁴ FATF (2008), *Mutual Evaluation Report: Singapore*, para. 145.
- ¹⁵ FATF (2008), *Mutual Evaluation Report: Singapore*, para. 249.

¹⁶ Kidnapping Act, Section 10.

¹⁷ Extradition Act, Sections 14, 18 and 32. Additional conditions in the Act, foreign legislation and a relevant treaty may apply.

¹⁸ FATF (2008), *Mutual Evaluation Report: Singapore*, paras. 162-164 and 167-168.

Criminalisation of Bribery in Sri Lanka

Penal Code

**(From the Commonwealth Legal Information
Institute: www.commonlii.org)**

Section 158 (Public servant taking a gratification other than legal remuneration in respect of an official act)

158. Whoever, being or expecting to be a public servant, accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person with the Government of the Republic, or with any public servant as such, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Section 101 (Abettor)

A person abets an offence who abets either the commission of an offence or the commission of an act which would be an offence if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Bribery Act

**(From the Sri Lanka Commission to Investigate
Allegations of Corruption or Bribery:
www.ciaboc.gov.lk)**

Section 19 (Bribery in respect of Government business)

A person –

(a) who offers any gratification to a public servant as an inducement or a reward for that public servant's performing or abstaining from performing any official act, or expediting, delaying, hindering or preventing the performance of any official act whether by that public servant or by any other public servant, or

assisting, favouring, hindering or delaying any person in the transaction of any business with the Government, or

(b) who, being a public servant, solicits or accepts any gratification as an inducement or a reward for his performing or abstaining from performing any official act or for such expediting, delaying, hindering, preventing, assisting or favouring as is referred to in paragraph (a) of this section, or

(c) who, being a public servant solicits or accepts any gratification,

shall be guilty of an offence punishable with rigorous imprisonment for a term of not more than seven years and a fine not exceeding five thousand rupees:

Provided, however, that it shall not be an offence for a public servant to solicit or accept any gratification which he is authorized by law or the terms of his employment to receive;

Provided further that section 35 of the Medical Ordinance shall not entitle a medical practitioner who is a public servant to solicit or accept any gratification.

INTRODUCTION

Sri Lanka ratified the UNCAC in March 2004 and is a founding member of the APG since 1997. The Sri Lankan legal system is based on English common law. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Sri Lanka's bribery offences are in the Penal Code and the Bribery Act. Section 158 Penal Code covers passive bribery, while active bribery is considered abetting an official to commit passive bribery under Section 100. The Bribery Act Section 19 also provides general offences of active and passive bribery of public servants. In addition, the Bribery Act contains 13 additional bribery offences, each dealing with particular officials or situations. This report focuses on the general offences but refers to the additional offences in the Bribery Act where appropriate. As will be observed throughout this report, the myriad of offences in these two statutes vary in terms of coverage and definitions, thus creating a complicated, overlapping and fragmented regime.

As noted above, the Penal Code covers active domestic bribery through the offence of abetment;¹ there is no specific offence of active bribery. When the Penal Code was enacted 1860, "the law aimed principally at the taker and not the giver of bribes."² However, this approach falls short of modern international standards, which require more specific language criminalising the

intentional offering, promising or giving of a bribe, whether directly or indirectly. As early as 1948, Sri Lankan courts have recognised the inadequacy of addressing active bribery through the abetment offence.³ It is notable that the more recent Bribery Act does not resort to the concept of abetment, but instead establishes eight specific offences of active bribery.

International standards also require active bribery offences to cover giving, offering and promising a bribe. The Penal Code abetment offence covers giving and offering a bribe (including an offer that is rejected by an official).⁴ However, the coverage of promising a bribe is not clear. Also, a bribe that is offered but rejected by a public servant constitutes abetment but the maximum punishment is only one-quarter of that for an accepted bribe.⁵ This puts “offering a bribe” on a different footing from “giving a bribe” and is at odds with international standards, which give “giving”, “offering” and “promising” equal status. Finally, it is unclear whether a bribe that is offered but not received by a public servant is an offence under the Penal Code.

The active bribery offences in the Bribery Act cover a person who “offers any gratification” to certain officials and/or in certain situations. Section 88 adds that “a person offers a gratification if he [...] gives, affords or holds out, or agrees, undertakes or promises to give, afford or hold out, any gratification”. The Bribery Act offences thus explicitly cover giving, offering and promising a bribe. However, it is unclear whether they also cover incomplete offences, *e.g.* bribes that are rejected, or which were sent but not received by an official.

International standards require a passive bribery offence to cover accepting and soliciting a bribe. Penal Code Section 158 expressly covers a public servant who “accepts or obtains or agrees to accept or attempts to obtain” a gratification. There is no express reference to soliciting a bribe, though this is likely covered by an attempt to obtain a bribe. By contrast, the passive bribery offences in the Bribery Act all expressly cover accepting and soliciting a gratification.

International standards also require offences to cover bribes given to third party beneficiaries and bribery through intermediaries. The Bribery Act expressly covers both situations. Section 89 states that “a person solicits a gratification if he, *or any other person* acting with his knowledge or consent, *directly or indirectly* demands, invites, [etc.] any gratification, whether for the first-mentioned person or for any other person.” The definitions for offering and accepting a gratification use similar language. Section 158 Penal Code expressly covers bribery where the benefit is transferred to a third party by referring to an official who accepts, obtains etc. any gratification “for himself or

for any other person". There is no reference to bribery through intermediaries, however.

International instruments define a "public official" through the functions performed. Bribery offences must cover any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a "public official" under domestic law.⁶ International standards thus take essentially a functional approach, i.e. by referring to persons who perform specified functions.

The Penal Code and the Bribery Act take a different approach by referring mainly to persons holding specific offices or titles. Penal Code Section 19 defines a "public servant" by enumerating twelve categories of officials: persons holding office appointed by the President; members of the Sri Lanka Administrative Service; commissioned military officers; judges; court officers; jurors; arbitrators; persons empowered to keep another person in confinement; officers responsible for preventing offences or to bring offenders to justice; persons who contract on behalf of the Government; and officers charged with levying taxes or preparing the electoral roll.

The Bribery Act contains its own list of officials. Under Section 90, a "public servant" includes Ministers and Deputy Ministers; Speaker and Deputy speaker; Deputy Chairmen of Committees; Provincial Governors; Minister of the Board of Ministers of a Province; Members of Parliament; officers, servants, and employees of the State or any Chairman, directors, governors, members, officers or employees, whether remunerated or not, of a Provincial Council, local authority or schedule institution, or of a company in which the Government holds more than 50% of the shares; members of the Provincial Public Service; jurors; licensed surveyors; and arbitrators. Additional offences cover bribery of specific officials, namely judicial officers, Members of Parliament, law enforcement officials, and members of local authorities or a listed institution.⁷

The approach in the Penal Code and the Bribery Act has both advantages and disadvantages. Enumerating officials can sometimes lead to greater certainty, such as when bribery involves a listed official. On the other hand, it could also result in gaps. It is difficult to ensure that both statutes exhaustively cover all persons who provide a public service or who perform a public function; there may be some who do so but are not covered by an enumerated category. Indeed, persons performing legislative functions are missing from the Penal Code. As well, neither the Penal Code nor the Bribery Act refers expressly to persons in public agencies. The Penal Code does not

mention public enterprises. The Bribery Act refers to companies in which the Government holds more than 50% of the shares. However, this excludes enterprises that are controlled by the Government despite a minority shareholding, *e.g.* when the Government holds a “golden share” that allows it to appoint a majority of the board.

International standards also require coverage of bribery in order that an official perform acts or omissions in relation to the performance of official duties. This includes any use of the public official's position or office, and acts or omissions outside the official's scope of competence. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official or private individual award a contract to that company.⁸

The Penal Code may be narrower. It deals with bribery whereby a public servant (a) does or forbears from doing any *official act*; (b) shows favour or disfavour to any person in the exercise of his/her *official functions*; or (c) renders or attempts to render any service or disservice to any person with the Central or any State Government or Parliament or the Legislature of any State or with any local authority, corporation or Government company or with any public servant. Thus, only category (c) deals with acts or omissions outside the official's scope of competence,⁹ but this category may be deficient in two respects. First, it is unclear whether “rendering a service or disservice” to another official includes using one's office to make another official perform the act for which the bribe was intended. Second, the definition does not seem to cover an official who acts outside his/her competence and uses his/her office to influence a private individual.¹⁰

The Bribery Act also falls somewhat short in this regard. The general active and passive bribery offences in Sections 19(a) and (b) cover the offering, accepting etc. of a gratification to induce or reward a public servant to expedite, delay, hinder or prevent the performance of any official act by that or *another public servant*. In other words, it covers an official acting outside his/her competence to influence another official, but only if the latter official performs an official act. Sections 19(a) and (b) also cover bribery to induce a public servant to assist, favour, hinder or delay *any person* in the *transaction of any business* with the Government. This covers an official acting outside his/her competence to influence another official or private individual, but only if it concerns the transaction of Government business. In sum, Sections 19(a) and (b) cover most but not all instances of a bribed official who acts outside his/her competence.

Section 19(c) might ameliorate these limitations to Sections 19(a) and (b), as least with respect to passive bribery. Section 19(c) covers the soliciting or accepting of a gratification by a public servant. There are no additional requirements that the gratification be an inducement or reward for influencing another official, or for assisting or hindering etc. a person in the transaction of Government business. This expansive interpretation of Section 19(c) is appealing but it renders the offence in Section 19(b) entirely redundant. It may therefore be questionable and arguably not be what the legislator intended.

The Penal Code and Bribery Act offences cover bribes of both a monetary and non-monetary nature. An explanatory note to Penal Code Section 158 states that “The word ‘gratification’ is not restricted to pecuniary gratifications, or to gratifications estimable in money.” Section 90 of the Bribery Act defines “gratification” to include not only money, but also any office, employment, contract, service, favour or advantage, among other things. Neither statute provides further information on whether the definition of “gratification” is affected by its value, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best-qualified bidder.

The Penal Code and Bribery Act do not expressly contain specific defences to bribery, such as solicitation; small facilitation payments (i.e. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits); and “effective regret” (when a briber reports the crime to law enforcement). The absence of these defences could enhance the effectiveness of the bribery offences.

However, the Penal Code and Bribery Act each provides a defence of “consent”. Under Penal Code Section 158, it is not an offence if the gratification in question is “legal remuneration”, which is in turned defined as “remuneration which a public servant can lawfully demand”, and “all remuneration which he is permitted by the Government which he serves to accept”. There is no guidance on how the Government may grant such permission, *e.g.* by public regulations. The Bribery Act similarly provides that it is not an offence for a public servant to solicit or accept any gratification “which he is authorised by law or the terms of his employment to receive.” This definition is slightly more precise as it prescribes the source of the authorisation. Nevertheless, the phrase “terms of employment” can be vague. Nothing on the face of the provision prohibits an official and his superior from modifying the terms of employment orally or retroactively after the gratification has been accepted.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

It is not a crime in Sri Lanka to bribe officials of foreign governments or public international organisations in the conduct of international business. The definition of “public servant” in the Penal Code and Bribery Act refer to Sri Lankan officials. The bribery offences in these two statutes therefore do not cover active or passive foreign bribery.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Sri Lanka can impose criminal liability against legal persons for bribery. Section 2 of the Penal Code provides that every person shall be liable to punishment under the Code. Section 10 defines “person” as including “any company or association or body of persons, whether incorporated or not”. Whether corporate criminal liability for bribery is actually imposed in practice is wholly unclear.

