
**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**

# ISRAEL: PHASE 2

# REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

*This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 11 December 2009.*

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## EXECUTIVE SUMMARY

The Phase 2 Report on Israel by the OECD Working Group on Bribery evaluates and makes recommendations on Israel's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The Working Group notes that Israel has dedicated considerable efforts to fighting corruption. Awareness-raising efforts in Israel remain at a reasonably early stage, mainly due to Israel's recent accession to the Convention in March 2009.

Although the legislation in Israel for dealing with mutual legal assistance appears to be satisfactory, the Working Group notes that the main unit tasked with dealing MLA requests is significantly under-staffed, even with the budgetted addition of three further staff. The Working Group therefore recommends that Israel, as a matter of priority, ensures that the Legal Assistance Unit is adequately resourced. Following on from Phase 1, the Working Group recommends that Israel proceed promptly with legislative steps: (i) to include a specific reference to "a political entity that is not a State, including the Palestinian Authority" in the definition of a "Foreign State" to fill this loophole in territorial jurisdiction; (ii) to ensure the full effectiveness of nationality jurisdiction; and (iii) to increase sanctions applicable to natural and legal persons in order to ensure that sanctions are effective, proportionate and dissuasive.

The Working Group is concerned whether the regime for the criminal liability of legal persons in Israel is totally adequate for the implementation of Article 2 of the Convention because of uncertainty as to the application of the liability of legal persons to *mens rea* offences in Israel, and in view of the limited number of relevant cases. The Working Group therefore recommends that Israel ensure the active prosecution of legal persons who engage in foreign bribery. It further recommends that Israel ensure that the need to identify a natural person does not prevent effective investigation, prosecution and sanctioning of legal persons, and that the level of natural persons in respect of which the criminal liability of legal persons can be engaged is applied broadly enough to capture the situation of legal persons that have decentralised decision-making structures. With respect to the non-tax deductibility of bribes, the Group recommends that Israel clarify the prohibition on the non-tax deductibility of bribes by introducing an express denial for foreign bribes.

The Report notes some positive aspects of Israel's implementation of the Convention and related instruments, amongst which is the recent issuance of Attorney General guidelines on the investigation and prosecution of the foreign bribery offence; the introduction by the Ministry of Foreign Affairs of a requirement for diplomatic representatives abroad to report suspected foreign bribery; and the introduction of anti-bribery clauses and declarations by Israel's export credit agency and centre for official development assistance. Israel has also introduced legislation to deal with some deficiencies in its laws concerning sanctions, and the jurisdictional application of the foreign bribery offence. The Report refers to but does not fully evaluate these legislative initiatives.

The Report and its recommendations reflect findings of experts from Australia and Switzerland and were adopted by the OECD Working Group on Bribery. Israel will provide an oral follow-up report on its implementation of the recommendations within one year of the Group's approval of the Phase 2 Report. It will further submit a written follow-up report within two years. The Report is based on laws, regulations and other materials supplied by Israel. It is also based on information obtained by the evaluation team during its five-day on-site visit to Jerusalem and Tel-Aviv on 28 June to 2 July 2009, during which the team met representatives of Israel's public administration, private sector, and civil society.

## A. INTRODUCTION

### 1. The On-Site Visit

1. On 28 June to 2 July 2009, a team from the OECD Working Group on Bribery in International Business Transactions (Working Group on Bribery) visited Jerusalem and Tel Aviv, Israel, as part of the Phase 2 peer evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation). The purpose of the visit was to evaluate the application and enforcement of Israel's legislation implementing the Convention and the Revised Recommendation.

2. The evaluation team was composed of lead examiners from Australia and Switzerland as well as members of the OECD Secretariat. Prior to the visit, Israel responded to the Phase 2 Questionnaire and a supplemental questionnaire. It also provided translations of relevant legislation, documents and case law. During the visit, the evaluation team met representatives of the Israeli public and private sectors and civil society.[1] The on-site visit was well-attended by Israeli officials, as well as by the private sector and civil society. The evaluation team expresses its appreciation of Israel's high level of co-operation throughout the process and notes with appreciation that, with the aim of encouraging free and frank discussions, Israeli officials absented themselves from panels with the business sector, banks and financial institutions, civil society, and lawyers and academics. The evaluation team is also grateful to all the participants at the on-site visit for their co-operation and openness during the discussions.

### 2. General Observations

3. Israel (estimated population 7.28 million) is located on the Asian continent. It borders the Mediterranean Sea in the west, Lebanon and Syria in the north, Jordan in the east, and the Red Sea and Egypt in the south. The State of Israel was established on 14 May 1948. Israel has held a unicameral parliamentary system since its establishment.

#### *(a) Economic System*

4. After the establishment of the State of Israel, the Israeli economy was transformed from an underdeveloped agrarian economy to a technologically advanced and services-based economy. Following a severe recession in the economy that began in late 2000, Israel maintained a rapid growth in all components of the GDP since mid-2003 (approximately 5% for each of the past three years) until the current global economic crisis. A small economy with a relatively limited domestic market, Israel's growth depends mainly upon expanding exports. With government expenditure at about 43% of GDP in 2008, public spending is 1 percentage point lower than the OECD average. Spending on defence, which is 8 percentage points of GDP higher than the OECD average, is a significant difference. By a number of measures, poverty has been worsening in Israel for the last five years. Israel identifies as its two most significant economic challenges those of maintaining national security, and absorbing large numbers of

[1] See Annex 1 for a list of participants.

immigrants (the right of every Jew to immigrate to Israel and acquire Israeli citizenship has resulted in the absorption of some 3 million immigrants since Israel's inception).[2]

5. As Israel is a relatively small country with limited natural resources, it is highly dependent on foreign trade. Israel's trade policy has been very active in integrating the economy into the global market. Israel's most important trading partners have traditionally been the European Union and the United States, although trade with Japan, China and other Asian countries has gained much in importance. In contrast, trade with Arab countries in the Middle East has remained at low levels.[3]

6. The progressive integration of Israel into the global economy is also shown by flows of capital. Inflows of foreign direct investment (FDI) have increased in recent years due to improved business conditions and privatisation. The majority of FDI inflows went into the production of high-tech goods and services. Israeli investors also increased their investment abroad. At the end of 2008, the stock of foreign direct investment in Israel was around 57 billion USD, or 28% of GDP, while the stock of Israel's direct investment abroad was above 54 billion USD, or 27% of GDP.[4]

### *(b) Political and Legal Systems*

7. Israel is a parliamentary democracy consisting of executive, judicial, and legislative branches. Parliament (the Knesset) consists of 120 members. The leader of the government is the Prime Minister. The President of the State is elected by a simple majority of the Knesset and acts as Head of State, although mainly for ceremonial purposes. Israel has no single constitutional document but, instead, a set of Basic Laws. In the past few years there have been efforts to formulate a single Constitution. Since 1949, the Knesset elects by secret ballot a State Comptroller for one seven-year term. Combined with the role of an Ombudsman, the State Comptroller investigates complaints and undertakes a State Audit for the purpose of ensuring the integrity and accountability of public administration.

8. The Israeli court system is composed of a general court system, including a number of specialised courts. The general court system is comprised of three instances: Magistrates' Courts; District Courts; and the Supreme Court. In addition to its role as the highest court of appeal, the Supreme Court also adjudicates as a High Court of Justice for administrative matters that are not subject to the jurisdiction of District Courts. Family issues are adjudicated according to different religious laws. Marriage and divorce are adjudicated solely in religious courts, and other family matters are adjudicated by general and religious courts. Religious courts are subject to review by the Supreme Court sitting as the High Court of Justice and are bound by its decisions.

9. In addition to being a Party to the OECD Convention, Israel ratified the UN Convention against Corruption (UNCAC) on 4 February 2009. It is also a party to the UN Convention against Transnational Organized Crime, which includes various relevant obligations such as the criminalization of corruption, measures against corruption, and the liability of legal persons.

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[2] See, for further details, the Assessment Report on Israel's request to accede to the Convention [DAF/INV/BR(2008)18/FINAL], paragraphs 113-123.

[3] See, for further details, the Assessment Report on Israel's request to accede to the Convention (ibid), para 124 and associated Figures 3 and 4.

[4] See, for further details, the Assessment Report on Israel's request to accede to the Convention (ibid), para 125 and associated Tables 3, 4, 5 and 6.

### *(c) Implementation of the Convention and the Revised Recommendation*

10. Israel deposited its instrument of accession to the Convention on 11 March 2009. The Convention entered into force for Israel on 10 May 2009 (Article 13(2)). Article 291A of the Penal Code 1977, which enacts the foreign bribery offence in Israeli law, came into force on 21 July 2008. In March 2009, the Working Group completed the Phase 1 evaluation of Israel.

### *(d) Cases Involving the Bribery of Foreign Public Officials*

11. Israel has not conducted any investigations or prosecutions of bribery of foreign public officials. There have been no allegations of bribery by Israeli persons or companies in the UN Oil-for-Food Programme. Authorities have been very active in the investigation and prosecution of domestic bribery, including those in high levels within the Israeli public sector.

12. Since at least mid-2008, media reports (including in Israel) began disclosing details concerning allegations of bribery of foreign public officials by at least two prominent Israeli State-owned companies. The allegations reportedly involve the payment of illegal commissions of between 6-9% for obtaining a defence contract worth 1.5-2.4 billion USD (one report refers to 120 million USD in "business expenses"). According to media reports in the country of the foreign public official, the allegations have resulted in investigations in that country into the conduct of the official, the Israeli companies and subsidiaries, and an alleged intermediary. These media reports also state that one of the Israeli companies has been "blacklisted". The investigations have resulted in the suspension by the government of the foreign public official of the defence contract in question. The lead examiners note that Israel has received, and is giving consideration to, requests for mutual legal assistance from the country of the foreign public officials who were allegedly bribed.

13. During the on-site visit, Israeli authorities stated that they were aware of the allegations just mentioned. Authorities told the lead examiners that investigations had not been commenced into these matters. Representatives from the Israeli Police explained that it had been agreed between them and the Attorney General's Office not to commence any investigation until the adoption by the Attorney General of guidelines on the investigation and prosecution of the foreign bribery offence. Since the on-site visit, Israeli authorities have gathered further information in order to carefully consider whether the allegations merit a formal investigation. In one of the two cases concerned, authorities have concluded that the information does not support the commencement of a formal investigation. In the other case, which involves allegations against a State-owned company, the Israeli Police has decided to commence a "preliminary inquiry" into the case. This will involve the gathering of further information, including information about the particular timing of events and whether these occurred or continued after the enactment of the foreign bribery offence in Israel, for the purpose of determining whether a formal investigation should be commenced.

14. The lead examiners are concerned by the lack of progress in this matter for several reasons. First of all, the lead examiners consider it problematic that any form of investigation into the matter was postponed until the adoption of guidelines on the investigation and prosecution of the foreign bribery offence. The alleged acts may have preceded the entry into force in Israel of the foreign bribery offence (i.e. before 21 July 2008), in which case there should have been no reason to wait for guidelines. In the alternative, if the alleged acts took place (or are continuing to take place) after 21 July 2008 and the foreign bribery offence is therefore of relevance, there should have been no impediment to the commencement of an investigation into allegations of this kind even in the absence of guidelines.

15. If the alleged acts did take place before 21 July 2008, the lead examiners would nevertheless have expected Israel to take some action to investigate the allegations, or assess whether they warranted the opening of a formal investigation into matters such as the possible commission of false accounting offences. Concerning the potential commission of offences of false accounting, the Israeli Securities Authority (ISA) has, in respect of one of the State-owned companies involved in the allegations (which is the only publicly traded company involved, and therefore the only company in respect of which the ISA has any authority), actively sought and obtained information regarding the allegations.[5] This information was also disclosed in the company's prospectus and reports to the ISA, in which the company denies any association with or knowledge of the alleged offences. Israeli authorities explain that defence export licences do not currently include anti-bribery clauses (or anti-bribery declarations in the application process) and that the Ministry of Defence has therefore not considered the question of whether any breach of licence by the companies has occurred. Furthermore, despite the fact that the State Comptroller and Ombudsman has jurisdiction to investigate allegations of corruption by State-owned companies, the State Comptroller had not brought the matter to the attention of the Attorney General (as required by Article 14(c) of the State Comptroller Law 1958). Authorities explain that the jurisdiction of the State Comptroller is excluded where allegations or suspicions concern criminal activity and that, because the State Comptroller knew that the media allegations in question were known to the Ministry of Justice, no report was made to the Attorney General in this case. Israeli authorities have further advised that its Tax Authorities cannot, at this stage, disclose whether any steps have been taken to investigate the authenticity of tax deductions claimed by the Israeli companies involved. However, Israeli authorities advise that, as a matter of policy, the Israeli Tax Authority can, and has done in the past, open investigations as a result of allegations in the media, including in respect of past tax assessments.

16. The delay in commencing any form of investigation could well be detrimental to the prospect of a successful investigation and prosecution, since it provides the companies in question with the opportunity to destroy any evidence. This may also have limited the opportunity to gather evidence covertly during any continuing offending. The lead examiners further note that, during the on-site visit, one Knesset Member stated that "we know that you sometimes have to hire local agents when the arms industry trades abroad" but that "thousands of Israelis have jobs as a result of the deal". While acknowledging that the Knesset is not responsible for the investigation and prosecution of offences in Israel, another Knesset Member stated that if the country of the foreign official was to complain to Israel, the matter would then be fully investigated.

17. Since the on-site visit, the lead examiners became aware of two a further allegations that Israeli companies were involved in the bribery of a foreign public official during the course of other defence contracts. Law enforcement authorities have gathered further information about these cases and have concluded that one case will proceed to a preliminary inquiry, but that information concerning the other allegations does not support the commencement of a formal investigation because the events in question preceded the entry into force in Israel of the foreign bribery offence.

***Commentary***

***Despite recent steps by law enforcement authorities concerning publicly available allegations of foreign bribery by Israeli companies, the lead examiners remain concerned by the lack of overall progress in this regard, particularly because these are companies operating in the defence industry, which is an area recognised to be at high risk of bribe solicitation by foreign public officials. The lead examiners recommend that Israel, complete its review of the***

5 The Israeli Securities Authority has the authority to ask a corporation in this situation for information on the matter and, where relevant, the ISA can also ask for due diligence to be undertaken and for disclosure of the possible exposure to shareholders as a result of allegations (Article 36 of the Securities Law 1968).

***allegations without undue delay, including through appropriate measures for the exchange of information about the allegations with the foreign public officials' country, and decide whether to commence a formal investigation into these matters.***

### 3. Outline of the Report

18. This report is structured as follows: Part B examines Israel's efforts to prevent, detect and raise awareness of foreign bribery; Part C looks at the investigation, prosecution and sanctioning of foreign bribery and related offences; and Part D sets out the Working Group's recommendations and issues for follow-up.

## B. PREVENTION, DETECTION AND AWARENESS OF FOREIGN BRIBERY

### 1. General Efforts to Raise Awareness

19. Corruption is an important topic of public debate in Israel, in parliament, in civil society, and in the media. However, prior to 2009, this debate had focussed almost exclusively on domestic bribery of Israel's civil servants and politicians. Significant efforts began prior to the on-site visit to raise awareness of the Convention and the foreign bribery offence. These efforts will need to continue, particularly in light of some views expressed by panellists that foreign bribery has been "the only way for Israeli companies to compete abroad", and what appeared to be an especially low level of awareness by SMEs.

#### *(a) Government Initiatives to Raise Awareness*

20. Israeli authorities have decided to pursue a continuous campaign to increase awareness of the Convention and the foreign bribery offence. This is coordinated by the Inter-Ministerial team on Combating Bribery and includes an intention by the Ministry of Justice to work with the State Comptroller's Office. The Ministry of Justice (MOJ) has established a page on its website dedicated to fighting corruption and international bribery (http://www.corruption.justice.gov.il). The webpage, which is bilingual (English and Hebrew), provides information about the foreign bribery offence, the OECD's anti-bribery instruments, and other materials relating to the activities of Israeli authorities in this regard. It will be updated on a regular basis, including reference to the Working Group's reports on implementation of the Convention by Israel. The web address for this page has been sent to a variety of relevant public and private sector organisations, and already appears as a link on a number of their websites (including that of the Manufacturers Association in Israel for example).

21. The MOJ has also prepared a brochure concerning the foreign bribery offence and the Convention. The brochure explains the essence of the Convention, the criminal sanctions associated with the foreign bribery offence and the overall framework of the struggle against international corruption, including Israel's ratification of the UN Convention against Corruption. It serves as a tool for dissemination of information about anti-bribery efforts, and includes information concerning the responsibility of legal persons and the non-deductibility of bribes for tax purposes. The brochure was produced in Hebrew and includes information on avenues for reporting suspicions of an offence or obtaining more information. Hard copies of the brochure were provided to the Ministry of Foreign Affairs for distribution throughout Israeli embassies and consulates around the world, to the Ministry of Industry Trade and Labour for distribution to commercial attachés, to the Manufactures Association of Israel for distribution to the

business sector, to some Knesset Members, and to the Institute of Internal Auditors. Electronic copies have been sent to the Ministry of Defense and the Institute of Certified Public Accountants in Israel (ICPAS). Prior to the publication of the brochure, and following the entry into force of the Convention, an information sheet was sent via e-mail to relevant bodies aimed at raising initial awareness to the foreign bribery offence. The lead examiners note that other important government publications, including brochures of the State Comptroller's Office, are reproduced in Arabic, English and Russian (reflecting the three main languages spoken in Israel, after Hebrew).

22. The Foreign Trade Administration, a division of the Ministry of Industry, Trade and Labor (MOITAL), has also produced its own information leaflet on the foreign bribery offence. This was distributed among manufactures, exporters, trade associations and consultants via e-mail and can also be found on the website of MOITAL at (http://www.trade.gov.il). The Ministry is currently examining various additional ways to promote awareness, among them the possibility that companies who receive assistance from MOITAL will be required to sign a declaration not to engage in foreign bribery. Several different support programs of the Ministry have already incorporated a provision requiring the signature of the applicant on a declaration stating that the applicant has no previous convictions of crimes under the Penal Law. The Israeli Government Companies Authority (GCA), which oversees accounting and internal company controls in government companies, is also considering means to expose State-owned enterprises to relevant developments.

23. The MOJ has, on at least three occasions, issued press releases concerning Israel's progress in the process of accession to the Convention and its activities in the Working Group. The press releases, which were published in major Israeli newspapers, as well as news websites, referred to the overall aims of Israel's struggle against international corruption and to the new foreign bribery offence, as well as to particular details about the Convention and its global impact. Complementing these press releases, the Director-General of the Ministry of Justice participated in a news radio talk show to discuss the Convention and the foreign bribery offence.

24. Since the on-site visit, the Civil Service Commission's Director of Discipline issued a circular concerning the foreign bribery offence to all government employees under the Commission's jurisdiction (approximately 200 000 employees). The Circular includes information on reporting and whistleblower protection (considered later in this report).

### *(b) Private Sector Initiatives to Raise Awareness*

25. The Israeli chapter of Transparency International is engaged in activities to promote awareness of the Convention and its implementation. These activities include publication of the Bribery Payers Index of Transparency International in the Israeli media, and participation in a seminar for lawyers on the foreign bribery offence. TI Israel is planning to promote the implementation of the "Integrity Pact" in Israel, a tool aimed at preventing corruption in public contracting.

26. The Israeli chapter of the International Chamber of Commerce aims to develop a generic code of business conduct to be used as guidance by companies in drafting internal ethical codes. It also promotes distribution of the ICC publication "Fighting Corruption – International Corporate Integrity Handbook". Although this has not yet been translated into Hebrew, the lead examiners were told that this may happen in the future. The Chamber of Commerce has also included a brief description of the foreign bribery offence and the Convention in one of its monthly newsletters.

27. The Manufacturers Association in Israel (MAI) has distributed the brochures produced by the Ministry of Justice to key members in the Israeli industry, as well as to the members of its Operating

Committee, which include 75 of the leading heads of industries in Israel. All the informational materials distributed by the Ministry of Justice, as well as a link to the Ministry of Justice website, are posted on the MAI webpage or may be accessed through it. The MAI intends to also distribute this information through its College of Management and Industry, as well as to incorporate the theme of combating foreign bribery into the schedule of committees and forums it holds.[6]

28. The Criminal Bar Association has not yet organised training specific to the foreign bribery offence. A major Israeli corporate law firm organised a seminar on 20 November 2008, in conjunction with a major US corporate law firm, on the implications of the foreign bribery offence on the conduct of Israeli companies. As part of weekly seminars held by the International Law Forum in the Hebrew University, a seminar was dedicated to the Convention and to the foreign bribery offence in April 2009. The seminar included presentations by senior officials from the Ministry of Justice, and was attended by government officials, law professors, academics, students and members of the general public.

29. One of the larger companies attending a panel during the on-site visit, which is listed on NASDEC and to whom the Foreign Corrupt Practices Act (US) therefore applies, reported being used to operating in a highly regulated environment, with a good knowledge of the foreign bribery offence. While the lead examiners heard that a number of larger companies had become aware of the enactment of the foreign bribery offence in Israel, they also heard that it was not thought that many SMEs knew a lot about the offence or the Convention.

***Commentary***

***Awareness-raising initiatives in the public and private sector remain at an early stage of implementation in Israel. This is not overly surprising given how soon this evaluation was conducted after Israel's accession to the Convention. The lead examiners recommend that Israel continue activities to raise awareness of the Convention and the foreign bribery offence within the public and private sectors. Particular attention should be paid to raising awareness within SMEs and business sectors, which are traditionally at high risk of bribe solicitation by foreign public officials. Consideration should be given to the translation of key resources, in particular into Arabic, English and Russian.***

## 2. Reporting and Whistleblowing

### *(a) Duty to Report Crimes*

#### *(i) Reporting of offences in general*

30. Israeli law does not generally require the reporting of offences by either the public or private sectors, although Article 262 of the Penal Law 1977 makes it an offence not to prevent a felony. According to this Article, a person who was aware of a felony (which includes the foreign bribery offence) and failed to use all reasonable means to prevent its commission shall be liable to two years' imprisonment. Article 262 is not broad enough, however, to capture circumstances in which a person becomes aware of information indicating the *past* commission of an offence. Furthermore, Article 262 simply imposes a duty to *prevent* the felony, without any corresponding duty to report to law-enforcement authorities.

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6 For example, a representative from the Ministry of Justice is scheduled to speak in an upcoming Forum of chain stores managers in the sectors which are likely to encounter the risk of a bribery or solicitation of bribery when operating abroad.

31. The Ministry of Foreign Affairs has introduced a requirement for diplomatic representatives to report suspected violations of the foreign bribery offence, including by the private sector (see part B(5) below), which now forms part of its Code of Conduct. The Civil Service Commission Circular of October 2009 (referred to earlier) instructs government employees to report information discovered during the course of carrying out the person's duties as follows: (i) instances where they have received an offer of a bribe; (ii) "substantial information of suspicion" that a fellow employee received a bribe or made an offer of a bribe to a foreign public official; and (iii) substantial information of suspicion of foreign bribery by the private sector. The Circular states that failure to report may constitute a violation of the Civil Service regulations or Rules of Ethics. The lead examiners are unsure what the practical effect of these instructions will be. Although violation by civil servants of the Civil Service regulations or Rules of Ethics can result in disciplinary action being taken by the Civil Service Commission, the evaluation team was told at the on-site visit that a failure to report would likely be dealt with by way of formal warning, although this warning action would be noted on the official's personnel file and remain there throughout the person's career. Israeli authorities have noted that the issuing of the Civil Service Commission Circular has contributed to the raising of awareness of the foreign bribery offence within the public sector.

32. Since the on-site visit, Israeli authorities advise that consideration is being given to introducing a statutory obligation to report instances or suspicions that a serious criminal offence, including foreign bribery, has been committed. This would be a reactive approach, limited to the past commission of offending. Although a statutory obligation to *prevent* suspicions of current offending exists under Article 262 of the Penal Law (discussed immediately above), this does not include an obligation to report to law-enforcement authorities.

*(ii) Reporting of information in suppressed media reports*

33. A matter brought to the attention of the lead examiners during the on-site visit concerns potential restrictions on the media to report on suspected foreign bribery. Israel enjoys an active media, and domestic corruption has been widely reported in the press over the past years, with a number of allegations concerning senior public officials. Due to the special situation in which Israel finds itself, censorship regulations have been established under the Defence Regulations 1945 which specify, amongst other things, that the Censor (who is responsible to the Minister of Defence) may prohibit publication of material, or require amendment of material, if this is necessary to prevent harm to the national security or public order of the State of Israel.[7] Further to this, a formal agreement between the media in Israel and the Office of the Chief Military Censor has come into effect. As a result of the regulations and formal agreement, any material to be published regarding, or in relation to, specified topics must be submitted to the Censor prior to its publication for pre-approval. Decisions of the Censor are subject to judicial review and must be based on a "near certainty" that substantial injury will occur to national security or public order.[8]

34. One of the topics requiring pre-approval by the Censor is "Israeli Defence Industries".[9] Worldwide, the defence industry is an area that is widely acknowledged to carry a high risk of bribery of

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7 Failure to comply with a direction of the Censor may result in the prosecution of the media under the Defence (Emergency) Regulations 1945.

