

# B20 Task Force on Improving Transparency and Anti-Corruption

*Development of a Preliminary Study on  
Possible Regulatory Developments to Enhance  
the Private Sector Role in the Fight against  
Corruption in a Global Business Context*

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# 1. Introduction

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1.1 In recent years we have seen increasing momentum in the multi-jurisdictional enforcement of anti-corruption legislation. This trend will continue as more states become involved in the coming years. For example the vigorous approach of the authorities in the People's Republic of China recently in dealing with bribes allegedly paid by global companies<sup>1</sup> has given rise to much interest. Recent years have also seen global companies recognise that they themselves have a vital role to play and that they must work with national governments and international institutions in the fight against corruption. The B20 companies have shown leadership on behalf of the private sector in taking forward these issues in a number of ways. The current initiative by the B20 Task Force on Improving Transparency and Anti-Corruption is very timely and welcome<sup>2</sup>.

1.2 There are important issues for states and companies. For states questions such as the following arise-

- Which tools are most effective in fighting corruption by large companies? What can be learned from countries that use those tools?
- What is the right balance between prevention and tough enforcement?
- Does the state have the right tools to enable it to work with other jurisdictions involved in a case (some of which may be using extraterritorial legislation<sup>3</sup>)? This goes beyond Mutual Legal Assistance.

1.3 For companies issues are likely to be-

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<sup>1</sup> The term 'company' or 'companies' is used as a convenient shorthand to refer to corporate groups as well as individual companies.

<sup>2</sup> The detailed Terms of Reference are set out in Annex 1. This Study was produced at the request of the B20 Task Force. It owes much to discussions with friends and colleagues over many years. In particular the author would like to thank Dimitri Vlassis, Nicola Bonucci and Massimo Mantovani for their encouragement throughout and for their insightful comments on earlier drafts. Responsibility for the views in this Study however rests with the author. A draft of this Study was discussed during the Conference of the States Parties to UNCAC at a meeting in Panama on 27 November 2013. Representatives from the UNODC, OECD, and the B20 were present together with representatives from civil society, international development institutions, enforcement authorities and private sector lawyers. The author is greatly indebted to the helpful and constructive comments made during that discussion.

<sup>3</sup> The meaning of 'extraterritorial' in this context will be described in para 2.8.

- Are they at risk of multiple penalties and multiple asset forfeiture for the same violation when a number of states have asserted jurisdiction?
- What incentives or disincentives are there for companies that want to work with the authorities in a state?

1.4 This Preliminary Study will look at these issues. It is a Preliminary Study and not an exhaustive account of the very many interesting developments taking place in various states. It will focus on real life examples that show how the principles established under international Conventions apply in practice and where more international guidance is needed. It will look at these issues from the standpoint of companies as well as states. It will analyse key technical issues that arise in this area. These need to be thought through in order to build a robust conceptual and legal platform for the new relationship between states and companies that is needed.

1.5 There will be a range of case studies in this Preliminary Study. A number of these come from the US and the UK. The opportunity has been taken as well to give examples concerning China because recent cases are going to make a number of these issues very relevant. For example there will be a new dynamic in these cases when one of the enforcing states is the state in which the bribe was allegedly paid. That state may well consider that issues regarding the protection of its sovereignty are engaged in any enforcement action it decides to take. There will be references as well to developments in other states.

1.6 Anti-corruption is an area where international cooperation is essential and where those involved can benefit from the experience of others engaged in this work. There is much to learn from international experience in looking at the role of education, prevention and enforcement. There is much to learn as well from looking at the tools that have been developed in particular states. Sometimes that particular tool may address specific issues relating to the state in question: more often however that tool can provide a stimulus to another state that is considering the most effective approaches to fighting corruption. That state would need to consider the (often very difficult) question about whether and how that new tool would fit (if at all) into its own legal system.

1.7 The aim therefore of this Preliminary Study is to raise awareness and to facilitate discussion about additional tools for this work and the effectiveness of those that have been developed so far. It should be emphasised that the tools to be discussed are additional tools and that they can supplement existing tools that a state has (including traditional enforcement through the criminal or administrative courts<sup>4</sup>). Traditional enforcement may still be appropriate in a particular case although the state is likely to encounter the issues concerning multi-jurisdictional enforcement to be discussed later.

1.8 Another aim of this Preliminary Study is to encourage better cooperation between global companies and states (and international institutions). The fight against corruption needs a close relationship between companies and states. This is an aspiration in some states but in the majority there is a limited or an adversarial relationship between the state and companies. Legal systems in states may create disincentives to this closer relationship. These need to be recognised and addressed. Leadership is needed both from companies and from states (through international institutions) in establishing a more modern and collaborative approach. There are many encouraging signs of progress but there remains much to be done. For example many states have difficulty in recognising the difference between companies that are trying to fight corruption and those with systemic corruption issues. This is a key issue that needs to be recognised. There are important consequences flowing from this distinction. Section 10 will highlight some very interesting developments in two states (Philippines and Colombia) as well as new legislation in Brazil and Chile. There is much to be done in order to bring about a new relationship. Leadership by UNODC and the OECD with the B20 will be needed.

1.9 This Study is intended to stimulate interest in the issues and to help to clarify the underlying technical issues. Some solutions will be suggested. These need to be the subject of more work by UNODC, the OECD and companies working together. It is hoped as well that the key international institutions involved (UNODC and OECD) will be able to take these issues forward. To set the scene for the discussion in the following Sections it may be helpful to set out an approach to dealing with enforcement that is influenced by the general approach of a number of well-respected

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<sup>4</sup> Some states do not have corporate criminal liability but will deal with these cases as administrative offences.

anti-corruption authorities.

1.10 An approach based solely on criminal or administrative proceedings for every bribe uncovered will be ineffective. Proceedings will be lengthy and expensive. There are relatively few of them<sup>5</sup>. There is a deterrent effect but the maximum impact comes not from the final outcome in court but from the announcement of an investigation together (particularly) with searches by the authorities.

1.11 There will be cases where traditional enforcement through criminal or administrative courts will be necessary. For example no other tool will be as effective in the case of a company where the corrupt behaviour is systemic and led from the top and where the company has no intention of changing its business culture. Tough enforcement followed by debarment signals the robust approach of the authorities. More of this robust action is needed. The tough approach in really difficult cases is lacking in too many jurisdictions. Companies that have done their best to comply want to see such action. They do not want to be disadvantaged by an approach by the authorities that concentrates on them while not tackling the worst cases.

1.12 There are many other cases where such a tough approach is not needed. A company that is trying to comply with the rules and has set a clear lead from the top is different to a company with the systemic issues just mentioned. The authorities should have a role in helping the company that is trying to comply with the rules. Education and engagement with the company is needed together with the tools to enable this.

1.13 This does not mean that the state's authorities are going soft on corruption. Nor does it mean that the authorities are providing incentives to enable the company to comply with the law. Instead it is a recognition that in applying the law different approaches and strategies are needed for different types of case in order to have the

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<sup>5</sup> The OECD Working Group on Bribery Report for 2012 shows how limited this work involving legal persons is in many countries (OECD WGB, 2013, pp. 13-16). There are also figures (compiled with a different methodology) in (Transparency International, 2013, pp. 6-7) although (unlike the OECD figures) the results for legal persons are not given separately. A key challenge for the future will be to use UNCAC and the OECD Convention to widen the coverage of this issue in other states.

maximum impact<sup>6</sup>. Tough enforcement for particularly bad cases is needed with the ‘effective, proportionate and dissuasive’ sanctions required under UNCAC and the OECD Convention<sup>7</sup>. What is also needed however is a cooperative approach by states and companies that are trying to move to zero tolerance of bribery<sup>8</sup>.

1.14 This will also enable a more productive relationship to develop between companies and the authorities<sup>9</sup>. There are companies that are genuinely trying to move to zero tolerance of bribery and are showing real commitment led from the top in doing this. They would welcome a more constructive engagement with law enforcement authorities. National systems are often however ill-equipped to distinguish between the systemically corrupt companies and those that are trying to fight corruption. A recognition of this important distinction is needed by states. This needs to be developed further with international leadership. A greater degree of predictability in national legal systems in dealing with these cases is needed together with an approach that is sensitive to whether the company is itself actively involved in fighting corruption. Areas where national systems create a real disincentive to cooperation (such as no or a limited acceptance of self-reporting) need to be addressed and disincentives removed.

1.15 The discussion of new tools in this Study will talk about the approach that could be taken in dealing with companies that want to cooperate with the authorities. Sections 3 to 9 below will look at the additional tools that have been developed in this area. There is a description of the tool and an account of its effectiveness in contributing to the fight against corruption. There will be ideas about how this can be developed further. There will also be an account of state specific issues that may make the tool particularly effective.

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<sup>6</sup> See the very interesting work of the Humboldt-Viadrina School of Governance (for example Humboldt-Viadrina School of Governance, 2012).

<sup>7</sup> Article 26 paragraph 4 of the UN Convention against Corruption and Article 3 paragraphs 1 and 2 of the OECD Convention.

<sup>8</sup> An example of the collaborative approach is the guidance for companies at (OECD, UNODC and the World Bank, 2013).

<sup>9</sup> The importance of involving the private sector in this way is stressed at (United Nations Global Compact, 2013, p. 13) which states ‘Due to the mechanics of corruption, the only workable approach is to involve businesses in numbers with state agencies and civil society watchdogs in collective pacts to minimize or eliminate its practice, while at the same time improving corporate and government transparency.’

1.16 There are obvious choices involved and different states may be interested in different tools. Even where the same tool is taken up by two states they may have different approaches to it depending on how it might fit into their legal system. Some states may consider that the tools suggested are not necessary in their legal system or would be politically unacceptable. Such states still need to consider how they can overcome the issues about multi-jurisdictional enforcement to be discussed later and whether their overall approach to anti-corruption fulfils their international commitments.

1.17 There will be some concluding remarks in Section 11. To begin with however Section 2 will look at how multi-jurisdictional issues can arise.



## 2. How Multi- Jurisdictional Enforcement Arises

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2.1 One day the Chief Compliance Officer of a global company comes to see the CEO very urgently. The authorities in state A have been contacted by a whistleblower who has told them that an employee of the company in that state has been paying bribes there. The Chief Compliance Officer tells the CEO that it is not just the authorities in state A that have jurisdiction. The following authorities could also become involved-

- The US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC). Other US regulatory and enforcement authorities could take an interest (particularly those based in New York).
- The UK's enforcement and regulatory authorities (the Serious Fraud Office (SFO) and the Financial Conduct Authority (FCA)).
- The authorities in other states in which the company has a business presence and which have extraterritorial jurisdiction.
- Any international institution such as the World Bank with which the company may do business.
- Money laundering authorities in states through which the bribe was routed or where amounts received by the company as a result of the corruptly obtained contract have passed.

2.2 The CEO will of course have many questions. Some will be more pressing than others. At some stage the CEO is likely to ask why so many authorities outside state A can have jurisdiction over an act of bribery that takes place wholly within state A. The CEO may also ask how the authorities work together and whether there are agreed international rules about how these cases are dealt with. The CEO may not be reassured by the answers to these legitimate questions. The rest of this Section will explain how different authorities can become involved and why.

2.3 The background is the determination by the international community over the last thirty years to fight corruption. Before then corruption was accepted as a way of life in many states. Bribes were regarded as necessary for business and were often tax deductible. This has changed dramatically. The OECD Anti- Bribery Convention and the UN Convention against Corruption (UNCAC) set out new international legal norms concerning the obligations of states. The OECD Convention deals with the supply side of bribery (legal and natural persons who pay bribes): UNCAC deals both with the supply side and also the demand side (those who accept bribes). Examples of the relevant provisions so far as legal persons are concerned are as follows.

#### **OECD Convention**

‘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 ....to a foreign public official...in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business ...’ (Article 1(1))

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 2)

‘Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.’ (Article 4(1)) The Commentary on this paragraph provides ‘The territorial basis for jurisdiction should be interpreted broadly so that an extensive physical connection to the bribery act is not required’.

#### **UN Convention against Corruption**

‘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 organisation, directly or indirectly, of an undue advantage...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...in relation to the conduct of international business.’ (Article 16 (1)) States with only territorial jurisdiction have to extend this because the offence will usually be committed by nationals abroad. (UNODC, 2012 (Second revised edition), p. 68)

‘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.’ (Article 26 (1))

2.4 States have to decide what jurisdiction in respect of legal persons they want to exercise in respect of a bribe paid in another state. There could be different jurisdictional bases. For example the supply state may focus on one or both of the following issues-

- Has any part of any transaction relating to the bribe taken place within their national territory?
- Is there some business presence of that company in the supply state (however defined)?

2.5 The US, the UK and China have dealt with this in the following way.

#### **US Jurisdiction under the Foreign Corrupt Practices Act**

The FCPA (broadly) applies to companies as follows-

- Where the company has securities listed on a US exchange.
- Where the company is organised under US law.
- Where (even if the above are not satisfied) the company engages in any act in furtherance of the corrupt payment in the US.

(DOJ/SEC, 2012, p. 11)

#### **UK Jurisdiction under the Bribery Act**

The Act applies to-

- Companies incorporated under UK law.
- Any other company (wherever incorporated) which carries on a business, or part of a business, in any part of the UK.

It will be for the courts in the UK to interpret the phrase 'carries on a business' in the context of complex international corporate structures.

#### **Jurisdiction of the People's Republic of China**

China changed its law with effect from 1 May 2011.

China now has jurisdiction over bribes given to foreign public officials (Article 164 of China's Criminal Law). This article applies to natural and legal persons. Companies organised under the law of China are covered together with joint ventures, representative offices, and wholly foreign owned enterprises.

Companies are also covered where there is some territorial link to China.

(See [www.fcpablog.com](http://www.fcpablog.com) for 10 March 2011 and link to advisory by Covington & Burling).

2.6 It is important to note that the jurisdictional bases described above do not refer to whether the supply state is what might be generally considered the 'home' state of the global company. A US multinational (with its global HQ in the US) for example may be subject to the laws of many different jurisdictions in respect of the bribe as well as the jurisdiction of the US and the demand state. Similarly, the US has been very vigorous in applying the FCPA to non US companies<sup>10</sup>.

2.7 A number of states will be looking to see if the jurisdictional basis in their own legislation is satisfied in respect of a bribe. This will include looking at any asset forfeiture and money laundering issues. In practice it will be difficult for a global company in the modern world economy to be immune to the jurisdiction of a significant number of states.

2.8 Commentators regularly refer to anti-corruption legislation as being 'extraterritorial' when one state has jurisdiction over a bribe paid in another state. This usage is well established and will be used here although the jurisdiction is not 'extraterritorial' in the classic sense<sup>11</sup>. Anti-corruption legislation such as those in the text box in para 2.5 above (unlike pure extraterritorial legislation) still requires a link between the supply state and the bribe. That link could be either or both of the situations described in para 2.4 above.

2.9 Later Chapters will contain some case studies where more than one jurisdiction is involved. It may be helpful though to give another illustration here. This concerns the cases involving the TSKJ joint venture and Bonny Island, Nigeria and will be described in the text box on the next page.

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<sup>10</sup> Nine of the top ten FCPA cases have involved non-US companies ([www.fcpablog.com](http://www.fcpablog.com) on 16 September 2013)

<sup>11</sup> In the classic sense a state has extraterritorial jurisdiction when it can bring proceedings against a non-national even though none of the events took place in that state. This can be seen in dealing with crimes against humanity.

### **TSKJ and Bonny Island, Nigeria**

TSKJ was a joint venture between Technip SA, Snamprogetti Netherlands BV, Kellogg Brown & Root Inc and JGC Corp. The head offices of the corporate groups were based in France, Italy, the US and Japan. The joint venture was based in Madeira.

Between 1995 and 2004 TSKJ was awarded contracts valued at \$6 billion by Nigeria LNG Ltd to build gas facilities on Bonny Island, Nigeria. The joint venture had hired two agents, Marubeni Corp (based In Japan) and Jeffrey Tessler (an English solicitor) to pay bribes to a wide range of Nigerian government officials. TSKJ paid approximately \$132 million to a Gibraltar based company controlled by Tessler and \$51 million to Marubeni so that the money could be used for bribes. Bribes were channelled via Monaco and Switzerland.

It has been calculated that twelve separate states potentially had jurisdiction. Active states were as follows-

- The US took the leading role in the case and imposed substantial fines on Technip, Snamprogetti, KBR, JGC and Marubeni.
- The UK dealt with a civil recovery action concerning a subsidiary of KBR. The UK also extradited individuals to the US.
- France provided evidence to the US concerning the bribery.
- Italy carried out an investigation. A fine imposed by the judge is the subject of an appeal. (The application for interim sanctions is discussed in para 8.3 footnote 99 below.)
- Switzerland became involved in asset recovery issues.
- Nigeria prosecuted the joint venture. Agreed penalties were paid by each participant.

(Source- DOJ Press Release 17.1.12 and (Spahn, 2013, pp. 27-31))

2.10 The TSKJ case is a very vivid example that shows how a company can become involved in enforcement action in a range of different jurisdictions as a result of bribes paid on behalf of that company and its joint venture partners. Senior executives need to be aware of the potential for this and the serious consequences for the company if this happens. How these issues are dealt with in practice and the unsatisfactory state of domestic laws concerning international enforcement will be dealt with next.

# 3. Multi-Jurisdictional Enforcement

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## Introduction

3.1 The detailed terms of reference for this subject are- **‘Frameworks to address multiple jurisdiction issues through the full implementation of Articles 47, 48 and 49 of UNCAC and Article 4.3 of the OECD Convention in national legislation. Experience on ways and means of preventing or mitigating the risk of duplicative financial sanctions in the case of cross-border concurrent liabilities (in particular with regard to disgorgement of profit) and recognition of the validity of global settlements.’**

3.2 This Section will focus on the issues when more than one state is asserting jurisdiction (sometimes extraterritorial) over the same act of bribery. The first part below will discuss what have come to be called ‘global settlements’. There will then be a discussion about the issues in cases of parallel investigations and prosecutions where global settlements are not reached. Asset forfeiture in these cases will be discussed next. There will then be some recommendations about the further action that is needed under UNCAC and the OECD Convention followed by some concluding remarks.