Nothing in the Penal Code indicates when a company is considered to have committed a crime. There is no guidance on when the acts or omissions of a natural person may be attributed to a legal person, whose acts or omissions may trigger liability, or whether the conviction of a natural person is a prerequisite to convicting a legal person.

Should Sri Lankan courts be confronted with the issue of liability of legal persons, they may well apply U.K. case law, given the country’s common law history. The leading case is the well-known U.K. House of Lords decision in *Tesco Supermarkets Ltd. v. Nattrass*, [1972] AC 153. The principle is commonly known as the “identification” doctrine. Under *Tesco*, a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company’s “directing mind and will”.¹¹

The limits of the identification doctrine in cases of complex corporate crimes such as bribery are now well-documented. Prosecutors, law enforcement officials, and academics in the UK have denounced the *Tesco* regime as ineffective and unsatisfactory for bribery offences. The problem is at least three-fold. First, the identification theory requires guilty intent be attributed to a very senior person in the company. Liability is unlikely to arise when bribery is committed by a regional manager or even relatively senior management, let alone a salesperson or agent, even if the company benefitted from the crime. Second, there is also no liability even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Third, the identification theory requires the requisite criminal intent to be found

in a single person with the directing mind and will; aggregating the states of mind of several persons in the company will not suffice. This ignores the realities of the modern multinational corporation in which complex corporate structures make it difficult to identify a single decision maker.¹²

An effective regime of liability of legal persons for bribery must address these limitations. The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.¹³ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

Sri Lanka has jurisdiction over bribery committed in its territory. Penal Code Section 2 states that “Every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty within Sri Lanka.” However, it is unclear whether territorial jurisdiction is extended to offences that only take place partly in Sri Lanka.

There is no nationality or extraterritorial jurisdiction to prosecute the bribery offences in the Penal Code or the Bribery Act.

SANCTIONS FOR BRIBERY

The general active and passive bribery offences in the Penal Code are punishable by imprisonment of up to three years and/or a fine. The Code does

not prescribe a maximum limit for fines. As noted above, a bribe that is offered but rejected by a public servant constitutes abetment but is subject to only one-quarter of the maximum jail sentence for an accepted bribe. All bribery offences in the Bribery Act are punishable by imprisonment of up to seven years and a fine not exceeding LKR 5 000 (USD 40 or EUR 30). Overall, the maximum punishment available against natural persons is in line with international standards. For legal persons, who can only be fined and not imprisoned, the fines available under the Bribery Act are extremely inadequate.

Only limited confiscation is available as a penalty for bribery. The Penal Code does not provide for confiscation as a sanction for bribery, even though forfeiture of property is an available penalty for other crimes (Penal Code Section 52). When a person is convicted of accepting a gratification under the Bribery Act, a court may either order the offender to pay a sum equal to the value of the gratification, or forfeit property of the offender that had been acquired by bribery or the proceeds of bribery (Bribery Act Sections 26 and 28A).¹⁴ However, it is unclear whether this provision allows a court to confiscate indirect proceeds of bribery. Furthermore, these provisions do not allow forfeiture against a person convicted of active bribery, or a third party who acquired the property in bad faith. In addition, upon a conviction for money laundering (including laundering proceeds of bribery), a court may forfeit any property of the offender that derived directly or indirectly from any unlawful activity (Prevention of Money Laundering Act Section 13A).

Additional administrative sanctions may be imposed for bribery. Public servants convicted of bribery under the Bribery Act are dismissed immediately. Membership in an institution listed in the Act also ceases. In addition, the person is disqualified from voting or running in elections for Parliamentary and local authorities for seven and five years respectively. The person is also banned from being a member of Parliament or a local authority for the same period of time, and banned permanently from being a public servant, a member of the institutions listed in the Act, and the governing body of such institutions (Bribery Act Section 29). The Penal Code bribery provisions do not contain comparable provisions. Information was not available on whether a person convicted of bribery (whether under the Penal Code or the Bribery Act) may be blacklisted and debarred from seeking procurement contracts.

TOOLS FOR INVESTIGATING BRIBERY

Sri Lankan bribery investigators may access documents and information possessed by private individuals or companies. Bribery investigations are conducted by the Commission to Investigate Allegations of Bribery or Corruption (CIABC). The CIABC has the power to request a person to attend

the Commission to answer questions. It may also summon any person to produce any document or thing in his/her control (CIABC Act Sections 5(1)(a) and (b)). Section 66 of the Criminal Procedure Code also allows a court to issue a summons to order the production of a document or thing.

Additional provisions deal with obtaining information and documents from banks and financial institutions. Once a person receives a request to attend CIABC for questioning, the Commission may require a bank manager to produce any book, document or cheque of the bank containing entries relating to the account of this person or his/her immediate family member (CIABC Act Section 5(1)(d)).

This arrangement for obtaining bank documents raises two questions, however. First, the procedure is available only after the CIABC has summoned a person for questioning. It may therefore be unavailable in the early stages of an investigation, *e.g.* when investigators do not wish to alert a person that he/she is under investigation. Second, there are doubts that confidential bank documents can be obtained. The provision does not expressly override bank secrecy, unlike other statutes.¹⁵ Furthermore, the Banking Act Section 77 states that bank secrecy shall be maintained except “when required to do so by a court of law.” The CIABC does not have the status of a court.

The CIABC Act also provides access to documents and information held by other Government bodies. The CIABC may request relevant information from Sri Lankan tax authorities. However, as with bank information, this power only arises after a person has been summoned by the CIABC for questioning (CIABC Act Section 5(1)(e)). The Commission may also request information and documents from any department, office or establishment of the Government, a local authority, Provincial Council, certain designated institution, or a company in which the Government owns more than 50% of the shares (CIABC Act Section 5(1)(f)). State-controlled companies in which the Government has a minority shareholding are therefore not covered.

The extent to which property (especially bank accounts) can be frozen during a bribery investigation is not entirely clear. Under the CIABC Act Section 5(1)(i), the Commission may prohibit a person from “transferring the ownership of, or any interest in, any movable or immovable property”. The CIABC may also serve a copy of the written order “on any such authority as the Commission may think fit”. The Act lists a number of authorities (*e.g.* the Land Registry) but does not refer to banks and other financial institutions. The wording of the provision is also relatively narrow. It does not refer to accounts, unlike other statutes that clearly deal with the freezing of bank accounts.¹⁶ It also only prohibits the transfer of *ownership* of or an *interest* in property, which arguably

would not prevent a transfer of funds between two accounts held by the same person.

Limited special investigative techniques are available in bribery investigations in Sri Lanka. Undercover operations and secret surveillance have been used in criminal investigations.¹⁷ The CIABC may issue warrants to search and seize for evidence (CIABC Act Section 7). A court has similar powers under the Penal Code Sections 68-70. There are no statutory provisions on wiretapping, listening and bugging devices, secret surveillance, video recording, email interception, undercover police operations (*e.g.* “sting” operations), or controlled deliveries.

International assistance is available in bribery cases. Bribery is an extradition offence under the Extradition Act, while all crimes qualify for mutual legal assistance (MLA) under the Mutual Assistance in Criminal Matters Act.¹⁸ A wide range of MLA is available. However, both Acts only allows extradition/MLA to be sought from designated Commonwealth countries and countries with which Sri Lanka has treaty relations.

An offender may receive immunity from prosecution if he/she co-operates with the authorities. Under the Bribery Act Section 81, a judge may pardon a co-operating offender on the condition that he/she makes “full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor.” The Judge may grant the pardon at any time before the offender’s trial concludes. Two points should be noted. First, the provision requires the offender to make full disclosure of the offence, but falls short of requiring the offender to testify in court against another accused. Second, this is an “all-or-nothing” provision. It does not contemplate plea bargaining that would allow an offender to assist the authorities in return for a reduced sentence, for example.

ENFORCEMENT OF BRIBERY OFFENCES

The CIABC conducts criminal bribery investigations in Sri Lanka, while the Director-General is responsible for criminal bribery prosecutions (the Commission to Investigate Allegations of Bribery or Corruption Act, Sections 4 and 11). Recent reports, however, indicate that the CIABC would cease to function after 29 March 2010.

Statistics on investigations, prosecutions, convictions, and sanctions for passive and active domestic bribery in Sri Lanka are not available. The Web site of the CIABC Corruption only mentions convictions of several notable officials. A recent article suggests that the CIABC is severely under-resourced.

Furthermore, investigators are not hired by the CIABC but seconded from – and continued to answer to – the police department. This reduces the CIABC’s ability to direct its investigators and to maintain the independence of its investigations.¹⁹

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

Sri Lanka’s general active and passive domestic bribery offences in the Penal Code and Bribery Act already meet several aspects of international standards, *e.g.* coverage of third party beneficiaries, and both monetary and non-monetary bribes. Sri Lanka could strengthen these offences by addressing the following issues:

- (a) The overlap between the numerous bribery offences in the Penal Code and the Bribery Act, and the application of the inconsistent features in those offences;
- (b) Criminalising active domestic bribery through a specific offence rather than via the offence of abetment;
- (c) The relationship between and applications of the passive bribery offences in the Bribery Act Sections 19(b) and (c);
- (d) Express language in all relevant bribery offences covering giving, offering, promising a bribe; bribery through an intermediary;
- (e) Incomplete offences, such as when a bribe is offered to but not received by an official;
- (f) Definition of “public servant” that covers all persons performing legislative functions, and all persons who provide a public service or perform a public function, including for a public agency or public enterprise (whether state-owned or state-controlled);
- (g) More specific language covering the situation where a bribe is given or taken in order that a public servant use his/her position outside his/her authorised competence;
- (h) Whether the definition of “gratification” is affected by its value, its results, the perceptions of local custom, the tolerance by local

authorities, the alleged necessity of the bribe, or whether the briber is the best-qualified bidder;

- (i) The scope of the defences of “legal remuneration” and gratifications authorised by the “terms of employment”.

Bribery of Foreign Public Officials

To bring its criminal bribery offences in line with international standards, Sri Lanka should criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

International standards require that legal persons be held liable for bribery. Sri Lanka’s Penal Code broadly defines “persons” to include “any company or association or body of persons, whether incorporated or not”. However, it is unclear whether legal persons have been held criminally liable for bribery in Sri Lanka. To improve the effectiveness of this regime, Sri Lanka could consider whether its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Sri Lanka could also consider addressing the following issues:

- (a) Whether corporate liability depends on the conviction of a natural person for the crime; and
- (b) The lack of prosecutions of legal persons in practice.

Jurisdiction for Prosecuting Bribery

Sri Lanka only has territorial jurisdiction to prosecute bribery. To ensure its overall jurisdictional basis for prosecuting bribery is sufficiently broad, Sri Lanka could address the follow matters:

- (a) Nationality jurisdiction to prosecute natural and legal persons for bribery that occurs outside of Sri Lanka; and
- (b) Jurisdiction to prosecute bribery offences that take place partly in Sri Lanka.

Sanctions for Bribery

The maximum available punishment against natural persons for bribery offences in Sri Lanka is largely in line with international standards. To ensure an effective regime in practice, Sri Lanka could consider addressing:

- (a) Whether sanctions against legal persons for bribery under the Bribery Act are effective, proportionate and dissuasive;
- (b) Confiscation of the direct and indirect proceeds of active and passive bribery under the Penal Code and the Bribery Act, including from non-*bona fide* third parties;
- (c) Availability of fines equivalent in value to property subject to confiscation if, for example, the bribe or proceeds thereof have disappeared;
- (d) The use of confiscation in practice, especially against bribers; and
- (e) Additional administrative sanctions for bribery, such as blacklisting and debarment from public procurement.