8 See *Schnitzer v Chief Military Censor* HCJ 680/88.

9 More specifically, this relates to:
"12. Defense industries – development, experimentation and production. Location of facilities, identification of employees, budgets, contacts with foreign bodies and foreign states.
"13. Items concerning purchase and sale of defense equipment, including items about the use of El-Al / Arkia airplanes as well as ships of the Merchant Navy for military and defense purposes.

foreign public officials, a fact acknowledged by various public and private sector panellists during the on-site visit.[10] It is therefore of concern to the lead examiners that, where the Censor prevents publication of a media report which discloses information concerning, or allegations of, foreign bribery by an Israeli defence company or individual, the Censor is not obliged to forward the information to law-enforcement authorities. Furthermore, Israeli authorities state that the Censor will not disclose this information to law enforcement authorities, explaining that this would be counter to ethical relations between the Censor and the media, and pointing out that the media would not be prevented from forwarding the information directly to law enforcement authorities in such circumstances. While conscious that there have been at least two media reports concerning the allegations of foreign bribery mentioned in part A(2)(d) of this report, the lead examiners were told during the on-site visit that other material concerning the same case had been suppressed by the Censor.

***Commentary***

***The lead examiners welcome the introduction by the Civil Service Commission of instructions to public sector employees to report instances or suspicions of bribery offences, including foreign bribery, although they are unsure what the practical effect of these instructions will be. They recommend that Israel progress with the possibility of introducing a statutory obligation to report instances or suspicions that a serious criminal offence is or has been committed, and that any such obligation apply to the foreign bribery offence. They also recommend that Israel impose an obligation on the Censor to forward any information suppressed (in part or in full) by the Censor, which alleges the involvement of an Israeli company or individual in foreign bribery, to law enforcement authorities and/or the Attorney General.***

### *(b) Whistleblowing and Whistleblower Protection*

35. At the on-site visit, the evaluation team was told by the full range of participants that there is a strong culture, and even an expectation, of blowing the whistle concerning corruption within the public sector, arising from an understanding that corruption in the public sector is detrimental to the proper functioning of government and other organs of the state. In contrast, however, representatives from civil society, the business sector, and the legal and academic community, stated that there is a strong reluctance within the private sector in Israel to blow the whistle, except perhaps relating to the conduct of public officials. There appeared to be only a low level of understanding that the bribery of foreign public officials can be damaging to the reputation of Israel's economic relations with other countries and to the reputation of its companies operating abroad. Israel's awareness-raising campaign on foreign bribery aims to change this position by sending the message that foreign bribery has great negative impacts, including on the economic reputation of Israel and Israeli companies engaged in international business. The Ministry of Justice brochure on foreign bribery, distributed amongst the public and private sectors, includes reference to whistleblower protection for employees who report suspicions of cases of foreign bribery in the workplace. Notwithstanding this, a representative of the business sector stated that there was a lack of awareness amongst parts of the business sector of the existence of whistleblower protection.

36. Where whistleblowing occurs, public and most private sector employees are entitled to protection under the Protection of Employees (Exposure of Offences of Unethical Conduct and Improper Administration) Law 1997. The Law prevents an employer from taking steps detrimental to a person's

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"14. Research institutes and factories working and producing for the army or the defense establishment, and any research work with security implications."

10 It has been estimated that, world-wide, nearly one-tenth of turnover in the international arms trade is paid in bribes: see A Global War against Bribery, *The Economist*, 16 January 1999.

employment for reasons that the person "complained" about their employer or a fellow employee. At the on-site visit, there were mixed views on the part of civil society representatives as to whether this Law is effective. One representative stated that although the law places a burden on the employer to prove that detrimental action against the whistleblower was not due to his/her reporting, Israeli courts remain reluctant to force an employment relationship by reinstating a whistleblower whose employment has been terminated.

37. Public sector employees have the following additional means of protection:

- Under regulation 43.523(a) of the Civil Service Regulations, a public official who in good faith reports an offer of a bribe received by him/her, or another official, cannot be removed from employment and his/her working conditions cannot be prejudiced as a result of the complaint.[11] At the on-site visit, representatives from the Civil Service Commission advised that if the reporting official requested anonymity, this would be granted unless disclosure of the identity is necessary for the proper investigation and prosecution of the disclosed offending.
- The Office of the State Comptroller and Ombudsman is able to protect public officials (and employees of state-owned companies) who report suspicions of corruption in the workplace by public officials working in the same office as the reporting person. The protection framework exists under the Encouragement of Integrity in Public Service Law, the State Comptroller Law, and the Protection of Employees (Exposure of Offences of Unethical Conduct and Improper Administration) Law. The State Comptroller has wide powers of investigation and is able to issue protective orders where there is a connection between the reporting of the act of corruption and the action taken against the complainant.

38. It should be noted that the State Comptroller Law stipulates that the Ombudsman cannot investigate any matter which is pending in court or in which a court has given a decision. Israeli authorities explain that the rationale for this approach is that, in such circumstances, the courts are in a position to provide protection. This means that, if an employee who had exposed suspected acts of corruption in the workplace makes a claim under the Protection of Employees Law, or makes a complaint to law-enforcement authorities which results in an investigation and prosecution into the allegations, protection by the Ombudsman will no longer be available unless the employee withdraws the claim. A representative from civil society told the lead examiners during the on-site visit that this limitation on the powers of the Ombudsman is not well known by public sector employees. To the contrary, Israeli authorities believe that this limitation is well known because it is made public through brochures of the Office of the State Comptroller and Ombudsman. It was also stated by a representative from civil society that the protection of whistleblowers in Israel is a fiction, having regard to the size of the country and that its population undertakes years of compulsory military service such that "everyone knows everyone". Israeli authorities dispute this assertion, noting that the Ombudsman issues protective orders every year, including 12 temporary protective orders issued in the first ten months of 2009.

***Commentary***

***Although there is a culture of blowing the whistle within the public sector, there appears to be a strong reluctance within the private sector to report on suspicions of bribery or other offences. Coupled with the fact that whistleblower protection in the private sector is more limited and less well known than in the public sector, the lead examiners are concerned that whistleblowing in the private sector will not be an effective tool for detection of foreign bribery in Israel.***

[11] It should be noted that the Civil Service Commissioner does not have any power to protect such an employee, although protection can be given by the courts or might be available from the Ombudsman.

***The lead examiners recommend that Israel's awareness-raising activities within the public and private sector include further attention to the detrimental effects of the foreign bribery offence, as well as working to reduce the stigma attached to whistleblowing within the private sector. They recommend that further steps be taken to raise awareness within the public and private sector of the availability of whistleblower protection, including the limitation upon the Ombudsman to investigate matters which are pending in court or in which a court has given a decision. They also recommend that Israel consider enhancing the level of whistleblower protection available for private sector employees.***

## 3. Officially Supported Export Credits

39. Export credit agencies offer credits and guarantees to companies that engage in international business transactions and thus may play a vital role in raising awareness of the Convention and detecting foreign bribery. The agency responsible for officially supported credits in Israel is the Israel Export Insurance Corporate Ltd (Ashr'a). Ashr'a provides insurance to the banks of applicant companies for medium and long term export credit transactions and investments abroad, but does not provide export finance. It is involved in approximately 80% of medium and long term export transactions by Israeli companies to developing countries, including transactions in: industry, infrastructure, high tech (medical equipment and communications), energy, agriculture, military industries and engineering services. Insurance covers risks for non-payment by foreign buyers, as well as political risks such as nationalisation of property by foreign countries. Israel is a member of the OECD Working Party on Export Credits and Credit Guarantees.

### *(a) Awareness-Raising Efforts*

40. Ashr'a has revised its application for cover to include a section informing applicants about the Convention and the foreign bribery offence. Links to the Convention, the Ministry of Justice webpage on foreign bribery, the World Bank Listing of Ineligible Firms, and the OECD Council Recommendation on Bribery and Officially Supported Export Credits are available on Ashra's website. Just prior to the Working Group's consideration of this Report, Israeli authorities told the evaluation team that Ashr'a has conducted training to its management and staff, including its underwriters, on an Internal Procedure adopted in November 2009, as well as on how to detect bribery and how to deal with clients who use foreign agents. Further training is planned. The lead examiners have not been provided with a translated copy of this Internal Procedure and were told that Ashr'a refused to share this document with the evaluation team.

### *(b) Detection and Reporting of Foreign Bribery*

41. To enhance the detection of bribery, applicants must sign a declaration that they and anyone acting on their behalf have not, and will not, engage in bribery in connection with the transaction for which cover is sought. Applicants must also declare whether they, or anyone acting on their behalf, are listed on a publicly available debarment list. Breach of this declaration includes an express forfeiture of the right of the applicant to compensation, and a guarantee to repay any compensation received. The application form recommends all policy holders to develop, apply and document control systems relating to non-bribery. Under its new Internal Procedure, Ashr'a will apparently undertake due diligence to confirm the accuracy of information provided by applicants if an application raises suspicion, but not as a matter of course. It is not clear, however, when this threshold would apply, and it appears that Ashr'a will not monitor the conduct of client companies during the period of the transaction for which cover is provided.

42. According to Israeli authorities, Ashra's Internal Procedure requires that suspicions of foreign bribery detected by its employees are reported to law enforcement authorities. The lead examiners have been told that where a policy holder is involved in foreign bribery, the Internal Procedure also clarifies that sanctions for violation of the non-bribery declaration may include suspension of insurance, denial of claim payments, cancellation of the policy or indemnification, and/or a requirement for the policy holder to refund any claim payments made. Ashr'a does not require clients to incorporate anti-bribery clauses when engaging sub-contractors or agents.

***Commentary***

***Given the vital role that export credit agencies can play in the detection of foreign bribery, the lead examiners recommend that priority steps should be taken by Ashr'a to: (i) undertake continuing training on the detection of bribery and how to deal with clients who use foreign agents; and (ii) consider requiring clients to incorporate anti-bribery clauses when engaging sub-contractors. The lead examiners also recommend that the application in practice of Ashra's new Internal Procedure be followed up, particularly as this applies to due diligence, and enhanced due diligence procedures where there are suspicions that applicants or clients have been or are involved in payment of bribes to foreign public officials.***

## 4. Official Development Assistance (ODA)

43. The Ministry of Foreign Affairs Center for International Cooperation (MASHAV) is responsible for a relatively small programme of official development assistance by Israel, which normally provides assistance through training and knowledge, in Israel and abroad, rather than funding or undertaking projects, or providing financial support for overseas ministries or government initiatives. In the case of physical projects, MASHAV will normally engage an Israeli business to execute the project within Israel and then export and install it abroad. While the lead examiners were encouraged to hear that new ODA contracts will include anti-bribery clauses, they were concerned that the representative of MASHAV believed that companies and individuals involved in ODA "would not need to bribe", even in sensitive regions and business sectors. This may reflect the current lack of awareness-raising initiatives within and for MASHAV. Since the on-site visit, an awareness-raising session was conducted for MASHAV employees and its professional extensions representatives.

***Commentary***

***The lead examiners recommend that Israel continue to raise awareness of foreign bribery, and the risks of bribe solicitation faced by Israeli businesses operating abroad, including by providing on-going training. Should the nature and extent of ODA projects be extended by Israel, consideration should be given to implementing robust structures for the detection and prevention of foreign bribery, including the reporting of suspicions to law enforcement.***

## 5. Defence Exports

44. International trade in arms, weapons and other forms of military technologies and know-how is important for the Israeli economy, although precise statistics are not available. In Israel, the Defense Export Controls Directorate (DECD) of the Ministry of Defense (MOD) acts as the licensing authority under the Defense Export Control Law 2007 for the export of defence equipment, know-how, or technology to other states. The Law requires all Israeli companies involved in the defence industry to be registered and then, on a project- or technology-specific basis, to obtain marketing and exporting licenses. There are 775 defence exporters listed in the defence export registry maintained by the MOD. Of these,

there are 715 with active marketing or export licences, including the three Israeli state-owned companies involved in this area.

### *(a) Awareness-Raising Efforts*

45. There have been no steps by the DECD to raise awareness of the foreign bribery offence with registered defence exporters, although a representative of the Ministry of Defense acknowledged that such steps should probably be taken. Since the on-site visit, authorities report that the MOD intends to take the following steps to increase awareness and understanding in the defence industry of the foreign bribery offence: establishing a link on the DECD website to the MOJ webpage on foreign bribery; posting an electronic copy of the MOJ brochure on anti-bribery; including the issue of foreign bribery in the agenda of conferences for defence exporters; and sending individual letters to all registered defence exporters providing information on the Convention and the foreign bribery offence.

### *(b) Detection and Reporting of Foreign Bribery*

46. At the time when a company is to be registered under the Defense Export Control Law, the DECD is authorised to request criminal records of an applicant company in determining whether or not to grant a licence. During and following the on-site visit, the lead examiners were told that this information will always be sought and reviewed, including concerning natural persons in control of a company and persons holding senior management positions. The DECD is able to refuse or revoke registration based on a criminal conviction, and has done so in the past, although not since the enactment of the Defense Export Control Law 2007. Although a representative from the MOD stated that dishonesty or corruption offences would be likely to relate to the credibility of an exporter, there are no guidelines on what type offence would result in a refusal or revocation of registration or licence. Authorities report that the issuance of such guidelines is being considered. Registration occurs every five years. Information regarding criminal convictions is not reviewed as a matter of course between each registration application, although this is possible and authorities have advised that it is likely that more frequent routine reviews will be instituted.

47. The registration and licensing of defence exporters does not currently include the need for exporters to declare that they and anyone acting on their behalf have not, and will not, engage in foreign bribery. Since the on-site visit, authorities state that the DECD is drafting such a declaration for inclusion in the registration and licensing process. Because such an undertaking would then be treated as a part of the export licence, authorities advise that a breach of that undertaking would be treated as a breach of the export licence. Notwithstanding this intended step, marketing and exporting licences do not include a requirement that the exporter not engage in foreign bribery or otherwise violate the laws of foreign countries in which the exporter will operate. There is no statutory requirement for the DECD to report suspicions of foreign bribery by defence exporters, although employees of the MOD are subject to the instructions in the Civil Service Commission Circular of October 2009, which instructs government employees to report "substantial information of suspicion" of foreign bribery by the private sector, where this was discovered during the course of carrying out the person's duties in the civil service.

***Commentary***

***Given the size of the defence industry in Israel, and the recognised vulnerability of the industry to bribe solicitation, the lead examiners are concerned by the lack of awareness-raising initiatives amongst defence exporters to date. They are encouraged to learn of plans to address this.***

***To enhance detection of foreign bribery, the lead examiners recommend that Israel: (i) encourage the defence industry in Israel to develop strong anti-corruption measures and engage in international anti-corruption initiatives concerning the defence sector; (ii) ensure that, when providing licenses for exporting military equipment and dual-use goods, the Defense Export Controls Directorate of the Ministry of Defense considers whether applicants have been involved in bribery as well as the level of risk of corruption in relation to arms procurement in the destination country; and (iii) consider the temporary or permanent disqualification of enterprises convicted of bribing foreign public officials from applying for export licenses.***

## 6. Foreign Diplomatic Representations

### *(a) Awareness-Raising Efforts*

48. As part of their missions overseas, Israeli diplomats are in touch with Israeli businesspersons in order to assist in promoting economic and trade ties with foreign countries. The Ministry of Foreign Affairs (MFA) has introduced important measures contributing to awareness-raising and detection of foreign bribery. In early June 2009, the head of the MFA legal department, circulated an internal memorandum to all Ambassadors and Consuls General abroad concerning the Convention and the foreign bribery offence. The memorandum requests all heads of mission to distribute the information at all relevant levels within missions abroad. All Commercial Attachés also received a briefing newsletter on the matter.

49. As well as including this information in the training curriculum of all training and preparatory programs, every diplomatic representative (which includes all Israeli officials stationed abroad under the authority of an Israeli Embassy or Consulate, including police and military attachés) is now required to sign in his or her dispatching file an acknowledgment of awareness of the information. The MFA is in the process of establishing an interactive online tutorial in the internal MFA web system, which all diplomatic representatives abroad will be required to undertake. The tutorial aims to raise awareness of the Convention and the foreign bribery offence, and to provide guidelines for its implementation. As a part of a conference for MFA heads of diplomatic missions in December 2009, an awareness-raising session will be conducted. MFA officials advise that the Ministry of Justice brochure on foreign bribery will be circulated to all missions abroad.

### *(b) Detection and Reporting of Foreign Bribery*

50. As part of the acknowledgment form mentioned, diplomatic representatives must acknowledge a duty on them to report suspected violations of the foreign bribery offence. This reporting requirement has been included in the Foreign Affairs Code of Conduct, a breach of which may be subject to disciplinary sanctions imposed by the Civil Service Commission. At present, such reports must be sent to the Ministry of Foreign Affairs in Jerusalem. At the on-site visit, it was stated that reports received by the MFA would then be immediately forwarded to the Israeli Police, although officials reported that more detailed procedures will be established.

***Commentary***

***The lead examiners are encouraged by the introduction of an obligation for diplomatic representatives to report suspected violations of the foreign bribery offence, including by the private sector. They recommend that Israel's overseas diplomatic representatives take steps to engage with the Israeli business sector abroad for the purpose of raising awareness of the foreign bribery offence and, in particular, its extraterritorial effect.***

## 7. Tax Authorities

### *(a) Non-Deductibility of Bribes*

51. Israel's Income Tax Ordinance 1961 does not expressly deny the tax deductibility of bribe payments. However, Israeli tax officials rely on both the general denial of the deduction of payments that constitute a violation of the law (amendment to Article 32 of the Income Tax Ordinance) and case law to maintain that bribes to foreign public officials are not tax deductible in Israel.

52. Article 17 of the Income Tax Ordinance sets out the general principles regarding deductible expenses incurred to generate income. Such expenses may be deducted from a taxpayer's taxable income unless such deduction is prohibited. Whereas Article 32 does not include bribe payments in its list of prohibited deductions, Israeli officials advise that an amendment to Article 32 of the Income Tax Ordinance has been enacted on 16 November 2009 that clarifies the legal situation[12] by expressly including any "payment, in money or money's worth, when there is a reasonable basis to believe it constitutes a violation of any law" in the list of prohibited deductions under Article 32 of the Ordinance (emphasis added). Moreover, according to the Israeli authorities case law has clarified that payments made "in violation of the law" include bribe payments.[13] They further indicated that on transnational bribery specifically, the Supreme Court recently held, in *Hydrola Ltd v Tel Aviv Assessment Officer (hereinafter Hydrola)*, that bribery expenses paid to authorities of a foreign State to expedite a transaction may not be considered an expense deductible for tax purposes.[14]

#### *(i) Small facilitation payments*

53. Both Israeli responses to the Phase 2 questionnaire, and those of tax officials met during the on-site visit strongly maintained that small facilitation payments are not allowed in Israel (under Article 291A, any payment of any size would be considered a bribe) and therefore not deductible pursuant to the recent amendment to Article 32 of the Income Tax Ordinance and case law as for any other bribe payment.

#### *(ii) Non deductibility of payment made in "violation of any law"*

54. However, the amendment to Article 32 generally refers to "a violation of any law" and does not specify that such violation include bribe payments. Israeli officials state that the combination of this amended provision with Article 291A of the Penal Law will make it clear that bribe payments to a foreign public official or intermediary are non-deductible. Even now that the ban on deduction of expenses related to illegal activities has been clarified in the law, it is unclear if all tax officials are aware that foreign bribery now constitutes an offence. In practice, tax officials are likely to react to outflows of money that look like they could constitute a bribe – and the lead examiners consider that the likelihood of such a reaction with regard to foreign bribery would be significantly greater with an express prohibition in the Income Tax Ordinance. Moreover, an express prohibition is also an important signal to companies, financial officers and auditors. The lead examiners welcome the steps taken by Israel to clarify the legal situation but note that the current wording of the amendment is not fully in line with the new OECD

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12 At the time of the on-site visit, Israel referred to the Collection of Interpretations of the Income Tax Ordinance ("*Habak*") in which the Income Tax Authority had ruled "the deduction of payments made in violation of any law shall be prohibited"

13 *Alarbia Hotels Ltd v Jerusalem Assessment Officer*, Income Tax Appeal 54/84 (1997).

14 *Hydrola Ltd v Tel Aviv Assessment Officer Number 1* (2008) CR.A 6726/05. See also *Company Ltd v The Netanya Assessing Officer*, Income Tax Appeal 1015/03 (2008).

Council Recommendation to "explicitly disallow the tax deductibility of bribes to foreign public officials" (emphasis added); this express denial could be established by other means than law, as long as it is binding and publicly available.[15] The Israeli officials advise that the Israeli Tax Authority is currently drafting an Income Tax Circular that will specifically refer to the foreign bribery offence. They also specify that this circular will be issued early January 2010 and will be binding on all staff of the Israeli Tax Authority and will be available to the public on the Tax Authority's website.

*(iii) Uncertainty in case law*

55. The Israeli authorities referred to two court decisions to maintain that in Israel, foreign bribery expenses are not tax deductible. In a recent decision in the case of *Company Ltd v The Netanya Assessing Officer (hereinafter Company X),*[16] the District Court in Tel Aviv held in January 2008 that bribes to secure the development of an agricultural venture in a foreign country are not allowable as deductible expenses for tax purposes.[17] The Court ruled that deducting such payments would contradict public policy and contravene the declaration of Independence of the State of Israel and its commitment to abide by the United Nations Charter.[18] While this is a clear decision, consistent with the 2009 Recommendation on Tax Measures,[19] it is of a lower court and thus susceptible to being overruled. It is thus important to ensure that this approach is either confirmed by the Supreme Court or incorporated into legislation.

56. However, in *Hydrola* (already mentioned above), the Supreme Court rendered a decision that might not be fully persuasive, because of the diverging opinions of two out of the three Justices. In this case, the company carried out various business activities in the Republics of the former Soviet Union (during the 1990's) through agreements with local agents to whom the company transferred large sums of money. The tax assessor qualified these payments as at least partially unlawful expenses incurred in the payment of bribes. The Supreme Court unanimously upheld the judgement in the first instance, i.e. to refuse the deduction of part of the payments made to the agents. While the outcome of the court decision is clear, the different reasoning of the judges might raise concerns. Whereas one Justice held that allowing such payments as deductible expenses would be contrary to public order, because the payment of bribes is unlawful in both Israel and the countries where it occurred (thus fulfilling the dual criminality requirement), the two other Justices did not pronounce themselves on this "question of principle" and rather based their decision on the absence of evidence and proper documentation[20]. Therefore, the judgement might be persuasive to some extent but it may not be considered as a binding court precedent for non-tax deductibility of bribes paid in a foreign country.

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15 Recommendation of the Council on tax measures for further combating bribery of foreign public officials in international business transactions, (C(2009)64), Section I(i).

16 *Company Ltd v Netanya Assessing Officer*, Income Tax Appeal 1015/03 (2008)

17 The payments in question, recorded in the books and accounts as "*other commissions and additional expenses*" in 1998 (*i.e.* before the entry into force of the offence of foreign bribery in Israel) amounted to approximately USD 860 000.

18 The judgement also refers to the UNCAC, the OECD 1996 Recommendation on tax deductibility of bribes and the OECD Anti-bribery Convention (although Israel was not yet a party to any of these instruments) as a "*call of the civilised states of the world for action to defeat governmental and business corruption as a phenomenon by also taking fiscal measures for this purpose.*"

19 Recommendation of the Council on tax measures for further combating bribery of foreign public officials in international business transactions, (C(2009)64).

20 Furthermore, as noted above, the Supreme Court allowed the deduction of another part of the payments to the agents, despite the lack of detailed records, based on the testimony of the agents.

*(iv) "A reasonable basis" to believe that a payment constitutes a bribe*

57. Tax officials pointed out that the wording of the amendment further clarifies that tax inspectors exercise their discretion in determining what constitutes a "reasonable basis" to believe that a payment constitutes a bribe, and that the burden of proof (that the claimed payment does not constitute a violation of law) will fall on the tax payer. They contended that the requirement for a "reasonable basis" is very broad and does not require any kind of proceedings. The lead examiners encourage Israel to proceed with its intention to clarify this interpretation with a special reference to bribery in an income tax circular. This interpretation will have to be further assessed in the context of future reviews.

*(v) Identifying bribe payments*

58. However, certain tax officials rightly pointed out the difficulty in identifying bribe payments and highlighted efforts by the tax inspectors to understand what is behind certain types of payments such as mediation and advising fees, or payments made through a foreign subsidiary. In case of doubt, tax inspectors can request more documents justifying a payment and have the authority to deny such a deduction if they determine that a bribe to a foreign public official was disguised as, for instance, a legitimate commission to agents and intermediaries.[21] This will need to be followed up, notably with regard to the possibility to submit non-documented expenses.

*(vi) Deductibility of non-documented expenses*

59. Article 17(13) of the Income Tax Ordinance 1961 allows for the deduction of expenses for board and lodging overseas incurred by a person during the tax year in the production of his/her Income. Tax Regulations provide for the conditions for such deduction, i.e. maximum thresholds per type of expenses (including airplane tickets, overnight accommodation, car rental and education).[22] The Regulations do not provide for a global maximum threshold for all expenses but specify that those expenses must be documented. However, in *Company X* (already mentioned above) the District Court (while denying the appellant company the claimed right to deduct bribes from its taxable income) did not review the deduction (allowed by the tax assessing officer) of expenses paid in cash allegedly for board and lodging overseas, amounting to 500 000 ILS (approximately 300 000 USD as valued at the time according to the Court).[23] In the same line, during the on-site visit, panellists indicated that this type of expenses is deductible even if not documented. In these circumstances, it remains unclear whether these deductible expenses may, in practice, be non-documented -- as retained in *Company X*[24] and indicated by tax officials during the on-site

21 An Assessee who wishes to have his expenses allowed must satisfy the Assessing Officer that it is indeed in the nature of an expense incurred in the production of income the deduction of which is not prohibited. The Assessing Officer exercises his discretion as to whether an expense that the Assessee wishes to deduct falls within the list of disallowed deductions set up by Article 31 and 32 of the Ordinance. He has the authority to demand reports, information, books, etc. including information on suppliers and customers from the taxpayer (Article 135A of the Ordinance). The control exercised over the discretionary power of the assessing officer is threefold: (i) a hierarchical supervision to ensure accountability, (ii) the State Comptroller power to review, via his audits, the work of the Tax authority's officials, including the application of discretionary powers and (iii) the possibility to appeal the tax assessment to the District Court.