## What is a Global Settlement?

3.3 The term ‘global settlement’ has been used in recent years when the authorities of more than one state are involved in enforcement action against a company and a resolution agreed with all of the major states is announced on the same day. This use of the term can be misleading however. A true global settlement would enable a company to resolve all outstanding issues with all the states involved (including demand states as well as supply states) at the same time and achieve closure. A global settlement would enable proper restitution to be made to the demand state<sup>12</sup>. Supply states would give credit for any amounts paid in that way to the demand state. Double or multiple penalties would be avoided. The company would also have finality and clarity about what it had to do in future to improve its anti-corruption approach.

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<sup>12</sup> See (Stolen Asset Recovery Initiative, 2014) for a very full account of the limited progress made in returning money to demand states. This book also contains a detailed account of relevant international cases.

3.4 The 'global settlements' that have been reached so far fall short of such an overall resolution. These settlements have been reached between authorities in a few states that are accustomed to working with each other on cases. They should more accurately be described as 'coordinated' rather than 'global' settlements. Demand states for example would be entitled to question the use of the term 'global' for settlements reached by a few supply states. The term 'coordinated' will therefore be used in this Study with the term 'global settlement' reserved for global settlements that satisfy the description in para 3.3 above.

3.5 There is a real need to move from coordinated to global settlements if at all possible. Demand states will obtain justice in this way. Companies can obtain closure and move on whereas with coordinated settlements they are still vulnerable to follow-up actions by other authorities. This would require much wider international collaboration and a mechanism that would enable the inevitable issues between states as well as between states and companies to be resolved<sup>13</sup>.

3.6 There is a mechanism under UNCAC and the OECD Convention that could be used for this purpose although it has never previously been invoked in a case of this nature. The issues involved with this mechanism will be discussed below. Leadership from UNODC and the OECD would be needed in developing this. This will be a pressing need as the number of multi-jurisdictional cases increases. The mechanism under the Conventions will be the way forward in these cases.

3.7 It is convenient to refer to some recent enforcement and regulatory outcomes to show what can be achieved when states and companies work together. On 27 June 2012 it was announced that Barclays Bank had reached a settlement with enforcement and regulatory authorities in the US and UK concerning allegations that Barclays employees had been involved in manipulating the LIBOR rate. This was followed on 19 December 2012 by an announcement involving UBS and then on 6 February 2013 by a settlement involving RBS. These were coordinated settlements.

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<sup>13</sup> Professor Spahn comments on this possibility at (Spahn, 2013, pp. 43-44) and describes what might be needed internationally to make this work. She observes that '...hybrid courts with one single forum, or a single super-prosecutor, as is periodically proposed for other crimes ...may end up being more attractive to [companies] than the current horizontal multiple-jurisdiction enforcement regime. Whether non-Convention nations might be willing to relinquish autonomous prosecutorial discretion to work cooperatively with a more centralized organisation...is uncertain'.

The UBS and RBS cases involved civil and criminal resolutions. The UBS case was as follows.

### **The UBS Settlement**

On 19 December 2012 UBS reached the following agreement-

- A plea of guilty in a US criminal court and a fine of \$100 million.
- A \$400 million penalty payable to the DOJ under a Non Prosecution Agreement (NPA).
- A fine of \$700 million payable to the US CFTC.
- A fine of \$259.2 million payable to the UK's FSA.
- A fine of \$64.3 million payable to the Swiss authorities.

The total amount of the resolution was \$1.5 billion.

3.8 Coordinated settlements such as the examples just described offer significant advantages to states and companies. There is therefore considerable interest in these resolutions. The advantages for companies are-

- A coordinated settlement enables the company to bring to an end on the same day all the investigations by the major states involved. The full extent of the remediation required by the major states (including the changes needed to the company's culture and policies) is known at that stage. This provides as much certainty and finality as is possible for the company<sup>14</sup>.
- A coordinated settlement can result from an investigation coordinated between the authorities of the different states. Companies should be entitled to expect that the authorities work together in this way when they each have jurisdiction over the same violation<sup>15</sup>. Overlapping and uncoordinated investigations impose additional costs on companies.
- A settlement helps to put an end to the continuing damage to the company's image in the marketplace. This is a key consideration for top level management.

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<sup>14</sup> In practice the company will still need to deal with enforcement actions brought by other states as well as shareholder actions and any other civil cases. All of these cases will be strengthened by the admissions the company has made in the coordinated settlement. This is something a company has to take into account in agreeing a coordinated settlement.

<sup>15</sup> The importance of this to companies is stressed in an article in Corporate Counsel at <http://tinyurl.com/lcja85p>.



- Cost can be a factor. These investigations can be very expensive.

### 3.9 There could be the following advantages for an enforcement authority-

- The international authorities involved can agree on which of them should lead on each area of the investigation. There could then be a sharing of knowledge<sup>16</sup>. This can result in a more effective investigation because lines of enquiry are not duplicated. It also potentially reduces the costs for the company.
- Coordinated pressure can be very effective. The company may be more ready to reach agreement if it knows that this will end all the major investigations<sup>17</sup>.
- There will be a great cost saving if a settlement is reached. Enforcement authorities have very tight resources.

### 3.10 Since there are significant advantages to the company and to the authorities in a coordinated settlement why have there been so few in the corruption area<sup>18</sup>? To answer this question it is instructive to look at the following US/UK case.

#### **The Innospec Case**

On 18 March 2010 it was announced that Innospec Inc had that day pleaded guilty in a US criminal court to defrauding the UN under the Oil for Food Programme, to violating the FCPA and to violating the US embargo against Cuba. Innospec agreed to pay a fine of \$14.1 million under a plea agreement with the DOJ. The company also agreed to pay \$11.2 million to the SEC as disgorgement of profits. Innospec agreed to pay \$2.2 million to the Office of Foreign Assets Control relating to the Cuba embargo.

On the same day Innospec pleaded guilty in a UK criminal court to making corrupt payments to foreign officials. The company was sentenced to a fine equivalent to \$12.7 million.

*Continued.....*

<sup>16</sup> In practice authorities and companies need to consider data sharing and privacy rules in the jurisdictions involved. This is a complex subject and cannot be covered here. A good summary is at para 1.45-1.57 of (Lomas & Kramer, 2013). The Total case (para 4.10) is a good example of the mechanism needed to comply with French law (although it was not a coordinated settlement).

<sup>17</sup> This may not be important to all states if their negotiating position is strong.

<sup>18</sup> Coordinated settlements in the US/UK context involve Innospec, BAE (on non-corruption issues) and Johnson & Johnson/DePuy. Siemens is a US/ German example (see (Stolen Asset Recovery Initiative, 2014, pp. 131-134). Statoil involved the US and Norway (see (Stolen Asset Recovery Initiative, 2014, pp. 134-136). There has been no experience so far of a case where a demand state is also seeking to prosecute the company and a coordinated settlement is reached.

These outcomes were the result of a coordinated settlement between Innospec and the authorities in the US and the UK. The settlement was subject to the approval of the courts in each jurisdiction.

The judge responsible for sentencing in the UK said that the SFO's actions in agreeing the plea and the financial penalty were wrong and should not happen again. This is because UK prosecutors traditionally are not involved in any discussions about the amount of the penalty.

- 3.11 A UK prosecutor cannot therefore be involved in any discussions about the penalty. This is for the judge. The position is different in the US as the Innospec case shows. A UK prosecutor could not have entered into a settlement of the type involved in the UBS and RBS cases<sup>19</sup>. The amounts had clearly been negotiated and agreed with the banks before the announcement. A UK prosecutor could not have done this. Only a regulator can do this<sup>20</sup>.
- 3.12 This is a critical point. A company may be very reluctant to reach a coordinated settlement where the final liability in one of the states is completely unknown. A coordinated settlement may not be possible. The company could reach agreement in one state and await events in the other<sup>21</sup>. There have also been circumstances (to be described in para 3.33) where the company has decided to reach agreement with the US and bypass the other state.
- 3.13 There is a question about whether prosecutors in other states are in the position of UK or US prosecutors. Other prosecutors may also have constraints on them depending for example on whether they operate within a civil law jurisdiction and on whether the liability of the company is criminal or administrative. Prosecutorial discretion may differ<sup>22</sup>.

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<sup>19</sup> There was no criminal plea by Barclays. Instead there was an NPA.

<sup>20</sup> The UK Government's new system of deferred prosecutions may help (paras 4.26 and 27).

<sup>21</sup> In the recent case involving Total SA there was a DPA in the US together with an announcement by the French authorities that they had requested that the company and certain senior officers should be referred to the Criminal Court in France. There was therefore no coordinated settlement. (DOJ Press Release 29 May 2013). The investigations concerning Alstom may be another example. The company has settled with the Swiss authorities and paid a fine of approximately \$38.9 million (<http://tinyurl.com/mhqmdr>). Investigations by other states continue.

<sup>22</sup> There are also some difficult practical issues about how criminal justice systems can work together in these cases particularly if a judge in one state takes a view that has an adverse impact

3.14 Coordinated settlements in suitable cases can offer considerable advantages to companies and states. These settlements are likely to be an increasing feature of regulatory and enforcement work in certain states as the LIBOR cases show. This tool could be useful in corruption cases. It is undesirable that such settlements are possible in some states in regulatory but not in criminal work.

3.15 Coordinated settlements show how enforcement authorities can work together to settle a case. It may be though that a state's legal system means that it cannot take part in these settlements. If so then it must still address the issues that arise in parallel investigations where each state wants to prosecute. UNCAC and the OECD Convention provide important general guidance. States need to consider how to apply the general guidance in the Conventions to specific cases. There has been limited public discussion of the issues however. They will potentially be faced by a state involved in such a case. This will be the subject of the next section.

### **UNCAC/OECD Convention Issues**

3.16 Articles 47 to 49 of UNCAC and Article 4.3 of the OECD Convention set out the international norms governing the behaviour of member states concerning cases in which two or more states have an interest<sup>23</sup>. Some states have expressly incorporated some of these Articles in their own domestic legislation. Other states have decided that domestic legislation is unnecessary and that enforcement authorities can comply with the Articles without the need for such legislation.

3.17 The Conventions have peer review mechanisms. Many of the reports on states have looked at the effectiveness of international cooperation under the Conventions<sup>24</sup>. The quality of this has been praised<sup>25</sup>.

3.18 The provisions in the Conventions about jurisdiction are readily applicable to the simple binary issue of whether an offender is to be prosecuted in state A or state B. This will commonly be seen in the case of a natural person where the states involved

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on another state. There is a question about judicial training and the need to raise the awareness of judges about the range of issues in these cases.

<sup>23</sup> For convenience the text of the Articles is set out in Annex 2.

<sup>24</sup> Some states are also members of other Conventions relating to corruption with cooperation obligations.

<sup>25</sup> See for example para 26 and Box 14 of (UN, 2013).

will discuss which jurisdiction should have primacy and should prosecute.

3.19 The position involving large groups of companies can be more complex. There is nothing in the Articles themselves (or in the Legislative or Technical Guides to UNCAC) which deals expressly with the situation where enforcement agencies in multiple states are involved each of which has jurisdiction and each of which wants to take action against some part of the corporate group for the act of bribery<sup>26</sup>. An example could be as follows.

#### **A Multi-Jurisdictional Example**

A bribe paid in China by a global company can satisfy the extraterritorial tests in the FCPA and the UK Bribery Act as well as China's law on domestic bribery. Each state may want to bring a prosecution. Each state may also want to use its asset forfeiture legislation. International institutions such as the World Bank may be involved as well.

3.20 The guidance provided in the Technical Guide to UNCAC is helpful but it is written in the context of deciding which of two states should prosecute. There is a discussion of the issues<sup>27</sup> followed by a list of the key factors for determining which state should prosecute<sup>28</sup>. The next box sets these out.

#### **Transfers of Jurisdiction: UN Guidance**

- Where was the offence committed and where was the offender arrested?
- Where are the most witnesses or most important evidence or victims of the crime concerned located?
- Which jurisdiction has the best/ most effective laws?
- Which jurisdiction has the best confiscation laws?
- In which jurisdiction will there be less delay?
- Which jurisdiction provides the best security and custody assurances?
- Which jurisdiction can best deal with sensitive disclosure issues?
- Which jurisdiction can bear the costs of the proceedings?
- In which jurisdiction had the crime substantial effects?
- Where are most of any potentially recoverable assets located?
- Which State Party has the most developed asset-recovery mechanisms?

<sup>26</sup> See the interesting proposals by Bourtin, Delahunty and Mantovani in the New York Law Journal at <http://tinyurl.com/nteqdsv>.

<sup>27</sup> (UNODC, 2009, pp. 173-174)

<sup>28</sup> A more elaborate version of these principles is to be found in (Eurojust, 2003, pp. 60-66). The UK has followed these principles in recent guidance but has expressly said that the guidance does not apply to cases of extra-territorial jurisdiction (<http://tinyurl.com/nhhe3fv>).

3.21 These principles are not easy to apply to more complex cases involving companies where each state is looking to prosecute. Public opinion in each state may be looking for a prosecution (and would be unsympathetic if the prosecution was transferred elsewhere). The principles above will not decide this in favour of one state or another. Each state will be able to find justification for its own prosecution. Because of the complexity of corporate structures each state may be able to select different parts of the corporate group to prosecute. The company is unlikely to be involved in these discussions.

3.22 Cases so far have tended to involve two or more supply states. Future cases are likely to involve the demand state in the case (China in the example above). The demand state is understandably likely to take the view that it has primacy over the act of bribery and that no action by a foreign enforcement authority should affect it. There may be considerations of national sovereignty<sup>29</sup>. The demand state (if it is resourced sufficiently to deal with these cases and has the political will) is unlikely to be willing to concede any jurisdiction to another state and might consider it inappropriate to enter into a coordinated settlement with other states. It may decide to deal with all of the cases involving the bribe (including asset forfeiture) within its own courts. The authorities (and the public) would be unlikely to be sympathetic for example if the company tried to use a foreign settlement as a way of trying to mitigate or eliminate liability.

3.23 Companies have a very real interest in this issue because of the potential risk of double penalties and are likely to consider that the current situation is unsatisfactory in principle. Potential issues for companies are-

- What are the principles by which states decide whether only one of them should prosecute or whether both or all should do so?
- What happens if states cannot agree?

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<sup>29</sup> See para 1.5 above.

- Will the company be at risk of criminal or administrative action in two or more states for the same act of bribery<sup>30</sup>? If so, does the company have any remedy?

3.24 Companies may take the view that it is unsatisfactory that these issues should be determined by a process of private negotiation between enforcement authorities with a limited role (at best) for the company. Companies may look for more international guidance on the principles to be invoked in these cases. This would mean looking at when it would be appropriate for one state to have primacy over the act of bribery and when it might be appropriate for two or more states to prosecute. The principles for making this decision could be worked out<sup>31</sup>. There might for example be different principles depending on whether the issue was between supply states or between supply states and a demand state that is able to take appropriate action.

3.25 Another issue is whether the company has any redress if two states decide that each will prosecute for the same act of bribery. The policy underlying the OECD and UNCAC Articles is that multiple actions should be avoided but the corporate group's only remedy arises if domestic law in either state gives the company rights as a result of double jeopardy or if credit can be given for amounts paid in other states.

3.26 Double jeopardy is of critical importance to a company in dealing with multi-jurisdictional enforcement. It is an important practical and legal issue with significant consequences. Double jeopardy as a legal right (if at all) becomes available to a company only at a late stage. It can plead double jeopardy as a legal bar to a prosecution (assuming the relevant domestic law of a state permits this) only when that state takes enforcement action in court. Alternatively it may seek credit for sums paid to other states. There has been limited public discussion of these issues so far<sup>32</sup>.

3.27 From the point of view of a company it is important that the relevant states liaise together and coordinate the investigations so far as possible. The states should decide on the aspects that each of them should investigate so as to avoid overlap. Double jeopardy can be used to assist in those discussions. It has to be said that

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<sup>30</sup> A similar point arises in respect of asset forfeiture and will be considered in para 3.38.

<sup>31</sup> See the interesting proposals by Bourtin, Delahunty and Mantovani in the New York Law Journal at <http://tinyurl.com/nteqds>.

<sup>32</sup> See though the interesting article in note 31 above.

while this is a legitimate aspiration on the part of companies, there is only limited experience of this happening. Companies may therefore have to use double jeopardy as a defence in proceedings.

3.28 The concept of double jeopardy is set out in Article 14(7) of the International Covenant on Civil and Political Rights and states as follows<sup>33</sup> -

**Article 14(7)**

‘No-one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of another country.’

3.29 The application of this principle will depend on who the defendant is in each jurisdiction. State A may bring proceedings against company X. Because of the complexities of the corporate structure it may be possible for state B to bring proceedings against group company Y. Company Y cannot invoke double jeopardy unless it was in some way named in the proceedings in state A<sup>34</sup>. Experienced practitioners know this and can try and bring about this result.

3.30 The law on double jeopardy can differ between states<sup>35</sup>. The US does not recognise convictions or acquittals in foreign courts for the purposes of its own rule against double jeopardy. Other states such as the UK are bound by domestic and European human rights law. In the UK double jeopardy prevents the prosecution of a defendant who has been at risk of a conviction in a foreign court in respect of the underlying factual situation. A US Deferred Prosecution Agreement (DPA) invokes the principle of double jeopardy in the UK. The same result would apply in the Netherlands under Article 68(3) of the Dutch Criminal Code<sup>36</sup>. There is scope for UNODC and the OECD

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<sup>33</sup> See (Vervaele, 2013) for other references to this concept.