Tools for Investigating Bribery

Sri Lanka has some useful investigative tools for bribery cases, such as the power to obtain documents and information from financial institutions through a summons process. Sri Lanka could consider some additional matters:

- (a) Ability of bribery investigators to obtain any relevant document or information from banks, financial institutions and tax authorities, including information that may be subject to secrecy rules;

- (b) Availability of investigative tools (e.g. obtaining bank and tax documents) before the CIABC summons a person for questioning;
- (c) Freezing of accounts at banks and other financial institutions in bribery cases;
- (d) Special investigative techniques in bribery investigations, such as wiretapping, email interception, video recording, listening and bugging devices, “sting” and undercover police operations, and controlled deliveries;
- (e) The ability to seek extradition and MLA from countries with which Sri Lanka does not have treaty relations;
- (f) Granting of pardon on the condition that an offender testifies at the trial of another accused; and
- (g) Plea bargaining for a reduced sentence when an offender co-operates with the authorities.

Enforcement of Bribery Offences

To properly measure the effectiveness of its criminalisation of bribery, Sri Lanka should maintain statistics on investigations, prosecutions, convictions, and sanctions for active and passive domestic bribery.

RELEVANT LAWS AND DOCUMENTATION

The Penal Code, Bribery Act and other Sri Lankan legislation: Commonwealth Legal Information Institute - www.commonlii.org

Commission to Investigate Allegations of Corruption or Bribery: www.ciaboc.gov.lk

APG (2006), *Mutual Evaluation Report on Sri Lanka*: www.apgml.org

NOTES

- ¹ See Illustrations (a) to Penal Code Sections 102 and 109. See also *P. Sivasambu, Inspector of Police v. Nugawela*, [1939] LKHC 5, 41 NLR 363.
- ² *Tennakoon v. Dissanayaka*, [1948] LKHC 56, 50 NLR 403 at 404.

- ³ *Ibid.* at 407-408.
- ⁴ See Illustrations (a) under Penal Code Sections 102 and 109.
- ⁵ See Penal Code Section 109 and Illustration (a) under that Section.
- ⁶ See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ⁷ See Bribery Act Sections 14-16 and 22.
- ⁸ See OECD Convention, Commentary 19.
- ⁹ That (a) and (b) do not cover bribery for an act which an official does not have power to perform was confirmed in *Tennakoon v. Dissanayaka*, [1948] LKHC 56, 50 NLR 403.
- ¹⁰ It is unclear whether this would be covered by a broad interpretation of Penal Code Section 162 (Taking gratification, in order, by corrupt or illegal means, to influence public servant) and Section 163 (Taking gratification, for exercise of personal influence with public servant).
- ¹¹ U.K. Law Commission Report, *Reforming Bribery* (2008) at para. 6.26.
- ¹² See U.K. Law Commission, *Reforming Bribery* (2008) at para. 6.27; OECD (2005), *Phase 2 Report: United Kingdom* at paras. 200; *Phase 2 Report: New Zealand* at paras. 182 and 188.
- ¹³ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ¹⁴ Fines and forfeiture are also available upon conviction for unjust enrichment (Bribery Act Sections 26A and 28A).
- ¹⁵ For example, see the *Prevention of Money Laundering Act*, Section 16.
- ¹⁶ For instance, the *Prevention of Money Laundering Act*, Section 7(1) provides for a Freezing Order prohibiting “any transaction in relation to any account, property or investment”.
- ¹⁷ Asia/Pacific Group on Money Laundering (2006), *Mutual Evaluation Report on Sri Lanka*, para. 183.
- ¹⁸ An applicable treaty or foreign legislation may impose additional conditions.
- ¹⁹ Rodrigo, P.C. (2010), “Sri Lanka’s Bribery Commission needs more fire-power”, Sunday Times (www.sundaytimes.lk)

Criminalisation of Bribery in Thailand

**Criminal Code
(Provided by the National Anti-Corruption
Commission Thailand)**

Section 143

Whoever, demanding, accepting or agreeing to accept a property or any other benefit for himself or the other person as a return for inducing or having induced, by dishonest or unlawful means, or by using his influence, any official, member of the State Legislative Assembly, member of the Changvad Assembly or member of the Municipal Assembly to exercise or not to exercise any of his functions, which is advantageous or disadvantageous to any person, shall be punished with imprisonment not exceeding five years or fine not exceeding 10 000 Baht, or both.

Section 144

Whoever, giving, offering or agreeing to give property or any other benefit to an official, member of State Legislative Assembly, member of Provincial Assembly or member of Municipal Assembly so as to induce such person to do or not to do any act, or to delay the doing of any act contrary to one's own duty, shall be imprisoned up to five years or fined up to ten thousand Baht, or both.

Section 148

Whoever, being an official, by a wrongful exercise of one's functions, coerces or induces any person to deliver or to procure the property or any other benefit, for oneself or another person, shall be imprisoned for five to twenty years or for life, and fined between 2 000 to 40 000 Baht, or death.

Section 149

Whoever, being an official, member of State Legislative Assembly, member of Provincial Assembly or member of Municipal Assembly, wrongfully demands, accepts or agrees to accept for himself or another person a property or any other benefit for exercising or not exercising any of his functions, whether such exercise or non-exercise of his functions is wrongful or not, shall be punished with imprisonment of five to twenty years or imprisonment for life, and fined up to 20 000 to 40 000 Baht, or death.

INTRODUCTION

The Thai legal system has civil law influences, *e.g.* it is based on a code system and judicial decisions are not binding. Thailand signed the UNCAC in 2003 but has yet to ratify the Convention. Its criminal bribery offences have not been externally reviewed. Thailand was a founding member of the APG in 1997.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Thailand's general active and passive domestic bribery offences are mainly in the Criminal Code (CC). CC Sections 144 and 149 deal with active and passive bribery of most public officials. Active and passive bribery of judicial officials (including prosecutors) are covered by CC Sections 167 and 201 respectively. Section 148 contains a separate offence for an official who wrongfully exercises his/her function to coerce or induce a person to deliver or procure property or other benefit. Passive bribery of officials of state-owned enterprises (SOEs) are covered by Sections 3, 5, 6 and 7 of the Act on Offence of State Organisation or State Agency Official B.E. 2502 (OSO Act). Thailand has also criminalised passive bribery of persons who accept an advantage before becoming public officials (CC Sections 150 and 202), which goes beyond the requirements of international standards.

International standards generally require coverage of three modes of active domestic bribery, namely offering, giving, and promising a bribe. The active bribery offences in CC 144 and 167 cover "giving, offering or agreeing to give" a bribe. A promise to bribe is not expressly mentioned. Thai authorities state that a promise to bribe is covered by an agreement to bribe. They also assert that the offence covers an offer to bribe that is made by an individual but is not received or is rejected by an official.

As for passive domestic bribery, international standards generally demand coverage of solicitation and acceptance of a bribe. The CC and OSO Act passive bribery offences all cover an official who "demands, accepts or agrees to accept" a bribe. The offences therefore meet international standards in this respect.

International standards also require coverage of a person who uses an intermediary to offer, give, solicit etc. a bribe. The CC and OSO Act active and passive offences do not expressly cover bribery through intermediaries. According to Thailand, a person who bribes a public official through an intermediary is guilty of instigating the offence of bribery (CC Section 84). An intermediary who agrees to bribe an official is guilty of an offence under Section

143, which prohibits a person from accepting a benefit in return for inducing an official by dishonest or unlawful means to exercise or not to exercise his/her functions.¹ If the intermediary carries out the agreement and actually bribes the official, then he/she is also guilty of the active bribery offence under CC Section 144. A similar scheme applies to the bribery of SOE officials (CC Section 84 assisting or facilitating an offence under OSO Act Section 6).

International standards also require that bribery offences cover bribes given to a public official for the benefit of a third party, or directly to a third party upon the instructions or agreement of the public official. The passive bribery offences in CC Sections 148, 149 and 201 and OSO Act Section 6 expressly refer to demanding, accepting etc. a benefit for the official “or another person”; bribery that benefits third parties is thus expressly covered. However, there is no such corresponding language in the active bribery offences in CC Sections 144 and 167. According to Thailand, the briber in these circumstances is liable for assisting and/or facilitating the official to commit passive bribery (CC Section 84).

The definition of “public official” in the bribery offences is somewhat narrower than required under international standards. The general active and passive bribery offences in CC Sections 144, 148 and 149 cover legislators and “officials”. Judicial officials are covered in CC Sections 167 and 201. Since the term “officials” is undefined in the CC, it is not entirely clear that it covers all persons who provide a public service, or who exercise a public function, including for a public agency. According to the Thai authorities, texts on Thai criminal law state that these officials are covered by the CC. Thailand is also considering amending the CC in this respect.

Another concern with the definition of “public official” is coverage of persons who perform a public function for a public enterprise. The CC presumably does not deal with such persons, since the OSO Act was enacted for this purpose. However, two issues arise under the OSO Act. First, the OSO Act does not cover *active* bribery of SOE officials or employees. According to the Thai authorities, active bribery of SOE officials are again considered to be a crime of assisting and/or facilitating an SOE official to commit passive bribery. Second, even for passive bribery, the OSO Act only covers companies in which the state is a majority shareholder; it does not cover enterprises in which the state controls despite a minority shareholding, e.g. because the state holds a “golden share”.

Thailand’s bribery offences also fall short in terms of the types of acts that a bribed official is asked to perform. International standards require broad coverage of bribes in order that an official acts or omits to act in relation to the

performance of official duties, including any use of the public official's position or office, and acts or omissions outside the official's competence.² The CC Section 144 and 167 active bribery offences cover bribes in order that an official breaches his/her duty. They do not cover bribery to induce an official to perform his/her duty or to exercise his/her discretion in favour of the briber. The passive bribery offences (CC Sections 149, 201 and OSO Act Section 6) are broader and cover an official who exercises or fails to exercise his/her functions. However, none of the active or passive bribery offences covers an official who acts outside his/her competence.

Regarding the nature of the bribe, all of the bribery offences refer to the giving etc. of "a property or any other benefit" to an official. Hence, both pecuniary and non-pecuniary bribes are covered. The Thai authorities state that the definition of a bribe is not affected by the value or the results of the advantage, or whether the briber was the best-qualified bidder who otherwise could properly have been awarded the advantage. However, it is unclear whether the definition is affected by local custom towards the giving of the advantage, tolerance by local authorities, or the alleged necessity of giving the advantage.

Regarding defences, there is no express defence of small facilitation payments *per se*. However, as noted above, giving bribes to induce an official to perform his/her duties is not a crime (though it is an offence for an official to accept such payments).

Co-operating offenders may receive a reduction in sentence. Pursuant to CC Section 78, a reduction of punishment up to one-half is available in certain "extenuating circumstances", such as when an offender provides information to the Court at trial.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

It is not an offence to bribe public officials of foreign governments or public international organisations in the conduct of international business. The definition of officials in the CC and OSO Act refer only to Thai public officials. In 2009, the Ministry of Justice submitted to a Bill to the National Assembly that would create a foreign bribery offence but later withdrew the Bill. The Ministry was drafting a second Bill at the time of this report.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

The precise scope of liability of legal persons for bribery is not clear. The CC and OSO Act bribery offences do not specifically provide for corporate

liability, unlike other types of offences.³ While the Supreme Court has stated that criminal liability may be extended to legal persons, these cases did not involve bribery.⁴ Nevertheless, the Thai authorities believe that legal persons may be held liable for bribery because the CC bribery offences apply to “whoever” engages in the prohibited acts. This formulation, in their view, covers both natural and legal persons. They also believe that additional sanctions such as forfeiture, denial of license, government blacklisting, and civil action by a victim may be available.