22 Income Tax Regulations (deduction of certain expenses), 5732-1972

23 The deduction of an additional amount of 400 000 ILS was also mentioned in the judgement although its purpose was not identified.

24 Although the Court noted that in its view, the assessing officer had treated the taxpayers leniently.

visit -- or should be documented as provided in the Expenses Deduction Regulations. Moreover, during the on-site visit, panellists explained that these types of expenses are deductible from the individual's income (as opposed to the Company's income), which means that the amount within this threshold might be multiplied by the number of employees involved in operations overseas. The lead examiners are concerned that non-documented expenses of this magnitude may be retained as tax deductible and that it might be used to deduct bribe payments. The lead examiners also note that in *Hydrola,* despite the lack of detailed records, the Supreme Court, relying on the District Court's factual determination, did allow the deduction of part of payments made to foreign agents based on the testimony of those agents.[25] The lead examiners are concerned that this, in practice, constitutes another loophole as to the obligation to document deductible expenses.

### *(b) Awareness, Training and Detection*

60. Reliance on the broad principle of the non-deductibility of payments that *constitute a violation of any law* raises the issue of awareness of the foreign bribery offence by tax assessors. Whereas tax officials met during the on-site visit demonstrated awareness of the offence of foreign bribery and of the prohibition of the tax deductibility of bribes deriving from Israeli case law, it cannot be taken for granted that all tax officials have the same level of awareness, especially in the absence of special communication or training on these issues.

61. In its replies to Phase 2 questionnaire, Israel indicated that tax inspectors are provided with intensive training prior to taking up duties on tax laws, secondary legislation necessary for the operation of the Ordinance, and policy principles guiding tax officials. The employees of the tax administration also attend courses and lectures on various topics linked to their day-to-day work. Tax officials to update both their employees and the public at large on legislative reforms and new case law, and their practical implications for tax assessment issue executive directives from time to time. In this context, the lead examiners welcome the publication by the Tax Spokeswoman of a notice stressing the non-deductibility of illegal expenses and pointing to the Supreme Court decision in Hydrola. However, the lead examiners are concerned that no specific guidance or training has been provided so far on the non-deductibility of bribe payments, or on how to distinguish between legitimate business expenses and illicit payments.

62. Following the entry into force of the amendment of Article 32 of the Ordinance and the publication of the Income Tax Circular announced by the Israel Authorities (see above), Israel indicates that the permanent training of tax inspectors will include the amendment to Article 32 and the new offence of bribery of foreign officials. Specific guidance will be given to tax inspectors on how to distinguish illicit payments..The content of the amendment and the Circular will also be included in the curriculum of the course for new inspectors. The Tax Authority also advises that the OECD Bribery Awareness Handbook for Tax Examiners has been translated into Hebrew and will be distributed to the tax inspectors early January[26]. The lead examiners welcome the recent adoption of the amendment to Article 32, the translation of the OECD Bribery Awareness Handbook and encourage the Israeli Authorities to implement the projects indicated above to raise awareness of tax officials.

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25 *Supra.*

26 During the on-site visit, tax officials specified that 2 000 Tax officers will undertake a half-day training course on the Handbook in 2009, (the exact training content was still under consideration).

### *(c) Sharing of Information and Duty to Report Foreign Bribery*

#### *(i) Within Israel*

63. Israeli tax legislation contains provisions on secrecy[27], which seems to generally prohibit tax officials from divulging any information obtained for tax assessment purposes. Disclosure of income tax secrets is a criminal offence, and the penalty is six months imprisonment or a fine of 12.900 ILS.

64. However, the Minister of Finance can authorise such disclosure. At the time of the on-site visit, Assessing officers were not allowed to report information on their own initiative and authorisation to disclose information could only be granted on the request of the Police. Israeli tax officials stressed that such requests are a routine procedure that has recently been streamlined with the delegation of the authority to allow such disclosure to the Director of the Tax Authority and that the authorisation is now granted within 2 or 3 days. The Director's decision is discretionary but tax officials have indicated that the Director will likely lift the privilege in case of disclosure of information concerning criminal violations. However, the lead examiners are seriously concerned that tax officials are not allowed to go to the police to disclose information that could contribute to the deterrence of bribes. Just prior to the Working Group meeting, Israel advised that a change of policy had been approved which will be reflected in the Income Tax Directive that is expected to be issued early 2010. According to Israel, in the future, in cases where an Assessing Officer will suspect an offence, he may, on his own initiative request an authorisation to disclose information from the Director of the Tax Authority. The lead examiners are not in a position to assess the scope or efficiency of this new policy which will need to be followed up in future reviews.

65. An "Integrated Intelligence Center" was established on 5 March 2007:[28] it combines resources from the Police, the Income Tax Authority and the Money Laundering Prohibition Authority under a single roof to exchange information in real time and produce collaborative intelligence materials focusing on the fight against serious and organized crime, including corruption and bribery. Members of the Center benefit from a general authorisation to exchange information within the Center but information cannot be disclosed outside of the Center without a new authorisation. Pursuant to information obtained from several officials during the on-site visit, this Center is focusing on analysing criminal information and producing reports, and has so far played a very limited role in the deterrence of serious crimes in general and foreign bribery in particular.

#### *(ii) Internationally*

66. As regards sharing of information internationally, information exchange with other national tax authorities depends on the existence of double tax agreements; Israel indicated in its questionnaire replies that it is currently a signatory of more than 40 Prevention of Double Taxation Conventions. Most of these Conventions include a provision that permits the transfer of information between the tax authorities of the contracting States. Tax officials specified during the on-site visit that such transfers of information, for the moment, were only provided upon request but that an automatic exchange of information should be put in place shortly.

67. As regards providing tax information to foreign law enforcement authorities, most of these tax Conventions do not include the optional language of paragraph 12.3 of the Commentary to Article 26 of

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27 Income Tax Ordinance, Article 234.

28 As a result of a decision of the Israeli Government, on 1 January 2006, aimed at intensifying the fight against criminal organizations engaged in serious crimes, and organized crime in general.

the OECD Model Tax Convention[29], which allows the sharing of tax information by tax authorities with foreign law enforcement agencies and judicial authorities on certain high-priority matters (*e.g.* to combat money laundering, corruption, terrorism financing). As a consequence, information exchanged with foreign tax authorities (where a double tax agreement exists) are for the exclusive use of foreign bodies concerned with the assessment or collection of tax, and only for tax purposes, or if a tax offence is being prosecuted. Therefore, tax information would have to be provided to foreign law enforcement authorities through the use of rogatory letters, in the context of MLA. However, tax officials indicated that new tax treaties will include such a provision, and that there is a current trend of re-negotiating existing tax treaties to allow such sharing of information (currently treaties with Germany and Denmark, soon to be followed by treaties with Belgium and Austria).

***Commentary***

***With respect to the tax treatment of bribes to foreign public officials, the lead examiners appreciate the efforts made by the Israeli authorities to clarify their Income Tax Ordinance to disallow the deductibility of payments made in violation of any law and welcome the amendment of Article 32 of the Income Tax Ordinance. They encourage Israel to pursue with its intention to issue a new Income Tax Circular that would make explicit the prohibition concerning the deductibility of foreign bribes and that would be binding on all tax officials and publicly available (2009 Council Recommendation on Tax Measures, Section I(i)). They recommend that the conditions allowing for the deductibility of expenses for board and lodging overseas (implementing Article 17(13) of the Income Tax ordinance) be re-evaluated to insure that non-documented expenses are not tax deductible. They also recommend that the possibility of allowing the deduction of payments despite the lack of detailed records, based on testimony, be reviewed.***

***With respect to awareness-raising, detection and reporting, the lead examiners recommend that Israel: (i) expressly communicate to tax officials the non-tax deductibility of bribes; (ii) issue guidelines and provide training programmes for tax officials on the detection of bribe payments disguised as legitimate allowable expenses; (iii) Adapt the OECD Handbook for Tax Examiners for use in Israel and distribute it to tax officials as appropriate; and (iv) provide guidance to facilitate reporting by tax authorities of suspicions of foreign bribery to domestic law enforcement authorities, and review the effectiveness of its reporting system and in particular the impact of the requirement for a prior authorisation from the Head of the Tax Authorities (2009 Council Recommendation on Tax Measures, Section II)).***

***With respect to sharing information with other law enforcement agencies and judicial authorities in another country, the lead examiners recommend that Israel continue to include in existing and future tax treaties the Commentary to Article 26(2) of the OECD Model Tax Convention, allowing for the reciprocal sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities in relation to corruption offences (2009 Council Recommendation on tax measures, Section 1(iii)).***

29 As recommended under Recommendation of the Council on tax measures for further combating bribery of foreign public officials in international business transactions C(2009)64, section 1 (iii).

## 8. Accounting and Auditing

### *(a) Awareness and Training*

68. At the time of the on-site visit, the principal bodies that regulate the accounting and auditing professions in Israel – namely the Israeli Securities Authority (ISA), the Institute of Certified Public Accountants in Israel (ICPAS), the Israel Accounting Standards Board (IsASB), the Institute of Internal Auditors Israel (IIAI) and the Israeli Accountant's Council (IAC) –had not produced any training materials, newsletters or other documents that specifically address foreign bribery, nor did they provide such information on their websites.[30] The accounting and auditing profession has not engaged in any specific awareness-raising with regard to foreign bribery and the role of the accountants and auditors in the fight against this crime. Only the largest audit firms are providing training to their staff on ethics in general and on bribery in particular. In at least one firm, a training session on bribery is mandatory, although this does not appear to specifically cover foreign bribery. The lead examiners were concerned by the lack of initiative in this area a full year after the entry into force of the foreign bribery offence in Israel.

69. However, since the on-site visit, the Ministry of Justice has been in contact with ICPAS, the IAC Council and IIAI to explore possible avenues to promote awareness within the accounting profession and has sent to ICPAS and IIAI an electronic version of its brochure on the foreign bribery offence (mentioned under Section B. 1. (a)), a short information sheet relating to the offence and the Anti-bribery Convention and provided a link to the Ministry of Justice website. A representative from the Ministry of Justice participated in a meeting of the governing body of the IIAI to present the Convention and the offence and is scheduled to speak in the upcoming winter conference of the IIAI. The Lead examiners welcome these initiatives and encourage Israel to pursue these efforts.

### *(b) Accounting and Auditing Standards*

*(i) Duty to keep books and documents*

70. Regarding the duty to keep books and documents, Israeli authorities have pointed to Article 130 of the Income Tax Ordinance 1961 (hereafter the Tax Ordinance), which, according to the Israeli authorities, establishes a duty of book keeping imposed on all taxpayers. Actually, Article 130 of the Tax Ordinance merely provides that the Director of the Tax Authority "may direct that account books be kept in respect of income and in those provisions he may prescribe on the method of keeping the account books" (emphasis added). The Israeli authorities then pointed to Article 25 of the Income Tax Directives (Management of Accounting Books) 1973 (hereafter the Tax Directives) as detailing the obligation to keep books. However, Article 25 exclusively focuses on the practical aspects of book keeping[31]. Participants in

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30 The Israeli Securities Authority (ISA) is an independent body which present itself as the regulating, supervising and enforcing body overseeing publicly traded Companies (including State owned). While the ISA does not have a rule-making authority, it collaborates with the Institute of Certified Public Accountants in Israel (ICPAS) in operating and financing the Israel Accounting Standards Board (IsASB). The ICPA is a voluntary body, which deals, *inter alia*, with keeping its members up to date with current revisions in legislation, case law, accounting standards, auditing standards and general issues such as ethics.. The Israeli Accountant's Council (IAC) is a statutory body, subordinate to the Ministry of Justice, which grants accounting licences and ensures continuous supervision of the auditing profession in Israel.

31 *E.g.* the place in which the accounting system is to be held, the dates until which it must be kept and the manner in which it must be stored in order to for it to be preserved.

the on-site visit pointed to Schedules to the Tax Directives[32], which detail by sector the obligation to keep books and the transactions that must be recorded in the books.

71. In addition to the abovementioned provisions from the fiscal field, the Companies Law, 1975-5735 (hereinafter the Companies Law) provides that public and private companies "shall keep accounts, and shall also prepare financial statements pursuant to either the Securities Law[33] for the public companies or the Companies Law for the private companies". No further provisions have been provided that would clarify the required content of the obligation to keep books and documents.

72. With regard to financial statement disclosure, the 1970 Securities Regulations (Periodic Statements) (hereafter the Securities Regulations) require submission of quarterly and annual statements, which must contain information and fair disclosure requirements, mandatory for financial statements required by the accounting rules applicable to the company. These statements are submitted to the Israel Securities Authority (ISA). The Companies Law provides that "a private Company must send the Registrar an annual Report" (Article 140) and is required to prepare yearly financial reports "in accordance with accepted accounting rules" (Article 172(d)).

73. As for the disclosure of contingent liabilities, the Israel authorities have indicated that Israel applies the International Accounting Standard IAS37[34] regarding the requirement that companies disclose the full range of material contingent liabilities in their financial statements.

*(ii) Accounting standards*

74. There are three main sets of accounting standards that apply to the Israeli private sector and to companies trading in Israel. Since January 2008, the full International Financial Reporting Standards (IFRS) have been mandatory for all Israeli public companies, which must prepare their financial statements according to these standards.[35] As an exception to this application of the IFRS standards for all public companies in Israel, companies that are dually listed in the United States as well as in Israel may choose to use US GAAP and some foreign companies that are listed in Israel may have to apply IFRS or GAAP standards.[36] Accounting standards established by the Israeli Accounting Standards Board (IASB), are applicable to all other companies. These standards (also called Israeli GAAP) include a certain number of IFRS standards that have been adapted to the Israeli context by the IsASB on a standard-by-standard basis. According to the Israel Accounting Standard no. 29, these non-listed companies can also apply the IFRS standards on a voluntary basis.

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32 There are 16 schedules attached to the Tax Directive

33 The Securities Law, 5728-1968 (hereinafter: the "Securities Law").

34 The objective of this Standard is to ensure that appropriate recognition criteria and measurement bases are applied to provisions, contingent liabilities and contingent assets, and that sufficient information is disclosed in the accompanying notes to enable users to understand their nature, timing and amount.

35 This appears to be linked to the US SEC decision (effective as of 2008) to allow foreign private issuers to file financial statements using IFRS without a reconciliation with US GAAP.

36 This applies to foreign companies listed in Israel if: more than 50% percent of the company's income is not received in Israel and if the company is not controlled by Israeli permanent residents; or if the company is listed both in Israel and in the Exchanges listed in the Third Annex of the Securities Law.

75. With the IFRS becoming mandatory for all Israeli public companies, the coming period is seen as a transition and a serious challenge by the auditing firms met during the on-site visit.[37] This move towards accounting standards widely accepted in the world is highly welcomed by the lead examiners but they also encourage the Israeli authorities to take steps to integrate and adapt the IFRS standards for non-listed companies.

### *(c) Internal controls, supervisory boards and audit committees*

#### *(i) Internal controls*

76. The Companies Law includes an obligation for public companies to appoint an internal auditor (Article 146). The board of directors must appoint an internal auditor according to the recommendation of the audit committee and in application of the rules on independence. Regarding international standards, the professional council within the Institute of Internal Auditors Israel (IIAI) has translated – and adapted to the Israeli legislative framework – the Definition of Internal Auditing, a Code of Ethics, and the Standards and Practice Guides[38] published by the International Institute of Internal Auditors. The Internal Audit Law 5752-1992 (hereafter the Internal Audit Law) includes detailed provisions on how internal audits should be carried out in public companies. Israeli authorities underlined the auditor's duty to check compliance with the law (Article 4 of the Internal Audit Law) including the Penal Law.[39]

77. Whereas the examiners welcome the steps taken by the profession, as described above, they are concerned by the result of a Survey on "the state of internal auditing at large public companies in Israel",[40] which indicates that "despite the ISA regulation requiring companies to disclose whether the internal auditor checked material transactions, 87% of the companies subject to the survey did not address the question of whether the internal auditor checked those transactions and in one case the company admitted that the auditor did not check all of the material transactions." Representatives of the accounting and auditing profession expressed the view that this situation is evolving; international concerns, notably reflected in rules such as the US Sarbanes-Oxley Act (hereinafter SOX), which require that companies pay more attention to risk management and to neutralization of such risks through improved internal control, are more and more frequently used in Israel – although only as "best practices" for the time being. According to the ICPAS, the adoption of SOX like regulations in Israel ("Israeli SOX") would likely promote the conduct of effective internal audits.

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37 A similar view was also expressed by Itamar Levin (editor of "*The Accountant*", a publication of the Institute of Certified Public Accountants in Israel) in an interview with "The Journal of Accountancy" (May 2008) available on the American Institute of Certified Public Accountants website (http://www.ifrs.com/overview/General/Adopting_IFRS.html ).

38 The International Standard 1010 makes the Recognition of the Definition of Internal Auditing, the Code of Ethics, and the Standards in the Internal Audit Charter mandatory and provides that they must be recognized in the internal audit charter.

39 The Internal Audit Law_5752-1992 stipulates (in Article 11) how an internal auditor should act if a suspicion of criminal offence arises. Article 9 (e) on the duty "*to keep secret every document*" provides for an exception "*if the disclosure is required in accordance with any law*".

40 Survey conducted and published by Fahn Kanne Control Management Ltd. Grant Thornton Israel, in February 2009 (http://www.internal-auditors.com/fileadmin/publications/Control_Management/Microsoft_Word_-_Survey_on_the_state_of_internal_auditing_at_large_public_companies_in_Israel.pdf ).

*(ii) Control over branches and subsidiaries abroad*

78. The public companies that implement the full IFRS (as indicated above) have had since 2008 the obligation to produce consolidated accounts covering their foreign subsidiaries (standard n°57 of the ICPAS). For the companies not applying IFRS – or solely those provisions adapted by ISA – it is unclear whether they are subject to the same obligation. Accounting and auditing professionals met during the on-site visit indicated that the primary audit teams normally go once a year to the foreign subsidiaries, but they did not discuss the quality of the internal control mechanisms by Israeli companies over foreign branches and subsidiaries. The survey published by Grant Thornton Israel (see reference in footnote above) notes that "awareness of companies as to the importance of conducting internal audits at foreign subsidiaries is still low".[41] The Israeli authorities indicate that the situation should improve with the entry into force on 2010 of ISA's regulations on the adoption of rules similar to the SOX providing that every public company will be obligated to document and inspect its controls in each substantive unit in Israel and abroad.

*(iii) Supervisory bodies and audit committees*

79. Another important issue is the effectiveness of supervisory bodies in Israeli corporations and of audit committees. Audit Committees are mandatory in public companies (Article 114 of Companies Law) and a possibility in private companies (Article 118 of Companies Law). They are nominated by the Board of Directors and "consist of its members"[42]. This raises a concern about their independence from management which seems to be largely alleviated however by Article 115 of the Companies law which provides that the Audit Committee of a public company shall be independent of management, a controlling shareholder and the Chairman of the Board of Directors – although this independence is limited to the Chairman of the Board of Directors in the case of private Companies (Article 118).

***(d) External Auditing***

*(i) Auditing requirements*

80. Under the Companies Law, all companies are required to appoint an auditing accountant to undertake an annual audit of the company's financial statements and give an opinion on those statements (Article 154).[43] Regulation 9 (a) of the Securities Regulations (Periodic and immediate reports 1970) provides that the annual and financial statements, included in the Periodic Report submitted to the ISA, must be "properly audited". An external review of the work of auditing accountants is carried out by the Peer Review Institute (a subsidiary of the ICPAS).

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41 The survey further stresses that "*62% of the companies did not mention whether their audit plan addresses companies held abroad. 5% of the companies noted that the audit plan does not address the operations of companies abroad, but our examination found that there were entities held abroad. Of the companies that failed to mention whether their audit plan addressed companies held abroad, we found that half carried out operations abroad."*

42 Article 118 (b) of the Companies Law provides an exception to the obligation to nominate a Board of Auditors for Companies in which the majority of the members or their relatives are substantial shareholders.

43 In the case of companies whose business cycle does not exceed ILS 500 000 (approximately EUR 95 000 or USD 150 000), Article 158 deems such a company to be "inactive" and allows it to resolve not to appoint an auditing accountant, unless 10% or more of the shareholders are opposed to this.

*(ii) Independence*

81. The Independence of the auditing accountant is set forth in several legislative acts (*inter alia*, the Accountant's Regulations), as well as in provisions of the ISA and publications of the ICPA. Article 160 of the Companies Law sets forth the principle that the auditing accountant "shall be independent from the company both directly and indirectly". Article 10 of the Accountants Law, 1955 (hereinafter the Accountants Law) sets out the general principle of independence[44] and the Accountants Regulations, (Behaviour Unfitting the Dignity of the Profession) 1965 as well as the Accountants Regulations (conflict of interest and harming the independence as a result of an additional occupation) 2008 include further conditions aimed at securing independence. The 2008 Regulations have notably clarified that accountants can no longer perform an audit and maintain bookkeeping in the same engagement. The ISA 1992 "Staff Legal Bulletin" (hereinafter SLB) provides detailed guidance as to the implementation of the above Laws and Regulation to the Companies to which the Securities Law applies.[45] SLB are not legally binding but they are widely accepted and applied by public Companies.

82. However, the lead examiners have noted serious weaknesses regarding the means in place in Israel to insure the effective independence of auditors. As to the turnover of external auditors within companies, Article 154 of the Companies Law provides that an auditor's appointment must be made by the general assembly of the shareholders, for a term of one year – although a longer appointment, for a term of up to three years, can be allowed under the constitution of the company. There is, however, no limit to the renewal of the mandate of the auditor. Similarly, the ISA 1992 "Staff Legal Bulletin" sets out that one audited company should not exceed 15 % of an audit firm's income in one accounting year. The threshold is, however, increased to 25% of the audit firm's income in the first three years of its opening. These thresholds are not in line with internationally agreed standards. However, the auditing and accounting profession present at the on-site visit indicated that the Sarbanes-Oxley requirements, which should be adapted in Israel by 2010, will address these issues.

83. The disciplinary supervision of accountants is carried out by the IAC, which was set up according to Article 2 of the Accountants Law. The behaviours which may be subject to conviction under disciplinary law are defined in the Accountants Regulations,[46] and in the Accountant's Method of Operation Regulations 1973. A disciplinary offence exposes the offender to disciplinary measures by the IAC.[47] In addition, civil actions – including, in some cases, class action suits – may be brought against the auditing accountant if a corporation does not disclose all the relevant information in its audited financial statements.[48] Administrative sanctions can also apply: The ISA "Staff Legal Bulletin" stipulates that

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44 Article 10 provides that "*An accountant would not engage in another occupation if a conflict of interest could arise between his occupation as an accountant and his additional occupation or if his independence as an accountant might be harmed*".

45 The bulletin notably describes situations in which the required independence is not fulfilled, *e.g.* the existence of financial relations between the auditing accountant and the audited company; certain additional services given to the audited company by the auditing accountant; existence of family ties between the auditing accountant and officers in the audited company, etc.

46 Accountants Regulations (Behaviour Unfitting the Dignity of the Profession) 1965 and Accountants Regulations (conflict of interest and harming the independence as a result of an additional occupation) 2008.

47 Article 12 of the Accountants Law sets forth the sanctions which the Council is authorized to impose in these situations in order to defend the public or the reputation of the profession. These sanctions may be: a warning; reprimand the accountant; suspension of his license; or, the complete revocation. According to Article 13 Accountants Law, the Council may publicize the decision (with the exception of warnings).

48 These may be brought against the auditing accountant by the corporations' stockholders, creditors or any other injured party.

financial statements that are reviewed by an accountant who does not meet the conditions of independence will not be considered as statements that have been legally audited. Panellists stressed that this is a dissuasive rule, which has been implemented in several instances.[49]

### *(e) Duty to Report Foreign Bribery*

84. Article 1A(3) of the Accountants Regulations (Behaviour Unfitting the Dignity of the Profession) 1965 prohibits auditing accountants from disclosing information obtained in the course of providing their professional services, unless "required by any other statutory provision to disclose such information". However, because Article 262 of the Penal Law requires a person who is aware of a felony (the foreign bribery offence being a felony in Israel) to use all reasonable means to *prevent its commission* (emphasis added), the Israeli authorities advised in Phase 1 that it would be reasonable to assume that an auditor is required to report to law enforcement authorities whenever s/he comes across information in the course of an audit indicating that a felony is in the process of being committed or about to be committed. Israel added in Phase 2 that the IAC and the Exams Committee are working on changing the required syllabus for the IAC license exams in order to adapt to the modifications of the accounting standards resulting mainly from the application of IFRS in Israel. Within this framework the IAC is also considering to include a reference to Article 262 and its implications for accountants. If this change occurs, the training institutions for accountants (universities and colleges) will likely have to amend their curriculum accordingly. At this stage, the lead examiners are not in a position to assess whether this would cover the situation of accountants who are already performing their functions – although the Ministry of Justice indicates its intention to issue a memorandum on the duty to report foreign bribery offences, to be sent to the ICPA for distribution to its members.