<sup>34</sup> Double jeopardy is complex and a simplified version is given here. In practice for example those involved also need to look at whether the charge in state B could be a wider one than the charge in state A so that the defendant was not at risk of conviction on that charge in state A. State B may also look to prosecute for another offence arising from the same facts although other states apply double jeopardy to any offences relating to the same facts. In Germany the punitive fine may be reduced to take account of a fine in another jurisdiction but there is no bar to the German proceedings ( OECD WGB, 2011, p. 37). Furthermore, the concept does not help a company faced with a subsequent investigation in another country: it does not prevent the taking up of an investigation by other states before a final decision in state A.

<sup>35</sup> Double jeopardy is a general concept. It applies to all cases and not just to corruption cases.

<sup>36</sup> This provision states ‘Nobody can be prosecuted for a fact that has been finally and conclusively resolved in a foreign state by his agreement and compliance with a proposal from the Competent Authorities to prevent or defer (further) prosecution in that State’.

to explore this further and to look at the laws in member states about double jeopardy<sup>37</sup>.

3.31 The UK government has recognised that UK rules on double jeopardy are an obstacle to effective collaboration with other enforcement authorities. The Consultative Document on DPAs observes<sup>38</sup>-

‘Commercial organisations which could be prosecuted in both England and Wales and the US may choose to engage with US authorities so as to prevent action being taken in England and Wales. Resolving a case in the US may also be attractive given the wider and more flexible range of enforcement tools, including NPAs and DPAs which do not result in a criminal conviction. The lack of equivalent enforcement tools for UK prosecutors makes negotiations between UK and US prosecutors, and ultimately resolution of the case, difficult.’

3.32 The issue set out in the quotation above is one that other states may have to consider.

3.33 Two brief studies of US/UK cases may help. One needs to be anonymised because these particular issues never became public in that case. The cases are summarised in the text box.

### **Two US/UK Cases Involving Double Jeopardy**

#### **Case 1**

Company X self-reported corruption violations to the authorities in the US and the UK. Both had jurisdiction over the corruption which happened in another state. Company X entered into a settlement with the US through the criminal justice system. The settlement involved all of the relevant subsidiaries. The UK closed its investigation because double jeopardy applied.

*Continued.....*

<sup>37</sup> A senior DOJ official said at a recent conference that the DOJ deducts foreign penalties on a dollar for dollar basis although this is not required under US law (November 2013 FCPA update by Debevoise&Plimpton at page 5). There are however very few cases where this is explicit in dealing with fines and none so far involving asset forfeiture. Relevant cases so far are Statoil and Siemens (note 18 above) and Johnson & Johnson in the US and UK (para 3.39 below). The UK case involved credit for asset forfeiture and not a criminal penalty. There is no discussion of the issue in (DOJ/SEC, 2012). It is to be hoped that the next version of the Resource Guide will cover this issue.

<sup>38</sup> Para 40 of (UK Ministry of Justice, 2012)



### **Case 2- BAE Systems**

BAE was being investigated by the US and the UK (and other states) for alleged offences in a number of states. The investigation by the US was wider than the investigation in the UK. BAE agreed to settle with the US for a range of issues including some covered by the UK's investigation. It also agreed to settle an issue with the UK that was not covered in the US settlement. All of this was agreed.

The UK closed its investigation into the states covered by the US settlement because double jeopardy applied. There was strong public criticism of the UK authority and no recognition concerning the principle of double jeopardy.

It should be mentioned for completeness that the pleas of guilty in the US and the UK did not involve pleas of guilty to corruption offences.

3.34 Further work will show whether other states recognise the decisions of foreign courts for the purpose of double jeopardy. Of particular relevance here is the extent to which criminal justice systems outside the US recognise a US DPA as giving rise to double jeopardy and what the approach of the state would be if the company entered into a DPA or a plea agreement with the DOJ. There will be a very pressing issue for example where a demand state is involved. That state may consider it unacceptable that double jeopardy could apply with the result that that state could not take enforcement action for an act of bribery that happened within its territory.

3.35 The law of a state may follow US rather than UK principles on double jeopardy. The company will then be at risk of being penalised in different jurisdictions for the same act of bribery. There are two international mechanisms that are very relevant. Article 47 of UNCAC and Article 4(3) of the OECD Convention both require states to work together at the request of one of them. There have however been no cases in this context where the states involved have sought to raise the issue under UNCAC or the OECD Convention and to seek a resolution. Then OECD and UNCAC mechanisms need to be used if these issues are to be resolved satisfactorily<sup>39</sup>.

3.36 The discussion so far in this Section shows the potential for coordinated settlements and the advantages for states and for companies. It has also shown some of the issues for states and companies in cases of multi-jurisdictional enforcement. States together with UNODC and the OECD need to address these issues and remove

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<sup>39</sup> Paras 3.45 to 3.51 below discuss what will be needed for this.

barriers to international cooperation in these cases.

3.37 There are related issues involving asset forfeiture. These will be considered next.

### **Asset forfeiture issues**

3.38 There is a potential problem with asset forfeiture when enforcement action in two or more states addresses disgorgement of profits or value based confiscation.

Companies have a legitimate concern in any application of rules by different states as a result of which they suffer asset forfeiture more than once for the same bribery.

States where the foreign official was located will also have a legitimate concern if payment by way of asset forfeiture is made by the company to another state and the benefit of that payment is not transferred for the benefit of the demand state.

3.39 Potential double recovery has been dealt with pragmatically so far. For example there was a global settlement involving the UK/ US authorities and the US multinational Johnson & Johnson. This is described in the text box.

#### **Johnson & Johnson/ DePuy**

The company entered into a DPA in the US and agreed to pay a fine. The amount was reduced because of action by the UK and Greece. The company also agreed to disgorgement of profits with the SEC.

The company entered into a civil recovery order with the UK's SFO. The SFO took into account the fact that there were fines and asset forfeiture elsewhere. The press release by the SFO stated that it had-

'taken particular note of the fact of disgorgement and recovery in more than one jurisdiction for the same underlying unlawful conduct...The SFO has considered the matter from a global perspective. It has worked to achieve a sanction in this jurisdiction which will form part of a global settlement that removes all of the traceable unlawful property and at the same time imposes a penalty.' SFO Press Release dated 8 April 2011.

There was nothing in the UK legislation that obliged the SFO to give credit for asset forfeiture elsewhere in respect of the same conduct. However the SFO took the view as a matter of principle that double recovery by way of asset forfeiture was wrong and that credit must be given.

3.40 The UK's pragmatic way of dealing with the issue is consistent with the approach of the German court in the Siemens case. The German and UK approaches were

commended in the OECD/ StAR 2012 Report<sup>40</sup>. The DOJ position has been discussed above<sup>41</sup>.

3.41 This pragmatic approach may be satisfactory in practice between the supply states so far involved but it is questionable whether it is satisfactory for companies or for demand states. More states including demand states may become involved. They could take a different view. The demand state for instance may want to use asset forfeiture even though another state has obtained disgorgement of profits. The demand state may be reluctant to give credit particularly if the asset forfeiture by way of disgorgement of profit is retained by another state and nothing flows back to the demand state. The public in the demand state is likely to regard this as unacceptable. The issue therefore remains for companies as to whether there are better ways of ensuring that they do not suffer double asset forfeiture.

3.42 The TSKJ case referred to in the text box at para 2.9 is a good example of what can happen in practice where multiple jurisdictions including the demand state are involved. Penalties totalling \$90 million were paid in Nigeria by members of the joint venture and by the Japanese intermediary<sup>42</sup>. By contrast in the US there was disgorgement of profits of \$618 million and fines of \$882 million. The total in the US was \$1.5 billion. The fine (under appeal) in Italy was \$33 million. Disgorgement in the UK was \$11 million. It is to be doubted that this type of result will be acceptable to a demand state in future with significant negotiating power. That state is likely to want to see more money either being collected in its own jurisdiction or returned by the supply states involved<sup>43</sup>. This is entirely legitimate because that state will have suffered from the corruption<sup>44</sup>. This will raise the question for companies about whether they will be subject to double forfeiture. It could also reinforce the need for a

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<sup>40</sup> (OECD-StAR, 2012, pp. 25-26). There is a very helpful discussion of detailed issues at pages 22-26. The point is made at page 22 that there is still very little experience to date of these issues in practice.

<sup>41</sup> See note 37.

<sup>42</sup> It is not clear whether double jeopardy featured in these proceedings.

<sup>43</sup> The BAE and Tanzania case is a UK example where an amount equivalent to the contract value less the UK fine was paid to Tanzania as part of the settlement. The Tanzanian people received £29.5 million. The case is discussed at para 4.24. This was criticised by the judge and by others and will not be followed again. It is not clear whether this result can be achieved in other ways through the UK courts.

<sup>44</sup> In the absence of this the supply state will potentially benefit twice (from the profits and tax relating to the contract as well as the financial penalty) and the demand state will lose twice (through a contract obtained corruptly and no share in any financial settlement). This is an unacceptable result.

global settlement of these issues. This was not attempted in the TSKJ case.

3.43 There could be an argument that asset forfeiture is designed to be very tough and that it does not matter if the company suffers asset forfeiture in two or more states. This is an argument that might need to be resolved by national states and their courts. The conceptual issue is that asset forfeiture is designed to recover the proceeds of a criminal action (whether the actual object or proceeds themselves or the equivalent value). A second state trying to recover the proceeds could be met with the argument that the proceeds no longer exist in the hands of the company. If that argument is unsuccessful, then the company will suffer double forfeiture.

3.44 There are real issues therefore for states and companies in dealing with asset forfeiture. This is an important tool to be used to ensure that a company does not keep any benefit from the violation. On the other hand it may be said that justice requires that this punishment should be suffered by the company only if the forfeiture happens once and not multiple times.

### **Mutual Agreement under UNCAC and the OECD Convention**

3.45 What is needed to resolve these challenges for the future will be the following-

- An international mechanism that enables states to discuss and agree on a coordinated approach. The mechanism needs to be available to all states involved (including demand states).
- A commitment by states to use this mechanism in cases of multi-jurisdictional enforcement.
- Detailed principles setting out how the states through this mechanism will address issues such as primacy, double jeopardy, asset forfeiture, restitution to demand states and global or coordinated settlements.

3.46 The private sector will need to have confidence in the mechanism and the principles to be applied. Companies need to be able to request states to participate in the mechanism in a case that affects them. A remedy (if any) if the state fails to participate will need to be found through national law. The reviewing systems under relevant Conventions will be relevant here in looking at how states are dealing with

these cases.

3.47 There is an appropriate mechanism for these discussions between states on cases in Article 47 of UNCAC and Article 4(3) of the OECD Convention. However no use has so far been made of this mechanism in cases of this nature. This needs to change. Bilateral discussions between states have their place but as has been seen they are limited and are unlikely to be able to deal with the range of issues that arise where the issues go beyond those two states. There has been no experience so far of wider discussions involving demand states and how restitution is to be made to them. These bilateral discussions are therefore inadequate for dealing with the challenges in these cases.

3.48 There is no need to develop a fresh international mechanism for dealing with these cases when appropriate provisions are contained in UNCAC and the OECD Convention. States should be ready to use these provisions. The mechanism can be invoked by just one state and does not need the consent of all states.

3.49 Although the mechanism under UNCAC and the OECD Convention envisages that the aim of the discussions is agreement between states on which one of them will prosecute, it may well be that agreement on this is unlikely. There may well be a strong public interest in a prosecution in a number of states. Public opinion in those states is likely to be very critical if prosecutors cede jurisdiction in such a case to another state. Prosecutors need to be sensitive to this. The outcome ought to be though that the states agree on how the investigations and prosecutions should be coordinated so that the issues relating to multiple sanctions discussed above are overcome. States should be able to agree on which of them has primacy over particular lines of investigation and particular corporate defendants. States should also be able to discuss how they will assist each other under MLA procedures.

3.50 States will naturally need to know more about what would be involved in discussing these cases through the mechanisms under the Conventions. More work is needed because this has not yet been considered in detail. There will be enforcement authorities that will be concerned about whether this type of discussion will be open ended and will circumscribe their power to move the case forward if they need to do so. Authorities would not want to see this mechanism used as a delaying tactic

(particularly if they have limitation constraints under domestic legislation). These authorities are likely to be circumspect about the need for this type of approach and its potential value.

3.51 Dialogue involving states, UNODC, the OECD and the private sector is needed about how the mechanism under the Conventions can be used. States and the private sector need to be persuaded of the benefit of this mechanism. An initiative on this subject would be a good opportunity for dialogue between states and the private sector working through UNODC and the OECD. This would show how states and companies can work together to address real practical issues and create a more effective system.

## **Conclusion**

3.52 There will be more cases involving multi-jurisdictional enforcement in the coming years. Even between supply states the tools can be lacking in order to resolve these cases in the most effective way. There are likely to be additional issues when demand states become involved. A coordinated settlement involving all the major authorities is the best way currently of dealing with the various legitimate interests of states and companies.

3.53 Ways need to be found to ensure that investigations are coordinated and that these are followed by a settlement that can truly be called a global settlement. It will be possible in such a settlement to ensure proper restitution to the demand state and credit for this by supply states. The present multi-jurisdictional legal framework provides the basis for this but has not yet been used in practice. Leadership by UNODC and the OECD is needed to work towards this bearing in mind different legal systems.

# 4. Settlement Mechanisms- DPAs/ NPAs/Declinations/Civil Recovery

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## Introduction

4.1 The detailed terms of reference for this subject are- **‘Mapping alternative means of settlement. In this regard, canvass the use of Deferred Prosecution Agreements (DPAs) and Non Prosecution Agreements (NPAs).** Other recent additional tools such as declinations (in the US) and civil recovery (in the UK) will be covered.

4.2 Alternative means of settlement are not for every case. Tough enforcement action (whether through the criminal or administrative courts) will continue to be the best approach for dealing with companies which have systemic bribery issues. Only a court ruling followed by debarment is likely to have an impact on such a company. Companies that have put in place excellent modern compliance systems will want states to take vigorous action against those who continue to bribe.

4.3 There are other cases though where experience has shown that this tough approach is not necessary and can lead to undesirable consequences. Alternatives have been developed to overcome these issues. These alternatives need to be judged by reference to whether they aid or hinder the fight against corruption. The US experience (and the UK experience between 2008 and 2012) is that these alternatives can make a real difference. 83% of corporate FCPA resolutions in the US since 2004 have used these alternatives<sup>45</sup>. They can be a useful and effective addition to the toolkit of a prosecutor over and above enforcement through criminal or administrative courts<sup>46</sup>.

4.4 This Section will therefore deal with the US and UK experience and the effectiveness of DPAs, NPAs, declinations and civil recovery. Experience in Greece as a result of

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<sup>45</sup> (Koehler, An Examination of Foreign Corrupt Practices Act Issues, 2013, p. 327)

<sup>46</sup> There remains understandable concern about settlements by reviewers under UNCAC and the OECD Convention and by civil society organisations. This concern is shown as well in (Stolen Asset Recovery Initiative, 2014). This is understandable when there is limited transparency and publicity about the settlements. It is to be hoped that the concerns will be dispelled as more experience is obtained of these alternatives in practice and there is fuller transparency.

the Siemens case will then be discussed. This was a novel way of resolving a case and shows the range of possibilities particularly for the demand state. There will then be some more general comments.

## **Alternative Mechanisms: The US Experience**

4.5 The importance that the US attaches to DPAs can be seen from a speech by Assistant Attorney General Lanny Breuer when he said<sup>47</sup>-

‘DPAs have had a truly transformative effect on particular companies and, more generally, on corporate culture across the globe....When the only tool we had to use in cases of corporate misconduct was a criminal indictment, prosecutors sometimes had to use a sledgehammer to crack a nut. More often, they just walked away. In the world we live in now, though, prosecutors have much greater ability to hold companies accountable for misconduct than we used to- and the result has been a transformation in the culture of corporate compliance.’

4.6 The US was asked to assess the impact of DPAs and other tools as part of the peer review mechanism under the OECD Convention. The result was reported in the OECD Follow-Up Report<sup>48</sup>. The DOJ relied on anecdotal evidence because quantifying the deterrent effect of particular criminal powers is next to impossible.

4.7 The anecdotal evidence came from companies that have been involved in FCPA cases. The DOJ also relied on evidence from companies that had not been the subject of investigation but which had reformed their practices as a result of DOJ enforcement activity. This can be seen from examples such as Siemens. There is also a beneficial impact when large companies require potential subcontractors to show that they have the right approach to anti-corruption. The impact of anti-corruption legislation and enforcement can therefore be considerable and can go beyond particular cases.

4.8 A DPA is part of the US criminal justice system. The process is described in the text box on the following page.

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<sup>47</sup> Speech by AAG Breuer set out in DOJ Press Release 13 September 2012.

<sup>48</sup> (OECD WGB, 2012, pp. 9-10)



### **DPAs**

'Under a deferred prosecution agreement, or a DPA as it is commonly known, DOJ files a charging document with the court, but it simultaneously requests that the prosecution be deferred, that is, postponed for the purpose of allowing the company to demonstrate its good conduct.

'DPAs generally require a defendant to agree to pay a monetary penalty, waive the statute of limitations, cooperate with the government, admit the relevant facts, and enter into certain compliance and remediation commitments, potentially including a corporate compliance monitor. ....If the company successfully completes the term of the agreement (typically two or three years), DOJ will then move to dismiss the filed charges. A company's successful completion of a DPA is not treated as a criminal conviction.'

Source- (DOJ/SEC, 2012, p. 74)

4.9 DPAs were developed following the prosecution of Arthur Andersen (one of the Big Five global accountancy firms at that time). The firm collapsed. Many employees worldwide who had no connection with the relevant events lost their jobs. Further, the already small number of global accountancy firms was reduced with a significant impact on competition. These collateral consequences led the US authorities to consider alternatives that did not involve a criminal conviction.