The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.⁵ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who does not have the highest level of managerial authority in certain cases.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

JURISDICTION TO PROSECUTE BRIBERY

CC Sections 4 and 5 provide territorial jurisdiction to prosecute any offences committed wholly or partially in Thailand, or when the consequences of an offence are felt in Thailand (passive territorial jurisdiction).

There is extraterritorial jurisdiction to prosecute passive but not active domestic bribery. CC Section 9 states that a Thai official who commits passive bribery outside Thailand shall be punished in Thailand. However, there is no corresponding jurisdiction to prosecute the briber in such a case. The provision also applies only to bribery offences in the CC and not to bribery of officials of SOEs under the OSO Act.

There is no nationality jurisdiction to prosecute bribery. CC Section 8 provides jurisdiction to prosecute Thai nationals for committing certain crimes outside of Thailand, but the section does not cover bribery.

SANCTIONS FOR BRIBERY

The available punishment for Thailand's bribery offences is shown in the table below. Statistics on the actual sanctions imposed are not available.

Offence	Available sentence
Active bribery (CC Section 144)	Up to 5 years' imprisonment and/or a fine of THB 10 000 (EUR 200 or USD 300)
Active bribery – judicial officials (CC Section 167)	Up to 7 years' imprisonment and/or a fine of THB 14 000 (EUR 300 or USD 400)
Wrongful exercise of functions (CC Section 148)	Either (1) death, or (2) imprisonment for 5-20 years or life and a fine of BHT 2 000-40 000 (EUR 40-800 or USD 60-1 200)
Passive bribery (CC Section 149)	
Passive bribery – judicial officials (CC Section 167)	
Passive bribery – official of state enterprise (OSO Act Section 6)	

Confiscation is also available. CC Section 34(1) allows forfeiture of “all properties” given under the [CC bribery offences]”. CC Section 34(2) allows forfeiture of “all properties “given in order to induce a person to commit an offence or to reward the committing of an offence, unless the property belongs to someone who did not connive in the commission of the offence.” CC Section 33 allows forfeiture of instrumentalities of crime and property acquired through the commission of an offence. A conviction is required for forfeiture under all of these provisions. According to Thai authorities, CC Sections 33 and 34 also apply to the offence of bribery of officials of state enterprises under the OSO Act.

However, there may be at least two shortcomings in these provisions in the CC. First, they do not allow forfeiture of direct or indirect proceeds (i.e. the proceeds of proceeds).⁶ Second, there are no provisions for imposing a fine in lieu of confiscation (i.e. value confiscation). It is unclear what remedy, if any, is available if the property that is the subject of confiscation has disappeared or has been spent. Thailand states that, at the time of this report, the National

Assembly was considering a Bill that would allow forfeiture of the indirect proceeds of crimes and value-based confiscation.

Forfeiture may also be available under the Anti-Money Laundering Act (AMLA). The Act allows a court to forfeit a bribe and the proceeds of bribery, including indirect proceeds.⁷ The scope of the AMLA may thus be broader than that of the CC.

Limited administrative sanctions are available but only against public officials. Disciplinary penalties for corruption are available against civil servants under the Civil Service Act B.C. 2551 (2008). According to Thai authorities, bribers are not subject to administrative sanctions such as debarment from seeking public procurement contracts.

TOOLS FOR INVESTIGATING BRIBERY

The National Anti-Corruption Commission (NACC), established by Organic Act on Counter Corruption, B.E. 2542 (2007) (OACC), is the principal body for investigating bribery cases in Thailand. OACC Section 25(1) allows NACC investigators to summon relevant documents or evidence from any person, including financial institutions. Bank secrecy rules do not prevent the release of bank records for use in a criminal investigation. OACC Section 25(2) provides for warrants to search for and seize evidence.

Tax information is available under a similar procedure. The NACC may demand the production of documents from “a Government official, official or employee of a Government agency, State agency, State enterprise or local administration” (OACC Section 25(1)). This allows the NACC to demand tax records from the tax authorities. The NACC may also demand a person under investigation to produce his/her tax records (OACC Section 79).

Covert investigative techniques are unavailable in bribery cases. Thai authorities state that there are no legislative provisions that specifically authorise the NACC to use undercover operations, controlled deliveries, wiretapping, secret surveillance, or listening and bugging devices in bribery investigations. However, the Anti-Money Laundering Office may use some covert techniques (*e.g.* wiretapping) in money laundering cases, including those involving the laundering of the proceeds of bribery.

Bank and financial accounts may be frozen, though perhaps with some difficulty. OACC Section 78 authorises the NACC to freeze assets or financial transactions when investigating an offence that a public official possesses unusual wealth, but not an offence of bribery *per se*. The anti-money laundering

authorities have freezing powers for bribery offences (AMLA Sections 35 and 48) but they are not responsible for investigating bribery cases *per se*. Nor are the freezing powers under the AMLA extended to the NACC. NACC and the anti-money laundering authorities must therefore co-ordinate to freeze assets in bribery cases not involving possession of unusual wealth, which could be especially challenging when assets may disappear imminently.

International assistance is available in bribery investigations. The Mutual Assistance in Criminal Matters Act, B.E. 2535 allows mutual legal assistance (MLA) to be sought for all criminal offences.⁸ For extradition, Thailand will grant extradition only if the conduct underlying the request is punishable in Thailand by one year's imprisonment if it was committed there (Extradition Act, B.E. 2472, Section 4). The Act does not impose a similar requirement when Thailand seeks extradition from a foreign country, but foreign countries may impose the one-year threshold due to reciprocity. In any event, all of Thailand's bribery offences are punishable by more than one year's imprisonment and would qualify for extradition.⁹

Plea bargaining is not available in Thailand. According to Thai authorities, they cannot offer an accused immunity from prosecution or a more lenient sentence in return for the offender's co-operation or testimony. However, a court has discretion to take into account an offender's co-operation with the authorities. Witness protection is available, but co-operating with the authorities in an investigation is not a precondition for protection (Witness Protection Act B.E. 2546). The Thai authorities add that Criminal Procedure Code Section 176 allows a court to dispose of a case against one accused in order that he/she assists in the prosecution of another co-accused.

ENFORCEMENT OF BRIBERY OFFENCES

As noted earlier, the NACC is the principal body for investigating bribery cases in Thailand. Once an investigation is complete, the case is transferred to the Prosecutor-General (PG) for prosecution. If the PG decides not to commence prosecution because the dossier is incomplete, the matter is referred to a committee consisting of representatives of the NACC and the PG. If the committee cannot resolve the impasse, the NACC takes over the case's prosecution (OACC Sections 91 and 97).

Only limited enforcement statistics were available. A 2007 report states that the National Counter Corruption Commission (the NACC's predecessor) received approximately 2 000 reports per year, of which 1 200 are investigated, and 10% of which result in prosecution.¹⁰ The Thai authorities add that, from 2007 to 2009, the NACC passed resolutions on 206 cases of alleged corruption,

25 of which involved bribery. The Supreme Court has decided 152 cases involved bribery, but only 4 in 2007-2009.

RECOMMENDATIONS FOR A WAY FORWARD

Thailand has made significant efforts in criminalising bribery offences. To further enhance compatibility with international standards, it could consider addressing the following issues.

Elements of the Active and Passive Domestic Bribery Offences

Thailand's general bribery offences already meet many aspects of international standards, such as their express coverage of different modes of passive bribery. Thailand also exceeds standards by criminalising bribery of persons expected to be officials. To further improve its bribery offences, the Thailand could consider addressing the following areas:

- (a) Express language covering additional modes of committing bribery, such as third party beneficiaries (for active bribery), and bribery through intermediaries;
- (b) A definition of "public official" that expressly includes all persons who provide a public service, or who exercise a public function, including for a public agency, or for a state-controlled enterprise in which the state owns less than 50% of the shares;
- (c) A direct offence of active bribery of officials of state-owned enterprises;
- (d) Bribery in order that an official acts or omits to act in relation to the performance of official duties, including any use of the public official's position or office, and acts or omissions outside the official's competence. This encompasses bribery (including making facilitation payments) in order that an official performs his/her duty or exercises his/her discretion in favour of the briber.
- (e) Whether a bribe is affected by the value of the advantage, its results, perceptions of local custom, the tolerance of such payments by local authorities, or the alleged necessity of the payment in order to obtain or retain business or other improper advantage.

Bribery of Foreign Public Officials

To bring its criminal bribery offences into line with international standards, Thailand should enact an offence to criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

The Thai legal system recognises criminal liability of legal persons, but it is not entirely clear whether such liability can be imposed for bribery. Even if such liability is possible, it is unclear when liability would arise, *e.g.* whether and how a crime committed by a natural person is attributed to a legal person. Procedural issues create further uncertainty. To ensure compliance with international standards, Thailand could consider amending its legislation to expressly address these issues, and to ensure its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Jurisdiction for Prosecuting Bribery

Thailand has jurisdiction to prosecute bribery that takes place wholly or partly in its territory, or when the consequences of an offence are felt there. To strengthen its jurisdictional base for prosecuting bribery, Thailand could consider addressing the following issues:

- (a) Nationality jurisdiction to prosecute bribery cases; and
- (b) Extending extraterritorial jurisdiction in CC Section 9 to passive bribery of officials of SOEs.

Sanctions for Bribery

Bribery is punishable in Thailand by death, imprisonment, confiscation and/or fines, though the maximum available fines are low. If corporate liability is available, then the maximum available fines are wholly inadequate. Furthermore, the adequacy of the sanctions imposed in practice is unclear, since the Thai authorities were unable to provide the necessary statistics. Thailand could therefore consider addressing the following issues:

- (a) Increasing the maximum fines available;
- (b) Confiscation of indirect proceeds of bribery under the Criminal Code;
- (c) Availability of a fine in lieu of confiscation (i.e. value confiscation);
- (d) Availability of administrative sanctions, such as blacklisting and debarment from seeking public procurement contracts; and
- (e) Maintaining statistics on the actual sanctions (including confiscation) imposed in bribery cases.

Tools for Investigating Bribery

Some basic tools for investigating bribery are available in Thailand. To enhance the ability of law enforcement to investigate bribery, the following matters could be addressed in the context of bribery investigations:

- (a) Availability of additional special investigative techniques in bribery investigations, *e.g.* undercover operations, controlled deliveries, wiretapping, secret surveillance, and listening and bugging devices;
- (b) Freezing of bank and other accounts; and
- (c) Plea bargaining, and offering immunity or reduced sentences in return for an offender's assistance in an investigation or prosecution.

Enforcement of Bribery Offences

There is some anecdotal evidence that the NACC receives a large number of complaints annually, many of which result in prosecutions. Thailand

could consider maintaining detailed statistics on the investigation, prosecution, conviction and sanctions for bribery offences. Such detailed statistics would be necessary to assess the effectiveness of Thailand's enforcement regime.

RELEVANT LAWS AND DOCUMENTATION

National Anti-Corruption Commission (NACC): www.nccc.thaigov.net

NOTES

- ¹ The offence also covers trafficking in influence.
- ² See OECD Convention, Article 1(4)(c) and Commentary 19.
- ³ For example, Section 53 of the Anti-Trafficking in Persons Act B.E 2551 (2008) and Section 61 of the Anti-Money Laundering Act 1999 create specific criminal offences against "juristic persons" for human trafficking and money laundering respectively.
- ⁴ Case No. 1669/2506 and No. 548/2508.
- ⁵ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ⁶ See also IMF (2007), *Thailand: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism*, para. 276 (www.imf.org/external/pubs/ft/scr/2007/cr07376.pdf).
- ⁷ AMLA Sections 51 and 3 (definition of "asset involved in an offence").
- ⁸ Applicable treaties and foreign law may impose additional requirements.
- ⁹ Applicable treaties and foreign law may impose additional requirements.
- ¹⁰ Commercial Banking Act, Section 46. See also IMF (2007), *Thailand: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism*, para. 419.