85. Moreover, beyond the issue of awareness and understanding of the duty to report, there is a concern that – given the language of Article 262 of the Penal Law – the exception to the above mentioned disallowance to disclose information does not apply to the discovery of an *already completed* act of foreign bribery (emphasis added). The Israeli authorities maintained that while this obligation is not set forth in law, it is circulated routinely to accountants via professional publications and instructions by the Accountants Chamber. However, a professional publication does not fulfil the requirement in Article 262 that exceptions to the non-disclosure obligation be provided in another Statute; the lead examiners believe that the doubt that may subsist within the accounting and auditing profession needs to be clarified.

86. During the on-site visit, panellists indicated that, in case of suspicion, they would go to management, and possibly to corporate monitoring bodies or to the general internal auditor within the ISA. Two panellists mentioned the possibility to resign and one to go to the police as a last resort. Some panellists indicated that they considered reporting a violation of the confidential relationship with their customers and that they would therefore only be obliged to report to management. The differing perception amongst the panellists of the required steps to take in such event shows a need for clarification.

### *(f) Accounting and Auditing of the Public Sector*

87. The accounting standards applicable to government companies are determined by the Israel Government Companies Authority (hereafter IGCA)[50] in accordance with the provisions of the Government Companies Law 1975. These are generally the same as those applicable in the private sector,

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49 In order to avoid this type of situation, the ISA allows for a pre-ruling procedure in which the independence of the auditing accountant is examined prior to the audit.

50 The IGCA is a professional unit of the Ministry of Finance.

and also include specific auditing standards that apply to government companies.[51] The State-owned Companies are overseen by the IGCA and the listed State-owned Companies are also overseen by the ISA. Independence of auditing accountants in government companies is guaranteed though provisions in the Government Companies Law 1975 and the IGCA circulars, in addition to the rules detailed above for companies in the private sector. Israel also emphasized that there are several disclosure requirements that differ from those applicable to the public companies, including the obligation to inform a Director and Chairman of the Board and CEO of violations of law and moral standards that come to the attention of accountants and auditors (Government Company Law 1975). The lead examiners noted that the specific rules applying to the Israeli government companies will need to be followed up in future reviews.

***Commentary***

***The lead examiners encourage the Israel authorities to: (i) review the effectiveness (with regard to the requirements of Article 8(1) of the Convention) of having provisions on the maintenance of books and records integrated in tax rules; (ii) continue their efforts to adapt the international financial reporting standards (IFRS) to the needs of non-registered companies; and (iii) continue their efforts to improve audit quality standards, including with regard to independence.***

***The lead examiners recommend that Israel take measures to encourage Israeli Companies to: (i) continue to develop and adopt adequate internal company controls and standards of conduct with a particular focus on the control of foreign operations and on compliance with the law criminalising foreign bribery; and (ii) extend the creation of corporate monitoring bodies, such as audit committees, to non-publicly traded companies, (iii) develop and strengthen these bodies and ensure that they are independent of management and have the effective power and competence to perform their full functions.***

***The lead examiners also recommend that Israel, in consultation with relevant professional associations: (i) develop and implement more stringent requirements to effectively ensure the independence of external auditors; (ii) take steps to encourage the detection and reporting of suspected bribery of foreign public officials by accountants and internal and external auditors, in particular through guidelines and training for these professionals and through raising the awareness of the management and supervisory boards of the Companies about these issues; (iii) require external auditors to report all indications of possible acts of foreign bribery by any employee or agent of the company to management and, as appropriate, to corporate monitoring bodies; and (iv) consider requiring external auditors, in the face of inaction after appropriate disclosure within the company, to report such suspicions to the competent law enforcement authorities.***

## 9. Anti-Money Laundering

88. Israel is an Active Observer in the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL). MONEYVAL conducted an on-site visit to Israel as part of its mutual evaluation process in November 2007, and adopted its report in July 2008. The MONEYVAL evaluators noted that, within its legal confines, Israel's Financial Intelligence Unit (the State of Israel Money Laundering and Terrorist Financing Prohibition Authority, or

51 A "government company" is a company in which more than half the voting power at general meetings, or the right to appoint more than half of its directors, is held by the Israeli State, or by the State together with a government company or with a government subsidiary (Article 1(a) of the Government Companies Law).

IMPA) performs its assignment in a well organised and professional manner resulting in a quality output. It made various recommendations for improvement, some of which have been implemented and others of which are still being considered by Israel.

### *(a) Reporting Requirements*

89. Transactions reporting requirements are governed in Israel by the Prohibition on Money Laundering Law 2000 (PMLL) and regulations applicable to different financial institution sectors.[52] Financial institutions must report two types of transactions. Firstly, cash and other transactions over certain values must be reported (known as "currency transaction reports", or "CTRs"). The applicable thresholds currently depend upon the type of transaction and the financial institution sector involved, resulting in a wide range of different thresholds applying. This was a feature criticised in 2008 evaluation of MONEYVAL. During the on-site visit, authorities from Israel's FIU advised that the cash transaction reporting threshold is to be standardised to transactions over the sum of 50 000 ILS (approximately 10 000 EUR or 13 000 USD).

90. The second type of transactions to be reported by financial institutions is unusual transactions. This is different to the more typical "suspicious transactions" reporting, and involves the automated reporting of transactions that fall outside the anticipated activity of a client (known as "unusual activity reports", or "UARs"). This relies on financial institutions conducting on-going "knowing your client" activities, which they are required to undertake under regulations applicable to them. This includes the obligation for banking corporations to check whether a customer is a politically-exposed person and considered a high-risk customer account.[53] The lead examiners were told that the system of unusual activity reports generates a higher volume of reports than would a practice of suspicious transactions reporting. Representatives from banking institutions confirmed that UARs do not require them to analyse whether a particular transaction is "suspicious" and that, so long as transaction falls outside a customer's profile, a UAR must and will be made. While this may be the case, the lead examiners remain concerned that this system of reporting may result in a failure to identify transactions that are disguised to appear like anticipated activity but which raise suspicions of money laundering.

91. Unusual activity reports are made to the Israeli FIU, an independent body established under the PMLL. The FIU is responsible for analysing UARs and CTRs and forwarding them to law enforcement as appropriate. To assist in this task, the FIU is empowered under the PMLL to obtain information (including information normally subject to bank secrecy) from reporting entities. The FIU also shares information spontaneously with its foreign counterparts. According to the FIU, it takes only a day or so to process a UAR, after which a decision would be made as to whether to pass the information on to the police.

92. Israel's FIU has sophisticated technical and other resources. It operates a secure information processing system which houses the data accumulated from unusual reports. The system is equipped with anti money laundering software that provides alerts to FIU analysts in cases of independent reports or compiled reports that meet defined characteristics. The tool also provides alerts based on a "Watched Entities" list, maintained by the FIU. The FIU employs 30 staff, most of whom are graduates in relevant

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52 Ordinances are applicable to currency service providers, portfolio managers, provident funds, members of the stock exchange, insurers, and the Postak Bank. Steps are being taken to make reporting obligations applicable to the precious stones sector.

53 A politically-exposed person is defined by the Proper Conduct of Banking Business Directive No 411 as a non-resident who holds an important public position abroad, such as heads of state or cities, senior politicians, senior government, judicial or military officials, and officials of political parties, and includes their spouses, and companies under their control.

subjects1. Israel also operates a "Fusion" integrated intelligence centre through which raw data from the Police, the Tax Authority, and the FIU is processed.

### *(b) Typologies and Guidelines*

93. Orders applicable to each reporting institution include examples of what constitutes an unusual transaction. In the case of banks, Schedule 3 of the Order includes (for example): transactions that seem unusual for the account in view of the routine activity characterising the relevant account on the basis of past experience and the nature of the customer's business; and transfers of substantial amounts from Israel abroad and vice versa, where the counterparty to the transaction, whether the source of the recipient, is not identified by name or account number.

94. The FIU provides training and holds seminars for financial institutions on the detection and reporting of transactions. It has also provided reporting entities with a manual on how to identify UARs, and on procedures for reporting. This manual focuses on the identification of transactions that fall outside the anticipated activity of a customer. Typologies and sanitised cases have been provided to insurers and insurance agencies, and the FIU publishes guidelines, typologies and other relevant information on its website. However, the FIU does not provide information about the offences predicate to money laundering. At the on-site visit, the FIU explained that this information was not required by reporting entities, since UARs focus on whether a transaction is within the anticipated activity of a customer rather than on the nature of the transaction. The lead examiners remain concerned, however, that lack of knowledge about predicate offences by reporting entities may result in a failure to identify transactions which are disguised to appear like anticipated activity but which raise suspicions of the laundering of money from predicate offences such as the foreign bribery offence.

95. As well as training and information available from the FIU, the Banking Supervision Department of the Bank of Israel provides banking corporations with guidelines and typologies relating to UARs, including training for banks' compliance officers.

### *(c) Sanctions for Failure to Report*

96. Responsibility for enforcing the transactions reporting system is shared by the FIU and each regulatory body overseeing the different financial institution sectors. There is no predetermined frequency for inspection of banks, although the lead examiners were told during the on-site visit that banking institutions are examined each two to three years. Money services businesses are subject to regular inspection by the Ministry of Finance, with approximately 40 inspections carried out each year. The examination of insurance companies and provident funds is conducted according to an annual work plan. The ISA conducts inspections of members of the Exchange which are not banks, as well as of portfolio managers. Examinations are conducted on notice (one or two months ahead of the evaluation), giving the institution a list of documents to be provided and identifying matters to be evaluated.

97. Deficiencies found during the course of an examination will in the first instance result in a direction to the institution to remedy such deficiencies. Consideration will then be given to whether the matter should be referred to one of the Sanctions Committees, which are made up of two representatives from the relevant regulatory body, plus one representative from the FIU. Violations may be sanctioned by fines of up to 2 000 000 ILS (approximately 370 000 EUR). If a currency provider is itself found to have committed a money laundering offence the institution must be disqualified (Articles 11E and 11I of the PMLL), although this has never occurred.

***Commentary***

***Israel's Financial Intelligence Unit appears to operate in a well organised and professional manner. Notwithstanding this, the lead examiners have some concerns about the efficacy of "unusual activity reports", as opposed to the reporting of "suspicious" transactions, particularly given the lack of information provided to reporting entities about predicate offences and the vast amount of unusual transaction reports provided to the FIU. This should be followed up in future monitoring work.***

## C. INVESTIGATION, PROSECUTION AND SANCTIONING OF FOREIGN BRIBERY AND RELATED OFFENCES

### 1. Investigation and Prosecution of Foreign Bribery

#### *(a) Law Enforcement Authorities*

*(i) Israeli Police*

98. The Israeli Police has primary authority for the detection and investigation of criminal activity in Israel. Until January 2008, there were several national units within the Israeli Police capable of investigating corruption. As part of Israel's national plan to fight corruption, these units were brought under the direction of one body called "Lahav 433".[54] Lahav 433 was established on the basis of existing financial and human resources within its component units. However, Israeli authorities state that the National Fraud Unit (the main branch of the Israeli Police responsible for combating corruption, which operates under the umbrella of Lahav 433) was significantly strengthened in its financial and human resources, including enhanced access to professional, investigative and intelligent support systems.

99. The Ministry of Public Security (responsible for the Israeli Police) has been working in partnership with the Ministry of Justice to promote awareness of the foreign bribery offence amongst Lahav 433. Officials from Lahav 433 attended a conference regarding the offence and the Convention held on 3 May 2009. The conference included presentations by the Inter-Ministerial Committee on Combating Bribery and senior officials from the OECD. A large contingent from the Israeli Police met with the lead examiners during the on-site visit and appeared to be well aware of the offence. Staff in Lahav 433 receive special training on matters such as the analysis of bank records and the use of specialised software.

*(ii) State Comptroller and Ombudsman*

100. The Office of the State Comptroller specialises in reviewing Israeli Government activities. This includes jurisdiction over State-owned enterprises and their subsidiaries, including water and railway transport providers, and three defence industry companies. The State Comptroller also inspects any non-governmental entity, such as government-supported not-for-profit associations, if requested by the Knesset.

101. The main issues examined by the State Comptroller are those pertaining to legality and good governance, proper budgetary spending, efficiency, effectiveness and governmental integrity. Over the last

[54] For a description of these units, see the Phase 1 report on Israel, para 109.

three years, the State Comptroller has published 51 reports concerning cases of corruption or bribes in different matters. Since 2005, the State Comptroller's Division for Special Functions has been charged with reviewing the fight against corruption, and 20% of the workload of other divisions has been focussed on corruption within their respective areas of expertise. The Division for Special Functions is currently devoted exclusively to overseeing the work of governmental and other bodies in cases related to corruption by high ranking government officials. Authorities explain, however, that the jurisdiction of the State Comptroller is excluded where allegations or suspicions concern criminal activity, in which case the information should be brought to the attention of the Attorney General.

### *(b) Prosecutors*

#### *(i) Structure and training*

102. The Attorney General, who is in charge of law enforcement and the representation of the State before the courts in all legal areas, as well as professional responsibility over public prosecutors, heads the public prosecution in Israel. While the Israeli Police has Prosecution Units that are capable of undertaking public prosecutions, the body responsible for the prosecution of corruption and bribery offences, including bribery of foreign public officials, is the State Attorney's Office.

103. The State Attorney's Office is divided into a National State Attorney's Office and six District Offices. The National Office is itself divided into 12 departments, of which the Criminal Department handles criminal cases, and the Economic Department handles economic crimes and white-collar felonies. District Offices are in charge of criminal prosecution within their respective districts' jurisdiction. This involves examining and evaluating evidence gathered by the Israeli Police, and deciding, based upon an assessment of the evidence, whether to prosecute. Where prosecutions are commenced, the District Office is responsible for all aspects of procedures before the court. From a practical perspective, the State Attorney's Office holds overall responsibility for the prosecution of foreign bribery cases. The actual proceedings would most likely be conducted by the Economic Department of the State Attorney's Office or, in less complex matters, by one of the District Offices. In most cases, the District Office that would prosecute the case would be the one in whose jurisdiction the offence was committed, or where the defendant resides.

104. Senior officials from the State Attorney's office have been involved in raising awareness of the foreign bribery offence amongst prosecutors. This includes the attendance by prosecutors at a conference regarding the offence and the Convention held on 3 May 2009 (referred to earlier).

#### *(ii) Prosecutorial independence*

105. The Attorney General (AG) and the staff of the State Attorney's Office operate independently from elected officials. In prosecutorial matters the AG is not bound by the decisions or policies of either the government or the Minister of Justice.[55] The Attorney General, and all prosecutors answerable to the AG, are required to perform their functions and exercise their authority in criminal matters independently, including in cases involving public figures, such as acting Ministers, the Prime Minister and the President.[56]

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55 Attorney General's Guidelines 4.1000 (51.000A) "Independent Power of the Attorney General – Criminal Proceedings".

56 Attorney General's Guideline 4.2200 (90.004) "Investigation of Public Figures".

106. The Government appoints that Attorney-General from amongst candidates recommended by a permanent professional Public Committee.[57] The Committee is headed by a former Supreme Court Justice (who is nominated by the Chief Justice with the consent of the Minister of Justice) and includes four other members: a former Minister of Justice or a former Attorney General, nominated by the government; a member of the Knesset, nominated by the Constitution, Law and Justice Committee of the Knesset; a private attorney, nominated by the Israel Bar Association; and an academic scholar with expertise in the fields of public law and criminal law, nominated by deans of the law faculties.

107. The Attorney General serves a single six-year term, but this term would automatically expire if s/he reaches the age of 70 during this period. The Government can remove the Attorney-General from office, in consultation with the Committee, in the following cases: (i) where there have been substantial and prolonged differences of opinion between the Government and the Attorney-General resulting in inability to cooperate effectively; (ii) where the AG has acted in an improper manner not befitting his status and position; (iii) where the AG is no longer capable of performing his duties; or (iv) where the AG is subject to a criminal investigation or to an indictment presented to the court.

108. The Attorney General is required to exercise his authorities in the area of prosecution, using independent discretion and without being subject to the orders or policies of the Government or the Minister of Justice.[58] In cases having special political, security, or public importance, the Attorney General will consult, depending on the matter and the need, with the Minister of Justice, with another Minister, or with the Government. Where there are differences of opinion, the final decision is made by the Attorney General. Israeli authorities state that such consultations are reserved for highly exceptional cases, in order to prevent, to the extent possible, the involvement of political figures in decisions in the criminal field.

### *(c) The Conduct of Investigations and Prosecutions*

109. During the on-site visit, the lead examiners were told that the Attorney General had decided to establish an inter-Ministerial team on foreign bribery for the purpose of formulating guidelines on the investigation and prosecution of the foreign bribery offence. While the lead examiners welcomed this step, they were surprised that this was necessary and, if necessary, that the team to establish these guidelines was not convened until almost one year after the foreign bribery offence entered into force in Israel. Since the on-site visit, Attorney General Guideline No 4.1110 on the foreign bribery offence was adopted (see Annex 4 herein). These Guidelines relate to various aspects of the investigation and prosecution of foreign bribery in Israel and are referred to, as applicable, in each of the following sections of this report. Israeli authorities have indicated that the adoption and circulation of these Guidelines have contributed to the raising of awareness of the foreign bribery offence within the public sector.

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57 Government Decisions 2274 of 20.08.2000 and 1773 of 10.6.2007.

58 Attorney General's Guidelines 4.1000 (51.000A) "Independent Power of the Attorney General – Criminal Proceedings". See also Attorney General's Guideline 4.0000 (Independent Power of the Attorney General – Criminal Proceedings), which cites the report of a special commission of jurists, appointed by the government in 1962 to examine the question of the status and powers of the Attorney General, including the power to stay legal proceedings against defendants. According to the Committee's report, as cited in the Guideline "the Attorney General must exercise the criminal powers given him based on independent judgment and without being subject to the orders or policy of the government or of the Minister of Justice."

*(i) The commencement of investigations*

110. According to Article 59 of the Criminal Procedure Law 1982 (CPL), the Israeli Police is obliged to initiate a criminal investigation whenever it receives information regarding an offence. Suspicions of criminal conduct can be reported to the Israeli Police through the general emergency phone number for reporting suspicions of crimes; by filing complaints in person at the various police stations around the country; by sending a written complaint to the Investigative and Intelligence Department; or through the general website of the Israeli Police. The information received is then referred to the relevant investigative unit. During the on-site visit, Police stated that information from media reports were sufficient to trigger an investigation and that units within Lahav 433 were responsible for conducting media reviews and data mining. Despite this, however, Police also told the lead examiners that allegations in the media concerning the possible bribery of foreign public officials by Israeli companies (see section A(2)(d) above) had not lead to the opening of an investigation. Since the on-site visit, law enforcement authorities have gathered further information in order to carefully consider whether the allegations merit a formal investigation. AG Guideline No 4.1110 instructs the Police that, where it learns of any suspicion of an offence of foreign bribery, regardless of the source of such information, the information must be looked into in order to determine whether there is a sufficient evidentiary basis to merit the opening of a formal investigation (paras 1 and 2 of the Guideline). This decision must be made by the Head of the Investigation and Intelligence Unit of the Israeli Police (para 4).

111. While the Israeli Police operates autonomously when conducting its investigations, the lead examiners heard that there is a good level of cooperation between the Police and the State Attorney's Office. In complex or sensitive matters, Police investigations will often include guidance from prosecutors on legal or procedural issues. Police stated during the on-site visit that an investigation into the conduct of companies or persons in the defence industry would be regarded as involving special sensitivity. Although not required to do so by law, Police explained that they would – in such cases – inform the Attorney General and the Ministry of Defense before opening a formal investigation. In the case of offences in respect of which the consent of the Attorney General must be obtained for a prosecution to commence, Police will also liaise with the State Attorney's Office.

112. Article 60 of the CPL requires law-enforcement authorities to provide the materials obtained in an investigation into any felony offence to the District Attorney (reflected in paras 5 and 6 of AG Guideline 4.1110). The prosecution can require the Israeli Police to continue the investigation if there is insufficient material to lay an indictment (Article 61).

*(ii) The commencement of prosecutions and the need for consent from the Attorney General*

113. Following the referral of an investigation by the Israeli Police to the State Attorney's Office, the prosecution will examine and evaluate the evidence gathered. Where it appears to the prosecutor that there is sufficient evidence to issue an indictment, the offence *must* be prosecuted unless the prosecutor is of the opinion that there is "no public interest" to prosecute. In the case of referrals concerning the foreign bribery offence, only the Deputy State Attorney (Special Functions) may make such a decision and, after reviewing the Police file, must make a recommendation to the Attorney General as to whether to file an indictment or to close the case (AG Guideline 4.1110, para 5).

114. Any prosecution of foreign bribery will require the consent of the Attorney General, arising by operation of two provisions.[59] First, Article 291A(b) provides that no indictment in respect of the foreign

[59] There are no set procedures for the process and timeframe for obtaining the Attorney-General's consent under these provisions. Israeli authorities explain that the relevant investigating unit normally refers an

bribery offence under Article 291A can be issued without the prior written consent of the AG, or of a person to whom that authority has been delegated (see also para 7 of AG Guideline 4.1110).[60] Secondly, even if this was not an express requirement of Article 291A, Article 9(b) of the Penal Law requires the consent of the Attorney General, or delegates, for the prosecution of any "foreign offence" (see also para 8 of AG Guideline 4.1110).[61] The AG may refuse to give consent to a prosecution if there is a lack of public interest.

*(iii) Non-commencement of prosecutions for lack of "public interest"*

115. As a result of the foregoing, there are two situations where the prosecution of a foreign bribery offence might not come about due to a lack of "public interest": (i) if a prosecutor decides not to issue an indictment for this reason; or (ii) if the Attorney General refuses to give consent to prosecution for the same reason.

116. According to the High Court of Justice decision in *Ganor v The Attorney General*,[62] and the State Attorney's Guideline Number 1.1 (Considerations for Closing a Case due to Lack of Public Interest), the underlying assumption is that if the legislator determined that a certain kind of behaviour constitutes an offence, there is a public interest to prosecute suspects of such behaviour.

117. Because Guideline No 1.1 does not explicitly exclude consideration of matters prohibited by Article 5 of the Convention, the Working Group urged Israel in Phase 1 "to take steps to expressly clarify that the Attorney General's Guidelines on Considerations for Closing a Case due to a Lack of Public Interest do not permit consideration of matters prohibited by Article 5 of the Convention". Attorney General Guideline 4.1110 addresses this recommendation, stating that: "Among the considerations as to whether to open an investigation or to prosecute for this offence, considerations concerning national economic interests, potential effect on the relations with a foreign country, or the identity of the person or the corporation involved, can not be taken into consideration." (para 3).

118. The prosecution may terminate proceedings at any stage after an indictment has been presented by cancelling the indictment. Cancellation of an indictment after arraignment normally results in acquittal, although Article 93 of the CPL prevents the prosecution from cancelling an indictment where the defendant confessed to facts that would be sufficient to secure a conviction. Under Article 5 of the CPL, the Attorney General may not reinstate criminal proceedings against a defendant who has been acquitted, even if new evidence has been received which tends to prove guilt.

119. The Attorney General (or delegates) can also order a stay of criminal proceedings at any time after the presentation of the indictment and before sentencing.[63] Under Article 94(b) of the CPL, the

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investigation file to a prosecutor at the relevant District Attorney's (Criminal Division) office. Police will normally indicate whether there appears to be an evidential basis to prove the offence, although this does not amount to a recommendation to the prosecution service. The prosecutor examines the material and is will give an opinion on the indictment. Where the AG's consent is required, the file will then be referred to the Attorney-General's Office.

60 The provision includes, as potential delegates, the State Attorney, the Deputy State Attorneys, and the Director of the Criminal Department of the State Attorney's Office

61 The bribery of a foreign public official would be a foreign offence where no part of the offence took place within the territory of Israel.

62 *Ganor v The Attorney General* (1989) PD 42(2) 485.

63 A stay of proceedings can be made on a conditional basis (Article 231 of the CPL), including upon a commitment to refrain from future offending, a condition (in the case of public officials) requiring the

prosecution and defence may mutually request the court to stay proceedings. The outcome in such cases will not be an acquittal, although the reinstatement of criminal charges can only occur with the consent of the Attorney General and, in the case of a felony offence such as the foreign bribery offence, provided that this occurs within five years from the date of the stay of proceedings. The prosecution is not limited to any specific grounds in its decision to withdraw an indictment, although it is common practice for reasons to be given.