4.10 An example of a DPA taken from a recent settlement is in the text box below.

### **Total SA**

On 29 May 2013 Total SA (Total) entered into a DPA with the DOJ and a related agreement with the SEC. The settlements with the DOJ and the SEC concerned contracts between Total and the National Iranian Oil Company. Total admitted responsibility for unlawful actions. Total agreed that, if the case were to proceed to prosecution, it would neither contest the admissibility of nor contradict the agreed statement of facts.

Under the DPA Total agreed-

- To pay a monetary penalty of \$245.2 million to the DOJ;
- To retain an independent compliance monitor for three years.

There was provision for early termination if the need for the monitor had been eliminated and the other terms of the DPA had been satisfied. This has become standard practice recently. (DOJ Press Release 29 May 2013)

4.11 These agreements can be extremely flexible and can take account of the DOJ's view of the company's culpability and its compliance processes. DPAs have developed over the last 20 years. These developments have happened most rapidly in recent years<sup>49</sup>.

4.12 There has also been increasing involvement of a US criminal court judge. Consent in earlier years was virtually certain. That is not the case now. Judges give their views on the DPA and where necessary require the DOJ and the company to re-negotiate. In very recent times judges have required copies of the monitor's reports so that the judge can continue to have a role in overseeing the settlement. An example of judicial involvement in a civil settlement under the FCPA is set out in the text box below.

#### **The IBM Case**

The SEC brought a civil complaint against the company alleging violations of the books and records and internal control provisions of the FCPA. The allegations involved payments to officials in South Korea and China. Illegal gifts and improper payment of travel and entertainment expenses were also alleged.

On 18 March 2011 IBM announced that it had reached settlement with the SEC. Under the settlement the company agreed to pay \$10 million to settle the allegations although it neither admitted nor denied the allegations. The company also agreed to inform the SEC about any further compliance issues relating to allegations of bribery. The settlement was agreed to be subject to the decision of the court.

On 20 December 2012 the judge said that he would not 'rubber stamp' the agreement. He said that there was growing awareness among federal judges of the need for rigorous review of corporate settlement agreements.

The judge said that IBM should be required to report all accounting violations and not just bribery issues. The judge also asked for annual reports regarding the company's FCPA compliance. (See the Bloomberg report at <http://tinyurl.com/muzyo4y>.)

On 25 July 2013 the judge agreed a revised settlement under which IBM agreed to file annual reports to the court and the SEC about its anti-bribery compliance programme. IBM also agreed that for the next two years it would report within 60 days of learning that 'it is reasonably likely' that the company violated the anti-bribery or books and records provisions of the FCPA. ([www.fcpablog.com](http://www.fcpablog.com) for 26 July 2013).

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<sup>49</sup> For example the agreement about early termination seen in the Total case.

4.13 An NPA (unlike a DPA) is not part of the US criminal justice system. It is a private agreement between the DOJ (or the SEC) and the company. Judges have no role to play in an NPA. The process and a recent example are as follows.

#### **Non-Prosecution Agreements**

‘Under a non-prosecution agreement, or an NPA as it is commonly known, DOJ maintains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA. Unlike a DPA an NPA is not filed with a court but is instead maintained by the parties. The requirements of an NPA are similar to those of a DPA.’ (DOJ/SEC, 2012, p. 75)

#### **Ralph Lauren**

On 22 April 2013 Ralph Lauren Corp. entered into NPAs with the DOJ and the SEC. The NPAs concerned activities by a subsidiary in Argentina and bribes to customs officials. A fine of \$882K was paid to the DOJ together with disgorgement of \$142K to the SEC. The DOJ cited the company’s ‘extensive, thorough and timely cooperation’. (DOJ Press Release 22 April 2013)

4.14 There is of course a natural preference on the part of companies for NPAs rather than DPAs. The DOJ were criticised for not being clear about the circumstances in which an NPA would be favoured over a DPA. The US agreed to publish more information about the circumstances in each case that justified the particular resolution<sup>50</sup>. The FCPA Resource Guide provides help on this. The Guide was generally welcomed although there was some criticism that it was insufficiently clear on when a DPA or an NPA would be appropriate<sup>51</sup>. The great variability of factual situations means that it is unrealistic however to expect a checklist of factors that will automatically point in one direction rather than another.

4.15 The latest feature in the US has been the increasing use of declinations by the DOJ. A declination is a decision by the DOJ that it declines to prosecute a company in respect of a particular alleged violation<sup>52</sup>. This practice became much better known as a result of the DOJ declination in the Morgan Stanley case<sup>53</sup>. The text box sets out the Morgan Stanley declination.

<sup>50</sup> (OECD WGB, 2012, pp. 11-12)

<sup>51</sup> See for example (Covington & Burling, 2012, p. 7). There was praise though for the more detailed treatment of declinations.

<sup>52</sup> Declinations are covered at (DOJ/SEC, 2012, p. 75)

<sup>53</sup> In the period from 1.1.13 to 31.7.13 the DOJ issued 15 declinations. (Miller Chevalier, 2013)

### **The Morgan Stanley Declination**

This was contained in a press release concerning the resolution of an enforcement action against Garth Peterson (a former managing director for Morgan Stanley's real estate business in China). The press release said-

'After considering all the available facts and circumstances, including that Morgan Stanley constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials, the Department of Justice declined to bring any enforcement action against Morgan Stanley related to Peterson's conduct. The company voluntarily disclosed this matter and has cooperated throughout the department's investigation.'

(DOJ Press Release 25 April 2012)

4.16 The US terminology can be difficult to understand because both an NPA and a declination are decisions by the DOJ that the company will not be prosecuted for an alleged offence<sup>54</sup>. There are two features that may show the difference in practice between an NPA and a declination. These are<sup>55</sup>-

- Under an NPA the company is required to take further action in order to improve its systems as well as paying a financial penalty. No further action is required under a declination.
- A declination recognises the efforts that the company made in order to prevent the breach and its continuing commitment to anti-corruption<sup>56</sup>. Under an NPA there is a recognition that there were defects in the company's processes and cultures.

4.17 The US has shown that DPAs (together where appropriate with NPAs and declinations) can have considerable advantages for the DOJ and the company and can make a significant impact. The advantages are-

- They are much less resource intensive for the DOJ than a contested trial.

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<sup>54</sup> They are therefore both examples of prosecutorial discretion in that the prosecutor decides that a prosecution in court is not appropriate. Jurisdictions such as the US and the UK give discretion to prosecutors to make such decisions.

<sup>55</sup> There is little public information about cases involving declinations. DOJ resources may also be a factor. It remains to be seen whether the recent use of declinations will continue to feature as part of the US approach to the FCPA.

<sup>56</sup> See the examples at [www.fcpablog.com](http://www.fcpablog.com) for 24 January 2013.

- They can have a major impact on corporate compliance in the particular company as well as others.
- There is no criminal conviction (with debarment). The company has a real incentive to cooperate.
- They can give the company a resolution more quickly and with more certainty than the full criminal justice process. As discussed above in para 3.8 there are major advantages to the company in entering into a resolution.

4.18 DPAs have also become controversial in the US for various reasons-

- There is public criticism that DPAs allow large corporations to buy their way out of trouble<sup>57</sup>.
- There is concern about the very limited role for judges. This criticism is heard less frequently now because judges have become more active. There remains concern by FCPA academics however that the DOJ can extend the impact of the FCPA without the issue being challenged by companies and resolved by judges.
- There has been recent criticism by a distinguished US judge (Judge Rakoff) who called DPAs 'morally suspect' because they were not accompanied by prosecutions of the individuals involved. The judge said that this cast doubt on whether the company had committed an offence<sup>58</sup>.

4.19 Despite these criticisms the use of DPAs, NPAs and declinations will continue in the US system. These tools are vital to the success that the US has had in combatting transnational bribery. States looking at the role they want to play in this area need to look at these tools to see whether they would work in their own jurisdiction and how effective they would be. They also need to be able to take account of the possibility of a DPA in the US in their own investigation. An example of the issues and

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<sup>57</sup> See the interesting conference discussion between Denis McNerney of the DOJ and a panel about DPAs and whether justice can be bought reported at <http://tinyurl.com/o5kqanc>

<sup>58</sup> The Judge's speech can be found at <http://tinyurl.com/oa3hhdX>. The relevant passage is at pages 16 to 18.

challenges and also successes can be seen from the UK experience between 2008 and 2012. This will be discussed next.

## Alternative Mechanisms: The UK Experience

4.20 The UK has made a sustained attempt at trying to use US models in this area. The UK experience shows a number of issues.

4.21 The first method used was a civil recovery order (non-conviction based confiscation)<sup>59</sup>. This is part of the UK civil justice system (and not the criminal justice system). The parties negotiate and reach an agreement on the amount of the forfeiture and any other terms such as the appointment of a monitor. The case is then referred to a senior civil court judge for a decision. Between 2008 and 2012 there were seven of these orders. An example is in the box below.

### **Civil Recovery Order: Macmillan Publishers Ltd**

On 22 July 2011 the SFO announced that the High Court had granted a civil recovery order requiring the company to pay £11 million in recognition of sums it received which were generated through unlawful conduct. The investigation and resolution were coordinated with the World Bank which announced its own settlement with the company

The company had cooperated and conducted a full internal investigation. It had also reviewed its anti-bribery policies and appointed external consultants to advise on action it should take to enhance its compliance regime. A monitor was appointed.

4.22 The use of civil recovery orders was criticised by NGOs such as TI<sup>60</sup> and by the OECD<sup>61</sup>. Underlying this was concern at the use of non-conviction based forfeiture in these cases. The criticisms were-

- Criminal justice processes should always be used in these cases and not civil justice ones.
- There was insufficient judicial involvement.

<sup>59</sup> It is important to note here that the pre-Bribery Act legislation was very restrictive and would not have applied in the cases where civil recovery orders were used.

<sup>60</sup> (TI-UK, 2012)

<sup>61</sup> (OECD WGB, 2012, pp. 22-25)

- There was insufficient transparency in the agreements. More detail should be made public. The case should be heard in open court.

4.23 These criticisms were accepted and the SFO announced a major change of practice on 9 October 2012<sup>62</sup>. It is unlikely therefore that the SFO will make further use of civil recovery orders in these cases. The fact that the Bribery Act has been in force for two years means that it will now be easier for the prosecutor to establish criminal liability.

4.24 Another UK mechanism was tried in the case of BAE Systems. This is described in the text box below.

#### **BAE and Tanzania**

Under the global settlement reached with BAE the company agreed that it would plead guilty in the UK to one charge of failing to keep proper books and records relating to the transaction in Tanzania (the sale of a radar system).

The company and the SFO agreed that the company would pay £30 million (the approximate value of the contract) for the benefit of the people of Tanzania less the fine to be imposed by the criminal court judge. The payment to Tanzania could not for technical reasons be made under a criminal confiscation or civil recovery order and was therefore an agreement between the company and the SFO.

All of this was agreed to be subject to the decision of a judge. The judge was free to accept, reject or amend the agreement.

At the sentencing hearing the judge was very critical of the agreement. He said that it put moral pressure on him to minimise the fine. He criticised the drafting of the agreement although he did not reject it.

4.25 This was another mechanism devised because of the unsatisfactory state of English law. It enabled money to be paid for the benefit of the people of Tanzania (unlike other settlements where the enforcing state keeps the money) but the mechanism was widely criticised. It is not likely to be used again.

4.26 The UK has looked at an alternative through the criminal justice system that will command more public confidence. The UK Government announced a consultation on

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<sup>62</sup> SFO Press Release 9 October 2012.

DPA's on 17 May 2012. The quotations in the text box are useful because they can apply wider than the UK.

#### **UK DPAs (1)**

'There are currently insufficient incentives for commercial organisations to engage and cooperate with UK authorities at earlier stages to achieve better outcomes....' (UK Ministry of Justice, 2012) (Para 31)

'The activities and offending of commercial organisations can be spread across several jurisdictions. Some of those jurisdictions, having a wider and more flexible range of enforcement tools, are better equipped to deal with the wrongdoing. We believe that the absence of such tools in England and Wales impacts negatively upon-

- Encouragement to engage early with UK authorities;
- Certainty as to the possible outcomes from such engagement;
- Achieving finality as to outcomes in a shorter time frame; and
- Enabling closer cooperation between foreign jurisdictions and the UK, and achieving resolution across several jurisdictions.' (Para 35)

Para 40 is also relevant and has been set out at para 3.31 above.

4.27 This eventually resulted in legislation enacted on 25 April 2013 to introduce a system of DPAs<sup>63</sup> in England and Wales although this is not yet in force. The first DPAs are likely in early 2014. The UK system is obviously heavily influenced by the US system but it is adapted to the UK criminal justice system. In particular a much greater role is envisaged for the judge in order to overcome the problems in the *Innospec* case<sup>64</sup>. The text box shows how DPAs will work.

#### **UK DPAs (2)**

The prosecutor will decide whether to offer a DPA. There is a consultation at present by prosecutors about the approach to this. Prosecutors are likely to look at the nature and the seriousness of the offence and other factors such as for example how widespread the practice was in the company.

Following agreement by the company the prosecutor can start DPA proceedings in court. There will be an early private hearing where a judge can express a provisional view on the decision to proceed with a DPA. If the judge is content, the prosecutor and the company will negotiate the DPA and then return to the judge for approval. If the judge agrees to the DPA, judgment is given in public.

*Continued.....*

<sup>63</sup> NPAs were rejected in the Consultation Document because of the lack of judicial oversight. Para 64 at (UK Ministry of Justice, 2012).

<sup>64</sup> See para 3.10 above.



Penalties will include a fine and disgorgement. The company must put in place proper anti-corruption policies. A monitor may be appointed. At the final hearing the prosecution will be deferred.

The first DPAs are expected in early 2014.

4.28 There has of course been much comment on this new tool for prosecutors. Time will tell whether this mechanism will be of interest to companies. Much will depend on the approach of prosecutors and judges.

**Siemens: Greece**

4.29 In the first quarter of 2012 the Greek Ministry of Finance entered into a settlement with Siemens over long running corruption allegations involving bribes paid by Siemens Hellas to win contracts with state-owned Hellenic Telecom. The settlement had a number of novel features. The text box gives details of the settlement.

**Siemens**

Siemens reached an out of court settlement with the Greek authorities under which it agreed to pay a total of €270 million (\$336 million). This consists of the following-

- €90 million to help the Greek government fight corruption;
- €80 million to help the Greek government pay off debts;
- An investment of €100 million by Siemens in Greece.

The settlement needs Parliamentary approval. ([www.fcpablog.com](http://www.fcpablog.com) on 12 March 2012)

4.30 This is a very imaginative resolution on the part of the demand state. It shows the possibilities that there are for crafting an out of court resolution that will also assist the state's wider objectives. There may be many states that would be unable to reach such an outcome through the traditional route through the criminal or administrative courts and could find this attractive.

4.31 It is to be noted that the resolution requires approval by the Greek Parliament. Effectively therefore the resolution in this case is an agreement between Siemens and the Greek government subject to Parliamentary approval and not an agreement with law enforcement agencies. This is a precedent that could be helpful for states (particularly demand states) although it should be noted that there will be states where there would be constitutional issues about the role of the executive and

legislature in dealing with a case that was the responsibility of law enforcement. The Greek settlement shows however that fresh thinking and an innovative approach are possible in dealing with these cases.

## **Conclusion**

4.32 The US experience has shown that alternatives to enforcement through the criminal or administrative courts can be effective in appropriate cases. They can encourage companies to cooperate and they can transform the culture in that company and others. These alternatives can therefore have a significant impact in fighting corruption. States that have encountered difficulties in taking companies through the traditional system (or which have not so far tried) may therefore want to consider what can be learned from these mechanisms and how they can assist in more effective enforcement of the law against companies.

4.33 The experience in Greece with the Siemens settlement also shows the potential for a demand state in reaching an agreement that does not involve action in the criminal or administrative courts. There will be states where an outcome of this nature will in fact be much tougher than the sentence that a court might apply assuming that the case could be proved.

4.34 The UK experience shows that there can initially be considerable resistance to what may be seen as the importation of US criminal justice mechanisms into another jurisdiction. These objections are capable of being overcome provided that governments can persuade public opinion that these new mechanisms will have a positive impact on the fight against corruption. Transparency and judicial involvement are likely to be essential in assuring public opinion that these resolutions are appropriate. States also need to show that these alternatives are not for all cases and that vigorous enforcement through the criminal or administrative courts must take place in those cases that are not suitable for alternatives.

4.35 States also need to consider the extent of prosecutorial discretion. Prosecutors in the US and the UK have discretion and can consider alternatives where appropriate. Other states may have different legal and cultural expectations of prosecutors.

4.36 States also need to consider how this could work where the liability is administrative and not criminal. Although no formal criminal conviction may be imposed, the administrative court may still have the power to impose a period of debarment and other sanctions. At present there is limited evidence that states with administrative offences for corporate corruption have sought to devise a form of alternative mechanism<sup>65</sup>.

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<sup>65</sup> Although the German Criminal Code has been amended to introduce the concept of negotiated sentencing. The OECD has kept this new provision under review para 138 of (OECD WGB, 2011) and (OECD WGB, pp. 11-12).

# 5. Self-Reporting

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## Introduction

5.1 The detailed terms of reference for this topic are- **‘Measures to further incentivise self-reporting, such as assurance of a reduction of financial penalties and assurance of a certain level of confidentiality.’**

5.2 Self-reporting has become an important way in which enforcement and regulatory authorities in a number of states work together with companies. These authorities expect companies to be proactive in disclosing violations and in working with the authorities on an investigation. It is an example of good faith by companies in fighting corruption. The authorities expect companies to be able to demonstrate what action they are taking to improve company processes and culture. This trend has been supported by rigorous legislation such as SARBOX which imposes obligations on companies to report.

5.3 Self-reporting applies in a number of areas and not just in relation to bribery. There are requirements in the financial markets of a number of states concerning the information that a company must publicly disclose about issues that could have an impact on its share price. There is legislation too concerning money laundering and the need for a proactive disclosure of suspicious transactions.