Criminalisation of Bribery in Vanuatu

**Penal Code of Vanuatu
Corruption and Bribery of Officials
(From www.pacii.org)**

73. (1) No public officer shall, whether within the Republic or elsewhere, corruptly accept or obtain or agree or offer to accept or attempt to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his official capacity.

Penalty: Imprisonment for 10 years.

(2) No person shall corruptly give or offer or agree to give any bribe to any person with intent to influence any public officer in respect of any act or omission by him in his official capacity.

Penalty: Imprisonment for 10 years.

(3) For the purposes of this section, "bribe" means any money, valuable consideration, office or employment, or any benefit, whether direct or indirect, and the expression "public officer" means any person in the official service of the Republic (whether that service is honorary or not and whether it is within or outside the Republic) any member or employee of any local authority or public body and includes every police officer and judicial officer.

INTRODUCTION

As of May 2009, Vanuatu has not yet signed nor acceded to UNCAC. It has been a member of the APG since 1999. Vanuatu has a unified legal system based on British common law and French civil law. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE BRIBERY OFFENCES

Vanuatu's main bribery offences are found in Section 73 of the Penal Code. As seen below, there are some inconsistencies between the active and passive bribery offences. In addition, bribery of various types of public officials is covered in at least seven other statutes.¹ Many of these offences overlap and

are inconsistent with the Penal Code offences. This report focuses on the Penal Code offences but refers to the other offences where relevant.

Section 73(2) Penal Code concerns active domestic bribery and covers a person who corruptly gives, offers, or agrees to give a bribe. A promise to bribe is not expressly covered, nor is there case law to confirm that it is covered. There is also no case law to clarify whether the offence covers bribes that are made but not received, and bribes that are rejected by an official. Also unclear is whether the term “intent to influence any public officer” would restrict the offence to “trading in influence” cases.

Section 73(1) deals with passive domestic bribery and covers a person who corruptly accepts, obtains, agrees, offers to accept, or attempts to obtain a bribe. Requesting or soliciting a bribe is not expressly covered but may be covered by an “offer to accept” or an “attempt to obtain” a bribe. The offences in other statutes are different. Some statutes expressly include an official who asks for or proposes an agreement to obtain a bribe.² There are also statutes whose bribery offences do not deal with passive bribery at all.³

The offences in Section 73 Penal Code deal with additional modes of committing bribery. Concerning bribery through intermediaries, both the active and passive offences expressly cover bribery committed “directly or indirectly”. As for third party beneficiaries, the passive bribery offence (Section 73(1) Penal Code) expressly covers a public official who accepts or obtains bribes “for himself or any other person”. However, there is no comparable language for the active bribery offence.

The Penal Code Section 73 offences cover bribery of a “public officer”, which is defined in Section 73(3) as a person in the official service of the Republic of Vanuatu. The definition expressly includes persons providing an “honorary” (i.e. unpaid) service, members or employees of any local authority or public body, police officers, and judicial officers. The definition also expressly covers persons in the official service of the Republic within or outside the Republic. It is not clear whether this definition covers persons who perform a public function, including for a public agency or public enterprise, or provides a public service. A separate statute deals with bribery of members and officers of parliament.⁴

The Penal Code Section 73 offences deal with bribery in order that an official acts or omits to act in his/her official capacity. This appears to cover an official who receives a bribe to perform or to breach his/her duty. But it might not include an official who uses his/her position outside his/her authorised competence (e.g. an official who uses his/her position to influence another

official to provide an undue advantage to the briber). Case law was not available on this point. The active bribery offences in the Customs and Excise Acts are even narrower. They apply only to officials who intend to defraud the Government or to commit an unlawful act. The provisions therefore do not apply to officials who receive a bribe to commit a lawful act, e.g. issuing a permit.

Section 73(3) defines a “bribe” as any money, valuable consideration, office or employment, or any benefit. The offences in the other statutes often follow a similar formulation. One exception is the offence that applies to members and officers of parliament, which covers “any fee, compensation, gift or reward”. “Benefit” is not expressly included, raising the question of whether non-pecuniary advantages would be covered. For all offences - whether in the Penal Code or the additional statutes - there is no information on whether the definition of a bribe is affected by the value of the bribe, its results, the perceptions of local custom, the tolerance by local authorities, the alleged necessity of the bribe, or whether the briber is the best-qualified bidder.

Regarding the mental element, both offences in Section 73 cover bribery that is committed intentionally or recklessly.⁵ An offender must also give/receive the bribe “corruptly”, an undefined term. Ni-Vanuatu case law was not available to elaborate the meaning of “corruptly”. The same term has been used in U.K. criminal statutes on corruption.⁶ U.K. case authorities interpreting this term are unclear and in “impressive disarray”. Some interpreted “corruptly” to mean “doing an act that the law forbids as tending to corrupt”, while others required further proof that the accused acted dishonestly.⁷ Recent reform proposals in the U.K. by the Law Commission, the Government and a Parliamentary Joint Committee all favour eliminating the concept of “corruptly”.⁸ The U.K. Bribery Act 2010 accordingly rejected this concept. For similar reasons, the OECD Working Group on Bribery has also recommended that another country replace the term “corruptly” in its foreign bribery offence with a clearer concept.⁹

The Penal Code domestic bribery offences do not contain some defences to bribery that are commonly found in other jurisdictions. There are no express defences of small facilitation payments, solicitation or “effective regret”.

As mentioned above, at least seven other Ni-Vanuatu statutes contain criminal bribery offences. These offences generally deal with bribery of specific types of officials. The formulations of these offences differ greatly, both among themselves and from Section 73 Penal Code. For example, some only cover giving and accepting but not offering a bribe. Others cover only offering. Only some expressly cover third party beneficiaries or bribery through intermediaries. Just one uses the term “corruptly”.

BRIBERY OF FOREIGN PUBLIC OFFICIALS

Foreign bribery is not an offence in Vanuatu. The Penal Code Section 73 offences cover bribery of a “public officer”, which is defined in Section 73(3) as a person in the official service of the Republic of Vanuatu. This definition clearly does not include officials of foreign countries or public international organisations.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Corporations (but not other types of legal persons) may be held liable for crimes (including bribery) in Vanuatu (Section 18 Penal Code). In the absence of judicial decisions, it is not clear how broadly the term “corporation” would be interpreted.

The Penal Code is unclear on when liability would be imposed against the legal person. The Code specifies that a company is liable if “the acts and intention of its principals or responsible servants may be attributed to the corporation.” The Code does not define who may be “principals or responsible servants”, for instance, whether the expression includes low level employees. The wording in Section 18 also suggests that the acts and intention of principals or servants are not always attributed to the company. Under what circumstances they will be attributed is not clear. Also unclear is whether corporate liability depends on the conviction of the principal or servant concerned. Case law is not available on these points.

On its face, the ni-Vanuatu Penal Code does not impose corporate liability for failure to prevent bribery or bribery arising from inadequate supervision. It is unclear whether courts would interpret the Code to impose such liability. There is no information on whether corporate compliance programmes affect liability. Also unclear is whether corporate liability can arise for bribery offences under the statutes outside the Penal Code.

The OECD Working Group on Bribery has recognised minimum standards for meeting the corporate liability requirement in the OECD Anti-Bribery Convention.¹⁰ These standards are instructive for meeting the comparable standard under the UNCAC. When deciding whether liability of legal persons should be imposed, countries should take one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person should be flexible and reflect the wide variety of decision-making systems in legal persons. In other words, liability may be triggered by the conduct of someone who

does not have the highest level of managerial authority in certain cases.

- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

There is no information on whether criminal liability has been imposed against companies for bribery or any other crime.

JURISDICTION TO PROSECUTE BRIBERY

Territorial jurisdiction is covered by Sections 1 and 2 of the Penal Code. The Code applies to any act done or omitted to be done within the territory of Vanuatu. For offences that take place partly abroad, the Penal Code applies only if an element of the offence has taken place within the territory of Vanuatu.

Penal Code Section 4 provides for nationality jurisdiction. A Ni-Vanuatu citizen may be prosecuted for an act or omission that constitutes a crime if it had occurred in Vanuatu, and if it constitutes a crime where it occurred. However, the Ni-Vanuatu national cannot be punished more severely than the maximum penalty prescribed by the law where the act or omission occurred. The prosecution also requires the written consent of the Public Prosecutor. Since this provision applies only to Ni-Vanuatu “citizens”, it likely does not apply to legal persons incorporated in Vanuatu.¹¹

SANCTIONS FOR BRIBERY

For the bribery offences under Penal Code Section 73, natural persons are punishable by 10 years’ imprisonment or a fine of up to VUV 365 000 (approximately USD 3 000 or EUR 2 400).¹² Jail sentences may be suspended. Legal persons are subject to the same maximum fine since they are liable “to the same extent as natural persons” (Penal Code Section 18). Convicted offenders may also have to pay prosecution costs.

On its face, the maximum fine available under the Penal Code may be low, especially for corporate defendants (against whom imprisonment cannot be imposed). In one case reported in 2002, the offender paid a bribe of VUV 500 000, i.e. substantially greater than the maximum fine.¹³ As well, the

bribery offence in one other statute (Customs Act Section 59) has a maximum fine that is 10 times higher than Penal Code Section 73.

Outside the Penal Code, the maximum fines for bribery can be much higher. For example, bribery under the Customs Act is punishable by 10 years' imprisonment, a fine of VUV 5 million (approximately USD 42 000 or EUR 33 000), or both. One notable exception is bribery of parliamentarians, which is punishable by 3 years' imprisonment, a fine of VUV 150 000 (approximately USD 1 300 or EUR 1 000) or both. It is unclear whether companies can be held liable under the non-Penal Code bribery offences.

Section 53 of the Penal Code provides for the confiscation of the bribe and the proceeds of bribery. The Proceeds of Crime Act 2002 (POCA) can also be used for the same purpose. The POCA (but not the Penal Code) allows a fine of an equivalent amount to be imposed if confiscation is not possible (e.g. if the bribe or the proceeds have disappeared). Almost all of the non-Penal Code bribery offences do not contain specific provisions for confiscation. Nevertheless, the confiscation provisions in POCA will apply if the statutory maximum penalty for the offence is at least 12 months' imprisonment.¹⁴

Information was not available concerning the availability of administrative sanctions for bribery, such as debarment from holding public office or seeking government public procurement contracts.

Statistics are not available on the actual sanctions that have been imposed for bribery. However, courts have stated that “[i]n general, a term of imprisonment is inevitable, save in exceptional circumstances or where the amount of money corruptly received is small. However, the Court should pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence.”¹⁵ Courts have also imposed fines, confiscated bribes, and ordered a defendant to pay the costs of the prosecution.¹⁶

TOOLS FOR INVESTIGATING BRIBERY

There is limited information on the investigative tools available for investigating bribery in Vanuatu. Criminal Procedure Code Sections 55-59 allow courts to issue warrants to search and seize evidence of an offence. The provision is available for investigating bribery offences. Pre-trial search and seizure are also available to ensure that funds are available for confiscation upon conviction.