***Commentary***

***The lead examiners welcome the inclusion in Attorney General Guideline No 4.1110 of an express clarification that decisions as to whether to open an investigation or to prosecute the foreign bribery offence cannot include the consideration of matters prohibited by Article 5 of the Convention.***

*(iv) Plea-bargaining*

120. The prosecution and defence can reach a settlement on specific factual details in the indictment which may form the basis for a guilty plea, and the corresponding sentence. A mutually agreed sentence either relates to a specific sentence, or an agreement to limit arguments in the sentencing phase of the trial to an agreed range of sentences. A plea-bargain must be approved by the court and be affirmed as a judgment. Plea-bargaining arrangements are not currently codified into law, but a Bill on the subject was published for consultation in July 2009. Plea-bargaining has been used in active domestic bribery cases in Israel.[64]

121. Plea bargains have been concluded in domestic bribery cases in accordance with State Attorney Guideline No 8.1. According to the Guidelines, a plea bargain may be used where it is in the "public interest" to do so. Although Guideline 8.1 does not expressly exclude consideration of factors prohibited by Article 5 of the Convention, consideration of such matters is expressly precluded under AG Guideline 4.1110 (para 3). Authorities explain that, because Guideline 4.1110 applies to decisions as to whether to prosecute the foreign bribery offence, this applies to any decision of whether to enter into a plea-bargain agreement.

### *(d) Investigative Techniques and Bank Secrecy*

122. Under Article 32 of the Criminal Procedure Ordinance, the Police may seize an object when there is reason to believe that: (i) the object was used, or is about to be used, for the commission of any offence; or (ii) that it is likely to serve as evidence in a legal proceeding; or (iii) that it was given as payment for the commission of an offence or as means of committing it. According to Article 1 of the Ordinance, the definition of an "object" includes, but is not limited to, certificates, documents, computerised materials or animals. In *Association of Independent Jurists v State of Israel*, the Court held that the definition in Article 1 is not exhaustive, and that its aim is to expand the regular meaning of the term "object".[65] The Court gave a broad interpretation to the term "object", to include also intangible assets, for example, a bank account.

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instigation of disciplinary proceedings against the official, or a voluntary agreement to supervision by the Israeli Probationary Authority.

64 The prosecution entered into a plea-bargain agreement, for example, with the active briber of Knesset Member Benizri. The agreement included provision for the person to testify in the prosecution case against Mr Benizri.

65 *Association of Independent Jurists v State of Israel* PD 55(1) 657.

The power to seize an object under Article 32 would therefore appear to include the bribe as well as its proceeds. The authority under Article 32 is discretionary, although there is no need for police to obtain a court order to exercise this power. AG Guideline 4.1110 on foreign bribery investigations and prosecutions specifies that, in cases where an investigation is opened, the Israeli Police must consider whether it would be possible to forfeit the bribe, its worth, or its proceeds, and must collect evidence for this purpose (para 10).

123. A range of coercive measures, including wire tapping, is available to Israeli Police in the investigation of offences. Such measures require court orders, which would be issued where "reasonable cause to suspect" can be shown by the Police.

124. Although there have been no foreign bribery prosecutions in Israel, search, seizure, and confiscation orders have been routinely used in domestic bribery cases and fraud-related cases. This has included accessing bank records and freezing bank accounts.[66] Israeli authorities advise that, where pre-trial seizure is not available, monetary sanctions cannot be imposed as an alternative measure. Civil forfeiture might be available, however, if a bribe and its proceeds are laundered.

***Commentary***

***The lead examiners recommend that the use of investigative techniques in foreign bribery investigations in Israel be followed up, including in the area of accessing bank records.***

### *(e) Mutual Legal Assistance and Extradition*

#### *(i) Mutual Legal Assistance*

125. Legal assistance in criminal and civil matters, with respect to both natural and legal persons, is governed by the International Legal Assistance Law 1998 and the International Legal Assistance Regulations 1999. Where a request is made of Israel for legal assistance, Article 8 of the 1998 Law allows Israeli authorities to conduct any form of assistance requested as if the matter to which the request relates had occurred and was being investigated in Israel, subject to the requirement that the assistance must not violate Israeli law. Thus, for example, privacy protections pertaining to the conducting of wiretaps in Israel would apply as well to wiretaps conducted on the basis of international requests. Israel's legal assistance provisions are broad in their availability in two respects: dual criminality is not a prerequisite for the granting of legal assistance; and the granting of legal assistance does not rely on the existence of an applicable treaty between it and the requesting State.

126. The Competent Authority for the granting of legal assistance is the Minister of Justice. The Minister of Justice may postpone legal assistance where immediate performance of the requested assistance would interfere with the conduct of a pending criminal trial in Israel, or would cause unreasonable harm to some other legal proceeding (Article 6(a)). Article 5 provides a number of discretionary bases upon which the Minister is permitted to refuse assistance, including that performance of the act involves an unreasonable burden on the State (Article 5(a)(7)). Refusal on this basis is explained to mean that extraordinary expense and use of resources would be incurred in comparison to the purpose of the request (i.e. the seriousness of the offence being investigated). In one such case in the past, involving significant costs for obtaining information from a telephone service provider, Israeli authorities requested that these costs be borne by the requesting country. Authorities advise that the use of Israeli law

[66] See Israel's responses to the Phase 2 questionnaire, paras 205-209.

enforcement manpower in a serious criminal case would not normally be considered to be an unreasonable burden justifying refusal of a request.

127. Bank secrecy is not one of the grounds permitting refusal of MLA, and authorities advise that requests for legal assistance are rarely refused. The most common reason for refusals is said to have been for requests that would have involved disclosure of sensitive military or security information. Delays may occur, however, based on problems with imprecise or insufficient descriptions of information in the request. Where this is the case, authorities will ask the requesting country to provide supplementary information. In complex cases, this may take some time. Authorities state that requests for information from a financial institution or information about a company can be speedily executed because of the management by Israel of corporate databases and the limited number of banking institutions in Israel.

128. Despite these assurances, the lead examiners are seriously concerned by the lack of resources dedicated to dealing with incoming and outgoing MLA requests. The Directorate of Courts should normally receive incoming requests. The Directorate reviews requests in order to determine to whom they should be routed for further review, which will either be the Israel Police Legal Assistance Unit or the Courts. In practice, virtually all incoming MLA requests in criminal matters are forwarded to the Police Legal Assistance Unit. Between 2002 and 2008 inclusive, this Unit received an average of 205 incoming legal assistance requests per year. It made an average of 105 outgoing requests per year between 2006 and 2008 inclusive. In the case of incoming and outgoing requests dealt with by the Police Legal Assistance Unit, these requests are disposed of by a team of just three staff.

129. The functioning of legal assistance in Israel was recently the subject of a two-year examination by an inter-Ministerial committee, headed by the Deputy State Attorney for Criminal Matters. The Committee made recommendations for the improvement of procedures in dealing with MLA, which are yet to be fully implemented. In early 2009, the Police had decided to double the size of the Police Legal Assistance Unit from three personnel to six. Since the on-site visit, Israeli authorities advised that this increase in staffing has been budgeted for and that one of the three positions has been filled. During the on-site visit, a representative from the Police Legal Assistance Unit expressed the view that this increase in manpower would not be sufficient, although the representative acknowledged that an increase in staffing would improve the overall treatment of MLA requests.

130. Furthermore, where a request is granted in principle, there will in some cases be a need to obtain a court order. In light of the observations concerning court delays and a lack of resources in the Israeli administration and judiciary (see part C(2)(a) above), this may further prevent Israel from being able to provide prompt legal assistance.

131. The lack of capacity of the Police Legal Assistance Unit to deal with the number of incoming requests is borne out by information received from a Party to the Convention about its experiences with requests made of Israel for legal assistance. The Party concerned reported frequent delays in receiving legal assistance from Israel, and gave details of five examples. At the on-site visit, a representative from the Police Legal Assistance Unit said that one of these requests (sent 25 August 2008, followed up in March 2009, and concerning the defrauding of a telecommunications company) was not known to him; that three others, sent June 2006 (concerning the protection of personal data), February 2007 (concerning a tax offence), and January 2008 (concerning use of a counterfeit letter of attorney), were not dealt with due to the prioritisation of other requests; and that one other had been understood to be closed (the Party's reminder of May 2009 was reportedly not received by Israel). Although these requests did not relate to the foreign bribery offence, most involved economic crimes. The Israeli Police advised that it receives an average of 20 legal assistance requests per year from the Party concerned and that, of those requests, it had actioned 3 in 2005; 7 in 2006; 5 in 2007; and 3 in 2008. This represents an average of less than a quarter of received requests being actioned over that period.

***Commentary***

***The legislative framework in Israel for dealing with mutual legal assistance appears satisfactory. Even with the planned increase in staffing of the Police Legal Assistance Unit, however, the lead examiners consider that resources dedicated to dealing with MLA requests by the Police are significantly inadequate in light of the number of incoming and outgoing legal assistance requests over the past ten years. Statistics provided by Israel, and information received on experiences with MLA requests to Israel, cause the lead examiners to conclude that Israel does not currently have the resources in place to provide prompt and effective legal assistance (Article 9(1) of the Convention). The lead examiners recommend that urgent steps should be taken by Israel to address this, and that the matter continues to be followed up in the future.***

*(ii) Extradition*

132. Israel's Extradition Law 1954 permits the extradition of persons who are accused or have been convicted in the requesting State of an extradition offence, being an offence for which the punishment is imprisonment for one year or more (Article 2A(a)(2)). As an offence punishable by up to three and a half years imprisonment, the foreign bribery offence qualifies as an extradition offence. Any extradition request must be made pursuant to an extradition agreement in place between the State of Israel and the requesting State (Article 2A(a)(1) of the Extradition Law).[67]

133. The Department of International Affairs in the State Attorney's Office, in the Ministry of Justice, deals with both incoming and outgoing extradition requests and serves as the Attorney General's representative in extradition proceedings. Department attorneys examine the evidentiary material that accompanies incoming extradition requests, check whether the conditions for extradition set out in Article 2A are met, and whether there are any applicable restrictions under Article 2B. The request for extradition is then submitted to the Minister of Justice, who may direct that a petition be submitted to the Jerusalem District Court, requesting that the wanted person be declared extraditable, in accordance with Article 3 of the Extradition Law. The decision of the District Court is subject to appeal to the Israeli Supreme Court sitting as the High Court of Justice.

134. Authorities advise that the time taken for considering and acting upon extradition requests depends on the clarity and sufficiency of information provided in support of requests. Information received from a Party to the Convention referred to an extradition request made to Israel in 2003. Israeli authorities requested and received additional information from the Party concerning the request. Following the on-site visit, Israeli authorities reported that they had been prepared to obtain a judicial extradition order at the end of 2006 but that, because the Party made a further request concerning the person's brother, authorities delayed the court proceedings to prevent both persons from fleeing Israel. The Party concerned reports that it has received informal explanations pointing to high workloads by Israeli authorities, as well as the need to deal with other extradition requests considered to be of higher priority.

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67 Article 2A(c)(1) clarifies that this can include a multilateral convention containing extradition provisions and Israeli authorities state that the Convention could thereby serve as an extradition agreement for the purposes of Article 2A(a)(1) of the Extradition Law (in compliance with Article 10(2) of the Convention). Article 2A(c)(2) also allows Israel to conclude ad-hoc agreements for the extradition of persons. Israel is also party to a number of bilateral extradition treaties, including with the United States, Canada, and Australia.

***Commentary***

***The lead examiners are concerned that, as with mutual legal assistance, there may be a lack of resources dedicated to extradition requests. They consider that this is a matter that should be followed up in the future.***

## 2. The Offence of Foreign Bribery

### *(a) Elements of the Offence*

135. Article 291A of the Penal Law 1977 makes it an offence to bribe a foreign public official. The offence under Article 291A extends the application of the domestic offence of active bribery to the bribery of a foreign pubic official. Therefore, apart from the purpose of the bribe and the definition of the term "foreign public official", the elements of the offence are identical to those for the domestic offence of bribery. In extending this offence, the law does not *specifically* clarify that the elements of the offence are the same, but provides more ambiguously that the person who commits an offence of foreign bribery should be treated in the same manner as a person who commits an offence under Article 291. Israeli authorities explain that the main reason for this extension is to allow the application of existing interpretative case law to the foreign bribery offence.

136. Israeli law contains an interpretative presumption that the laws of Israel should correspond with Israel's international obligations. The Supreme Court has repeatedly held that any legislation, including the Penal Law, must be interpreted on the basis of this presumption, as much as it is possible to do so, to avoid any contradiction between domestic law and international conventions in respect of which Israel is a party.[68] Notwithstanding this, the lead examiners in Phase 1 took the view that consideration should be given to the way in which Israeli courts apply the foreign bribery offence as an extension of the domestic offence of active bribery. Since there have been no such cases in Israel, this is a matter that should be followed up in the future.

#### *(i) Definition of "foreign public official"*

137. Article 291A(c) of the Penal Law contains an autonomous definition of "foreign public official". This definition is very broad and covers the categories of foreign public officials required of Article 1 of the Convention. The definition expressly includes "the legislative, executive or judiciary branch of the foreign country, whether by appointment, by election or by agreement". It also expressly covers public entities "over which the foreign country exercises, directly or indirectly, control". Israel has taken a positive step by clarifying this coverage directly in the law. Israeli authorities explain that this part of the definition also applies where more than one foreign government exercises such control, including in the case of State-owned enterprises, in accordance with Commentary 14 to the Convention.

138. Authorities further explain that direct or indirect "control" is normally understood to mean the ability to direct the activities of the entity in question. This would normally be presumed when the foreign country holds a majority of the means of control in the entity, although there would be circumstances in which holdings of less than a majority of the means of control would be considered as "control".

[68] See, for example: *Horev v State of Israel*, Crim. A. 9937/01, PD 58(6) 378; and *Kamiar v State of Israel*, Crim. A. 131/67, PD 22(2) 85, 112. One such example is the reference to the OECD Anti-Bribery Convention in *Hydrola v Tel-Aviv Income Tax Assessor* (CA 6726/05, Tak-al 2008(2), 3135 (2008)), even before Israel became a Party to the Convention, where the court referred to the Convention to hold that bribes paid abroad cannot be tax deductible.

Authorities advise that the most frequently used definition of "control" is set down in Article 1 of the Securities Law 1968.[69] When clarifying the meaning of the term, the Supreme Court of Israel has stated that there does not necessarily need to be a direct link between the share of the capital owned and the extent of control, and the quantity of the means of control in hand does not necessarily testify as to the ability to influence the corporation's management, but that: "The real issue when determining control is the degree to which a share holder can in practice influence decision making in the firm", which must be determined on a case by case basis, according to the particular circumstances of the situation.[70] This appears to be consistent with the requirements of the Convention.

*(ii) Bribes for the benefit of a third party*

139. Article 291A does not expressly apply to the case where the bribe is for the benefit of a third party. Article 293(5) clarifies, however, that bribery includes a situation where the bribe is given to a third party. This appears to cover situations where a bribe is transferred directly to a third party, on behalf of the public official, which is consistent with Israeli case law relating to domestic bribery. It also appears to cover a situation where agreement is reached between the briber and the foreign public official to transmit the advantage directly to a third party for that third party's benefit.[71] In Phase 1, the Working Group remained uncertain whether Article 293(5) would apply to all cases where the bribe is given to a third party for the benefit of the third party. Article 293(5) provides that, in connection with a bribe, it is immaterial:

> …whether it is given personally by the person who gives it or through another person; whether it is given directly to the person who takes it or to another for him; whether it is given in advance or after the event; and whether it is enjoyed by the person who takes it or by another.

140. Israeli authorities have pointed to case law which leads to the conclusion that the public official needs to have known at some stage (even if only when the bribe was proposed) that the third party would be a beneficiary of the bribe.[72] Authorities state that they are confident that there is no requirement that the public official him or herself nominate or request that the third party be a beneficiary of the bribe and that knowledge on the part of the public official is sufficient. Assuming this is correct, then if a bribe is given to a third party, this need not be at the request of the foreign public official, although the fact of giving the bribe to the third party must be known to the official at some stage (up to the receipt of the bribe by the third party). This would not appear to be problematic.

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69 Control is defined under Article 1 of the Securities Law as "the ability to direct the activity of a corporation, excluding an ability deriving merely from holding an office of director or another office in the corporation, and a person shall be presumed to control a corporation if he holds at least half of a certain type of means of control of the corporation".

70 *"Dagesh" Foreign Trade (Shipping) Ltd v the Port Authority (Israeli Ports, Development & Assets Company, Ltd)*, Administrative Petition 4011/05, Tak-Al 2008(1), 2109, at p. 2129.

71 The Israeli Supreme Court held in *Algarisi v State of Israel* that an act of domestic bribery occurred even though the bribe was given for the benefit of a municipal sports organisation, rather than for the personal benefit of the public official – see *Algarisi v State of Israel*, Cr.A 8027/04.

72 See: *State of Israel v Oded Tal* (Tel Aviv Magistrate) 8438/03 (9 September 2008); *State of Israel v Benizri and Elbaz*, (Jerusalem District) 2062/06 Tak-Mach 2008(2), 1 (confirmed on appeal to the Supreme Court); *Armon Atias v State of Israel*, CA 6916/06 Tak-Al 2007(4), 653; and *Rafael Levi v The State of Israel*, CA 355/88, PD 43(3), 221.

*(iii) Performance of official duties by the foreign public official*

141. Article 291A(a) of the Penal Law provides that the bribe must be given to the foreign public official for "an act in relation to his functions". The Hebrew wording of this expression is identical in the offence of domestic bribery under Article 290. Case law has interpreted this wording as signifying any act performed in relation to the public official's function, including cases where the public official was not authorised to perform such acts.[73] Case law has also held that if a public official has been given a benefit by a person with whom he has an official connection, a presumption of fact arises that such benefit was given for an act related to his function as a public official.[74]

142. As a factual presumption, the burden of disproving the presumption rests with the accused. The presumption has been applied on a case-by-case basis, including in cases where the person was a subordinate (and also a friend of the public official)[75] and a fiancée.[76] The application of the presumption applying to the case of a bribe from a person with whom a public official has an "official connection" is therefore broad and would not appear to restrict the application of bribery offences in Israel.

***Commentary***

***The offence of foreign bribery in Israel appears to conform to the requirements of Article 1 of the Convention. Since there have been no foreign bribery prosecutions in Israel, however, the lead examiners take the view that, in future evaluations, consideration should be given to the way in which Israeli courts apply the foreign bribery offence as an extension of the offence of domestic active bribery.***

***(b) Defences and Exemptions from Prosecution***

*(i) Defences applicable to the attempted commission of an offence*

143. Article 28 of the Penal Law provides a defence to the attempted commission of an offence, where a person (of his or her own accord) abstains from completing an act, or substantially contributes to preventing the consequences on which the completion of the offence depended.[77] The Supreme Court of Israel held in *Ronen v State of Israel* that the scope of the offence of bribery is broad enough to cover, as a complete offence, acts that would normally be considered as acts of preparation or attempt. It therefore appears that Article 28 would not act as a defence to the foreign bribery offence under Article 291A.

144. Furthermore, Israeli authorities explain that a person who conspired to commit an offence and decides not to proceed with the principal offence can still be criminally liable for the offence of

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73 See, for example: *Covilio v State of Israel*, CA 534/78 PD 34(2), 281 (1979); *Eliezer Buzaglo v State of Israel*, ACA 3352/06 Tak-Al 2008(2), 3421; and *Nathanial Trytel v State of Israel* CA 5822/08.

74 *State of Israel v Ben Atar*, 53 PD (4) 695, para10.

75 *State of Israel v Hatum* (Nazareth Magistrate) 2741/07.

76 *Armon Atias v State of Israel*, CA 6916/06 Tak-Al 2007(4), 653.

77 Article 28 of the Penal Law provides that: "A person who attempts to commit an offence shall not bear criminal liability for the attempt if he proves that, solely of his own accord, and from repentance, he abstained from completing the act or contributed substantially to the prevention of the consequences on which the completion of the offence depended; however, the aforesaid shall not derogate from criminal liability for another, completed, offence involved in the act.

conspiracy.[78] Israeli authorities explain that remorse does not negate criminal liability for the offence of conspiracy. A person who conspired to commit an offence and decided not to proceed with the complete (principal) offence can still be criminally responsible for the offence of conspiracy. Authorities further explain that they are unaware of any case where a person who conspired to commit a bribery offence acted in a manner that would satisfy the conditions of the remorse exemption in Article 28. They concede, however, that it is possible that the prosecution could decide in a specific case, due to lack of public interest, not to present an indictment against a person who conspired to commit an offence and acted according to the conditions in Article 28, i.e. s/he prevented the commission of the act or substantively contributed to the prevention of the results, on which the completion of the offence depends, of his or her own free will and out of remorse. This does not appear to go beyond what would be expected in the normal course of exercising prosecutorial discretion.

*(ii) Defences applicable to the instigation, abetment, or attempted instigation of an offence*

145. Article 34(a) of the Penal Law sets out a further defence concerning the instigation, abetment, or attempted instigation of an offence. Article 1(2) of the Convention requires States parties to ensure that all such conduct "shall be a criminal offence", whereas Article 34(a) of the Penal Law provides a defence where the person "prevents the commission or completion of the offence or if he informs the authorities of the offence in time in order to prevent its commission or completion and acted otherwise to the best of his ability to such purposes". Israeli authorities explain that this rule reflects a belief that a strong internal transformation that brings an individual to repent and to cease to practice criminal behaviour, to the extent that they prevent the commission of the offence, should be taken into consideration and encouraged.

146. The defence in Article 34(a) would be applicable to the same extent in the case of an attempt or conspiracy to bribe a public official of Israel, and thus appears to be in compliance with the requirement that attempt and conspiracy in relation to foreign bribery be treated in the same manner as domestic bribery (final sentence of Article 1(2) of the Convention). It should be noted that the defence under Article 34(a) is not one of "effective regret", since it applies only when action is taken to *prevent* the commission of an offence.

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78 Article 499 of the Penal Law sets out the basis of liability for conspiracy:

(a) If a person conspires with another to commit a felony or misdemeanor, or to commit an act in a place abroad which would be a felony or misdemeanor if it had been committed in Israel – and which also is an offence under the Laws of that place, then he is liable –

(1) if the offence is a felony, to seven years imprisonment or to the punishment prescribed for that offence, whichever is the lighter punishment;

(2) if the offence is a misdemeanor, to two years imprisonment or to the punishment prescribed for that offence, whichever is the lighter punishment.

(b) A conspirator shall bear criminal liability also for the offence for which the conspiracy was made or which was committed in order to advance its objective, only if he was party to its commission under Article Two, Chapter Five.

### *(c) Jurisdiction*

#### *(i) Territorial Jurisdiction*

A domestic offence: Article 7 of Penal Law and Israeli case law

147. The Israeli Penal Law establishes the principle of territorial jurisdiction and categorises offences by location as either "domestic offences" or "foreign offences" (Article 7). A domestic offence is defined in Article 7(a)(1) as "An offence all or part of which was committed within Israeli territory". Case law gives a broad interpretation of the required connection with Israeli territory. According to *State of Israel v Abergil*: "part of an offence' can be constituted by a part of the direct commission of a crime within Israeli territory, or by an act of assisting, inducing or conspiracy performed in Israel, while the offence itself was committed outside Israel".[79] Israel has added that, according to *Rosentein v State of Israel*, the courts may interpret the law in a manner that broadens Israeli territorial jurisdiction, as long as it adheres to its purpose.[80] However, Panellists confirmed that it is unlikely that Article 7(a)(2) would apply to foreign bribery.[81]

Required level of connection with Israel

148. Although Israeli legislation and case law seem to point to a definition of "domestic" criminal offences allowing for a significant range of jurisdiction over extra-territorial acts, during the on-site visit the prosecutors provided a very different picture of how these provisions work in practice. While on the face of the law it is sufficient that the offence be committed *in part* on Israeli territory, Israeli prosecutors stated that a telephone conversation, fax or email emanating from Israel would not in principle be deemed a sufficient connection with Israel to establish jurisdiction over an offence of foreign bribery which mostly takes place elsewhere. A transfer of funds through an Israeli bank would also be deemed insufficient. For jurisdiction to be exercised, the prosecutors explained that it would have to be determined by the nature of the act, in the specific context of the offence, and that the part of the act committed in Israel (including possibly a fax, a telephone conversation or an email) would need to be "a significant act" (Israel also referred to "a material act") in the commission of the offence – such as the making of the offer, or an authorisation to bribe, or the receipt of the proceeds of a bribe.

149. Regarding acts of preparation or complicity in an offence otherwise committed abroad (when, for example, a person instigates or aids and abets foreign bribery within the territorial jurisdiction of Israel but is not otherwise involved in the commission of the offence), the prosecutors met during the on-site visit indicated that acts of preparation of a foreign bribe would not be sufficient for jurisdiction to be exercised.

150. Prosecutors also indicated that Israeli authorities could not take action against a parent company in Israel if one of its foreign subsidiaries bribes a foreign public official unless they obtain evidence through "the layers of all the chain" that the parent company used its influence and "exercises its control" over the foreign subsidiary. Given that territorial jurisdiction over foreign bribery offences committed in part in Israeli territory comes into play when the offence is largely committed abroad by an individual or legal person who is a foreign national (whether agents or employees of a foreign subsidiary), this is an

79 *State of Israel v Abergil (PD 44(2) 133)*

80 *Rosentein v. State of Israel CRA 4596/05 (Pulished in Nevo)*

81 Article 7(a)(2) of the Penal Law further provides that a domestic offence includes *"*an act in preparation to commit an offence, an attempt to commit an offence, an attempt to induce or incite another person to commit an offence, or a conspiracy to commit an offence abroad, on the condition that all or part of the offence was intended to be committed within the Israel territory."

important aspect of the effectiveness of Israeli territorial jurisdiction. The lead examiners are concerned that the level of evidentiary requirements indicated above, as opposed to the growing complexity of the operations involving foreign bribery, makes it unlikely that Israel will be able to establish jurisdiction over acts of bribery involving foreign subsidiaries.