5.4 It is not surprising therefore that self-reporting has become a feature of anti-corruption work in some states. It is though less widely adopted than self-reporting in the other areas mentioned above.

5.5 This Section will look at experience in the US and UK together with the World Bank. Reference will also be made to interesting recent guidance from the authorities in China. This discussion will bring out issues for states to consider. Self-reporting can be a very important tool in fighting corruption. Taken together with cooperation and

alternative resolutions, self-reporting can offer advantages to states and to companies<sup>66</sup>.

## Experience in the US

5.6 The FCPA Resource Guide states-

### FCPA Resource Guide

'..in many investigations it will be appropriate for a prosecutor to consider a corporation's pre-indictment conduct, including voluntary disclosure, cooperation, and remediation, in determining whether to seek an indictment.' (Page 53)

'While the conduct underlying any FCPA investigation is obviously a fundamental and threshold consideration in deciding what, if any, action to take, both DOJ and SEC place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.' (Page 54)

5.7 In the Ralph Lauren case (at para 4.13 above) the DOJ cited the company's 'extensive, thorough and timely cooperation, including self-disclosure of the misconduct' and other examples as justifying an NPA.

5.8 The essential features of a self-reported case are as follows-

- The company makes a full and unprompted disclosure to the DOJ/SEC.
- The company carries out a full investigation.
- If there were violations, the company agrees to pay a fine and disgorgement of profits and agrees to improve its compliance processes.
- The DOJ/SEC agree to a reduced financial sanction, disgorgement of profit and a DPA or an NPA.

5.9 The US experience has shown that self-reporting and agreed resolutions have many advantages to an enforcement authority<sup>67</sup>-

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<sup>66</sup> It should be noted that experience so far has always involved large global companies. There is little experience of dealing with smaller companies in the context of self-reporting.

- They incentivise companies to improve their compliance processes and culture.
- The authority will obtain more cases. Without self-reporting the enforcement authority must rely on whistleblowers, the media, exchange of information, regulatory filings, suspicious activity reports and electronic surveillance. These will always be important but they are very resource intensive and unpredictable in producing cases.
- The burden on the prosecutor is reduced because the company will conduct a detailed internal investigation at its own expense. The company will be looking for a negotiated settlement. The prosecutor will not have to prepare for trial.
- If self-reporting is not part of the legal system, then the prosecutor has to consider whether it has the resource to carry out the detailed investigation and court proceedings itself. This can cost millions of euros.

5.10 The numerous cases resolved by the DOJ/ SEC following self-reporting show that this can give the company the best opportunity to reduce the penalty and to avoid a formal criminal conviction with debarment or an administrative penalty that may include debarment and other sanctions<sup>68</sup>.

5.11 There are issues for a company to consider in deciding to self-report to the US (and other) authorities-

- What is the benefit from self-reporting? Is there a legal requirement?
- What is the likely result? Will the company be faced with enforcement action in court leading to sanctions and debarment?
- Who should the company report to? This is straightforward where one authority has responsibility for the investigation and prosecution of a corruption case. It is

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<sup>67</sup> See paras 3.8,3.9 and 4.17 above for the advantages of agreed resolutions and coordinated settlements.

<sup>68</sup> Professor Koehler has calculated that 50% of corporate FCPA enforcement actions in the US in 2012 resulted from self-reporting (Koehler, An Examination of Foreign Corrupt Practices Act Issues, 2013, p. 325)

more difficult when there are separate investigators and prosecutors.

- When should the self-report be made?
- Will the authority to which the self-report is made disclose this to the authorities in other states?
- Should the company self-report in other states with jurisdiction? This will be particularly difficult if one state has a well-developed system of self-reporting and the other has no such system.
- What degree of confidentiality can the company obtain?

5.12 The issue of confidentiality will be important to the company but in practice it will have limited control. It is likely to have to make a regulatory filing in the US (and other states). These are followed closely by FCPA practitioners and in certain cases (e.g. Wal-Mart) by the wider media. The DOJ and SEC also publish substantial amounts of information when the settlement is reached. .

5.13 Confidentiality also arises in considering whether the authority concerned will pass on the information to other states. This happens. Companies need to recognise that enforcement and regulatory authorities have regular discussions and help each other. Companies therefore have to take into account the possibility that following a self-report they may face criminal or administrative action in other states. Action could also be taken against their employees. In practice companies have little influence over the decision to give details to another state. Nor will they find published guidance on this issue that will enable them to predict what the authority will do following the self-report. This uncertainty can act as a real disincentive to a company that is contemplating a self-report.

5.14 There is no easy answer to this issue particularly when the practice of states concerning the readiness to accept self-reports and the availability of alternative sanctions varies so much. The lack of a joined up approach by states to the investigation and the resolution (as discussed in Section 3) can also be an obstacle.

5.15 There has been some public criticism of the US practice on self-reporting. It has been said that the benefits of self-reporting are not clear<sup>69</sup>. One suggestion for example is that there should be a standard reduction of a substantial percentage in calculating the fine in a case of self-reporting. It is not always easy to determine the reduction from published information because the final figures reflect negotiations<sup>70</sup>. Other criticism has reflected the criticism of DPAs and other tools (see para 4.18 above). The issue is not really about self-reporting (which clearly is highly desirable for an enforcement authority) but what follows from this and whether the company can escape a criminal conviction. Section 6 below will discuss whether the real benefit of self-reporting is the likelihood of a DPA or NPA or declination rather than a reduction of the fine of a certain amount.

5.16 It is not surprising that the DOJ remain firmly of the view that self-reporting must be an essential part of their approach. The success of the US in fighting corruption of foreign officials means that self-reporting needs to be looked at by other states. The experience of the UK over the last five years shows some of the potential for introducing this elsewhere and some of the obstacles.

## Experience in the UK

5.17 In 2009 the UK introduced a system of self-reporting that was heavily influenced by US experience. The UK system had the same essential features as were described above in para 5.8. However the UK had no concept of DPAs at that time and so the UK had to identify another way of settling cases following a self-report and full cooperation. The lead authority in these cases (the SFO) said that civil recovery would be used although there were no guarantees.

5.18 The UK Consultation Paper on DPAs<sup>71</sup> recognised the problem with self-reporting without the backup of DPAs<sup>72</sup> and stated-

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<sup>69</sup> See for example the articles cited at footnote 45 of (Koehler, An Examination of Foreign Corrupt Practices Act Issues, 2013, pp. 325-326)

<sup>70</sup> In the Total case for example (para 4.10) the DOJ and the company agreed that the range of the fine was between \$235 million and \$470 million. The amount agreed was \$245 million <http://tinyurl.com/ko8hqst> at pages 5 and 6. No details are available as to how this was arrived at. This case did not involve self-reporting. The NPA in the Ralph Lauren case (para 4.13) resulted from a self-report but it is not clear how the penalty was calculated (<http://tinyurl.com/kzwh630> at page 2).

<sup>71</sup> (UK Ministry of Justice, 2012)

<sup>72</sup> See also paras 3.31, 4.26 and 4.27 above.



'The justice system needs to ...incentivise self-policing, self-reporting and admission of wrongdoing, with appropriate and proportionate penalties for offenders and restitution for victims.' (Para 43)

5.19 The question of incentives and penalties is important. Civil recovery cannot include a fine (since this is a criminal sanction). The financial penalty was therefore disgorgement of profit. There was no incentive to a company to self-report and cooperate because it would obtain a lower fine. The incentive was that the SFO would look for a civil resolution rather than a criminal outcome.

5.20 Confidentiality was dealt with under civil recovery although it became controversial. The material put in the public domain was the subject of negotiation between the SFO and the company. Very limited information was disclosed about the first case. The information disclosed steadily increased from case to case although there remained criticisms about the extent of this. TI has also said that there should be more transparency about SFO processes when a self-report is accepted as well as about the final settlement<sup>73</sup>.

5.21 Self-reporting became an important tool for the SFO between 2009 and 2012. It led to seven corporate resolutions through civil recovery orders. This is in a jurisdiction that had seen no corporate resolutions before 2008. The policy was regarded as successful in enabling the SFO to find out about cases and deal with them.

5.22 Para 4.22 above has discussed the criticisms of civil recovery in these cases and the change of policy by the SFO. The 2009 guidance was withdrawn in October 2012 as a result of the criticisms and the SFO has returned to the traditional UK criminal justice approach. The new SFO guidance says that self-reporting is only one issue to be taken into account in deciding whether to prosecute and that 'self-reporting is no guarantee that a prosecution will not follow.'<sup>74</sup>

5.23 The UK experience is instructive in showing the tension between a system of self-reporting and agreed resolutions and the more traditional approach that emphasises the primacy of the criminal court approach. It is easier now for the SFO to obtain a

<sup>73</sup> (Transparency International, 2013, p. 83)

<sup>74</sup> [www.sfo.gov.uk/bribery-corruption/corporate-self-reporting.aspx](http://www.sfo.gov.uk/bribery-corruption/corporate-self-reporting.aspx).

conviction against a company as a result of the Bribery Act. There will also be alternatives as a result of DPAs from early 2014. A key question will be whether the UK authorities can obtain cases without the support of a system of self-reporting.

## World Bank Experience

5.24 The World Bank has become an important enforcer of anti-bribery obligations in recent years. The World Bank encourages self-reporting and cooperation and has set up a Voluntary Disclosure Program (VDP)<sup>75</sup>. The Chair of Transparency International (Huguette Labelle) is quoted as follows on the VDP website-

‘When a firm decides to disclose its past corrupt behaviour, this is one more firm that can contribute to ending the plague of corruption. The more tools we have like the VDP, the more we will be able to reduce corruption in a substantial way.’

5.25 The VDP website contains detailed Guidelines for Participants. These are set out in the text box.

**World Bank VDP**

The purpose ‘is to scale up the World Bank’s fight against corruption by partnering with the private sector through a program that provides firms, other entities, and individuals with incentives to disclose their knowledge of fraudulent and corrupt practices and comply with World Bank rules and guidelines. The program aims to improve development effectiveness by creating a business climate surrounding World Bank-financed and supported projects that is free of fraud and corruption, and to reduce the risk of fraud and corruption in ongoing and planned Bank projects by providing the World Bank with information about specific wrongdoing.’  
(Para 2)

‘The VDP gives firms...the opportunity to confidentially partner with the World Bank and:

- Cease corrupt practices;
- Voluntarily disclose information [and conduct] internal investigations at the Participant’s cost; and
- Adopt a robust ‘best practice’ corporate governance Compliance Program which is monitored for 3 years by a Compliance Monitor.

In exchange the Bank does not publicly debar Participants for disclosed past misconduct and keeps their identities confidential. If, however, a Participant does not disclose all misconduct voluntarily, completely and truthfully; continues to engage in Misconduct; or violates other material provisions...that Participant faces mandatory 10-year public debarment...’  
(Para 3)

<sup>75</sup> The VDP website is at [www.worldbank.org/vdp](http://www.worldbank.org/vdp).

5.26 The Integrity Vice Presidency has published its Annual Update for Fiscal Year 2013<sup>76</sup>. There is a breakdown relating to the 49 cases settled in the year that shows the source of the information. Of the 15 cases of corruption resolved in the year one case started as a result of self-reporting. The details published by the Bank for FY2013 show that 89 new cases were opened in that year although there is no breakdown concerning the origin of the cases.

5.27 The issue discussed in paras 5.13 and 5.14 above about sharing a self-report with other authorities is also relevant to World Bank cases. The Bank works with national states and refers cases to them<sup>77</sup>. The Bank has dealt with the issue of confidentiality in the VDP expressly. The relevant parts of the VDP are in the text box.

#### **Confidentiality**

'The [Bank] recognises that if a Participant's identity is made public either directly or through the sharing of information provided by the Participant, the safety and welfare of the Participant (and their present and former...employees...) may be compromised. Therefore the Participant's identity will not be revealed to parties outside INT except ....(iii) by joint agreement between the [Bank] and the Participant; (iv) if the [Bank] determines it has a legal obligation to do so and after notice to the Participant; or (v) if the [Bank] agrees to do so after receiving judicial notice and after consultation with the Participant.' Para 5.7.2

'Subject to confidentiality limitations, the VDP may provide information obtained from VDP disclosures to the following recipients:

(iii) member countries receive redacted information....(Para 5.7.3)

5.28 This is a very interesting way of dealing with this difficult issue. There is an express recognition that a company will have legitimate concerns about the way that its employees and others will be treated in the other state. It also recognises the need to consult the Participant before a disclosure is made. The particular solution adopted may not be appropriate for national authorities where civil society groups, international organisations and others will expect them to pass information to other states<sup>78</sup>. However the need for the authority to discuss the issue with the company and the importance of recognising the legitimate concerns of the company should be

<sup>76</sup> See the report at (World Bank Integrity Vice Presidency, 2013) and the Facts and Figures at (World Bank Integrity Vice Presidency, 2013).The World Bank is currently consulting on improvements to its sanctions system.

<sup>77</sup> Details of the numbers of cases referred are at (World Bank Integrity Vice Presidency, 2013, p. 5).

<sup>78</sup> There may be Mutual Legal Assistance obligations as well.

part of an approach by national authorities. A formal published policy could then set out how the authority would deal with the information<sup>79</sup>.

## Recent Developments in China

5.29 China has become an increasingly important enforcer of anti-corruption legislation.

China has legislation criminalising bribery of domestic officials<sup>80</sup>. The enforcement of this legislation has become a key feature in the approach of the Chinese Government. There is very visible political will in support of this. Recent months have seen strong enforcement action by the Chinese authorities against global companies that are alleged to have paid bribes in China<sup>81</sup>. This trend is likely to continue.

5.30 There are two aspects of the approach of the Chinese authorities that are relevant to a discussion of self-reporting. The first concerns a meeting between the Chinese enforcement authority responsible for antitrust issues (the National Development and Reform Commission) and a number of global companies. At that meeting the companies were encouraged by the authority to self-report any economic crimes they may have committed before being discovered. Leniency was likely to be available<sup>82</sup>. This is an interesting indication of the approach of the authorities and may have implications for other cases.

5.31 The second important aspect of the Chinese approach arises from guidance issued by the Supreme People's Court and the Supreme People's Procuratorate with effect from 1 January 2013. This guidance contains a commentary on the interpretation of various issues concerning criminal bribery cases. Article 7 applies to legal persons and provides that where the briber voluntarily confesses to the bribery before it is prosecuted, then the penalty may be mitigated or waived<sup>83</sup>. Cases in the public domain will be needed in order to see how the Chinese authorities apply this guidance.

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<sup>79</sup> Leadership by UNODC and the OECD will be needed in order to ensure so far as possible that the policies of states are consistent.

<sup>80</sup> China has also introduced new legislation following the OECD Convention and UNCAC which criminalises bribery of foreign public officials. This legislation applies to companies as well as individuals. (Anti-Corruption Regulation, 2013, pp. 58-60)

<sup>81</sup> This has been praised by the UN. Companies have been encouraged to see this as an opportunity to review and improve their policies (<http://tinyurl.com/mxlddjw>).

<sup>82</sup> See [www.fcpablog.com](http://www.fcpablog.com) on 9 September 2013

<sup>83</sup> See [www.fcpa.blog.com](http://www.fcpa.blog.com) for 3 January 2013 with a link to a translation. The mitigation or waiver does not apply in certain circumstances e.g. when there are 'harmful consequences'.

## Concluding Remarks

5.32 A detailed survey of self-reporting in other jurisdictions would be too lengthy for this Preliminary Study<sup>84</sup>. There can be a reluctance and sometimes a distrust of self-reporting in a number of states. There may be various reasons for this. It may be that over a period of years and with leadership from UNODC and the OECD the mistrust of self-reporting will diminish and that it will be seen as an important additional tool.

5.33 Self-reporting and agreed resolutions can be very important components in an overall approach to dealing with corruption. This strategy needs to be about more than enforcing the law through the criminal or administrative courts. There needs as well to be an emphasis on prevention and working with companies that are trying to bring about the right corporate culture. Self-reporting can help with this approach.

5.34 The UK experience shows the resistance that there can be to a system of self-reporting in these cases and the arguments that need to be addressed by any such system.

5.35 Self-reporting has the potential to make a significant impact in fighting corruption. Companies need to be prepared to report violations to the authorities and work with them on resolutions rather than wait to be detected. This will encourage a more productive partnership between states and companies. States need to recognise however how difficult it can be for a company to self-report particularly in a jurisdiction with little or no experience of this. States also need to recognise the legitimate concerns companies have about the self-report being shared with states with different systems. States should consider what would be needed to make self-reporting effective. UNODC and the OECD can provide leadership by helping states to work through the implications.

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<sup>84</sup> There is very helpful guidance in (Lomas & Kramer, 2013)

# 6. Leniency

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## Introduction

6.1 The detailed terms of reference for this topic are- **‘Leniency mechanisms (such as leniency programmes in the case of anti-cartel regimes) resulting in sanctions reduction, to be defined on the basis of clear parameters as well as clear benefits.’**

6.2 Leniency mechanisms are important incentives to companies that want to cooperate with the authorities and report violations. They also incentivise companies to improve their compliance systems and culture. Companies considering whether to self-report to the authorities will want to know about the advantages and risks and the immunity or mitigation that they may receive.

6.3 Leniency mechanisms in corruption cases can work in a number of ways. Some mechanisms will be discussed below. There is one other mechanism that has attracted interest. This is the grant of immunity in anti-cartel work. This will be discussed next. There will then be a discussion about how leniency works in corruption cases in the four states that are regarded by TI as active enforcers of anti-corruption legislation (the US, the UK, Germany and Switzerland) followed by some concluding remarks. Feedback from companies and states will be helpful in understanding how leniency works in a range of other states.

## Immunity Mechanisms

6.4 A company that has been involved in cartel activity can receive immunity in various jurisdictions if it is the first to approach the authorities and provide evidence about the cartel. This offer has been a vital part of the attack on cartels. Identifying cartels would be much harder without this. A company has a very real incentive to be the first to report. Immunity is justified on the basis that it enables the other companies in the cartel to be sanctioned and therefore makes anti-cartel enforcement more effective. The immunity policy receives public support.