International assistance is available for investigating bribery. Vanuatu may seek search and seizure from a foreign state for offences that are

punishable by 12 months' imprisonment, while extradition and less coercive forms of mutual legal assistance (*e.g.* taking testimony) are available in investigation of all criminal offences.¹⁷ Bribery under the Penal Code is punishable by 10 years' imprisonment and thus falls well within these thresholds.

Less clear, however, is the ability of law enforcement to seek information protected by secrecy during a bribery investigation. Vanuatu has strict secrecy laws, particularly for information concerning or held by international companies, exempted companies (including banks and insurance companies) and trusts.¹⁸ It is not clear to what extent the general search and seizure provisions in the Criminal Procedure Code override these secrecy provisions.

Special investigative techniques do not appear to be available in bribery investigations. The Criminal Procedure Code does not contain provisions on wiretapping, secret surveillance, undercover operations, or controlled deliveries. There are also no provisions on plea negotiations or the use of co-operative informants or witnesses, and it is not clear whether such tools are used in practice. Also absent are provisions concerning immunity from prosecution for persons who cooperate in corruption investigations or prosecutions.

ENFORCEMENT OF BRIBERY OFFENCES

The Vanuatu National Police Service is responsible for criminal bribery investigations, while the Attorney General has conduct of bribery prosecutions.

Statistics on the number of investigations, prosecutions and convictions of bribery were not available.

RECOMMENDATIONS FOR A WAY FORWARD

Vanuatu has already made significant efforts in criminalising bribery offences. To further enhance compatibility with international standards, Vanuatu could consider the following.

Elements of the Active and Passive Domestic Bribery Offences

Vanuatu's Penal Code bribery offences already contain several positive features that broadly conform to international standards. For instance, the offences expressly cover third party beneficiaries for passive bribery. They define public officials to include persons performing honorary service, and officials both in and outside ni-Vanuatu territory. The definition of a bribe also broadly covers both money and non-pecuniary advantages.

To improve the bribery offences, Vanuatu could consider further addressing the following areas:

- (a) The overlapping offences in several statutes;
- (b) Express language covering additional modes of committing bribery, such as a promise to give a bribe, third party beneficiaries for the active bribery offence, and soliciting a bribe;
- (c) Incomplete offences, such as when a bribe is offered to but not received by an official, or when an official rejects a bribe;
- (d) The definition of giving, receiving etc. a bribe “corruptly”;
- (e) Bribery of persons who perform a public function, including for a public agency or public enterprise, or who provides a public service; and
- (f) Bribery in order that an official uses his/her position outside his/her authorised competence.

Bribery of Foreign Public Officials

To bring its criminal into line with international standards, Vanuatu should enact an offence to criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Vanuatu may hold corporations criminally liable for bribery under the Penal Code. This provision is commendable, since international standards require legal persons to be held liable for bribery. To improve the effectiveness of this regime, Vanuatu could consider whether its system for imposing corporate liability takes one of two approaches:

- (a) The level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects the wide variety of decision-making systems in legal persons.
- (b) Alternatively, liability is triggered when a person with the highest level managerial authority (i) offers, promises or gives a bribe to an official; (ii) directs or authorises a lower level person to offer, promise or give a bribe to an official; or (iii) fails to prevent a lower

level person from bribing an official, including through a failure to supervise him/her through a failure to implement adequate internal controls, ethics and compliance programmes or measures.

Vanuatu could also consider addressing the following issues:

- (a) The application of liability to a wide range of legal persons, and not only corporations;
- (b) Whether corporate liability depends on the conviction of a natural person for the crime; and
- (c) Whether corporate liability applies to the bribery offences outside the Penal Code.

Jurisdiction for Prosecuting Bribery

In addition to territorial jurisdiction, Vanuatu also has nationality jurisdiction to prosecute natural persons for bribery. This is in line with international standards. To ensure its overall jurisdictional basis for prosecuting bribery is sufficiently broad, Vanuatu could address the follow matters:

- (a) Providing territorial jurisdiction to prosecute bribery even if no elements of the offence takes place in its territory, e.g. when a briber calls an official while in Vanuatu to arrange a meeting, but subsequently meet and give a bribe to the official outside Vanuatu; and
- (b) Providing nationality jurisdiction to prosecute legal persons for bribery.

Sanctions for Bribery

The offences under Section 73 Penal Code are punishable by 10 years' imprisonment and a fine of VUV 365 000 (approximately USD 3 000 or EUR 2 400). The maximum term for imprisonment appears in line with international standards. To ensure sanctions for bribery are effective, proportionate and dissuasive, Vanuatu could address several issues:

- (a) Under the Penal Code: the sufficiency of the maximum fine for bribery, and whether courts should be allowed to impose imprisonment concurrently with fines; and

- (b) The sufficiency of the maximum penalties for bribery under the bribery offences outside the Penal Code, especially for bribery of members and officers of parliament.

Tools for Investigating Bribery

Based on the limited information available, Vanuatu could improve its ability to investigate bribery cases by addressing the following issues:

- (a) The availability of information protected by secrecy, particularly information concerning or held by international companies, exempted companies (including banks and insurance companies) and trusts, as well as information that may be protected by tax or bank secrecy laws;
- (b) The availability of special investigative techniques such as wiretapping, secret surveillance, undercover operations, and controlled deliveries;
- (c) Formalising in writing practices (if they exist) such as plea negotiations with a defendant and reliance on co-operative informants or witnesses; and
- (d) Granting immunity from prosecution to a person who co-operates in a corruption investigation or prosecution.

Enforcement

Statistics are an essential tool for evaluating whether a scheme of criminalising bribery is effective. Vanuatu could therefore consider maintaining full and current statistics on investigations, prosecutions, convictions of bribery for both natural and legal persons. It could also maintain statistics on the number and nature of sanctions imposed in bribery cases, including confiscation.

RELEVANT LAWS AND DOCUMENTATION

Penal Code and other Ni-Vanuatu legislation and judicial decisions:
www.paclii.org

NOTES

- ¹ These include Casino Control Act, s. 68; Customs Act, s. 59; Excise Act, s. 54; Leadership Code Act, ss. 23 and 30; Members of Parliament (Powers and Privileges) Act, s. 13; Ports Act, s. 33; and Shipping Act, s. 14.
- ² For example, see Casino Control Act, s. 68(1)(a). See also Customs Act, s. 59(2); and Excise Act, s. 54(2).
- ³ For example, see Ports Act, s. 33; and Shipping Act, s. 14.
- ⁴ Members of Parliament (Powers and Privileges) Act.
- ⁵ Penal Code, Section 6.
- ⁶ Public Bodies Corrupt Practices Act 1889 and Prevention of Corruption Act 1906.
- ⁷ See OECD (1999), *Phase 1 Report: United Kingdom*, Section 1.1.2; U.K. Law Commission (2008), *Reforming Bribery*, para. 2.33; D. Lanham, "Bribery and Corruption", *Essays in Honour of J C Smith* (1987) 92 at p. 104.
- ⁸ The U.K. Law Commission (2008), *Reforming Bribery* (Law Com No. 313); U.K. Ministry of Justice (March 2009), *Bribery: Draft Legislation*, Cm 7570; Joint Committee on the Draft Bribery Bill (July 2009), *Report on the Draft Bribery Bill*, HL Paper 115-I / HC 430-1.
- ⁹ See OECD (2006), *Phase 2 Report: New Zealand* at paras. 156-161.
- ¹⁰ OECD (2009), *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex I.
- ¹¹ It is arguable that there is extraterritorial jurisdiction to prosecute a non-ni-Vanuatu citizen who is a public official. This is because the definition of a "public officer" includes persons in the official service of the Republic outside its territory.
- ¹² In lieu of imprisonment, a court may impose a maximum fine of VT100 per day of the prescribed maximum penalty of imprisonment (Penal Code, Section 51).
- ¹³ *Public Prosecutor v. Zheng Quan Cai*, Supreme Court of Vanuatu, Criminal Case No. 22 of 2002.
- ¹⁴ In *Public Prosecutor v. Zheng Quan Cai*, Supreme Court of Vanuatu, Criminal Case No. 22 of 2002, the Court forfeited the bribe after convicting the accused of bribery under the *Customs Act*, even though that Act does not contain provisions for forfeiture. The jurisdictional basis for ordering forfeiture likely derived from the POCA, although the Court did expressly so indicate.
- ¹⁵ *Public Prosecutor v. John Wai*, Supreme Court of Vanuatu, Criminal Case No. 19 of 2001.

- ¹⁶ For instance, see *Public Prosecutor v. Zheng Quan Cai*, Supreme Court of Vanuatu, Criminal Case No. 22 of 2002.
- ¹⁷ Extradition Act, c. 287; Mutual Assistance in Criminal Matters Act, c. 285, ss. 1, 18 and 23. An applicable treaty may impose further limits.
- ¹⁸ According to the Web page “About Vanuatu” on the Web site of the Vanuatu Financial Services Commission (www.vfsc.vu), viewed in February 2009.

Criminalisation of Bribery in Viet Nam

Penal Code 1999
(From WorldLII: www.worldlii.org/vn)

Article 279
Receiving bribes

1. Those who abuse their positions and/or power, have accepted or will accept directly or through intermediaries money, property or other material interests in any form valued between five hundred thousand dong and ten million dong, or under five hundred thousand dong but in one of the following circumstances in order to perform or not to perform certain jobs for the benefits or at the request of the bribe offerers, shall be sentenced to between two and seven years of imprisonment.

Article 289
Offering bribes

1. Those who offer a bribe which has a value of between five hundred thousand dong and under ten million dong, or under five hundred thousand dong but cause serious consequences or commit it more than once, shall be sentenced to between one and six years of imprisonment.

INTRODUCTION

Viet Nam ratified the UNCAC in August 2009. It has been a member of the APG since 2007. The Vietnamese legal system is based on the civil law and the communist legal system. Its criminal bribery offences have not been externally reviewed.

ELEMENTS OF THE ACTIVE AND PASSIVE DOMESTIC BRIBERY OFFENCES

Viet Nam's main bribery offences are found in the Penal Code 1999, though the Anti-Corruption Law 2005 is of limited relevance. Active bribery is covered by Penal Code Article 289, while passive bribery is covered by Penal Code Article 279. The Anti-Corruption Law prohibits officials from committing "corrupt acts", which is defined as, among other things, "taking bribes", "taking advantage of positions while performing official duties" etc. (Articles 3 and 10).

However, the Law specifies administrative but not criminal sanctions for “corrupt acts”. The Law also does not define what amounts to “taking bribes”. This report will thus focus on the Penal Code offences, which are more detailed than the corruption offence in the Anti-Corruption Law. Nevertheless, it will touch upon the Law where appropriate.

International standards require active bribery offences to cover giving, offering or promising a bribe. Penal Code 289 only covers offering a bribe. Whether the offence covers giving and promising a bribe is unclear. Also unclear is whether a bribe that is offered but rejected or not received by a public official is an offence under the Penal Code.

For passive bribery, international standards require coverage of accepting and soliciting a bribe. Penal Code Article 279 only refers to “have accepted” and “will accept” a bribe. Whether the offence covers solicitation is therefore also unclear. However, solicitation is arguably covered since “asking for bribes” is an aggravating factor at sentencing (Article 279(2)(e)).

Effective active and passive bribery offences must also cover bribes that are given, solicited etc. through intermediaries. The Penal Code Article 279 passive bribery offence expressly covers bribes accepted “directly or through intermediaries”. On the other hand, the active bribery offence in Article 289 is silent on this issue; the coverage of active bribery through intermediaries is thus unclear.