151. During the Working Group meeting, the Israeli authorities firmly expressed their disagreement with the view provided by all relevant panellists during the on-site visit.

Jurisdiction in the West Bank and Gaza

152. In the Phase 1 evaluation of Israel, the Working Group on Bribery recommended that Israel amend Article 291A of the Penal Law to expressly include a political entity that is not a State, including the Palestinian Authority in the West Bank or an elected official in the Gaza Strip. There is a concern that this could create loopholes where: (i) the Israeli Penal law regarding foreign bribery does not apply (and from where an Israeli company or citizen could then bribe the official of another country without breaking the law); or (ii) the officials are not considered as foreign public officials (and could thus be bribed by an Israeli company or citizen).

153. Article 7 defines "Israeli territory" as "the area of Israel sovereignty, including the strip of its coastal waters, as well as every vessel and every aircraft registered in Israel". Israeli authorities have explained that the Penal Law, including the foreign bribery offence, applies to the Golan Heights and Jerusalem. The Gaza Strip, however, is regarded by Israel as foreign territory to which the Penal Law does not apply. Israel's Penal Law also does not extend to the West Bank.

154. Israel explained in Phase 1 that it believes that Article 291A of the Penal Law may be sufficient to cover a bribe given to a member of the Palestinian Authority in the West Bank, or an elected official in the Gaza Strip. Israel based this assertion on the Extension of Validity of Emergency Regulations Law.[82] However, this law: (i) is a military law which might not serve the purpose of fighting foreign bribery; and (ii) does not fully address the potential loopholes identified above. The first part is not relevant to cases of foreign bribery committed in the territory of the Palestinian authority nor in the Gaza strip, and the second part: (i) only applies to Israelis and not to residents of Israel; and (ii) does not seem to cover the Gaza strip.

155. A proposed Bill has been prepared to include a specific reference in the definition of a "Foreign State" in Article 291A to "a political entity that is not a State, including the Palestinian Authority".[83] Israel advised that the proposed Bill had been approved by the Ministerial Committee for legislation in December, initiating the regular legislative process required to amend Article 291A. If the proposed amendment is approved by the Knesset, Article 291A would thereby expressly cover the situation of a

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82 The Extension of Emergency Regulations Law (Jurisdiction and Legal Assistance) (Judea and Samaria) 1967 states that in addition to any law, Israeli courts shall have jurisdiction, according to the applicable law in Israel: over persons present in Israel, regarding acts which took place in Judea and Samaria, with the exception of the territory of the Palestinian Authority; and over Israelis, including corporate bodies established or registered in Israel, regarding acts which took place in the [territory of] Palestinian Authority, as far as the act would have been considered as felony, had it occurred within the jurisdiction of the courts in Israel. This provision does not apply to a person who, at the time the act took place, was not an Israeli.

83 The text of the proposed amendment to Article 291A(c) currently reads as follows (new text underlined): "foreign country" includes, but is not limited to, any governmental unit in the foreign country, including national , district or local unit, <u>including a political entity that is not a state, including the Palestinian Authority.</u>

bribe being given by an Israeli natural or legal person to a member of the Palestinian Authority or an elected official in Gaza.

*(ii) Nationality jurisdiction*

156. In all instances where an offence is not a "domestic offence" under Article 7 of the Israeli Penal Law, the offence will be categorised as a "foreign offence", to which two forms of jurisdiction may apply: nationality jurisdiction; and jurisdiction over crimes under international treaties (see (iii) below). Nationality jurisdiction is expressly provided for in respect of "foreign offences" which amount to felonies and misdemeanours under Article 15 of the Penal Law. Since the foreign bribery offence carries a penalty greater than three years' imprisonment, it is a felony offence under the Law and would thus fall under Article 15. Nationality jurisdiction applies to Israeli citizens as well as residents of Israel.

Application to legal persons

157. Israeli authorities believe that nationality jurisdiction may be applied to legal persons under Israeli law because: (i) Article 4 of the Interpretation Law 1981 provides that the term "person" includes an association of people, regardless of whether or not it is incorporated; and (ii) Israeli law provides for the criminal liability of legal persons (see Article 23 of the Penal Law and section C(3) of this report).[84] Israeli prosecutors indicated during the on-site-visit that they have no practical experience of the application of nationality jurisdiction to legal persons, and that they are unaware of case law where nationality jurisdiction or jurisdiction under Article 16 of the Penal Law was applied to a legal person.

158. As to determining the nationality and the residence of a legal person for the purpose of nationality jurisdiction, Israel pointed to Article 1 of the Income Tax Ordinance, in which "a legal person that is a national or resident of Israel" is defined as either "a legal person that was incorporated in Israel; or a legal person which control over business and management is conducted in Israel." The criterion of "control" is nonetheless likely to be difficult to establish and raises issues similar to those discussed in the section on the liability of legal persons. Moreover, jurisdiction under Article 15 is subject to three types of restrictions set out in Article 14(b) and (c).

Dual criminality requirement

159. Article 14(b)(1) provides that Israeli penal laws shall not apply if the offence in question is not an offence under the domestic law of the country in which the offence took place. In the absence of practical experience of the enforcement of this provision upon the foreign bribery offence, Israeli authorities have explained that two possible situations may arise which will give rise to two different interpretations.

160. In the first situation, if an Israeli, in a foreign country, bribes an official of that country, Israel will have jurisdiction if the bribery of a *domestic* public official is an offence in the foreign country. This requirement appears too specific. It prevents the exercise of jurisdiction over a foreign bribery offence in those countries where the offence is not a crime and is only liable to administrative sanctions, as was

[84] They also point to the Extension of Validity of Emergency Regulations Law, which provides that Israeli courts have jurisdiction over Israelis – including corporate bodies established or registered in Israel – regarding acts or omissions which took place in the Palestinian Authority, as far as the act or omission would have been considered as felony had it occurred within the jurisdiction of courts in Israel.

confirmed by prosecutors during the on-site visit. It also implies that the offence in the foreign country will have to be verified by the Israeli prosecutor, which might be a serious practical impediment to prosecution.

161. In the second situation, if an Israeli who is in a foreign country (country A) bribes an official of a third country (country B), nationality jurisdiction under Article 14(b)(1) will only be exercised if bribery of a foreign public official is an offence in country A. This will be problematic, since it means that nationality jurisdiction is likely only to be applicable where the foreign country is a party to the OECD Anti-Bribery Convention. As noted in Phase 1, this might be offset by the increasing number of parties joining the UN Convention against Corruption, although ratification of UNCAC does not necessarily mean that the foreign bribery offence under Article 16 of UNCAC will have been established. This would represent a serious loophole. In practice, it would mean that any company willing to bribe a foreign public official could do so from a foreign country, which is not a party to the Convention, without any risk of prosecution in Israel.

162. For these reasons, the Working Group on Bribery recommended in Phase 1 that Israel ensure that – consistent with Commentary 26 to the Convention – dual criminality is deemed to be met if the act is *unlawful* where it occurred. Israeli authorities have explained that a proposed Bill has been prepared stipulating that dual criminality in nationality jurisdiction is not applicable to the foreign bribery offence. The proposed Bill has been approved by the Ministerial Committee for legislation, initiating the regular legislative process required to amend Article 15.[85]

163. Nonetheless, the exact language in the proposed amendment has not been provided to the lead examiners. It might address the important loophole identified when bribes take place in a third country – provided that it is clarified that "the offence according to the law" mentioned above is the domestic offence of "passive bribery" and not the foreign bribery offence. However, as currently presented, the Bill will not address the concern raised about the restrictive nature of the dual criminality requirement under Article 14(b)(1), which remains inconsistent with Commentary 26 to the Convention. Moreover, the Bill does not address the concerns raised about the potential effect of other restrictions enumerated under Article 14(b) and (c) (discussed below).

Restriction of criminal liability applicable in the foreign country

164. A further restriction is contained in Article 14(b)(2), which allows jurisdiction so long as "no restriction of criminal liability applies to the offences under the laws of that state". This might be problematic for two reasons: (i) criminal liability may be restricted in a foreign State due to the application of defences which are incompatible with the Convention; and (ii) criminal liability might also be restricted in a foreign State for other reasons which are incompatible with the Convention, such as the expiry of a very short statute of limitations, or the application of immunity. Israel maintains that the restriction contained in article 14(b)(2) only encompasses defences related to the criminal "responsibility" (i.e. mental capacity, minority of defendant etc…) and not to procedural defences (e.g. statute of limitations). In the absence of case law clarifying the matter, the examiners remain however concerned by the potential effect of this restriction. After the on-site visit, Israel indicated that in this regard, it is currently reviewing the conditions provided under its law to establish nationality jurisdiction.

Level of penalty in the foreign country

165. The final restriction upon the exercise of nationality jurisdiction is found in Article 14(c), which provides that "no penalty may be imposed for a foreign offence that is more severe than that which could

[85] Public consultation process, see footnote above.

have been imposed under the laws of the country in which the offence was committed". This requirement is even more problematic than dual criminality, since it makes Israel's sentencing authority dependent upon a foreign country's treatment of the foreign bribery offence. Israeli prosecutors recognised that, if a foreign country applies low, ineffective and non-dissuasive sanctions to the offence, Israel would be bound by that sentencing regime in the application of nationality jurisdiction. It was confirmed during the on-site visit that this might be an issue, in particular with regard to legal persons. Not all countries have established the criminal liability of legal persons, and there might be a number of countries where either no penalty, or only non-dissuasive penalties, may be imposed. Even within the parties to the Convention, some countries have opted for the administrative liability of legal persons for the offence of foreign bribery. This restriction – coupled with the dual criminality requirement that bribery be an offence in the foreign country – creates a serious impediment to the effective prosecution of legal persons operating abroad. As for the restriction in above subsection, Israel has indicated that it is currently reviewing the conditions provided under its law to establish nationality jurisdiction.

166. As to whether Article 14(c) would also impact upon the ability to seize and forfeit bribes and their proceeds, the Israeli authorities have indicated that this should not be the case, since forfeiture is not considered to be a punitive measure in Israel. They pointed to the *Ben Shitrit* case, where the Supreme Court addressed the difference between a fine and forfeiture.[86] The Court stated that while the role of a fine is punitive, and it is paid from the defendant's legitimate assets, forfeiture is not a punitive act per se, and its role is not punitive; rather, it removes from the convicted person's possession property obtained illegally, regardless of its worth, and treats it as property which does not rightfully belong to the convicted person, but is held by him illegally. However, it appears that this interpretation which, in this case applied to the forfeiture of drugs, remains untested with regard to the proceeds of economic crimes.

*(iii) Jurisdiction over crimes under international treaties*

167. Where Israel has undertaken to punish a foreign offence as a result of its party status to an international convention, Article 16 of the Penal Law provides that jurisdiction shall apply even if the offence was committed by a person who is not an Israeli citizen or resident, no matter where it was committed. At first glance, this Article appears to be an extremely broad basis of jurisdiction, which may counter some of the deficiencies noted above concerning nationality jurisdiction. In particular, the dual criminality requirement provided under Article 14(b)(1) does not apply to this type of crime. However, Article 16(b) provides that the restrictions enumerated in Article 14(b)(2) (restrictions provided under the law of the foreign State), and 14(c) (no more severe penalty than in the foreign State) also apply to offences against international law. This notably implies that this Article would not remedy the deficiencies pointed to above, in particular with regard to Israeli jurisdiction over legal persons. No examples of implementation of this provision were available

*(iv) Summary*

168. The Convention does not establish a treaty obligation to establish nationality jurisdiction for the bribery of foreign public officials, but requires that jurisdiction be exercised in accordance with the same principles as for other offences. Although the restrictions set out in Article 14 apply to nationality jurisdiction in respect of all offences in Israel (thus complying with Article 4(2) of the Convention), the lead examiners are concerned that a number of the restrictions in Article 14(b) and (c) of the Penal Law prevent the current basis for jurisdiction (under both Article 15 and to a lesser extent Article 16) from

86 *State of Israel v Ben Shitrit*, CrA 7475/95, PD 52(2), 385, 410. In this case the defendant was convicted of drug-related offences to which specific forfeiture provisions apply.

being “effective in the fight against the bribery of foreign public officials” (Article 4(4) of the Convention). This concern is reinforced by the limited basis for territorial jurisdiction discussed above.

***Commentary***

***The lead examiners recommend that Israel take steps to ensure the effectiveness in practice of territorial jurisdiction concerning offences committed in whole or in part abroad, in particular with regard to acts involving foreign subsidiaries.***

***The lead examiners welcome the steps taken by Israel to amend Article 291A to include a specific reference to “a political entity that is not a State, including the Palestinian Authority” in the definition of a "Foreign State" – and recommend that the Working Group follow up on the implementation of this provision once it is adopted.***

***The lead examiners recommend that: (i) Article 14(b)(1) be amended to clarify that where a bribe is paid in a third party country, the dual criminality requirement does not entail that the offence of foreign bribery should also be an offence in that country; and (ii) Israel pursue its intention to review the effectiveness of the conditions provided under its law to establish nationality jurisdiction and jurisdiction over crimes under international treaties, in particular over legal persons.***

### *(d) Limitation Periods and Delays in Proceedings*

169. Article 9(a)(2) of the Criminal Procedure Law provides that, where no contrary rule is stipulated, the statute of limitations for a felony offence will be 10 years from the date on which the offence was committed. The foreign bribery offence under Article 291A is a felony offence, and there is no express mention of the statute of limitations applicable to it. Israeli authorities thus confirm that the applicable limitation period to Article 291A is 10 years.

170. Article 9(c) of the CPL further provides that any investigatory action carried out by law enforcement authorities stops the clock running on the period of limitation for that offence. The limitation period also stops running in cases where, during the course of the limitation period, an indictment was issued or a court procedure was held regarding the offence. In such cases, the limitation period begins on the date of the last court proceedings or investigatory action, or on the date in which the indictment was issued (whichever is the latest). There are no specific limitations for the period between the opening of the investigation and the filing of the indictment.

171. Interventions from various panels during the on-site visit referred to a very high case load in Israeli courts, including in the Supreme Court. Representatives from the legal profession expressed the view that the judicial system in Israel is very slow and that criminal trials can take several years, especially in complex matters. A Supreme Court judge stated that, although the case load of the courts was not particularly high when compared to other countries, there is a lack of resources (i.e. judges) which has resulted in delays. Israeli prosecutors state that, despite trial delays, they do not believe that such delays would be problematic for the statute of limitations because, as provided in Article 9(c), “…the count of the statute of limitations will begin from the last day of investigation or from the day of issuance of the indictment or from the last proceeding of the court, whichever was the latest”.

## 3. Liability of Legal Persons

### *(a) The legal basis for liability of legal persons in Israel*

172. Article 23 of the Penal Law provides for a corporate body to be subject to criminal liability for both strict liability offences (Article 23(a)(1)) and *mens rea* offences (Article 23(b)(2)). Bribery offences under the Penal Law require a finding of intention or *mens rea* in order to obtain a conviction. Israeli authorities have therefore confirmed that the offence of foreign bribery would fall under Article 23(a)(2), as an offence requiring proof of *mens rea* of a natural person.[87] This Article states that the act and *mens rea* of a natural person shall be regarded as that of the corporate body if dictated by "the circumstances of the case and in the light of [the] functions, powers and responsibility [of the natural person] in managing the affairs of the body corporate". This approach corresponds to the "Alter Ego" doctrine retained in many common law countries, according to which certain individuals are the embodiment of the legal entity.[88]

173. Israel does not specifically provide for liability of a parent company in general or in particular for bribery by its subsidiaries. Israeli prosecutors state that, in accordance with general criminal law principles, where a foreign subsidiary bribes on behalf of the parent company, the parent company may be found criminally responsible if *mens rea* can be established. However, due to the lack of enforcement practice in this area, it remains unclear that this situation is covered,

#### *(i) The Need to identify the natural perpetrator*

*Mens rea* of a natural person

174. The Israeli authorities infer from the *mens rea* requirement that, whereas it is possible to convict a legal person even where the individual responsible for the bribery has not been convicted, the individual responsible for the bribery needs to be identified. All participants questioned on this issue during the on-site visit consistently stated this position. It is also reflected in the judicial procedure which provides that the responsibility of the legal person is determined in the same proceedings as the individual. The lead examiners expressed concern that the liability of a legal person is contingent on the commission of the offence by a specific and identifiable human agent and that, unless this agent is identified, no sanction could be applied against the legal person.

175. However, participants also indicated that there might be exceptions. They pointed to *Modiim Construction*[89] (hereinafter *Modiim*) where the legal person had been held responsible even though the natural person had not been identified. In this case, the Supreme Court held that "the personal liability of the corporation is separate from the liability of those acting in its name". The impact of this decision, although considered as a reference as regards the organ theory, is nevertheless limited, as it deals with traffic offence, i.e. a strict liability offence. Panellists further referred to *State of Israel v Modi'in*

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87 Authorities confirmed that Article 23(a)(1), which provides for the criminal liability of a corporate body "*for an offence committed by a person in the course of fulfilling his functions in the corporate body*" would not apply to the offence of foreign bribery, as it pertains to criminal responsibility for strict liability offences and not to offences requiring *mens rea.*

88 Israeli authorities additionally explain that prosecutions are possible against both the corporate body and the natural person who undertakes the acts in question and imposing criminal liability on a corporation does not exempt the person who committed the offence from criminal liability or from the possibility of criminal proceedings. Likewise, imposing criminal liability on the person who committed the offence does not exempt the corporation from criminal liability.

89 *Modiim Construction and Development Corporations Ltd v The State of Israel*, CR.A. 3027/90.

*Publishing Ltd*[90] (hereinafter *Modi'in*), where the court held the legal person liable even though the natural person could not be identified, this time in a case of *mens rea* offence. The Israeli prosecutors further stressed that the focus is on identifying that "an organ", regardless of the human agent embodying this organ, committed the offence. The lead examiners note that the decision in *Modi'in* seems to broaden the possibilities to retain the liability of legal person, although the offence in that case was not in the economic sphere and the decision which emanates from a District Court has not been confirmed, to date, by the Supreme Court.

176. Other panellists played down the impact of these decisions on the establishment of the liability of legal persons and expressed the view that in the absence of identification of a natural person it is in practice unlikely that a legal person will be convicted. They indicated that the same requirement would apply in the case of a bribe through a subsidiary. The lead examiners note the uncertainty as to possible exceptions to the need to identify a natural person and suggest that when collective decisions are involved, it may be more practical and appropriate to proceed against the legal person alone rather than a corporate agent who may have bribed due to corporate pressure or in respect of whom Israel might not have jurisdiction. Given the different positions expressed by the Israeli prosecutors during the on-site visit and the limited enforcement practice in this area, the lead examiners believe that there is a need to clarify the requirements of the law in this regard and that this issue should be followed up as case law develops.

Limits of the organs theory and absence of "aggregated mind"

177. The Phase 1 report noted that the attribution of responsibility to legal persons is limited to situations in which it is possible to attribute the acts and intentions of the corporate body to those of its organs. Israeli officials reiterated in Phase 2 that case law determined that a corporate organ includes all those whose acts should be regarded (according to the law, the corporation's founding documents, or any other normative source) as acts of the corporation.[91] Article 23(a)(2) clearly refers to "a person" and not to an organ, but it appears to be currently accepted that a natural person, once identified, will be deemed to act as an organ.[92]

178. The organs theory originating in the Companies Law has not been transposed into the Penal Law to the extent that perpetration by an organ would constitute a possible means to trigger liability of a legal person without the need to identify the person who acted as an organ.[93] Case law has also not expanded on the organ theory to recognise the notion of "aggregated intent",[94] which would permit the creation of a corporate *mens rea* by aggregating the states of mind of different people in the company. Corporate liability under Israeli law is distinctly derivative and strictly depends on proving the perpetration and intent by a single member of the organ as a representative of the company.

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90 *State of Israel v. Modi'in Publishing Ltd,* CR. A. (Tel Aviv) 1435/87. In this case an editor authorised the publication of an article in a newspaper in violation of the Youth (care and supervision) Law, 5720, 1960.

91 The *Modiim* case (above).

92 See, notably, the article by Eli Lederman Dean of the Faculty of Law, Tel-Aviv University, Israel, in an academic study entitled "*Models for Imposing Corporate Criminal Liability: From adaptation and Imitation Toward Aggregation and the Search for Self-Identity*", published in 2001 in the Buffalo Criminal Law Review [Vol 4:64], which discusses the main trends in the evolving theories of corporate criminal liability mostly in Anglo-American and Israeli laws. (http://wings.buffalo.edu/law/bclc/bclrarticles/4(1)/ledermanpdf.pdf ).

93 In Section 47 of the Israel Companies Law: "*the acts and intentions of an organ shall be the acts and intentions of the company*".

94 See notably the article by Eli Lederman (above).

Wilful blindness

179. As to the level of knowledge required from the offender, as in Phase 1, Israeli authorities maintain that criminal liability would apply when a person in authority knowingly does *not* prevent an employee from committing the offence (wilful blindness). Panellists reported that they have proceeded on this basis in indicting a company and obtaining a conviction in the *Leumi* case (although only following a plea agreement).

*(ii) Level of seniority of person whose actions trigger the liability of the legal person*

The organisational/hierarchical and functional standard test

180. Prima facie, although Article 23(a)(2) requires *mens rea* and hence requires that the offence be committed by an individual, it does not go as far as requiring that this individual be a "directing mind and will" of the company, as in some common law countries.[95] The criteria of the "functions, powers and responsibility in managing the affairs of the body corporate", enshrined in the Israeli Penal Law, may encompass a broader range of persons and functions. During the on-site visit, prosecutors explained that case law has clarified that the test to determine whether a person is an organ who fulfils the above criteria, is twofold: organisational and functional[96]. Whereas the organisational/hierarchical factor would most certainly lead to the identification of those who represent the "directing mind" of the company,[97] the functional test might allow judges to identify natural persons at a lower level. According to prosecutors met during the on-site visit, while the first step (the organisational consideration) requires courts to consider the rank and powers of the natural person within the structure and organisation of the legal person (*i.e.* the status of the person), the functional consideration implies examination, in the circumstances of the case, of whether the nature of the criminal behaviour of the employee can be identified as acts of the company. Statements from the panellists at the on-site visit indicated, however, that this would most probably not cover a situation where a person acts outside of his or her formal or recognised functions.

181. Whereas these criteria are presented as cumulative in the law ("functions, powers and responsibility" - emphasis added), Israel refers to a case in which it was held that the test is alternative, which implies that it should pass either the "organizational or the functional standard test" (emphasis added).[98] Prosecutors confirmed during the visit that the two elements of the test are clearly separate and do not depend on one another. Following the on-site visit, they provided other cases where natural persons who were not of the highest rank in a company where deemed to act as organs of the company according to the functional standard test (i.e. their actual function and not their formal title)[99]. This appears to constitute

95 On the basis of the well-known decision of the UK House of Lords decision in *Tesco Supermarkets Ltd v Nattras* [1972] AC153.

96 First set in the *Modiim* case.

97 During the on-site visit, in several instances, certain prosecutors referred to the "*hierarchical* and functional standard test". In practice, the notions of organisation and hierarchy may overlap but the repeated shift to the *hierarchical* element highlights the importance granted to this factor by practitioners.

98 *Sahar v. Israel Police*, Jerusalem Magistrate Court 3811/02.

99 According to the Israeli prosecutors, in *Even ve Sid Industries* (not provided), which discusses the offence of negligence, it was determined that a "work manager" can also be a company organ for the commission of certain offences (Cr.A. 20/58 *Even ve Sid Industries v. the Attorney General*, PD 17, 49). In *Baranovitz*, which deals with false invoices, the court held that "a person who does not hold the title of director also might establish responsibility of the corporation" and that a Human Resources manager in a contracting company is an organ whose actions affect the company's debts and credit through his authority to make payments to workers and sub-contractors.(Cr.A. 1825/95 *State of Israel v. Baranovitz*). In the

an important departure from the terms of the Statute which has not yet been confirmed by the Supreme Court and will therefore require follow up by the Working Group.

Coverage of lower-level employees

182. Certain prosecutors and officials met during the on-site visit strongly argued (as in Israel's replies to the Phase 2 supplementary questions) that even lower-level employees could trigger the liability of legal persons on the basis of this second broader test. The difficulty is to determine where the line has been drawn.

183. Israeli participants underlined that, with regard to offences related to driving a vehicle, it was decided in the *Modiim* case that pursuant to the functional standard test, the action of the driver could be attributed to the company. However, it is unlikely that the action of a driver would fall under Article 23(a)(2) as an offence requiring *mens rea* and the functional test at stake here is most probably related to the implementation of Article 23(a)1 of the Penal Law, which pertains to strict liability offences. As indicated above, the prosecutors also referred to other cases, although all but one (*Baranovitz* which deals with the recording of false invoices) do not relate to economic crimes. Except in a case of injury by imprudence (a bus driver in *Egged Ltd)*, the natural persons who triggered the responsibility of their Company in these cases were still relatively senior persons: a human resources manager (in *Baranovitz*), an editor (in *Modi'in*) and a "work manager" (in *Even v Sid Industries*). In *Baranovitz* the criterion retained was the "centrality (of the organ) in the company's management". Israeli prosecutors also referred to an organ vested with the company's "authority". Nevertheless, it remains currently unclear that the case where a senior level person fails to prevent a lower level person from bribing, including through an intentional failure to supervise him or her, would be covered under Israeli law.