6.5 It is not surprising therefore that a similar leniency mechanism has been suggested for anti-corruption work. This will be an important question for states to consider.

There are however significant differences between cartels and corruption. Corruption cases will not usually involve a group of independent companies acting together to pay bribes. The enforcement authority would receive nothing in return for the immunity if a company reports corruption under an immunity programme.

6.6 Some states will have another immunity mechanism (usually seen in connection with organised crime) where someone involved in criminal actions obtains immunity on the basis that they will give evidence against more serious offenders. No state has used this yet to give immunity to a company for corruption. There is no evidence that any company would take advantage of this and give evidence against another company although it is certainly conceivable that a business competitor (or a partner in a joint venture) could take the initiative and report another company<sup>85</sup>. States would also need to consider whether there would be public support for immunity.

## **Leniency Mechanisms in Corruption Cases**

6.7 Leniency is not immunity. A company that receives leniency will not be absolved from sanctions in respect of the corruption. Those sanctions though can be mitigated by reference to various features such as the company's self-report and cooperation.

6.8 Companies will have a number of issues about leniency. States contemplating leniency programmes either with new tools or as part of their existing system also need to consider these issues. A state that wants to take advantage of alternative resolutions or self-reporting for example must consider the degree of leniency that will make this effective. Tools that do not incentivise companies to take advantage of them are unlikely to be successful. The issues that will need to be addressed include-

- Will there be a formal verdict against the company either in a criminal or an administrative court?
- Does the leniency policy set out clearly what benefit the company will receive?
- How certain can the company be that the decision of the authority to which the self-report is made will be upheld by a court if judicial approval is needed?

6.9 The next section will set out experience in the US, the UK, Germany and Switzerland.

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<sup>85</sup> Companies may be very reluctant to do this for a number of reasons.

## Leniency in Practice

6.10 The US policy is set out in the FCPA Resource Guide as follows-

### Leniency in the US

The DOJ/SEC Resource Guide summarises the US Sentencing Guidelines (pages 68 and 69). A base fine is calculated. This is then multiplied by a culpability score that can increase or reduce the base fine. The fine is reduced if the company had an effective pre-existing compliance programme to prevent violations and if the company voluntarily disclosed the offence, cooperated in the investigation and accepted responsibility for the criminal conduct.

The resolutions published by the DOJ give detail of how the Guidelines have been applied in particular cases. An example is the Total case (para 4.10). The DPA sets out at pages 5 and 6 the base fine, the culpability score (and an assessment of the relevant factors), the calculation of the fine range and the amount agreed. The settlement is discussed in [www.fcpaprofessor.com](http://www.fcpaprofessor.com) for 30 May 2013 with links to the court documents.

The information from resolutions is very useful for practitioners.

6.11 As noted above in para 4.14 there have been recent criticisms that the benefits of leniency are not clear. It is not clear for example what the particular benefits are from self-reporting. DPAs are not reserved for self-reported cases with traditional prosecutions for all other cases. A company can still benefit from a DPA if it does not self-report. In any event it may be that the benefits of leniency for a major global company come from the availability of alternative mechanisms such as DPAs/ NPAs and the relative speed and certainty of the process rather than the discount received. The financial and operational consequences of any monitoring are also important.

6.12 In the UK leniency has been dealt with in connection with civil and criminal cases. Para 4.21 above described civil recovery orders. Leniency in those cases was a civil resolution rather than a criminal outcome. This was obviously well received by companies and was an important incentive to them. The drawback of civil recovery was that no fine was possible and that only disgorgement of profits was possible. This was one of the reasons for the criticism referred to in para 4.22.

6.13 Para 4.26 above described the new UK DPAs that are expected to be available during 2014. The ability of a company to obtain a DPA and not to be formally



prosecuted is an important example of leniency. The other aspect of leniency concerns the quantification of the financial penalty. There is currently no guidance in place for judges on the calculation of fines for offences under the Bribery Act. This is being remedied now and the UK Sentencing Council is consulting on sentencing in these cases. The proposals are set out below.

### **Leniency under the UK Bribery Act**

The Act states that a company may be subject to an unlimited fine.

On 27 June 2013 the UK Sentencing Council issued a Consultation about guidance to judges on sentencing. The judge will apply a multiplier based on culpability to the amount of the harm from the offence. The maximum multiplier is 400%. This can be reduced by reference to the company's cooperation, early admissions and/ or voluntary disclosure. The judge will also look at the proportionality of the fine and any collateral consequences.

The consultation is on the Council's website at [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk)

These proposals (if they come into force) will be used in calculating fines for DPA purposes.

6.14 It will be interesting to see how judges apply this guidance if it comes into force. The UK experience is that judges are very reluctant to impose large fines on companies whether in SFO or other cases<sup>86</sup>. It is extremely unlikely that we shall see fines on US lines imposed for Bribery Act offences. The level of the fine (and the reduction in the monetary amount) is unlikely however to be decisive for a company in deciding whether to self-report and cooperate. The type of disposition and the general approach of the enforcement authority (see further in Section 7) will be more important.

6.15 In Germany legal persons are subject to the jurisdiction of administrative courts for violations of the law. Self-reporting and assisting the authorities are relevant factors in assessing the appropriate sanction but there are no sentencing guidelines to help predict this. There are also no alternative forms of resolution such as DPAs or NPAs. Agreements with prosecutors are however possible about how cases are to be

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<sup>86</sup> For high US-type fines in the UK it is necessary to look at fines by regulators.

conducted<sup>87</sup>.

6.16 The way in which an administrative court can grant leniency in Germany is summarised in the text box<sup>88</sup>.

### **Leniency in German Administrative Proceedings**

The courts can take account of various mitigating factors. These can include-

- The company's cooperation with the authorities;
- The extent of self-reporting;
- Whether the company has released employees from confidentiality obligations; and
- Whether the company has taken measures to prevent future bribery.

6.17 There is no special mechanism in Switzerland giving leniency to companies in exchange for self-reporting and cooperation. These factors can however be taken into account in assessing a sentence in the Swiss criminal courts<sup>89</sup>. There is a special procedure in Switzerland that can be used for resolving criminal cases. This is a summary punishment order. This was used in the Alstom case (para 3.12 note 21 above). It is not clear how leniency is calculated in such cases because of the lack of detailed public information<sup>90</sup>.

## **Conclusion**

6.18 Although cartel or participating offender type immunity is unlikely in the case of companies with corruption issues, companies that decide to self-report to the authorities and cooperate will want to know about the benefits to them. They will look to see from the law and practice in the particular state what discount is given in terms of the type of resolution available and the monetary exposure. An alternative to an adverse verdict in a criminal or administrative court (provided that excessive and onerous monitoring can be avoided) is likely to be more important to a company than the amount of the fine (however reduced).

<sup>87</sup> ((ed) Bourtin, 2013, pp. 135-136)

<sup>88</sup> (OECD WGB, 2011, p. 37)

<sup>89</sup> (Anti-Corruption Regulation , 2013, p. 253)

<sup>90</sup> (OECD WGB, 2011, pp. 19-21)

6.19 From the point of view of enforcement authorities with tight resources, any policy that encourages companies to be proactive and to cooperate is welcome. This in itself should not be controversial. States are likely to have systems already that recognise that the offender's behaviour after the offence has occurred can be a mitigating or aggravating feature in sentencing for offences generally and not just for corruption. There is unlikely to be a legal obstacle in states in reducing the penalty depending on the extent of cooperation.

6.20 A challenge for states will be in setting out clear parameters for the amount of the financial penalties and how they are to be mitigated. States will also need to consider the link between the reduction in a penalty and an incentive to cooperate and whether a reduction of this nature would be acceptable to public opinion. There will inevitably be many areas for negotiation and judgement by the enforcing authorities<sup>91</sup>. States will need to decide whether the enforcing authorities can take these decisions and resolve cases or whether this is for the courts. There is a balance to be struck here by states between the need to leave room for discretion in dealing with the facts of cases while providing guidance that is sufficiently clear to enable companies and practitioners to predict the likely penalties and the leniency available.

6.21 Appropriate leniency can therefore be an important part of the fight against corruption as it is in other areas of the criminal law. There is much to learn from the experience of other states. Ultimately a state will need to consider the approach that is most likely to be accepted by professional and public opinion as enhancing the fight against corruption. Leniency can be a very important component in such an approach.

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<sup>91</sup> States with a legal obligation to report may need to consider whether a self-report by itself qualifies for a reduction in the penalty or whether the reduction applies only to the extent of full cooperation and restitution. States where there is no legal obligation to report have more discretion in this area.

# 7. Internal Investigations

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## Introduction

7.1 The detailed terms of reference for this topic are- **'Identification of benefits to corporations that have initiated internal investigations before self-reporting or in consultation with national authorities (with consequent savings of government resources by relying on companies' investigations carried out at their own expense).'**

7.2 Earlier Chapters have dealt with a number of issues concerning the value of cooperating through an internal investigation in a self-reported case. This Chapter will therefore deal with some additional issues that are less frequently discussed.

7.3 Two important questions can arise for companies in relation to internal investigations. These are-

- When should the company commence an investigation?
- When should the company disclose the investigation to the authorities?

## When Should the Company Commence an Investigation?

7.4 Compliance departments in global companies are likely to receive many allegations of potential wrongdoing in various areas and not just corruption. They should also be proactively looking for areas of concern as a result of the risk assessment process that is a vital part of the running of a modern company. They may also receive approaches from the authorities particularly if whistleblowers have approached the authorities directly in the hope of receiving a reward.

7.5 Those involved in this work have to consider what should be the trigger for a full investigation. They may consider that the receipt of an allegation by itself is not enough for this and that preliminary work is needed in assessing whether the allegation is likely to have substance. Professional advisers might be engaged for this purpose or the company might use its own internal resource. At that stage the company could take the view that disclosure to the authorities or a market announcement would be premature.

7.6 This is likely to be a reasonable approach to take although there might be circumstances where earlier disclosure would be needed. Whistleblowers can be very valuable but have to be treated with great care<sup>92</sup>. They are likely to have their own motives. A whistleblower can be completely sincere about the allegation they make but wrong. On the other hand they can be malicious or self-serving but correct in their allegation. The company's task is similar to the task of an enforcement authority when approached by a whistleblower. The authority and the company have to assess for themselves whether the allegations are likely to have substance.

7.7 The company has to make a further decision when the result of the preliminary review is available. It may be that the company is told that there is nothing in the allegation that requires further action. A company can then take the view that no further action is needed. This has to be properly documented in case an enforcement authority later approaches the company because the whistleblower is dissatisfied and approaches the authority.

7.8 The position will be different if the preliminary investigation shows that more work is needed. The investigation at that stage will not have reached a conclusive view but will recommend that further work is needed in order to establish the truth of the allegations.

7.9 Many modern companies are likely to treat this very seriously. Senior executives need to get this right because of the potential impact on the company and the potential impact on themselves. Executives need to be careful to take appropriate advice from lawyers in each of the jurisdictions concerned because of the range of issues that arise concerning money laundering and market announcements as well as the corruption allegation itself.

7.10 If the company decides that a full investigation is needed then it has to consider whether it needs to notify the authorities and whether to make a market announcement. This is considered in the next section.

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<sup>92</sup> The same care is needed in assessing allegations by those who are not from within the company but may have knowledge of a bribe.

## When Should the Company Disclose the Investigation to the Authorities?

7.11 The company may have no choice. The requirements of securities markets may impose an obligation to make an announcement. There may be other legislation in some jurisdictions (e.g. SARBOX) that requires disclosure<sup>93</sup>. The company will need legal advice on whether there is a legal duty. There may be other circumstances though where the company has a genuine choice. The question for the company would be whether to disclose and cooperate with the authorities or whether to investigate and carry out any necessary remediation without informing the authorities. The remediation could include dismissing those involved in the bribery where appropriate as well as improved procedures and training. All of this would be documented so that the company could show what it had done if the authorities later took an interest. There has been very little discussion of this publicly although it is a real and difficult issue for companies and their advisers<sup>94</sup>.

7.12 The issues for the company in deciding whether to self-report, cooperate and enter into an agreed resolution were discussed earlier<sup>95</sup>. Clearly from the point of view of an enforcement authority as well, self-reporting is to be encouraged as a way of obtaining more cases and enabling them to be dealt with using far fewer resources than would be needed for a full investigation. Most cases have involved an internal investigation. The enforcement authority will need to decide whether to allow the company to conduct an internal investigation if a tough approach is needed and the case is likely to result in proceedings before a criminal or administrative court. The authority could use the results of the investigation for the purposes of any investigation it carries out itself and any court action that follows.

7.13 Despite the advantages, there are some significant issues for companies to be concerned about. A proper system of self-reporting will need to address these issues and bring about the relationship between companies and authorities that is needed. Examples of issues not so far discussed are-

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<sup>93</sup> In a jurisdiction such as the UK the professional advisers will consider whether to lodge a suspicious activity report. This can be a trigger for a self-report by the company.

<sup>94</sup> The authorities to be considered here will include international development institutions. The institution may want to investigate or it may prefer an internal investigation.

<sup>95</sup> See para 5.11 and 5.13.

- The company needs to be able to predict with reasonable certainty what the approach of the authority is likely to be if it decides to self-report. This is not just about jurisdictions that have little experience of self-reporting: the point applies as well to jurisdictions such as the US and the UK and international institutions such as the World Bank with a self-reporting policy<sup>96</sup>. There are also likely to be enforcement authorities which will take a negative approach in dealing with a self-report.
- The company will also want to know what the consequences will be of a decision not to report if the authorities later learn about the investigation. In the UK for example the SFO has recently stressed that there would be no leniency (and no DPA or civil recovery) in such a case. The US could still offer a DPA but clearly the amount of mitigation would be reduced significantly.
- An important question for the company will be cost. The company may believe that the investigation should concern only states X and Y but the authority may require an investigation into numerous other states as well. This is an understandable reaction by an authority which clearly wants to know whether the conduct concerned is also repeated in other states. On the other hand the company loses control over the scope of the investigation and starts to incur very significant costs<sup>97</sup>.
- The company will also be concerned about whether the authority will require a monitor. There has been considerable controversy over this in the US for some years. The DOJ position has now relaxed to some extent and monitors are not always necessary. There remains though a genuine concern by companies. The UK learned from the US controversy by having more light touch monitoring in cases of self-reporting and cooperation with the company choosing the monitor subject to SFO approval.

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<sup>96</sup> There is some experience in practice of the difficulty for a representative body in giving guidance to companies in that sector where the necessary clarity and predictability are regarded as absent. Companies will also want to know if the state or international institution has a policy of referring any allegations to the authorities in another state for possible criminal investigation and prosecution (see paras 5.13 and 5.27)

<sup>97</sup> Wal-Mart incurred expenses for its investigation and compliance work in Q2 2013 of \$82 million. The company estimated that these costs for each of Q3 and Q4 would be in the range of \$75-80 million. (See FCPA Professor for 16 August 2013 at [www.fcprofessor.com/](http://www.fcprofessor.com/))

- Does the company have a defence to the allegation? For example the company may be advised that it will be successful in establishing a compliance defence and that therefore no breach of the law has occurred. This will not be relevant where compliance is mitigation and not a defence.
- A company may also have to consider at some stage what the implications of a self-report are for future contractual negotiations. The fact that there has been a self-report may need to be disclosed during due diligence by the other party. This should not be a disincentive to a self-report however. It ought to show a modern approach by a company that recognises its obligations.

7.14 The discussion of a self-report and an internal investigation so far has concentrated on the relationship between the company and the enforcement authority in major supply states such as the US. There is an important issue though about demand states. A company might decide on advice that it is not going to report the allegation of a bribe and the results of its internal investigation to the authorities in its home jurisdiction. This means that it will also not be reporting these issues to the authorities in the demand state. No information about the corrupt official involved will be passed to the demand state and no restitution paid. The company will continue to enjoy the benefit of the corrupt contract.

7.15 This is an important issue that is not mentioned in the guidance given by lawyers and others about self-reporting. The issue is a complex one<sup>98</sup>. The key to a solution will be to make self-reporting effective in supply states and then to use the mechanism under UNCAC and the OECD Convention discussed in paras 3.45 to 51 above to involve the demand state as well where this can be done.

## Conclusion

7.16 There is an important issue at present about the willingness of companies to self-report in various jurisdictions. There may be views on whether more companies are deciding not to self-report to the authorities now and are deciding to carry out the internal investigation without reference to the authorities. The investigation may still be carried out by the company but without reference to the authorities. Any necessary remediation may be implemented. The intention would be that this can be shown to

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<sup>98</sup> It may be for example that reporting a bribe in the demand state could endanger the safety of company employees.



the authority if a request is received because it will show that the company behaved properly in following up the allegation.

7.17 This trend (if it exists) would be a concern for enforcement authorities that welcome self-reports. They would need to devote more resource to uncovering these cases themselves and to carrying out their own investigation. For companies there are risks because of the potential consequences if the authority discovers the case.

7.18 There needs to be more dialogue on this between authorities and companies. It is important to be able to identify the obstacles to effective self-reporting. The authorities can decide whether there are changes needed to their own approach. Companies can then be encouraged to take more advantage of this.

## 8. Sanctions during Investigations

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8.1 The detailed terms of reference for this topic are- **‘Experience with systems of removing sanctions pending investigations and in a situation of self-reporting or effective co-operation of involved corporations (such as interim injunctions, monitoring, debarment).’**

8.2 There is very limited experience in the great majority of states of the use of sanctions during the course of an investigation. This is because the main focus will usually be on the investigation and the final resolution. Some states do have legislation that would enable them to impose sanctions at the earlier stage. The World Bank also has this power. These examples will be discussed.