Bribery offences should also cover bribes that are given to a third party beneficiary, not only an official. The Penal Code active and passive bribery offences are silent on this matter. Their coverage of third party beneficiaries is thus also uncertain.

International standards require active and passive bribery offences to cover a broad range of public officials, namely any person holding a legislative, executive, administrative or judicial office, regardless of seniority and whether appointed or elected, permanent or temporary, paid or unpaid; any person performing a public function, including for a public agency or public enterprise, or provides a public service; and any person defined as a “public official” under domestic law.¹ International standards thus take a broad functional approach. “Public official” is defined through broad, general categories of functions performed by officials.

The Penal Code offences may well meet this standard. The Article 279 passive bribery offence merely covers bribery of “those who abuse their positions and/or power”. The provision is not restricted to public officials *per se*

and conceivably includes anyone abusing his/her position or power, whether in the private or public sector. That the offence is under a Chapter of the Penal Code entitled “Crimes Relating to Position” - as opposed to, say, crimes relating to public officials - reinforces this view. The Article 289 active bribery offence refers only to “those who offer a bribe” without specifying to whom the bribe is offered. If the offence implicitly refers to bribes to those persons who abuse their positions or power in Article 279, then the active bribery offence may also meet international standards.

The Anti-Corruption Law has a narrower definition of public officials, however. The Law applies to public servants, certain specified military officials, leading/managerial officials in state enterprises and enterprises whose shares are held by the state, and persons assigned tasks or official duties (Article 1). The Law therefore does not expressly cover legislators, judges, or persons exercising a public function, including for or a public agency or public enterprise but who are not leading/managerial officials. The Vietnamese authorities point out that the Law on Public Servants considers legislators and judges to be public servants. Nevertheless, in the absence of confirmatory case law, it is not clear that the definition in the Law on Public Servants would necessarily apply to the Anti-Corruption Law.

International standards for the criminalisation of bribery also require broad coverage of acts or omissions in relation to the performance of official duties. This requires coverage of bribery in order that the official (a) performs his/her official duty, (b) breaches his/her official duty, and (c) does not exercise his/her judgment or discretion impartially while making an official decision.

It is not completely clear that the passive bribery offence in the Penal Code meets this standard. Article 279 passive bribery offence covers persons who *abuse* their positions and/or power. The term “abuse” on its face might not cover an official who accepts a bribe in order to (1) perform his/her duty or (2) influence his/her impartial exercises of discretion.

In addition, bribery offences must also cover any use of the public official’s position or office, including acts or omissions outside the official’s scope of competence. For example, a bribery offence should cover a case where an executive of a company gives a bribe to a senior official of a government, in order that this official use his/her office - though acting outside his/her competence - to make another official or private individual award a contract to that company.² For the Article 279 passive bribery offence, if the term “abuse” is interpreted sufficiently broadly, then the offence could cover an official who acts outside official competence. On the other hand, the provision also states that the offence only covers bribery in order to induce the official “to

perform or not to perform certain jobs”. The reference to “jobs” arguably limits the offence to officials who accepts bribes to perform acts or omissions within his/her official competence. The coverage of acts outside official competence is thus not totally clear.

The acts of the official that are covered by the active bribery offence is even less clear. The Article 289 offence does not refer to an official at all; it merely states that “those who offer a bribe” commit an offence. It is therefore unclear whether the offence covers officials who act in relation to the performance of official duties as well as beyond official competence. Much may depend on whether the active bribery offence is interpreted to mirror the passive bribery offence, and if so, how broadly the passive offence is interpreted.

International standards require coverage of bribes of both a monetary and non-monetary nature. The Article 279 passive bribery offence speaks of “money, property or other material interests”. This definition, particularly the reference to “material” interests, suggests that only tangible bribes are covered. Intangible bribes such as services would be excluded. That the maximum penalty for bribery is a function of the monetary value of the bribe (see below) reinforces this conclusion. The Article 289 active bribery offence refers to “bribes” with no further elaboration. If this term is interpreted to mirror Article 279, then intangible and non-monetary bribes may also be excluded.

Whether the giving of an advantage amounts to a crime also depends on the value of the advantage. The Penal Code active and passive bribery offences apply to bribes under VND 500 000 (approximately EUR 20 or USD 28) only if the offence causes “serious consequences”.³ The passive bribery offence also applies only if the offender has not been subject to administrative disciplinary measures.

Making small facilitation payments does not necessarily constitute bribery. The Penal Code does not specifically provide a defence of small facilitation payments (e.g. payments to officials to induce them to perform non-discretionary routine tasks such as issuing licenses or permits). But as noted above, it is not an offence to give a small bribe under VND 500 000 (approximately EUR 20 or USD 28) that does not cause “serious consequences”. This exception also allows non-facilitation payments because it allows payments that are made to secure governmental action that is not of a routine nature.

“Effective regret” is also a defence. For bribers, the Penal Code Article 289(6) states that “Persons who are coerced to offer bribes but take initiative in reporting them before being detected may be exempt from penal liability and

have part of or the entire property offered as bribes returned.” The meaning of “coerced” is not defined; it is unclear whether a mere solicitation would suffice. For officials, the Anti-Corruption Law states that a person who commits a corrupt act and who reports the crime may be considered for reduced penalties or exemption from liability (Article 4(4)). Neither the Penal Code nor the Anti-Corruption Law requires a person who effectively regrets to testify against another offender, or to give up any benefits derived from bribery.

There does not appear to be a specific defence of solicitation to domestic bribery (i.e. no active bribery offence takes place if the official requested the bribe).

BRIBERY OF FOREIGN PUBLIC OFFICIALS

Viet Nam has not enacted an offence to expressly cover bribery of officials of foreign governments or public international organisations in the conduct of international business. Penal Code Article 279 and possibly also Article 289 refer to bribes to “persons who abuse their position and/or power”. On its face, this could encompass a foreign public official. However, international standards require specific legislative language covering bribery of foreign public officials, particularly in the absence of supporting case law.

LIABILITY OF LEGAL PERSONS FOR BRIBERY

Viet Nam does not punish legal persons for bribery. The Penal Code does not sanction legal persons for any intentional criminal offence. Nothing in Viet Nam’s constitution prohibits criminal sanctions against legal persons.

JURISDICTION TO PROSECUTE BRIBERY

Viet Nam has jurisdiction over bribery committed in its territory. Article 5 of the Penal Code states that “The Penal Code applies to all acts of criminal offenses committed in the territory of the Socialist Republic of Viet Nam.” It is not clear whether this provides jurisdiction to prosecute offences that occur partly in Viet Nam.

The Penal Code also provides for nationality jurisdiction. Penal Code Article 6 states that “Vietnamese citizens who commit offenses outside the territory of the Socialist Republic of Viet Nam may be examined for penal liability in Viet Nam according to this Code.”⁴ There is no requirement of dual criminality, i.e. the conduct in question need not be an offence in the place where it occurred.

Extraterritorial jurisdiction also applies to stateless persons who permanently reside in Viet Nam. Finally, non-Vietnamese nationals can also be prosecuted for extraterritorial offences if so provided in a treaty to which Viet Nam is a signatory.

SANCTIONS FOR BRIBERY

The sanctions for active and domestic bribery in the Penal Code are graduated depending on the presence of certain aggravating factors. The sanctions for the Article 289 active bribery offence are as follows:

- (a) One to six years' imprisonment: If the bribe is between VND 500 000 and 10 million (approximately EUR 20 to 400 or USD 28 to 560), or if the bribe is below VND 500 000 but the offence causes "serious consequences";
- (b) Six months to 13 years' imprisonment: If the offence was committed: in an organised manner; through solicitation or harassment; using "treacherous tricks"; involved state property as bribes; by someone who had committed the offence more than once;⁵ or the bribe is between VND 10 million and 50 million (approximately EUR 400 to 2 000 or USD 560 to 2 800);
- (c) 13 to 20 years' imprisonment: If the bribe is between VND 50 million to 300 million (approximately EUR 2 000 to 12 000 or USD 2 800 to 16 800), or if the offence causes "very serious consequences";
- (d) Imprisonment of 20 years to life, or death: If the bribe is VND 300 million (approximately EUR 12 000 or USD 16 800) or more, or if the offence causes "particularly serious consequences".

In addition, the offender may also be subject to a fine of at least VND 300 million (approximately EUR 12 000 or USD 16 800).

The sanctions for the Article 279 passive bribery offence are as follows:

- (a) 2 to 7 years' imprisonment: If the bribe is between VND 500 000 and 10 million (approximately EUR 20 to 400 or USD 28 to 560), or if the bribe is below VND 500 000 but the offence causes "serious consequences" or if the offender has been subject to administrative disciplinary measures;
- (b) 7 to 15 years' imprisonment: If the offence is committed: in an organised manner; involves abuse of positions and/or powers; by someone who had committed the offence more than once;⁶

knowing that the bribe is state property; using “treacherous tricks”; the bribe is between VND 10 million and 50 million (approximately EUR 400 to 2 000 or USD 560 to 2 800); or by “abusing positions and/or powers”. This last factor creates confusion, since “abusing positions and/or powers” is already an element of the offence;

- (c) 15 to 20 years’ imprisonment: If the bribe is between VND 50 million to 300 million (approximately EUR 2 000 to 12 000 or USD 2 800 to 16 800), or if the offence causes “particularly serious consequences”;
- (d) Imprisonment of 20 years to life, or death: If the offence involves appropriation of property of VND 300 million (approximately EUR 12 000 or USD 16 800) or more, or if the offence causes “particularly serious consequences”.

In addition, the offender may also be subject to a fine of one to five times the value of the bribe.

What amounts to “serious consequences”, “particularly serious consequences” or “treacherous tricks” is wholly unclear. The Penal Code does not elaborate on these concepts.⁷

Confiscation under the Penal Code is only available against bribed officials in some cases. Article 279(5) permits confiscation of all or part of a bribed official’s property. There are no comparable provisions for the active bribery offence. Furthermore, confiscation is only available for “serious crimes, very serious crimes or particularly serious crimes” (Penal Code Article 40). This suggests that confiscation is not available for all passive bribery offences, but only those that are at least “serious”.

When available, confiscation may be ordered *viz.* several categories of property. Penal Code Article 41 allows confiscation of instrumentalities of crime, and “objects and money acquired through the commission of crime or the trading or exchange of such things”. APG indicated that it is unclear whether this provision allows confiscation of objects or money not acquired through the commission of crime by the trading or exchange of such things, such as proceeds from an investment. Equally unclear is the confiscation of property that has not been used but is intended to be used for the commission of an offence. The report also expressed doubts over the confiscation of indirect proceeds (i.e. proceeds of proceeds).⁸ Article 40 further allows confiscation of an offender’s property. There are no provisions to impose a fine of equivalent value to the property subject to confiscation if, for example, the bribe or proceeds thereof have disappeared.

The Anti-Corruption Law also speaks of confiscation against officials but does not indicate how this would be accomplished. The law merely states that corruption-related property must be recovered and confiscated, and that persons who commit corrupt acts must pay compensation. As well, the Law only applies to corrupt officials and therefore does not provide a basis for confiscation of the proceeds of bribery against a briber.

The inability to order confiscation against a briber is made worse because a briber may recover the bribe. If a bribe-giver reports the crime before the authorities detect it, the bribe paid must be confiscated from the official and returned to the briber (Anti-Corruption Law Article 70). A briber who bribes to obtain a contract and who reports the matter quickly may be in a “win-win” situation, as he/she may recover the bribe and also retain the contract.