184. The lead examiners noted that other panellists expressed a clearly different view that there is a need to identify a human being at the highest level of the corporation, i.e. "someone who can act in the name of the company". An academic analysis of the problem reached similar conclusions in comparing Article 23(a)(2) of the Israeli Penal Law with the relevant section of the US Model Penal Law, which states that a corporation's agent is a "senior managerial agent" identified with the legal body, when granted "duties of such responsibility that his conduct may fairly be assumed to represent the policy of the association".[100]

185. The degree of uncertainty as to the alternative or cumulative nature of the test (despite evolution noted in case law), and as to where the line has been drawn as regards the possibility to identify lower-level employees to establish the responsibility of legal persons for intentional criminal offences and in particular economic crimes, makes it difficult for the lead examiners to form an opinion. In view of the hesitations and contradictions that emerged from the interventions of several panellists, and in the absence of sufficient enforcement action to date, the lead examiners fear that with regard to economic crimes, only the most senior persons would qualify to establish the liability of legal persons. It is notably unclear

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aforementioned *Modi'in* case, which addresses the conviction of a newspaper publication for the offence of publishing an article which disclosed a minor's details in violation of the Youth Law (Care and Supervision) 1960, it was also determined that the editor on-call of the newspaper who is not a member of the board - is an organ. In *Egged Ltd (not provided)*, the Israeli prosecutors state that a bus company was convicted in addition to the conviction of its driver in an offence under the Transportation Regulations (offence requiring mens rea) (Cr.A. 8106/09 *Egged Ltd. v, the State of Israel*).

100 See the article by Eli Lederman (above). Section 2.07(4) of The Model Penal Law is a statutory text developed by the American Law Institute in 1962 to help update and standardize the penal law of the United States of America.

whether acts by a regional manager would be sufficient to attribute liability to a company – and deliberate acts by a salesperson would, according to some panellists, not qualify.

186. In view of the above, the lead examiners believe these issues should be further analysed as case law develops to ensure that the Israeli system covers offences committed by legal persons with decentralised decision-making processes and, in particular, the case where someone other than a senior person who has been delegated authority to act on behalf of the legal person in international business transactions bribes a foreign public official, including where a bribe is paid by an outside agent or an intermediary (like a foreign subsidiary)[101].

### *(b) Vagueness in the law and exercise of prosecutorial discretion*

#### *(i) Liability to be found "in the circumstances of the case"*

187. The commission of an intentional criminal offence by an organ of a corporate body will not automatically give rise to corporate liability. Both case law and Article 23 require such liability to be found *"in the circumstances of the case". Israeli authorities explain that this gives the Court discretion in deciding whether to convict a corporation for an offence attributed to it, according to the unique circumstances of each case.*[102] *The discretion given to the Court enables the conviction of corporations only in those cases where their conviction "would help attain the desired social aims".* The Supreme Court decision in *State of Israel v Leumi Investment Bank* defines the desired social aims as follows: "How can the social aims that society seeks to achieve by imposing liability on the corporate body be promoted? The main considerations are deterrence and preventing repetition of the offences".[103]

#### *(ii) The "social aims" test*

188. During the on-site visit a senior prosecutor explained that, by exercising its discretion, the Court can refrain from convicting corporations for criminal conduct in three circumstances: (i) where the type of offence is not normally performed by a body corporate (bigamy, sexual offences);[104] (ii) in respect of acts of an organ of the corporation, which are not connected to the corporation's operations; and (iii) where the acts caused damage to the company. This is a closed list, which was presented by panellists as illustrating the other side of the coin of the *Leumi* case and as demonstrating that the discretion granted to the Court

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101 The Israeli prosecutors state that, in this case, the prosecution would have to prove that an organ of the Company knew or was wilfully blind. Nonetheless, the lead examiners believe that in such a case it would be particularly easy for a large company to argue that the "directing mind" of the company, or its senior management, was not involved and thereby avoid liability.

102 Reaffirmed in *State of Israel v Norden Petroleum* (1998) Ltd (SCC (Jerusalem) 856/05, 18.12.07, not yet published.

103 *State of Israel v Leumi Investment Bank*, CC 2665/2007 (Tel Aviv). These "social aims" recall the standard set out in the well-known *Meridian* case in the United Kingdom (Privy Council, *Meridian Global Funds Management Asia Ltd v Securities Commission*, [1995] 2 AC 500), in which it was held in substance that the test for attribution should depend on the purpose of the provisions creating the relevant offence rather than on a search for a directing mind. However, as stated in an academic analysis of the case; "*the policy behind a case may be hard to find and it is unlikely that the words of the relevant provision will yield the answer as to who constitutes the Company for the purposes of the offence*": see Hainsworth, *The Case for establishing Independent Schemes of Corporate and Individual Fault in the Criminal Law, J. Crim. L.* 65(420) (October 2001).

104 See Israel's responses to the Phase 2 questionnaire, paras 166-170.

serves as a kind of protective barrier, preventing the conviction of corporations in cases where it would be inadequate, i.e. where it would not help attain the desired social aims. The lead examiners are concerned that the sole effect of this "social aims" test will in practice limit the liability of legal persons.

189. The lead examiners are particularly concerned with the third element of the test. In the *Leumi* case, the Court held that activities of the organ directed against the corporation will not trigger the corporation's criminal liability. In this case, the offence committed by the organ of the corporation was performed for the organ's personal benefit, and even caused harm to the corporation's assets. According to the prosecutors who participated in the panel, and in line with *State of Israel v Kopel*[105], there must be evidence that the bribe "benefited the parent company". This would amount to creating an additional standard of liability as it would restrict the liability of legal persons for the foreign bribery offence to cases where the bribe benefits the legal person that gave the bribe and might not cover a situation where a legal person bribes for the benefit of related legal person, such as a parent company, a subsidiary or member of the same industrial group, or a situation where the payment of a bribe did not lead to the expected benefit for the company.

*(iii) Considerations inconsistent with Article 5 of the Convention*

190. As to the range of considerations that may be taken into account when attributing liability, Israeli authorities state that considerations that are inconsistent with Article 5 of the Convention are not relevant to a court's discretion under Article 23 in light of the broad notion of "social aims".[106] However, as in Phase 1, in the absence of a court decision to this effect, the lead examiners remained concerned that the vagueness of the law, and in particular the need for the court to find liability "in the circumstances of the case" might provide a rationale for consideration of prohibited factors., i.e. considerations contrary to Article 5 of the Convention.[107] However the Israeli prosecutors maintain that considerations that are not consistent with Article 5 of the Convention are not relevant to the Court's discretion under article 23 and that the prosecution would appeal a court decision that would be based on such considerations. Moreover, the Attorney General has recently issued guidelines on the investigation and prosecution of the foreign bribery offence, in which he expressly clarified that decisions concerning investigation and prosecution of the offence cannot include considerations of matters prohibited by article 5 of the Convention. The lead examiners welcome this clarification. However, because it is not specifically addressed in paragraph 3 of the Attorney General Guidelines, the lead examiners are unclear as to whether the Guidelines would apply to the investigation and/or the prosecution of legal persons. This should be further analysed in Phase 3 as case law develops.

***(c) Uncertainty as to the number of prosecutions and convictions of legal persons for intentional criminal offences***

191. In their Phase 1 replies, Israeli authorities pointed to one case where a corporate body was convicted in Israel for the domestic offence of giving bribes but no other similar case has been mentioned

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105 In CF 49/97 *State of Israel v. Kopel (U-Drive) Ltd***.,** the Court held: "I find it difficult to see which social objective can be advanced by imposing criminal responsibility on a corporation in circumstances in which the organ of the corporation is completely responsible for the conduct that led to the corporation's offense, and the corporation gained no benefit whatsoever in the matter. (…) Of course, the situation is different when the organ's acts benefit the corporation (or **also** benefits the corporation)."

106 See Israel's responses to the Phase 2 questionnaire, paras 174-175.

107 Article 23(a)(2) of Israeli Penal Law.

by the Israeli authorities since then.[108] Despite the possibility of criminal liability of legal persons for *mens rea* offences since 1977, convictions or prosecutions of corporations for analogous offences (economic crimes in general) also appear to be rare and none were cited during the on-site visit. After the on-site visit, the Israeli prosecutors provided one case involving an economic offence (recording of false invoices in the above mentioned *Baranovitz case*). However, they emphasised that the prosecution units that prosecute economic crimes (the Economic Department in the State Attorney's office, and the Tel Aviv District Attorney's Office (Taxation and Economics)) prosecute legal persons on a regular basis. On the request of the lead examiners, Israel provided statistics going back 10 years showing the number of convictions and acquittals using Articles 23 for economic offences, the sanctions applied, and the underlying offences. These data show 45 cases over the past ten years (amongst which was one acquittal). Just prior to the Working Group meeting, an additional list of 24 cases prosecuted by the securities department in the Tel-Aviv District of the State Attorney's Office (Taxation and Economics) was also provided but it shows that most of the offences prosecuted were offences against the Securities law, and therefore regulatory offences. The lead examiners are concerned with this low level of convictions, i.e. an average of six to seven cases per year (including the offences against the securities law). Israel maintains that these statistics are not exhaustive and that the State Attorney's Office files each year many cases against private companies for tax offences and that other departments also prosecute legal persons on a regular basis[109]. In the absence of case law and reliable statistics and given the little number of cases mentioned during the on-site visit, the lead examiners are not in a position to forge a final opinion on this issue which should be further analysed in phase 3 as case law develops.

192. The lead examiners welcome the efforts made in the Attorney General Guideline 4.1110 on foreign bribery, to raise awareness among the investigative units and the prosecution as to the importance of indicting both natural and legal persons. However they do not see the general statement contained in paragraph 11 of the Guidelines as sufficient to trigger a more systematic prosecution of the legal persons wherever possible.

193. While the identification requirements appear to be an impediment to the prosecution of large companies with decentralised operations (or at least operations away from the corporate head office), this does not explain why smaller companies, where the directing mind is involved at lower level of operation within the company, have not been subject to more prosecutions and/or convictions for *mens rea* criminal offences in the field of economic crimes. Israel indicates its intention to review its regime of criminal liability applicable to legal persons "on a principle level" but without specifying when.

194. Moreover, whereas according to the Israeli authorities, there is no legal principle preventing the prosecution of State-owned or State-controlled companies for criminal offences,[110] the lead examiners are concerned that their liability remains untested in the domain of economic crime, especially given the sensitive sector in which the largest Companies operate and despite the longstanding existence of the intentional criminal offence provided under Article 23(a)(2) in Israel.

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108 *State of Israel v Cohen and others*, Criminal Case (Be'er-Sheva) 147/02.

109 These departments are the Economic Department of the State Attorney's Office and additional prosecutorial divisions in the field of economic enforcement such as antitrust, trade and industry etc. The Israeli Authorities indicated that other divisions also prosecute companies in related spheres such as environmental offences.

110 As in Phase 1, Israel stated that such companies may bear criminal liability and provided examples of prosecutions against municipalities in the environmental protection field. However, these cases would fall under Article 23(a)(1) which pertains to criminal responsibility for strict liability offences, and therefore is not relevant to bribery offences, which require *mens rea*.

*Commentary*

***Given the uncertainty as to the level of implementation of the intentional liability of legal persons in Israel, the lead examiners are not in a position to determine whether the regime of criminal liability applicable to legal persons in Israel is totally adequate to the implementation of the foreign bribery offence (as required in Article 2 of the Convention). However, in view of the limited number of cases regarding bribery and/or other related economic crimes involving mens rea, the lead examiners recommend that Israel take steps:***

***(1) to raise awareness of prosecutors (e.g. through guidelines and training) regarding Article 23(a)(2) to ensure that contravention of the foreign bribery legislation by legal persons, including in the case of State-owned enterprises, are actively prosecuted.***

***(2) to ensure that:***

***(a) the lack of certainty about whether there is a need in practice to identify a natural person does not prevent the liability of a legal person, especially in cases where a subsidiary is involved;***

***(b) the level of natural persons engaging the criminal liability of legal persons for foreign bribery offences is broad enough to address the situation of legal persons with decentralised decision-making processes; and***

***(c) the vagueness in the law and the exercise of judicial discretion in deciding whether to convict a corporation does not result in the creation of additional criteria to the law which – such as the requirement that the offence "benefit the legal person" – is not an impediment to the effective implementation of Article 2 of the Convention.***

***(d) the exercise of judicial discretion does not include considerations inconsistent with Article 5 of the Convention for legal persons.***

## 4. The Offence of Money Laundering

### *(a) Scope of the Money Laundering Offence*

195. Articles 3 and 4 of the Prohibition on Money Laundering Law 2000 (PMLL) establish criminal liability for the laundering of money (or property) originating directly or indirectly from, or used to commit or enable the commission of, a wide range of predicate offences. Predicate offences include all offences of bribery under the Penal Law 1977 (paragraph 6 of the First Schedule to the PMLL) which includes the foreign bribery offence under Article 291A of the Penal Law. The predicate offences extend to conduct that occurred in another country (Article 2 of the PMLL).

196. It is an offence under the PMLL to perform a transaction related to "prohibited property":[111] (i) with the object of concealing or disguising its source, owners, location or disposition (Article 3(a) of the

[111] Article 1 of the PMLL defines "property" as "immovable and movable property, monies and rights, inclusive of property which is the proceeds of any such property, and any property accruing or originating from the profits of any such property". Article 3(a) in turn defines "prohibited property" as property originating directly or indirectly from an offence; property used to commit an offence; or property enabling the commission in an offence. For the purpose of classifying property as "prohibited property", it is not necessary that a person be convicted of a predicate offence.

PMLL); or (ii) where the perpetrator knows it is prohibited property and that the property is of a certain kind and value (Article 4 of the PMLL, i.e. monies in excess of 450 000 ILS (approximately 91 000 EUR or 125 000 USD) or real estate, securities, artefacts, and other specified items if their value is 135 000 ILS (approximately 27 500 EUR or 37 500 USD) or more, cumulated within a period of three months). It is also an offence under Article 3(b) of the PMLL to prevent reporting or to cause false reporting. AG Guideline 4.1110 on foreign bribery directs that any investigation of foreign bribery must include consideration of whether there is an evidentiary basis for including charges of money laundering (para 11).

197. Although international conventions do not generally *allow* for money laundering up to a particular threshold before an offence is committed, Israeli authorities explain that the threshold requirement in Article 4 is intended to restrict the money laundering offence to significant cases and to prevent the FIU from having to deal with negligible cases. MONEYVAL's report included a recommendation to remove this threshold (Recommendation 13). The Ministry of Justice is considering this recommendation.

### *(b) Sanctions for Money Laundering*

198. The money laundering offence is punishable by up to ten years' imprisonment, and/or heavy fines. The PMLL includes powers to seize monies, as well as the use of monies seized (Article 11). Property obtained in violation of Articles 3 or 4 may be forfeited in both criminal and civil proceedings (Articles 21 and 22 of the PMLL).

### *(c) Enforcement of the Money Laundering Offence*

199. Because the foreign bribery offence only entered into force in July 2008, there have so far been no money laundering indictments based on the laundering of proceeds derived from the foreign bribery offence. Since 2006, nine cases of money laundering offences based on the predicate offence of domestic bribery of public officials were opened, involving 52 defendants. Of these cases, two led to convictions, to have been closed, and the rest remain under investigation.

## 5. The Offence of False Accounting

### *(a) Offences against the Tax System*

200. As in Phase 1, the Israeli authorities cite provisions related to offences against the tax system as a basis for criminalising the prohibitions listed in Article 8 of the Convention.

201. As indicated above (section B. 8. Accounting and Auditing), the income tax directives and the Schedules to the Directives establish a duty to keep accounting books and documents. Israeli authorities advised that when a divergence from the Tax Directives or deficiencies found in the accounting books are *substantial*, (emphasis added) an Assessing Officer may disqualify the taxpayer's books and issue an assessment in accordance with his or her own best judgment (Article 130 of the Tax Ordinance)**.**

202. As to what would amount to a "substantial" divergence/deficiency or "material deviations" from the obligations of book keeping, Israel pointed to the *Shipudey HaBira Company* case[112] in which the Court

[112] In the translation of Article 130 provided by Israel, the language is slightly different: rather than using the terms "substantial divergence", it refers to "deviations" that are "material", which is also the terminology

stated that failure to keep documents essential for determining a tax payer's income, and documents pertaining to the organizational financial structure of the taxpayer, constitute a material divergence. In its reply, Israel maintains that this should cover inaccuracies in reporting a transaction and added that the *Habak* also provides general guidelines for determining whether there is a substantial divergence which would justify the disqualification of a taxpayer's books.

203. On top of the disqualification of a taxpayer's book, a failure to keep account books in accordance with the provisions of the Tax Directives "*without sufficient cause*" might constitute a criminal offence under Article 216(5) of the Income Tax Ordinance. This Article provides that a person who commits this offence shall be liable to one year's imprisonment and/or a fine of ILS 26 100 (approximately EUR 5 000 or 6 400 USD). Israel specified that these penalties are discretionary. As to what amounts to a "*sufficient cause*" in a failure to comply with the Tax Directives (and therefore amounts to a failure to keep accounting books), Israel explained that although it is not defined in Article 216, interpretations to Article 216(5) are provided within the Habak.[113] Israel further explained that in application of Article 216(5) cases are examined on their merits, on a case-by-case to see whether the elements of the offence have been fulfilled and the necessary *mens rea* exists for the purpose of filing an indictment against the taxpayer. The lead examiners are concerned that the interpretation of the tax offence in regard of the intention to avoid tax might not cover all the activities listed in Article 8.1 of the Convention when they are pursued for the purpose of bribing foreign public officials or of hiding such bribery (e.g. the making of falsified or fraudulent accounts, creating statements and records for the purpose of bribing foreign public officials or of hiding such bribery). However, Israel explains that according to Israeli jurisprudence (not provided), this type of *mens-rea* is tantamount to awareness and that there is no requirement to prove an "intention to avoid tax".

### *(b) Offences against the Securities Law*

204. Under Chapter 9 of the Securities Law, a company which submits reports that are not as required by the Securities law may be subject to sanctions. Article 53 lists a wide range of offences including, *inter alia* omissions, deception and fraud with regard to the prospectus and the company's financial reports. Article 53 is divided into three parts, according to the severity of the sanction applicable to every offence: starting from a sanction of fine of up to three times that set in Article 61(A)(1) of the Penal Law (12 900 ILS, approximately 3 300 USD) and up to the sanction of 3 years imprisonment or a fine of up to four times that set in Article 61(A)(3) of the Penal Law (67 300 ILS, approximately 17 250 USD).

### *(c) Government Companies Law*

205. Under the Government Companies law, a government company which fails to submit complete financial statements – where the chairman of the Company or a director knew or should have known and did not take action to prevent it –the chairman or director might be considered as having failed in the performance of their duties and may be removed from office (Article 33D(a) of the Government Companies Law).

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retained in the Income Tax Appeal 112/97 *Shipudey HaBira Company v. Assessing Officer Jerusalem*, TAXES, 14(1) (Feb. 2000).

113 Amongst the possible failures quoted in Israel's reply, the following can be cited: The reasonable cause was interpreted in case law so as to reflect a reason outside the usual business conduct. The conduct of a person in good faith does not alone constitute a sufficient reason for the purposes of this Article.

***Commentary***

***The lead examiners recommend follow up to ensure that:***

***(a) all of the activities listed in Article 8(1) of the Convention are effectively prohibited under existing laws, including the establishment of off-the-books accounts and the recording of non-existent expenditures for the purpose of bribing foreign public officials or of hiding such bribery; and***

***(b) provisions related to offences against the tax system form an appropriate basis for punishing the prohibitions listed in Article 8(1) of the Convention for the purpose of bribing foreign public officials or of hiding such bribery.***

## 6. Sanctions for Foreign Bribery

### *(a) Criminal Sanctions*

206. Article 291A(a) of the Penal Law provides for a person convicted of foreign bribery to be treated in the same manner as a person who commits a domestic offence of active bribery (under Article 291). A person convicted under Article 291 is liable to half the penalty specified for passive bribery under Article 290, namely a maximum of three and a half (3.5) years' imprisonment, or imprisonment and a fine. Article 36 of the Penal Law clarifies that it is possible to impose a fine without also imposing a term of imprisonment.

#### *(i) Sanctions against natural persons*

207. The maximum sentence of imprisonment for the foreign (active) bribery offence is 3.5 years. As opposed to this, the maximum term of imprisonment for domestic passive bribery is 7 years. Israeli authorities explain that the difference in treatment between active and passive bribery reflects the desire to combat the bribery of domestic public officials, which is seen as having very negative social consequences. This sentiment is reflected in case law, including a recent decision of the Supreme Court of Israel in which it increased the sentence of a former minister from 18 months imprisonment to four years on charges of accepting a bribe, fraud and breach of faith, and obstruction of justice. It was stated in the Court's judgment that: "The time has come to take action by putting a higher price tag for violations of this kind than has been customary in the past".[114]

208. Terms of imprisonment for theft, fraud and cartel offences can be higher than that for the foreign bribery offence, including when aggravating circumstances apply.[115] Israeli authorities note that lower

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114 *Benizri v The State of Israel* CrA 5083/08, 5189/08 and 5208/08 (24 June 2009).

115 The maximum penalty for the basic offence of theft is 3 years imprisonment (Article 384 of the Penal Law). There are other theft offences, including, *inter alia*, theft by public official (Article 390) the maximum penalty for which is 10 years imprisonment; theft by employee (Article 391) the maximum penalty for which is 7 years imprisonment; and car theft (Article 413B), the maximum penalty for which is 7 years imprisonment.

The maximum penalty for the offence of "obtaining an object by deceit" is 3 years imprisonment, and 5 years imprisonment in aggravated circumstances (Article 415). The maximum penalty for the offence of fraud and breach of trust is 3 years imprisonment (Article 284).

sanctions (three years) apply to other economic offences - fraud and breach of trust (Article 284) and credit fraud (Article 439). A Bill to increase sanctions applicable to domestic and foreign bribery cases was passed the first reading in the Knesset on 7 December 2009. The Bill proposes to increase the maximum term of imprisonment for passive bribery to 10 years, and that the maximum term of imprisonment applicable to active bribery (both domestic and foreign) to 7 years. It also proposes to increase the maximum fine applicable to both passive and active bribery (domestic and foreign) to fivefold the fine prescribed in Article 61(a)(4) of the Penal Law, i.e. a maximum fine of 1 010 000 ILS (approximately 180 000 EUR or 265 000 USD).

209. Israeli officials state that, when imposing a sentence of imprisonment, sentencing courts almost always determine that part of the term of imprisonment be suspended. The Supreme Court has held, however, that when considering offences of corruption, breach of trust, and economic offences, it is not appropriate to enable the defendant to serve the sentence by community service, and that the purpose of the sentence will be better achieved if the defendant serves the sentence in prison.[116] Representatives from the private bar nevertheless reported during the on-site visit that suspended sentences are regularly used in the sentencing of economic crimes. The application of this approach to the foreign bribery offence should be followed up in the future.

210. The lead examiners note that conditional release of a convict may be available after a prisoner has completed at least two-thirds of their sentence. Israeli prosecutors stated during the on-site visit that conditional release is used very often. Also, if prison populations exceed those approved by the Minister of Public Security, the Knesset Committee of Internal Affairs and Environment may deduct periods from sentences imposed which are proportionate to the length of the sentences (up to a maximum deduction of 24 weeks for prisoners sentenced to terms exceeding 132 weeks – as provided for under the Prisons Ordinance).

***Commentary***

***The lead examiners welcome the steps taken by Israel towards increasing the penal sanctions available against natural persons in foreign bribery cases. As the law currently stands, however, they consider that the distinction between the maximum terms of imprisonment applicable to passive domestic bribery (7 years) and active foreign bribery (3.5 years) do not reflect the seriousness with which foreign bribery should be treated. They note that higher maximum terms of imprisonment can apply to theft, fraud and cartel offences. The lead examiners recommend that the maximum term of imprisonment applicable to the foreign bribery offence be increased in order to provide for effective, proportional and dissuasive sanctions against natural persons (Article 3(1) of the Convention). The level of sentencing of natural persons for the foreign bribery offence, and the application of suspended sentences or conditional release in such cases, should be followed up in the future.***

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The maximum penalty for cartel offences is 3 years imprisonment or a fine of up to 10 times the fine set in Article 61(a)(4), and an additional fine of 10 times the fine set in Article 61(c) for each day in which the offence continues. Where the defendant is a body corporate, the maximum fine will be twice the fine or the additional fine. In aggravated circumstances, the maximum penalty is 5 years imprisonment or the abovementioned fines.

116 *Ovadia v the State of Israel* (1994) Cr App 1776/94.

*(ii) Sanctions against legal persons*

211. A legal person convicted of the foreign bribery offence may be subject to a maximum fine of 202 000 ILS (approximately 38 000 EUR or 60 000 USD). Although these penalties are equal to those applicable to the offence of domestic active bribery, it was concluded in Phase 1 that the maximum penalties applicable to legal persons are low. While fines can be supplemented by additional sanctions under Article 63 of the Penal Law, it was noted in Phase 1 that: (i) the power under Article 63 is discretionary; (ii) the discretionary power is not available in all circumstances and fails to capture cases where a bribe is *offered*; and (iii) calculation of sanctions under Article 63 is likely to be difficult. Furthermore, different panellists during the Phase 2 on-site visit expressed the view that Article 63 is rarely, if ever, applied in the sentencing of active bribery cases. Although prosecutors stated during the on-site visit that the use of Article 63 was "not uncommon", Israeli authorities were unable to point to any cases where Article 63 had been applied to such cases.