8.3 Italy has an extensive range of sanctions that can be imposed during the course of an investigation. These sanctions include suspension or revocation of authorisations, debarment and denial of funding<sup>99</sup>. The OECD has welcomed this range of sanctions including the power to impose them before a final court decision<sup>100</sup>. The Italian authorities, prosecutors and defence lawyers interviewed by the OECD regarded these powers as the most dissuasive part of the anti-bribery regime.

8.4 A company can avoid interim sanctions in Italy if it completely compensates the damage, establishes proper compliance processes, or gives up the profit gained from the offence for the purpose of confiscation. This raises the question whether Italian prosecutors could use the threat of these measures to obtain most of what they would want to achieve following a long drawn out criminal or administrative process with much less difficulty and no final decision by a court on whether the prosecutor’s case was well founded. A trial would be avoided because the only additional sanction following the expenditure of further considerable resource would be a fine. A practical prosecutor with resource constraints might find it pragmatic to achieve most of what is needed through the interim measures particularly in a jurisdiction where

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<sup>99</sup> For example prosecutors applied for pre-trial sanctions against the Italian companies involved in the TSKJ case referred to in the text box at para 2.9 above. An order was sought prohibiting the companies from entering into contracts with the Nigerian National Petroleum Corp. The request was withdrawn following the payment of a substantial deposit by the companies.

<sup>100</sup> (OECD WGB, 2011, pp. 67-71)

limitation periods are a real constraint.

8.5 In order to avoid interim sanctions the company will need to take the actions referred to in para 8.4 above. Self-reporting and cooperation by themselves would not appear to be sufficient. There is no general duty to self-report in these cases in Italy. In one case the Judge of Preliminary Measures said on 27 March 2007-

'There is no duty of cooperation for the legal entity. However, the cooperation becomes mandatory for the company to prevent the imposition of interim measures. In fact, the legal entity must improve the Organisational Model in order to prevent the same offence from being committed again' (Para 9.86 and footnote 55 of (Lomas & Kramer, 2013))

8.6 It is clear therefore that a company considering whether to self-report in Italy will also have to take into account the range of interim sanctions that could be applied. This is a real disincentive to a system of self-reporting. The measures that a company would have to take to avoid these interim sanctions go far beyond self-reporting and cooperation. An alternative approach would recognise that self-reporting shows that the company's control mechanisms are working well in identifying the issue and that the company has acted properly in reporting the issue to the authorities. Companies should be incentivised to do this by knowing that the full range of interim sanctions would not be imposed on them at that stage.

8.7 Italian law grants prosecutors extensive powers to deal with corruption. Prosecutors are said to make considerable use of their powers together with the flexibility they have over sanctions although the results in terms of convictions of legal persons have so far been limited. There are a number of reasons for this. These were discussed in the OECD Phase 3 Report<sup>101</sup>. The suggestion made in para 8.4 may have some bearing.

8.8 For a company doing business in Italy the availability of powerful interim sanctions is very important. There are questions about the way in which these sanctions are invoked by Italian prosecutors and the legal processes involved. Such a sanction can have a very serious impact on a company at a stage when the investigation is still ongoing and the allegations have not yet been substantiated.

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<sup>101</sup> (OECD WGB, 2011, pp. 20-23)

- 8.9 There is limited public information about this and it is difficult to tell whether the process is regarded as fair and whether judges<sup>102</sup> have a real role in considering the competing interests involved. This model of powerful interim sanctions would have many attractions to enforcement authorities and it is interesting that it has not been followed widely elsewhere.
- 8.10 The World Bank has a procedure called Early Temporary Suspension. This has been used infrequently although the Bank is considering ways in which it can make more use of it. The Bank recognises that the process presents a range of issues. Bank officials will be very concerned about due process in such an important decision and the proper use of appeal mechanisms.
- 8.11 The US has power to take civil proceedings at the interim stage and to seek an injunction in the event of potential violations of the FCPA. This power is used rarely. The last case was in 2001<sup>103</sup>. This power may be unnecessary in practice given the success of the alternative tools developed by the US.
- 8.12 It would be possible to seek a court order in the UK High Court to stop a company carrying on illegal actions. This would be an application by the SFO for a Serious Crime Prevention Order. This has not happened yet and it is doubtful that there will be such an application. The SFO is more likely to concentrate on investigating the case with a view to a prosecution.
- 8.13 At present therefore it appears that most states do not have or use these powers. Companies have concerns though about any increase in the use of these powers where they are available. They would be concerned if other states seek to adopt them as well. Any new procedure would need to find the right balance between preventing future criminal conduct and not pre-judging issues that ought to be resolved through a final decision in a criminal or administrative court.

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<sup>102</sup> The decision here is made by the Judge for Preliminary Investigations on the application of the prosecutor.

<sup>103</sup> (Shearman & Sterling, 2013, p. viii)

8.14 Powers to be exercised before a final decision by a court on the facts always present difficult issues. Prohibiting conduct that is unlawful is more straightforward at that stage. The problems increase when the object of the sanction is not just to prohibit unlawful conduct but also to punish the company for something that has not yet been proven (e.g. by requiring compensation for victims or surrendering the profit). This goes beyond many other powers exercised by courts at the interim stage.

8.15 There has been very limited coverage of these issues in the academic and practitioner literature. States that decide to use interim sanctions will need to recognise that they will be a considerable disincentive to self-reporting if they seek at that stage remedies that in other states would be sought at the end of the court process and a final determination on the facts. While these sanctions may be appropriate for that state in dealing with cases it uncovers itself, it should consider whether the sanctions are needed for self-reported cases.

# 9. Compliance as a Defence or Mitigation

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9.1 The detailed terms of reference for this topic are- **‘Experience of national laws with the validity of a compliance defence, as a means to mitigate or exclude liability in the presence of adequate anti-corruption programs (perhaps along recognised international sectoral best practices) together with the existence of mechanisms for independent third party assurance of such anti-corruption programs.’**

9.2 There is a fundamental distinction between compliance as a defence and compliance as mitigation. A compliance defence means that no criminal offence was committed. Compliance as mitigation means that an offence was committed but that the penalty is mitigated by reference to the extent of the company’s compliance approach. This Section will look at the contrasting approaches to this issue in the US and the UK and then the experience in some other states<sup>104</sup>. State specific issues that have a bearing on the choice between the approaches will be identified.

## Contrasting Approaches in the US and UK

9.3 The US has compliance as mitigation. The UK and some other states recognise a compliance defence although the details vary. The UK Bribery Act compliance defence is set out below<sup>105</sup>.

### **Bribery Act: Corporate Offence**

A company commits an offence if it fails to prevent an act of bribery committed by someone associated with it. This is defined very widely. The bribery can take place anywhere in the world. The offence applies to UK companies together with foreign companies that carry on part of their business in the UK.

There is a defence to this liability if the company had adequate procedures to prevent the bribery. Guidance from the UK Government sets out what is needed by companies in order to satisfy this defence.

<sup>104</sup> Reference will also be made to Italy, Australia and Brazil. Other states that recognise a compliance defence include Chile, Germany, Hungary, Japan, Korea, Poland, Portugal, Sweden and Switzerland (Koehler, Revisiting a Foreign Corrupt Practices Act Compliance Defense, 2012, p. 638). Brazil has recently introduced administrative liability for companies and has followed the mitigation approach.

<sup>105</sup> This is recognised as an example of good practice in (UN, 2013, p. 8). The OECD has not yet had time however to make a full assessment of the impact of this provision in practice on preventing bribery and encouraging the adoption of compliance measures.

9.4 There has been very little experience so far of the compliance defence in particular enforcement cases. By contrast there has been much experience of the US mitigation approach. It would be very informative to look at the experience of companies to see which approach is more effective in improving compliance. At present the answer would be that the US approach has played more of a role here than any other approach. One reason for this though will be that the compliance defence has not yet been tested sufficiently in practice.

9.5 The Bribery Act has also been a considerable spur to companies to improve their compliance processes. Realistically though FCPA is far more significant in this area. There are some special features however of the US system that states would need to take into account in deciding whether to adopt this approach. They may also want to see more evidence of how effective the compliance defence is in practice.

9.6 There has been controversy in the US about whether the US should abandon the mitigation approach and adopt a compliance defence. Professor Koehler has set out the arguments for a compliance defence<sup>106</sup>. Professors Kennedy and Danielsen have argued equally strongly that compliance as mitigation should be retained<sup>107</sup>. The US Chamber of Commerce has advocated a compliance defence and has said that under the mitigation approach-

‘..even if a company had in place a state-of –the-art compliance program that was well-designed to prevent FCPA violations and that was aggressively enforced, it remains exposed to liability if the program is circumvented by even one employee<sup>108</sup>.’

9.7 The DOJ has opposed any change from the mitigation approach. The DOJ's arguments are<sup>109</sup>-

- A compliance defence could encourage compliance as a paper exercise. This risk however arises whether compliance is a defence or mitigation. A paper based compliance programme that is not carried out in practice is unlikely to

<sup>106</sup> (Koehler, Revisiting a Foreign Corrupt Practices Act Compliance Defense, 2012). See also (Jordan, 2011)

<sup>107</sup> (Kennedy & Danielsen, 2011)

<sup>108</sup> See US Chamber of Commerce Press Release dated 19 February 2013 at <http://tinyurl.com/ou2fb24>

<sup>109</sup> (Koehler, Revisiting a Foreign Corrupt Practices Act Compliance Defense, 2012, pp. 645-646)

qualify for a defence under the Bribery Act or mitigation under the FCPA.

- Assistant Attorney General Breuer said before Congress that ‘the creation of such a defense would transform criminal FCPA trials into a battle of experts over whether the company had established a sufficient compliance mechanism’. There is a risk of this with the compliance defence. The company’s experts will support the company’s procedures: the prosecutors will have their own experts. It remains to be seen how this will work in practice but this may not be the sort of issue that a jury is interested in. The result could make prosecutors more reluctant to take cases particularly where there are no alternatives to a trial.

## Approaches in Italy, Australia and Brazil

9.8 Italy introduced comprehensive legislation in 2001 that created administrative liability for legal persons for criminal offences including foreign bribery. The legislation created a defence of ‘organisational models’. The text box sets this out.

### **Italy: Defence of Organisational Model**

A company has a defence if it has put in place an organisational model aimed at preventing an offence that has nevertheless occurred. To establish the defence the company must prove that-

- The company’s management had adopted and implemented effectively an appropriate organisational and management model to prevent offences of the kind that occurred;
- The organisation had set up an autonomous body to supervise, enforce and update the model;
- The autonomous body had sufficiently supervised the operation of the model.

The essential elements of an acceptable organisational model are set out in the legislation.

Where the natural perpetrator holds a senior managerial role, the company has to prove that the crime was committed by evading the controls put in place. Where the perpetrator had a subordinate role, there will be corporate liability only where the company had failed to discharge its obligation to direct and control the individual.

(OECD WGB, 2011, pp. 14-16)

9.9 The Italian defence is particularly interesting because of the stress it places on what the company actually did in carrying out the model. This is much more explicit in the Italian defence than, for example, in the Bribery Act defence. The OECD are keeping the Italian defence under review as practice develops in Italy and it will be interesting



to see how the courts approach this.

9.10 Australia extended the scope of corporate liability in 2001. Under the new legislation there are broadly two circumstances in which a company will be liable. The first concerns criminal actions committed by a 'high managerial agent' of the company. The second circumstance is more relevant for present circumstances and concerns the culture of the company. The approach is set out in the text box.

#### **The Relevance of Corporate Culture**

A company is liable if its corporate culture encouraged, tolerated, or led to the offence or if it failed to create and maintain a corporate culture that required compliance with the relevant law. Factors in considering this include whether a high managerial agent of the company gave authority for the commission of the offence and also whether the employee who committed the offence reasonably believed that the offence would have been authorised by a high managerial agent.

The OECD has commented that this provision is novel and has not so far been used.

(OECD WGB, 2012, pp. 12,70-71)

9.11 The provision just cited has not yet resulted in an outcome in court. It will be necessary to see if prosecutors decide to take advantage of the provision concerning corporate culture and how a court interprets it. Australia is taking more action in enforcing anti-corruption law and so it is to be expected that there will be results in due course.

9.12 Brazil has recently changed its law in order to create a new administrative offence. This will be considered in more detail in paras 10.11 to 10.13. For present purposes it is to be noted that there is no compliance defence.

### **The Different Approaches- Wider Issues**

9.13 There are a number of different strands that need to be considered in looking at compliance as a defence or mitigation. There is more for states to consider than simply a defence or mitigation. These different strands will be listed and then their significance in this context explained.

9.14 The various issues to be considered by states are these-

- The extent of corporate liability whether criminal or administrative. This is exceptionally wide under the US system. A company commits an offence if an illegal act is performed by any employee wherever based if the employee believes that this is for the benefit of the company. Other systems require more high level involvement by senior officials in the company<sup>110</sup>. The UK for example looks to the directing mind of the company. This is the top level board or individuals very close to it.
- Should the compliance defence be available for violations by senior members of the company?
- Does the state have alternative methods of resolving cases so that they do not result in a criminal or administrative verdict and debarment?

9.15 The impact of these issues is as follows. The US test is relatively easy for prosecutors to satisfy. The result is that there will be many violations that could give rise to a criminal prosecution in the US of a company. This however could be too powerful a weapon because it would produce criminal convictions in all these cases with the debarment issues that follow.

9.16 It is notable therefore that the state that has a very wide test for establishing liability has developed alternative means of dealing with cases that enable them to be resolved without a criminal conviction. It has been said that the DOJ uses DPAs, NPAs and declinations to adjust the rigour of the law and to produce the same result as a compliance defence in practice<sup>111</sup>. States with wide corporate liability that are considering compliance as mitigation will need to consider the range of cases that will be produced and how they should be dealt with<sup>112</sup>. They will also need to consider whether prosecutors in their jurisdiction have discretion to enter into alternative settlements and whether there would be public support for this.

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<sup>110</sup> There is very helpful guidance on this issue in Annex I Section B of (OECD WGB, 2009)

<sup>111</sup> (Koehler, Revisiting a Foreign Corrupt Practices Act Compliance Defense, 2012, pp. 644-650)

<sup>112</sup> Facilitation payments would give rise to a number of issues with such an approach. The US exempts them from liability.

9.17 The compliance defence can be a better solution in principle to this problem. The company will not be liable if it can satisfy the terms of the compliance defence. No question of prosecutorial discretion or an alternative settlement arises. The company has a clear incentive to ensure that it has appropriate procedures to prevent bribery.

9.18 States will also need to consider whether the defence should apply if senior officers of the company were involved in the bribery. Under the Bribery Act a prosecutor would prosecute the company for corruption in such a case and would not use the offence summarised at para 9.3 above<sup>113</sup>. There is no compliance defence to such an offence.

9.19 States and companies may also have views on the importance the authorities should attach to internal investigations and audit reports in deciding whether the mitigation or defence applies. Reference has been made in earlier Sections to the role of internal investigations and the assistance these can give to the authority. There is also an important role for regular checks of compliance systems on a risk basis even if no allegations had been received.

9.20 These checks are important for the company. There is a role for company auditors or outside firms in checking these processes. The reports (provided they are properly acted on) should be important in showing the authority the seriousness with which the company takes anti-corruption. This will also show that this is not just a matter of box-ticking but is a genuine effort to learn and improve. There is scope for further development and for firms (operating to agreed methodologies) to provide assurance.

9.21 There will be some enforcement authorities that look on these reports with scepticism or which discount them completely. There is a dialogue to be had between companies and states. It is in the interest of states for these audits to take place regularly. This should be encouraged.

## Conclusion

9.22 Time will tell if the compliance defence will be as powerful in practice as the mitigation approach. In principle there is more to recommend the compliance

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<sup>113</sup> Canada also has corporate liability if one of the senior officers of the company is party to the offence ((ed) Mendelsohn, 2013, p. 48)

defence. It recognises and incentivises the company's approach to anti-corruption and means that a company with good systems and the right approach does not face the criminal or administrative courts through traditional enforcement. This result is achieved as well under the mitigation approach in the US but only through alternative resolutions and exemption for facilitation payments. States that are attracted to the mitigation approach must consider the cases that will be produced by the full rigour of the law and decide how they should be dealt with. A state for example that follows the mitigation approach but has no system of alternative resolutions may have to rely on prosecutorial discretion if that concept is part of its legal system.

9.23 There are therefore a number of questions for states to consider in deciding which approach to adopt. The issues discussed in this Section will become more pressing for states as they start to take action to enforce the law against legal persons.

# 10. Other International Comparisons

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10.1 It would not be possible to give an exhaustive account of the many encouraging developments in other states<sup>114</sup>. It may be helpful though to give a short account of some recent developments in Colombia, the Philippines, Brazil and Chile because there is much to learn from what is happening in those states.

## Colombia

10.2 Earlier Sections have referred to the partnership needed between states and companies. Collective action between states and companies in order to deal with the supply and the demand side of bribery will be vital in taking forward the fight against corruption. There have been examples of collective action between states and companies. These demonstrate real practical commitment and show what is possible<sup>115</sup>. Colombia is an excellent example of an initiative that has the potential to make a very significant difference.

10.3 Colombia volunteered to lead a collective action initiative involving the establishment of a High Level Reporting Mechanism (HLRM). The purpose of the HLRM is to address the demand for bribes particularly in public procurement. Under the HLRM a company that has been asked for a bribe can report this to the Government at a level above that of the agency for which the official seeking the bribe works. This enables companies to report bribes speedily and to be free from concerns about retaliation. It is focused therefore on prevention. The HLRM offers companies the opportunity to handle solicitation and extortion constructively.

10.4 Colombia launched the HLRM on 2 April 2013. The text box on the next page shows how the HLRM will work.

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<sup>114</sup> A number of developments are covered conveniently in (Anti-Corruption Regulation , 2013), ((ed) Bourtin, 2013), ((ed) Mendelsohn, 2013) , (OECD WGB, 2013) and (Transparency International, 2013).