Some additional administrative sanctions are available. Section 279 provides that an official convicted of passive bribery is “banned from holding certain posts for one to five years”. There is no explanation of what qualifies as “certain posts”. Under the Anti-Corruption Law Article 69, officials (including legislative officials) convicted of committing “corrupt acts” are dismissed. Neither the Penal Code nor the Anti-Corruption Law provides for debarment from seeking government procurement contracts.

TOOLS FOR INVESTIGATING BRIBERY

The Criminal Procedure Code 2003 (CPC) contains some investigative tools for bribery investigators. The Code provides for summons of witnesses to provide statements (Article 133). A warrant may be issued to search premises and seize instruments of crime, property acquired from crime, and other objects and documents related to the case (Articles 140-143). Investigators, prosecutors and courts may request agencies, organisations and individuals to supply documents and objects (Article 65). However, there are no specific procedures to order banks and financial institutions to produce documents and information, including those covered by bank secrecy. There are also no provisions dealing specifically with tax information covered by secrecy rules.

CPC Article 146 provides for freezing and restraint of property. Restraint is only available against a person charged with offenses; it does not appear to be available early in an investigation before a charge has been filed. Restraint is also only available against property that is likely to be confiscated, or if an accused may be fined or ordered to pay compensation. Restrained property is assigned to “their owners or their relatives for preservation”. Failure to discharge this responsibility, e.g. by consuming or destroying the restrained property, is an offence. The authorities are therefore not responsible for

managing restrained property. Whether and how these provisions apply to bank and financial accounts is uncertain.

The recent APG noted additional provisions for freezing accounts.⁹ Decree No. 64/2001/ND-CP on Payment Activities, Article 9 provides for the blocking of accounts upon the decision or request of a competent person. Decree 74/2005 on Anti-Money Laundering, Article 11 also allows the freezing of an account and the suspension of transactions, though the decree has only been applied to credit institutions in practice. APG thus questioned the Decree's effectiveness and enforceability.

The CPC does not provide for special investigative techniques. Article 144 allows the seizure of mail and other postal items at post offices. Beyond this measure, there are no provisions for wiretapping, listening and bugging devices, secret surveillance, video recording, email interception, undercover police operations (e.g. "sting" operations), or controlled deliveries. Nevertheless, the Vietnamese authorities have apparently conducted undercover operations and controlled delivery in serious cases.¹⁰ These operations were authorised by the Criminal Procedure Code, according to the Vietnamese authorities.

Extradition is available in bribery cases under the Criminal Procedure Code (CPC) and the Law on Mutual Legal Assistance (LMLA), which entered into force on 1 July 2008.¹¹ Under the CPC Article 343, Viet Nam may seek extradition for all criminal offences, including from bribery, but only from countries with which it has extradition treaty relations.¹² Dual criminality is required for extradition under both statutes. The LMLA further requires the conduct underlying a request to be punishable in Viet Nam by imprisonment of at least one year, life imprisonment or death.

The Criminal Procedure Code and LMLA also allow Viet Nam to seek mutual legal assistance (MLA) in bribery cases. Assistance may be sought under a treaty or without a treaty on the basis of reciprocity (CPC Article 340 and LMLA Article 4). There does not appear to be a dual criminality requirement for seeking MLA. The CPC does not describe the types of assistance that Viet Nam may seek or provide.¹³

Apart from the provisions on the effective regret defence described above, there are no provisions dealing with offenders who co-operate with the authorities in the investigation or prosecution of other offenders. There are also no provisions on plea bargaining.

ENFORCEMENT OF BRIBERY OFFENCES

The Supreme People's Procuracy has conduct of corruption-related prosecutions (Anti-Corruption Law Article 79). The Viet Namese authorities did not provide enforcement statistics for bribery offences, but a 2009 APG report provided the following data:¹⁴

	Data from 1 June 2006 to July 2009
Number of detected corruption cases	820
Number of prosecuted corruption cases	759
Number of corruption cases adjudicated	631
Number of convicted persons	1 477
Value of corrupt assets	VND 418.2 billion (approximately USD 23.4 million or EUR 16.4 million)
Value of recovered assets	VND 92.3 billion (approximately USD 5.2 million or EUR 3.6 million)

Citing Global Integrity, the APG noted that Viet Nam received a "very weak score" in its anti-corruption enforcement."¹⁵

RECOMMENDATIONS FOR A WAY FORWARD

Elements of the Active and Passive Domestic Bribery Offences

Viet Nam's active and passive domestic bribery offences meet some requirements found in international standards. Viet Nam could strengthen these offences by addressing the following issues:

- (a) Express language covering giving and promising a bribe in the active bribery offence, and soliciting a bribe in the passive bribery;
- (b) Express coverage of bribery through an intermediary and bribes given to third party beneficiaries for the active and passive bribery offences;
- (c) Incomplete offences, such as when a bribe is offered but rejected by an official, or is not received by an official;
- (d) Bribery in order that an official perform his/her duty or exercises his/her discretion in a particular fashion, and briber in order that a

public servant use his/her position outside his/her authorised competence;

- (d) Non-monetary bribes;
- (e) Bribes a small value;
- (f) Whether small facilitation payments is a defence; and
- (g) Requiring a person who invokes the defence of “effective regret” to testify against another offender.

Bribery of Foreign Public Officials

To bring its criminal bribery offences in line with international standards, Viet Nam should criminalise the bribery of officials of foreign governments and public international organisations in the conduct of international business.

Liability of Legal Persons for Bribery

Establishing criminal liability against legal persons for bribery in order to bring Viet Nam in line with international standards.

Jurisdiction for Prosecuting Bribery

In addition to territorial jurisdiction, Viet Nam also has nationality jurisdiction to prosecute natural persons for bribery. This is in line with international standards. To ensure its overall jurisdictional basis for prosecuting bribery is sufficiently broad, Viet Nam could address the jurisdiction to prosecute bribery offences that take place partly in Viet Nam.

Sanctions for Bribery

To ensure a regime of sanctions that is effective, proportionate and dissuasive, Viet Nam could consider addressing:

- (a) Clarification of “serious consequences”, “particularly serious consequences” or “treacherous tricks”;
- (b) Confiscation against bribers and bribed officials of the direct and indirect proceeds of bribery, and the availability of fines of

- equivalent value to the property subject to confiscation if, for example, the bribe or proceeds thereof have disappeared;
- (c) The use of confiscation in practice;
 - (d) The return of bribes to bribers who report the crime to the authorities; and
 - (e) Additional administrative sanctions for bribery, such as blacklisting and debarment from public procurement.

Tools for Investigating Bribery

With limited investigative tools for bribery cases, Viet Nam could consider some additional matters:

- (a) Ability to compel banks and financial institutions to produce information and documents that are subject to bank secrecy;
- (b) Ability to obtain from the tax authorities information and documents subject to tax secrecy;
- (c) Special investigative techniques in bribery investigations, such as wiretapping, email interception, secret surveillance, video recording, listening and bugging devices, undercover police operations, and controlled deliveries;
- (d) Freezing the proceeds of corruption, especially accounts, whether before or after a person has been charged;
- (e) Management of frozen or restrained property;
- (f) The ability to seek extradition from countries with which Viet Nam does not have extradition treaty relations; and
- (g) Provisions or guidelines for plea bargaining, and for dealing with offenders who co-operate with the authorities in the investigation or prosecution of other offenders.

Enforcement of Bribery Offences

To properly measure the effectiveness of its criminalisation of bribery, Viet Nam should maintain statistics on investigations, prosecutions, convictions, and sanctions for active and passive domestic bribery.

RELEVANT LAWS AND DOCUMENTATION

Laws of Viet Nam: WorldLII - www.worldlii.org/vn

Anti-Corruption Law 2005: www.shtp.hochiminhcity.gov.vn/webshtp/news/content.aspx?cat_id=610&news_id=805

APG (2009), *Evaluation Report: Viet Nam*: www.apgml.org

NOTES

- ¹ See: UNCAC Article 2(a); OECD Convention Article 1; Inter-American Convention Against Corruption Article 1; and, African Union Convention on Preventing and Combating Corruption Article 1.
- ² See OECD Convention, Commentary 19.
- ³ See below for what amounts to “serious consequences”.
- ⁴ “Offences” in this context presumably means offences under the Penal Code of Viet Nam.
- ⁵ It is unclear whether “a person who has committed the offence more than once” refers to someone who has a prior conviction for bribery, or someone who has committed (but not yet convicted for) multiple acts of bribery.
- ⁶ It is unclear whether “a person who has committed the offence more than once” refers to someone who has a prior conviction for bribery, or someone who has committed (but has not yet been convicted for) multiple acts of bribery.
- ⁷ Penal Code Section 8 defines the punishment for “serious crimes”, “very serious crimes” and “particularly serious crimes”. But these terms are also undefined, and hence the provision is of limited assistance to interpreting the sanctions for bribery. Moreover, the application of Section 8 to the bribery offences is questionable, since the punishment prescribed therein does not

correspond to those for the bribery offences. Section 8 may therefore not be intended to refer to the bribery offences.

⁸ Asia-Pacific Group on Money Laundering (2009), *Mutual Evaluation Report: Viet Nam*, paras. 208-214.

⁹ Asia-Pacific Group on Money Laundering (2009), *Mutual Evaluation Report: Viet Nam*, paras. 215-227.

¹⁰ Asia-Pacific Group on Money Laundering (2009), *Mutual Evaluation Report: Viet Nam*, para. 331.

¹¹ Unfortunately, a full English translation of the law, including the provisions on seeking extradition and MLA, was not available.

¹² Additional conditions in applicable treaties and foreign legislation may apply.

¹³ Asia-Pacific Group on Money Laundering (2009), *Mutual Evaluation Report: Viet Nam*, paras. 840, 873 and 880. Paragraphs 842-867 and 873-888 of the Report discuss in detail the provisions of the Law concerning Viet Nam's provision – but not seeking – of extradition and MLA.

¹⁴ Asia-Pacific Group on Money Laundering (2009), *Mutual Evaluation Report: Viet Nam*, para. 105.

¹⁵ Asia-Pacific Group on Money Laundering (2009), *Mutual Evaluation Report: Viet Nam*, para. 104.

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where governments work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

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OECD Publishing disseminates widely the results of the Organisation's statistics gathering and research on economic, social and environmental issues, as well as the conventions, guidelines and standards agreed by its members.

ADB/OECD Anti-Corruption Initiative for Asia and the Pacific

The Criminalisation of Bribery in Asia and the Pacific

Criminalisation is a key component of all international anti-corruption instruments. For example, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) and the UN Convention against Corruption (UNCAC) both require States Parties to enact specific criminal offences on bribery. The Asian Development Bank (ADB)/Organisation for Economic Co-operation and Development (OECD) Anti-Corruption Initiative's Action Plan commits countries to ensure "the existence of legislation with dissuasive sanctions which effectively and actively combat the offence of bribery of public officials".

However, criminalisation can be a challenging task, as experienced by many countries party to the Anti-Bribery Convention. With this in mind, the Initiative decided to conduct a thematic review on the criminalisation of bribery offences under the UNCAC. Drawing on the experience of the OECD Anti-Bribery Convention's monitoring mechanism, the review focuses on each member's implementation of UNCAC Articles 15, 16 and 26 (domestic and foreign bribery by natural and legal persons). The review also identifies trends and challenges across the Asia-Pacific region.

The ADB/OECD Anti-Corruption Initiative for Asia and the Pacific supports its 28 member countries and jurisdictions in their efforts to establish sustainable safeguards against corruption as set out in the Anti-Corruption Action Plan for Asia and the Pacific. For more information, please visit www.oecd.org/corruption/asiapacific.

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