212. It therefore appears that legal persons convicted of foreign bribery would only ever be subject to a maximum fine of 202 000 ILS (approximately 38 000 EUR or 60 000 USD). It was further noted in Phase 1 that the low level of sanctions is compounded by the discretionary nature of confiscation provisions under Israeli law (see below). It is also noteworthy that some offences under Israeli law, including the cartel offence under Article 47 of the Anti-Trust Law 1988, make legal persons liable to twice the level of maximum fine than for natural persons.[117]

213. During the on-site visit, authorities conceded that the level of financial sanctions for the foreign bribery offence is low and stated that this was seen as a problem applicable to all economic crimes. A Bill to increase sanctions applicable to domestic and foreign bribery cases passed the first reading in the Knesset on 7 December 2009. The Bill proposes to increase the maximum fine applicable to both passive and active bribery (domestic and foreign) where the offence is perpetrated by a body corporate to a maximum fine of 2 020 000 ILS (approximately 360 000 EUR or 530 000 USD). The Working Group welcomes this step but is nevertheless concerned that this level of maximum penalty may not amount to an effective, proportional and dissuasive sanction against legal persons and that this matter should be further considered in the future.

***Commentary***

***The lead examiners reiterate the Working Group's recommendation in Phase 1 that Israel take legislative steps to increase the level of financial sanctions available against legal persons in foreign bribery cases in order to provide for effective, proportional and dissuasive sanctions against legal persons (Article 3(1) of the Convention).***

***(b) Confiscation***

214. Article 39 of the Criminal Procedure Ordinance 1969 provides the primary avenue for confiscation in Israel and gives a sentencing court the discretion to forfeit an object if it belongs to a person convicted of an offence or used to facilitate the commission of an offence.[118] The wording of Article 39(b) includes the situation where a bribe or its proceeds have been transferred to a non-bona fide third party.[119]

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117 This is also the case under Article 13 of the Preservation of Clean Environment Law [***year?***].

118 The Combating Organized Crime Law 2003 provides for the forfeiture of property connected to offences connected to conduct undertaken within the framework of a criminal organisation. The relevance of the

215. Article 39(c) allows the prosecution to petition for criminal forfeiture after sentencing. Article 297 of the Penal Law expands upon the above provisions in the case of bribery offences, whereby the court has a further discretion to order the forfeiture of what was given as a bribe, or any assets to which it was converted, as well as order the person who gave the bribe to pay to the State Treasury the value of the benefit derived by him from the bribe.[120]

216. It was noted in Phase 1 that if the grounds enumerated in each Article are met, the Court will usually order forfeiture. Israeli authorities advise that abstaining from making a forfeiture order would occur if the offence is minor compared to the value of the item in question, or where the item is essential for the defendant and his/her family as a means of living. During the on-site visit, prosecutors confirmed this and stated that confiscation is frequently sought, i.e. as often as is possible.

***Commentary***

***The lead examiners recommend that the use of confiscation in foreign bribery cases be followed up.***

### *(c) Administrative Sanctions*

#### *(i) Public Procurement*

217. The Mandatory Tenders Law 1992, the Ministry of Defense Guidelines on Authorised Suppliers, and the Foundations of the Budget Law 1985 govern public procurement and the distribution of State funds amongst "public institutions". These laws and guidelines allow for procuring authorities to request criminal record information, although each process differs, without a standard application form having been adopted.

218. A representative of the Ministry of Justice responsible for overseeing public procurement in Israel indicated that a tender might be rejected if a tenderer was convicted of a bribery offence, although this would be at the discretion of the Tenders Committee based upon various factors, including the importance of the project and the existence or abilities of competitors. Israel has not imposed a ban on public procurement as an administrative sanction for bribery, and it was not clear from the Ministry of Justice representative that this is possible. Israeli authorities state that they expect to review this in the future.

#### *(ii) Official Development Assistance (ODA)*

219. MASHAV has amended its standard contract for ODA-funded projects to include an anti-bribery clause for all future contracts. The clause requires contractors to declare that they had not previously been

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COCL to the foreign bribery offence would therefore be limited. See further the Phase 1 report on Israel, para 82.

119 Case law confirms that this will be the case where the third party is a "fictitious" owner: see *Michallshvilly v State of Israel* PCA 5271/90; *State of Israel v Bolus* CC 3689/02; and *Bank "Leumi" v State of Israel* CA 1982/93, PD MH(3) 238, 241.

120 Israeli authorities explain that Article 297 of the Penal Law has been used in only a few bribery cases, and that courts have in most cases utilised the forfeiture provisions in Article 39 of the Criminal Procedure Ordinance, or other tools including those under the Prohibition of Money Laundering Law.

convicted of foreign bribery, and includes a provision to state that such conviction is a ground for termination of the contract.

*(iii) Officially Supported Export Credits*

220. Ashr'a has adopted an Internal Procedure concerning sanctions to be applied to export insurance policy holders involved in foreign bribery, including suspension of insurance, denial of claim payments, cancellation of the policy or indemnification, and/or a requirement for the policy holder to refund any claim payments made.

***Commentary***

***The lead examiners recommend that Israel establish formal, written policies for denying ODA contracts and public procurement contracts to legal and natural persons who have been convicted of foreign bribery.***

## D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

221. Based on its findings regarding Israel's implementation of the Convention and the Revised Recommendation, the Working Group: (1) makes the following recommendations to Israel under Part 1; and (2) will follow up the issues in Part 2 when there is sufficient practice.

### 1. Recommendations

***Recommendations for Preventing and Detecting Bribery of Foreign Public Officials***

1. Regarding awareness-raising in the public sector, the Working Group recommends that Israel take steps to continue to raise the level of awareness of the Convention and the foreign bribery offence, including further attention to the detrimental effects of foreign bribery, within the public sector generally as well as specifically within the Ministry of Foreign Affairs Center for International Cooperation (MASHAV) and the Defense Export Controls Directorate of the Ministry of Defense (Revised Recommendation I).

2. Regarding measures in the private sector, the Working Group recommends that Israel:

(a) Continue to raise the level of awareness of the Convention and the foreign bribery offence, including further attention to the detrimental effects of foreign bribery and the extraterritorial effect of the offence, amongst the public generally as well as specifically within the business sector and defence industry, including through the engagement of businesses operating abroad by Israeli overseas diplomatic representatives (Revised Recommendation I).

(b) Consider making key resources on the Convention and the foreign bribery offence available in Arabic, English and Russian (Revised Recommendation I).

3. Regarding whistleblower protection, the Working Group recommends that Israel:

(a) Consider enhancing the level of protection against discriminatory or disciplinary action afforded to private sector employees who report in good faith and on reasonable grounds suspected acts of foreign bribery to competent authorities (Revised Recommendation I and V(C)(iv)).

(b) Take further steps to raise awareness within the public and private sectors of the availability of whistleblower protection, including awareness of the limitation upon the Ombudsman to take protective action concerning matters which are pending in court or in which a court has given a decision (Revised Recommendation I).

4. Regarding reporting of foreign bribery, the Working Group recommends that Israel:

(a) Consider taking appropriate measures to strengthen the detection of foreign bribery through the reporting of credible information relating to foreign bribery to law enforcement authorities, including through the possibility of establishing a statutory obligation for all public sector employees to report to law enforcement authorities information or suspicions that a serious criminal offence is or has been committed by an Israeli company or individual, with an accompanying clarification that any such obligation applies to the reporting of foreign bribery (Revised Recommendation I).

(b) Impose an obligation on the Military Censor to forward any information to law enforcement authorities and/or the Attorney General where that information has been suppressed by the Censor (whether in part or in full) and the information alleges the involvement of an Israeli company or individual in foreign bribery (Revised Recommendation I).

5. Regarding officially supported export credits, the Working Group recommends that the Israel Export Insurance Corporate Ltd (Ashr'a): (i) continue to undertake training on the detection of bribery and how to deal with clients who use foreign agents; and (ii) consider requiring clients to incorporate anti-bribery clauses when engaging sub-contractors (Revised Recommendation I and VI(ii)).

6. Regarding detection within the defence industry, the Working Group recommends that Israel: (i) encourage the defence industry in Israel to develop strong anti-corruption measures and engage in international anti-corruption initiatives concerning the defence sector; (ii) ensure that, when providing licenses for exporting military equipment and dual-use goods, the Defense Export Controls Directorate of the Ministry of Defense considers whether applicants have been involved in bribery as well as the level of risk of corruption in relation to arms procurement in the destination country; and (iii) consider the temporary or permanent disqualification of enterprises convicted of bribing foreign public officials from applying for export licenses (Revised Recommendation I and VI(ii)).

7. Regarding taxation, the Working Group recommends that Israel:

(a) Clarify the prohibition on the deductibility of payments made "in contravention of any law" by introducing an express denial of the deductibility of foreign bribe payments either in tax legislation or through another mechanism that is binding and publicly available (Revised Recommendation IV; 2009 Recommendation on Tax Measures I(i)).

(b) Expressly communicate to tax officials the non-tax deductibility of bribes and the need to be attentive to any outflows of money that could represent bribes to foreign public officials, including commissions, bonus, gratuities as well as non-documented expenses incurred abroad,

through the issuance of guidelines or manuals, and training programs (2009 Recommendation on Tax Measures).

(c) Continue to include in existing and future tax treaties the Commentary to Article 26(2) of the OECD Model Tax Convention, allowing for the reciprocal sharing of tax information by tax authorities with other law enforcement agencies and judicial authorities in relation to corruption offences (Revised Recommendation IV; 2009 Recommendation on Tax Measures).

***Recommendations for Preventing and Detecting Bribery of Foreign Public Officials***

8. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that Israel:

(a) Take further steps as a matter of priority to ensure that the Police Legal Assistance Unit is adequately resourced to enable it to provide prompt and effective legal assistance (Convention, Article 9(1); Revised Recommendation VII).

(b) Complete without undue delay its preliminary enquiries concerning allegations of foreign bribery by Israeli companies, including through appropriate measures for the exchange of information about these allegations with the foreign public officials' country, and decide whether to commence formal investigations into these matters (Convention, Article 5; Revised Recommendation I and VII(i)).

9. Regarding jurisdiction over the foreign bribery offence, the Working Group recommends that Israel:

(a) Given the stringent requirements of dual criminality for the application of nationality jurisdiction, ensure the full effectiveness of nationality jurisdiction, especially in the case of legal persons (Convention, Article 4(2)).

(b) Proceed promptly with the amendment of Article 291A of the Penal Law 1977 to include a specific reference to "a political entity that is not a State, including the Palestinian Authority" in the definition of a "Foreign State" (Convention, Article 4(1)).

10. Regarding the liability of legal persons for foreign bribery, the Working Group recommends that Israel ensure: (i) the active prosecution of legal persons who engage in foreign bribery, including State-owned or State-controlled companies; (ii) that the need to identify a natural person does not prevent effective investigation, prosecution and sanctioning of legal persons; and (iii) that the level of natural persons in respect of which the criminal liability of legal persons can be engaged is applied broadly enough to capture the situation of legal persons that have decentralised decision-making processes (Convention, Article 2; Revised Recommendation I).

11. Regarding accounting and auditing, the Working Group recommends that Israel:

(a) Take measures to encourage Israeli companies that are active in foreign markets to: (i) continue to develop and adopt adequate internal company controls and standards of conduct with a particular focus on the control of foreign operations and on compliance with the law criminalising foreign bribery; and (ii) develop and strengthen monitoring bodies (such as audit committees) and ensure that they are independent of management and have the effective power and competence to fully perform their functions (Revised Recommendation V(C)).

(b) In consultation with relevant professional associations: (i) develop and implement more stringent requirements to effectively ensure the independence of external auditors; (ii) take steps to encourage the detection and reporting of suspected bribery of foreign public officials by accountants and internal and external auditors, in particular through guidelines and training for these professionals and through raising the awareness of management and supervisory boards of companies about these issues (Revised Recommendation V(B) and V(C)).

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

(a) Increase the level of penal sanctions available against natural persons convicted of the foreign bribery offence to provide for effective, proportionate and dissuasive sanctions (Convention, Article 3(1)).

(b) Increase the level of financial sanctions available against legal persons convicted of the foreign bribery offence to provide for effective, proportionate and dissuasive sanctions (Convention, Article 3(1)).

(c) Establish formal, written policies for denying ODA contracts and public procurement contracts to legal and natural persons who have been convicted of foreign bribery, and debarment of defence industry companies convicted of foreign bribery (Convention, Article 3(4); Commentary paragraph 24; Revised Recommendation VI).

## 2. Follow-up by the Working Group

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

(a) The application by Israeli courts of the foreign bribery offence as an extension of the offence of domestic active bribery (Convention, Article 1).

(b) The effectiveness in practice of territorial jurisdiction concerning offences committed in whole or in part abroad, in particular with regard to acts involving foreign subsidiaries (Convention, Article 4(1)).

(c) The application of the judicial discretion on whether to convict legal persons, particularly as this applies to the potential creation of additional criteria for the liability of legal persons, to ensure that this cannot create an impediment to the effective implementation of Article 2 of the Convention (Convention, Article 2).

(d) The exercise of judicial discretion in the determination of whether a conviction of a legal person would, in the particular circumstances, "help attain the desired social aims" with a view to ensuring that this does not include considerations contrary to Article 5 of the Convention.

(e) The use of investigative techniques in foreign bribery investigations, including in the area of accessing bank records (Convention, Article 5; Revised Recommendation I).

(f) The level to which Israel is able to provide prompt and effective legal assistance and respond to requests for extradition (Convention, Articles 9(1) and 10; Revised Recommendation VII).

(g) The number of convictions for money laundering and the efficacy of "unusual activity reports" (Convention, Article 7).

(h) The level of sentencing of natural and legal persons for the foreign bribery offence, and the application to natural persons of suspended sentences or conditional release in such cases (Convention, Article 3(1)).

(i) The use of confiscation in foreign bribery cases (Convention, Article 3(3)).

(j) The effectiveness of the reporting system by Israeli tax authorities, in particular as this applies to the requirement for prior authorisation from the Head of the Tax Authority (2009 Recommendation on Tax Measures II).

(k) The effectiveness of having integrated the provisions on the maintenance of books and records in tax rules, in particular as this applies to the *mens rea* offence of false accounting (Convention, Article 8(1); Revised Recommendation V(A)).

(l) The application in practice of new internal procedures adopted by Ashr'a, particularly as this applies to due diligence, and enhanced due diligence procedures where there are suspicions that applicants or clients have been or are involved in payment of bribes to foreign public officials.

(m) The nature and extent of official development assistance projects undertaken by Israel, with a view to determining whether this is extended from the current mandate and practice of MASHAV and whether further structures for the detection and prevention of foreign bribery should be implemented accordingly (Revised Recommendation I and VI(iii)).

## ANNEX 1 LIST OF PARTICIPANTS IN THE ON-SITE VISIT

Government Ministries and Bodies

- Ministry of Justice
- Ministry of Finance
- Office of the State Comptroller and Ombudsman
- District Attorney's Office
- Ministry of Public Security
- Tax Administration
- Israel Securities Authority
- Ministry of Defense
- Chief Censor of Israel
- Ministry of Industry, Trade and Labor
- Ministry of Foreign Affairs
- Civil Service Commission
- State Attorney's Office
- Israeli Police
- Israel Government Companies Authority
- Customs
- Israel Auditor's Council
- State of Israel Money Laundering and Terrorist Financing Prohibition Authority

Government-Funded Bodies

- Ashr'a (Israel Export Insurance Corporate Ltd)
- Bank of Israel

Judiciary

- One Supreme Court Justice and one District Court Judge

Legislators

- Four Members of Parliament (Knesset)

Private Sector

*Private enterprises*

- Elbit Systems Ltd
- Israel Chemicals
- Jerusalem Marble Co
- Teva
- SigNet Wireless Ltd

*Associations*

- Banking Association of Israel

*Business associations*

- Manufacturers Association of Israel
- Institute of Certified Public Accountants in Israel
- Institute of Internal Auditors

*Financial institutions*

- Bank Ha'poalim
- Mizrahi Tefahot
- Bank Leumi
- Union Bank of Israel Ltd
- Israel Discount Bank

*Legal profession and academics*

- Bar Association of Israel
- Gross, Kleinhendler, Hodak, Halvey, Greenberg & Co
- School of Law, Academic College Carmel
- Caspi & Co
- Yehuda Weinstein Law Offices
- Faculty of Law, University of Haifa

*Accounting and auditing profession*

- Independent Certified Public Accountants
- Fahn Kanne & Co
- KPMG Israel
- Deloitte
- Ernst & Young Israel
- Ziv Haft
- Somech Chainkin
- School of Buinesss Administration, The College of Management

<u>Civil Society</u>

- Chamber of Commerce
- 'Haaretz' (media)
- Association for Ethics and for the Eradication of Corruption in Israel
- Transparency International
- 'The Marker' (media)

## ANNEX 2 LIST OF ABBREVIATIONS, TERMS AND ACRONYMS

| | |
|---|---|
| Ashr'a | Israel Export Insurance Corporate Ltd |
| CPL | Criminal Procedure Law 1982 |
| DECD | Defense Export Controls Directorate (Ministry of Defense) |
| FDI | Foreign direct investment |
| Habak | Collection of Interpretations of the Income Tax Ordinance |
| IAC | Israel Auditor's Council |
| IASB | Israel Accounting Standards Board |
| ICPAS | Institute of Certified Public Accountants in Israel |
| IIAI | Institute of Internal Auditors Israel |
| IMPA | State of Israel Money Laundering and Terrorist Financing Prohibition Authority |
| ISA | Israel Securities Authority |
| GCA | Government Companies Authority |
| Knesset | Parliament of Israel |
| MASHAV | Ministry of Foreign Affairs Center for International Cooperation |
| MFA | Ministry of Foreign Affairs |
| MLA | Mutual legal assistance in criminal matters |
| MOD | Ministry of Defense |
| MOITAL | Ministry of Industry, Trade and Labor |
| MONEYVAL | Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism |
| ODA | Overseas Development Assistance |
| PMLL | Prohibition on Money Laundering Law 2000 |
| UARs | Unusual activity reports |

## ANNEX 3 ATTORNEY GENERAL GUIDELINE NO 4.1110

## PROHIBITION ON PAYMENTS OF BRIBES TO A FOREIGN PUBLIC OFFICIAL – ARTICLE 291A OF THE PENAL LAW 1977

[Unofficial translation]

### General

In recent years, the world is witnessing a growing need to effectively deal with the phenomenon of corruption and bribery in international business transactions. The international community has decided to join forces in the international fight against corruption, as expressed by the obligations undertaken by the international community in the United Nations Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The underlying perception of these conventions is the commitment and dedication by each of the member states, to act together to eradicate bribery and corruption, which are key in successfully creating an international climate free from corruption. Israel is a party to both conventions, reflecting its belief in this perception and its willingness to take part in the joint global effort.

Setting a criminal prohibition on bribing a foreign public official and effectively enforcing it comprise an important tier in the struggle to create an international climate free from corruption. This prohibition complements the internal legislative framework, while making a contribution to the strengthening of domestic ethical standards. Additionally, effective enforcement of the prohibition will place Israel in line with many countries in the world which enforce the prohibition on paying bribes in international transactions. Maintaining these international standards will render it easier for Israeli companies to operate in international business transactions and will increase the competitiveness of the Israeli market.

On 14 July 2008, the Knesset approved the Penal Law (Amendment No. 99), 2008 adding Article 291A to the Penal Law, 1977, which set forth an offence of bribing a foreign public official in business activity (hereinafter: "the offence").

The wording of the offence is as follows:

> *"291A Bribing a Foreign Public Official*
>
> *(a) A person who gives a bribe to a foreign public official for an act in relation with his functions[121], in order to obtain, to assure or to promote business activity or other advantage in relation to business activity, shall be treated in the same manner as a person who commits an offence under Article 291.*

[121] The Hebrew wording of "an act in relation with his function" is identical in Article 290. Case law interpreted this wording as any act performed in relation to the public official's function including in cases where the public official was not authorized to perform it. This was also indicated in the explanatory note to the Bill.

*(b) No indictment shall be issued in respect to an offence under this article unless given written consent from the Attorney General.*

*(c) For the purpose of this article:*

*"**foreign country**" includes, but not limited to, any governmental unit in the foreign country, including national , district or local unit.*

*"**foreign public official**" includes any of these:*

*(1) An employee of a foreign country and any person holding a public office or exercising a public function on behalf of a foreign country; including in the legislative, executive or judiciary branch of the foreign country, whether by appointment, by election or by agreement;*

*(2) A person holding a public office or exercising a public function on behalf of a public body constituted by an enactment of a foreign country, or of a body over which the foreign country exercises, directly or indirectly, control;*

*(3) An employee of a public international organization, and any person holding a public office or exercising a public function for a public international organization;*

*"**public international organization**" means an organization formed by two or more countries, or by organizations formed by two or more countries;"*

The offence is included in the bribery offences section in the Penal Law, and all the general provisions applicable to offences in this section apply to it as well. The offence has unique characteristics, amongst other reasons because it will usually be committed, at least in part, in a foreign country, engaging a public official of a foreign country or an international organization.[122] Given these and other special features, it is immensely important that the investigation and prosecution policy regarding this offence will be cohesive and applied in light of the protected values the criminal statutory provision seeks to promote and Israel's international commitments.

**Procedural Guidance**

1. When the Israel Police (hereinafter: IP) learn of any suspicion relating to an offence under Article 291A, the information must be looked into in order to examine whether there is a sufficient evidentiary basis to merit the opening of an investigation. The source of such a suspicion may be, *inter alia*, a complaint, information from any Israeli or foreign government entity or international organization, a media report in Israel or abroad, or any other source.

2. While examining whether to open an investigation as mentioned above, the IP will consider whether the initial evidentiary basis justifies opening an investigation, and, *inter alia*, consider the content of the suspicions, the alleged authenticity of the information which was the basis of the suspicion, etc.

3. Among the considerations as to whether to open an investigation or to prosecute for this offence, considerations concerning national economic interests, potential effect on the relations with a foreign country, or the identity of the person or the corporation involved, can not be taken into considerations.

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122 In a governmental draft bill it is proposed to expand the applicability of the offence also to bribery of public officials of a political entity that is not a state, including the Palestinian Authority.

4. Due to the importance of enforcement in this field, a decision to open an investigation or to archive the information or the complaint without an investigation shall be made by the Head of the Investigation and Intelligence Unit of the IP.

5. In cases where it was decided to conduct an investigation, upon its completion, the file shall be referred to the Deputy State Attorney (Special Functions) who will be responsible for making a reasoned recommendation to the Attorney General (through the State Attorney), as to whether to file an indictment or to close the case.

6. If an accompanying attorney has been assigned to the case, the IP will refer the file, following the conclusion of the investigation, to the accompanying attorney, which in turn would refer it, with his recommendations, to the Deputy Attorney General (Special Functions).

7. In Accordance with the provisions set in Article 291A(b) of the Penal Law, an indictment, for this offence, shall not be filed unless prior written consent was given by the Attorney General. This authority has not been delegated at this stage.

8. Where offence was perpetrated, in its entirety, outside of Israel, i.e. a "foreign offence", the applicability of the Penal Law to the foreign offence should be verified.[123] In this case, the written consent of the Attorney General should also be given with regards to prosecution of the foreign offence, as required in Article 9(b) of the Penal Law.

9. Given the characteristics of the offence under Article 291A, it is important to cooperate with law enforcement authorities of other countries – in accordance with relevant statutory provisions, and common practice. Such cooperation may substantially assist, in many cases, with the conduct of investigations. The importance of international cooperation in the investigation of the foreign bribery offence is highlighted by Israel's commitment to collaborate with other countries to establish a corrupt free climate.

10. In cases where it was decided to open an investigation, the IP shall also consider whether it would be possible to forfeiture the bribe, its worth, or its proceeds, as the matter may be, and shall collect evidence for this purpose. The use of tools such as forfeiture and provisional remedies is highly significant in such cases, as the motivation for bribery offences is economic, and these tools – which are essentially instruments of "economic enforcement" – carry great effectiveness and deterring power.

11. In addition to the question of the existence of evidentiary basis for commission of an offence under Article 291A of the Penal Law, the investigation and prosecution authorities shall also consider whether there is an evidentiary basis for including charges for additional offences from the Penal Law or other laws, such as money laundering offences, tax evasion, offences under the Securities Law, etc. Where possible, indictments should be filed against the cooperation, as well as against the persons directly responsible.

12. Where the indictment includes an offence under Article 291A of the Penal Law in addition to offences from other laws which contain provisions on confiscation (such as the Prohibition of Money Laundering Law, 2000 and the Income Tax Ordinance [New Version], 1961), the differences between the forfeiture provisions in each of the laws should be taken into account, and consideration must be given to the question under which statutory provisions should the forfeiture be requested.

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[123] It should be noted, with respect to the condition for applying the penal laws of Israel to an offence executed by an Israeli citizen or resident, that there is a governmental draft bill suggesting to add the foreign bribery offence to the list of exceptional offences which do not require double criminality, as listed in Article 15(b) to the Penal Law.

13. Supervisory bodies in the Defense Establishment and other relevant bodies within the Defense Establishment and the Ministry of Foreign Affairs shall assist and provide information they have at their disposal, as will be required, during the examination and investigation proceedings conducted with regard to this offence.