<sup>115</sup> See ((ed) Pieth, 2012) for extensive coverage of developments. The Basel Institute was established as the International Center for Collective Action in October 2012.

### Colombia HLRM

‘The structure and procedures [of an HLRM] necessary for a good fit were found in Colombia’s Office of the Secretary of Transparency. The HLRM will call on experts from government, academia, international financial institutions, local professional associations and experts in procurement, civil engineering and project management. .... The HLRM has set thresholds which will trigger reporting and complaints. These can then be verified. It has been designed to alert senior officials within the procuring agencies of any irregularities in their processes and to enhance supervision of particular procurement processes. The HLRM will also be used to review the selection criteria for bids.’ (Interview with Charles Monteith of the Basel Institute at <http://tinyurl.com/lehj269>)

10.5 The HLRM in Colombia shows in a very practical way how states and companies can work together in innovative ways in dealing with corruption. It is particularly imaginative in that the purpose is to deter the demand for bribes and to deal with any such demands speedily. The reports can be dealt with speedily and in a non-bureaucratic manner<sup>116</sup>. This means that the procurement process can continue. The company can continue to be involved in the procurement exercise without breaching its own ethical standards. This is important both for the state and the company concerned.

10.6 The HLRM therefore benefits the state involved by helping with a clean procurement process that can continue speedily. This will enhance the effectiveness and quality of public services for the benefit of economic growth and social development. It also benefits companies by giving them a mechanism to address the demand for bribes.

## The Philippines

10.7 The attack on corruption has been an important part of the agenda of the government of the Philippines since the election of the current President in 2010. There was a clear mandate for this because of widespread popular discontent with corruption. Since 2010 there has been much work by the new Government in pursuing this agenda.

10.8 On 18 October 2011 chief executives from 700 firms doing business in the Philippines (including global companies) entered into an Integrity Pledge. This forms

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<sup>116</sup> This will be particularly important if bribes are demanded for business licences or for getting goods through Customs.

part of the Integrity Initiative in the Philippines<sup>117</sup>. The chief executives recognised that the government's commitment to fighting corruption could not succeed without individual and collective commitment from businesses to level the playing field and to build integrity in the business environment.

10.9 Examples of the commitments of the chief executives in the Integrity Pledge are set out below.

**The Integrity Pledge**

- To prohibit bribery;
- To maintain a Code of Conduct for employees;
- To conduct training programmes for employees;
- To implement appropriate internal systems;
- To have whistleblower systems;
- To enter into integrity pacts with other businesses and government agencies;
- To refrain from doing business with those who have demonstrated unethical business practices.

10.10 There remains top level political commitment to this Initiative. The result has been an improvement in the ranking of the Philippines on the TI index<sup>118</sup>, investment grade ratings from Wall Street, capital inflows and an economy growing at 7.5%<sup>119</sup>. This is a very good example of the way in which business and governments can work together.

## Brazil

10.11 There has been very significant progress in Brazil over the last year in enforcing the law and also in improving the legislative framework. There have been a number of cases against leading public figures in what is known as the Mensalao case<sup>120</sup>. In addition there has been progress concerning the Clean Companies Act as a result of widespread public demonstrations. This has been a very important development. Key details are given in the text box on the following page.

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<sup>117</sup> <http://integrityinitiative.com/>. The text of the Pledge is set out on the website. About 2000 companies have now signed up to this Pledge.

<sup>118</sup> The Philippines were ranked as 129 in the Corruption Perceptions Index 2011, 105 in 2012 and 94 in 2013.

<sup>119</sup> See the comment at [www.fcpablog.com](http://www.fcpablog.com) on 18 September 2013.

<sup>120</sup> (Transparency International, 2013, p. 23)

### **The Clean Companies Act**

The Act will come into force on 29 January 2014. Key provisions are-

- There will be strict civil and administrative liability for companies involved in bribing government officials. The authorities will not need to prove guilty intent on the part of senior officers.
- The Act applies to bribery in or outside Brazil by local companies. Foreign companies are covered if the bribery takes place in Brazil and the company has some form of representation in Brazil.
- There is no compliance defence but there are reduced fines for companies that have implemented effective anti-corruption programmes.
- There is leniency for companies that cooperate with the government by a self-report, cooperate with the investigation including admitting to violations and which provide evidence against others.
- There is successor liability.

The government can suspend a company's operations, seize its assets, debar the company and ban it from receiving public subsidies.

(Commentary by Debevoise at <http://tinyurl.com/no8xkqj> and by Jones Day at <http://tinyurl.com/o6qxm37>)

10.12 This legislation emphasises the importance of self-reporting and leniency. It also encourages companies to ensure that they have adequate internal procedures to ensure that corruption does not take place. These are important incentives to companies. There are some other very tough aspects of the legislation that reflect the Brazilian system and public opinion. These are-

- There is strict liability.
- Facilitation payments are unlawful.
- There is no compliance defence. Instead compliance is relevant only to the amount of the penalty. The legislation could have wide application therefore in view of strict liability for companies.
- Leniency is available but only on certain conditions. Most of these have parallels elsewhere. However one condition is that the company demonstrates cooperation by providing evidence against others. It is not clear if this is meant to apply to investigations of the individuals involved in the bribery or to other cases such as industry sweeps.
- The enforcement agencies have considerable powers in terms of financial penalties as well as administrative sanctions.



10.13 It was observed above<sup>121</sup> that the Brazilian legislation is an example of very wide corporate liability with no compliance defence. It is not clear if there could be alternative resolutions. Facilitation payments (unlike the US) are unlawful. The scope of liability and the range of cases produced will be very wide. It will be interesting to see how this develops.

## Chile

10.14 There has been considerable change in Chile over the last four years. Chile has signed international conventions such as the OECD Convention and UNCAC. Progress was slow however and the OECD expressed concerns in 2007 about Chile's compliance with key provisions of the Convention<sup>122</sup>. Since then there have been significant developments. New legislation in 2009 imposed criminal liability on companies involved in corruption. It has been commented<sup>123</sup>-

'This new legal scenario and the actual activity of the different state agencies, especially in the last years, has changed the political agenda. The prosecution of crime and criminal organisations is now an unavoidable matter for those aiming to lead the country; it is a trending topic on the political agendas of political parties'

10.15 Chile is also significant because of the recognition that, to make the system work more effectively, there has to be a degree of cooperation between the authorities and those suspected of violations. Leniency programmes, self-reporting, internal compliance programmes and negotiated settlements are being developed. Many of the themes referred to earlier in this Study are being implemented in Chile. For example the Public Prosecutor can enter into settlement agreements with legal persons to cease any criminal prosecution under a 'conditional suspension of procedure'. This allows the prosecution to be suspended and then dropped if the defendant agrees to certain conditions<sup>124</sup>. It is therefore an example of a type of DPA that has been fashioned having regard to the Chilean legal system.

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<sup>121</sup> Para 9.12.

<sup>122</sup> See <http://tinyurl.com/lmou4lu>

<sup>123</sup> ((ed) Bourtin, 2013, p. 88)

<sup>124</sup> ((ed) Bourtin, 2013, pp. 88-89) although it is not clear if this type of process will be used in a foreign bribery case (Anti-Corruption Regulation , 2013, p. 53)

10.16 There has been limited enforcement action however in Chile so far and Chile is categorised by Transparency International as having little or no enforcement<sup>125</sup>. It remains to be seen how the new approaches of the Chilean authorities will be carried out in practice.

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<sup>125</sup> (Transparency International, 2013, pp. 27-29)

# 11. Concluding Remarks

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11.1 There is a major opportunity in the coming years for states and companies to make a very real impact in the fight against corruption if they are able to develop ways of working more closely together. This will involve a changing perception on the part of states so that they recognise the contribution that companies can make. Companies are often on the front line in receiving demands for bribes. Experience has shown that a strong stance by a company can have a real impact.

11.2 Companies and states need to develop this relationship through more opportunities for collective action such as a High Level Reporting Mechanism and Integrity Pacts. There are many interesting developments at present but these go beyond the scope of this Study.

11.3 States also need to develop policies to encourage companies to work with them and to report cases of corruption. Those companies that do not should face the full rigour of the state's criminal or administrative law. The general public and good ethical companies want to see this. There are many global companies though that are moving towards zero tolerance and have shown real determination. These companies are different to those that have systemic bribery issues although there can sometimes be insufficient recognition of this by states. The range of tools discussed in this Study will help states in considering the right approach to take with such companies.

11.4 Companies need to show real commitment. They must recognise that any case of alleged corruption involving them in any state will encourage those who believe that the company is not committed to anti-corruption. They must accept as well that allegations of systemic bribery concerning any global company are likely to reinforce scepticism by states and public opinion about global companies more generally.

11.5 There is a very real onus on a company to ensure rigorous processes and a true anti-corruption culture. If there is bribery, then the company's top management must be the first to hear about it and not state authorities. The company can then show a modern culture in dealing with the allegations and providing remediation. Self-reporting and cooperation are part of this modern culture. States may then take the

view that alternative tools can be used in cases involving such companies.

11.6 There is a range of additional tools that can help states and companies work more closely together in the fight against corruption. There are many choices for states. States have to consider what approach will fit into their own criminal or administrative system. They also need to be sensitive to public opinion. This means persuading the public that additional tools will help in the fight against corruption<sup>126</sup>.

11.7 It is suggested that the following themes emerge from the discussion in this Study-

- A combination of sanctions and incentives to companies will make the maximum impact on the fight against corruption.
- States need to recognise the important difference between companies with systemic bribery issues and those that are trying to fight corruption and show real leadership from the top.
- Disincentives to cooperation between states and companies need to be recognised and addressed. These disincentives could be part of the national law of a state or they could reflect the approach of enforcement authorities.
- The current approach to dealing with cases involving multi-jurisdictional enforcement is inadequate and needs to be improved so as to provide justice to the whole range of those potentially involved.
- There is a range of additional tools available that can make a major contribution to fighting corruption.

11.8 These issues can be addressed and a better way forward developed given leadership by the B20 companies, UNODC and the OECD. Leadership has been shown and was clearly demonstrated at the CoSP in Panama. It will be important to

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<sup>126</sup> The UK Government was able to do this in connection with its proposals concerning DPAs.

build on the momentum generated by this commitment by developing the range of detailed policy and legal initiatives needed to take this work forward.

# Works Cited

- (ed) Bourtin, N. (2013). *The International Investigations Review*. London: Law Business Research Ltd.
- (ed) Mendelsohn, M. F. (2013). *The Anti-Bribery and Anti-Corruption Review*. London: Law Business Research.
- (ed) Pieth, M. (2012). *Collective Action*. Zurich: Dike.
- Anti-Corruption Regulation* . (2013). London: Law Business Research Ltd.
- Covington & Burling. (2012). *An Analysis of the FCPA Resource Guide*. Washington DC: Covington & Burling.
- Covington and Burling. (2011). *E-Alert*.
- DOJ/SEC. (2012). *A Resource Guide to the US Foreign Corrupt Practices Act*. Washington DC: DOJ/SEC.
- Eurojust. (2003). *Annual Report*.
- Humboldt-Viadrina School of Governance. (2012). *Motivating Business to Counter Corruption: A Global Survey on Anti-Corruption Incentives and Sanctions*. Berlin: Humboldt-Viadrina School of Governance.
- Jordan, J. (2011). The Adequate procedures Defense Under the UK Bribery Act: A British Idea for the Foreign Corrupt Practices Act. *Stanford Journal of Law, Business & Finance*, 25-66.
- Kennedy, D., & Danielsen, D. (2011). *Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act*. New York: Open Society Foundations.
- Koehler, M. (2012). Revisiting a Foreign Corrupt Practices Act Compliance Defense. *Wisconsin Law Review*, 609-659.
- Koehler, M. (2013). An Examination of Foreign Corrupt Practices Act Issues. *Richmond Journal of Global Law and Business*, 317-391.
- Lomas, P., & Kramer, D. J. (2013). *Corporate Internal Investigations (Second Edition)*. Oxford: OUP.

Miller Chevalier. (2013). *FCPA Summer Review 2013*. Washington DC: Miller Chevalier.

OECD WGB. (2009). *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*. Paris: OECD.

OECD WGB. (2010). *US- Phase 3 Report*. Paris: OECD.

OECD WGB. (2011). *Germany-Phase 3 Report*. Paris: OECD.

OECD WGB. (2011). *Italy- Phase 3 Report*. Paris: OECD.

OECD WGB. (2011). *Switzerland- Phase 3 Report*. Paris: OECD.

OECD WGB. (2012). *Australia- Phase 3 Report*. Paris: OECD.

OECD WGB. (2012). *UK-Phase 3 Report*. Paris: OECD.

OECD WGB. (2012). *US- Follow-Up to the Phase 3 Report & Recommendations*. Paris: OECD.

OECD WGB. (2013). *Annual Report*. Paris: OECD.

OECD WGB. (n.d.). *Germany- Follow-Up to Phase Report*. Paris: OECD.

OECD, UNODC and the World Bank. (2013). *Anti-Corruption Ethics and Compliance Handbook for Business*. Paris: OECD, UNODC and the World Bank.

OECD-StAR. (2012). *Identification and Quantification of the Proceeds of Bribery*. Paris: OECD.

PRC . (n.d.). *Criminal Code*. Beijing.

Shearman & Sterling. (2013). *FCPA Digest*. Washington DC: Shearman & Sterling.

Spahn, E. K. (2013). Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention. *Virginia Journal Of International Law Digest*, Volume 53 pages 1-52.

Stolen Asset Recovery Initiative. (2014). *Left out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery*. Washington DC: World Bank.

TI-UK. (2012). *Deterring and Punishing Corporate Bribery*. London: TI-UK.

Transparency International. (2012). *Exporting Corruption? Country Enforcement of the OECD Anti-Bribery Convention Progress Report 2012*. Berlin: Transparency International.

- Transparency International. (2013). *Exporting Corruption: Progress Report 2013: Assessing Enforcement of the OECD Convention on Combating Foreign Bribery*. Berlin: Transparency International.
- UK Ministry of Justice. (2012). *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisation: Deferred prosecution agreements*. London: UK Government.
- UN. (2013). *Review of Implementation of the United Nations Convention against Corruption*. Vienna: UN.
- UN. (2013). *UK- Final Country Review Report*. Vienna: UNODC.
- United Nations Global Compact. (2013). *Corporate Sustainability and the United Nations Post-2015 Development Agenda*. UN Global Compoact.
- UNODC. (2009). *Technical Guide to the United Nations Convention against Corruption*. New York: UN.
- UNODC. (2012 (Second revised edition)). *Legislative guide for the implementation of the United Nations Convention against Corruption*. Vienna: Division for Treaty Affairs, UNODC.
- UNODC. (2013). *An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide*. Vienna: UNODC.
- Vervaele, J. A. (2013). Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU? *Utrecht Law Review*, 211-229.
- World Bank Integrity Vice Presidency. (2012). *Annual Report* . Washington DC: World Bank.
- World Bank Integrity Vice Presidency. (2013). *FY13 Annual Update*. Washington DC: World Bank.
- World Bank Integrity Vice Presidency. (2013). *FY13 Facts and Figures*. Washington DC: World Bank.



## Annex 1

### TERMS OF REFERENCE

Companies increasingly recognise the importance of effective enforcement of anti-corruption laws and that their cooperation with enforcement authorities is crucial to the ultimate success of those efforts. To that end, it would be important to eliminate any disincentives that might exist to such cooperation and, to the contrary, to create incentives for corporations to actively participate in the common fight against corruption. This would also be a key factor for enlarging the base of corporations that are prepared to take an active role in the fight against corruption.

The B20 Work Stream 4 (Strengthening the role of the private sector in improving the regulatory environment) seeks the services of a consultant to assist in the development of a preliminary study ('white paper') on existing –at least in certain jurisdictions- or possible tools to encourage voluntary disclosure, self-reporting and active cooperation with law enforcement authorities by companies or diminish/remove disincentives to do so. It is envisioned that the study would cover major topics including, but not limited to:

- Frameworks to address multiple jurisdiction issues through the full implementation of Articles 47, 48 and 49 of UNCAC and Article 4.3 of the OECD Convention in national legislation. Experience on ways and means of preventing or mitigating the risk of duplicative financial sanctions in the cases of cross-border concurrent liabilities (in particular with respect to disgorgement of profit) and recognition of the validity of global settlements.
- Mapping alternative means of settlement. In this regard, canvass the use of Deferred Prosecution Agreements, (DPA) and Non-Prosecution Agreements (NPA).
- Measures to further incentivise self-reporting, such as assurance of a reduction of financial penalties and assurance of a certain level of confidentiality.
- Leniency mechanisms (such as leniency programmes in the case of anti-cartel regimes) resulting in sanctions reduction, to be defined on the basis of clear parameters as well as clear benefits.
- Identification of benefits to corporations that have initiated internal investigations before self-reporting or in consultation with national authorities (with consequent savings of government resources by relying on companies' investigations carried out at their own cost).

- Experience with system of removing sanctions pending investigations and in a situation of self-reporting or effective cooperation of involved corporations (such as interim injunctions, monitoring, and debarment).
- Experience of national laws with the validity of a compliance defence, as a means to mitigate or exclude liability in the presence of adequate anti-corruption programmes (perhaps along recognised international sectoral best practices) together with the existence of mechanisms for independent third party assurance of such anti-corruption programmes.

## **Annex 2**

### **OECD/ UNCAC ARTICLES**

#### **OECD**

##### **Article 4(3)**

Where more than one party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.

#### **UNCAC**

##### **Article 47 Transfer of Criminal Proceedings.**

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

##### **Article 48. Law Enforcement Cooperation.**

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities:

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

- (i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned:
  - (ii) The movement of proceeds of crime or property derived from the commission of such offences:
  - (iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;
- (c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes:
- (d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;
- (e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements between the States Parties concerned, the posting of liaison officers;
- (f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organisations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

**Article 49. Joint Investigations.**

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions, or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.