

6 May 2019

Submission to Consultation on OECD 2009 Revised Anti-Bribery Recommendation

Transparency International welcomes the opportunity to provide input to the OECD Working Group on Bribery's (OECD WGB) consultation process on the OECD's 2009 Revised Anti-Bribery Recommendations.¹ We note that as explained by the OECD, the Recommendation was adopted by the OECD in order to enhance the ability of the States Parties to the Anti-Bribery Convention to prevent, detect and investigate allegations of foreign bribery.² We believe that ten years on the Recommendation could be significantly enhanced and strengthened with an extended framework.

One major improvement to the existing framework would be to encourage transparency of the beneficial ownership of companies and trusts, a key prevention, detection and investigation measure. Accountability for foreign bribery should also be increased through encouraging States Parties to (1) provide for victim states' participation and remedies in foreign bribery enforcement; (2) provide for measures to address grand corruption including through standing for non-state victims' representatives and criminalizing the demand side of foreign bribery; (3) guidelines on non-trial resolutions and (4) increased transparency regarding enforcement through publication of statistics and detailed information on case dispositions

This submission elaborates on these and other proposals below, referencing some of the questions suggested for submissions to the consultation. The paper's structure is as follows:

- I. Introductory section:** Exporting Corruption Report (GQ2)
- II. Proposed new recommendations** (page 4)
 - (1) beneficial ownership transparency
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 - (3) grand corruption cases
 - (4) non-trial resolutions
 - (5) transparency of enforcement data and case dispositions; as well as short texts on
 - (6) facilitation payments
- III. Proposed revisions to existing recommendations** (page 29)
 - (1) Recommendation III. Awareness raising;
 - (2) Recommendation IX. Reporting Foreign Bribery;
 - (3) Recommendation X. Accounting Requirements, External Audit, and Internal Controls, Ethics and Compliance;
 - (4) Recommendation XI. Public Advantages including Public Procurement; and

¹ This submission was prepared by Gillian Dell of the Transparency International Secretariat in consultation with TI chapters in OECD Convention countries.

² https://www.oecd.org/daf/anti-bribery/2009_Anti-Bribery_Recommendation_Brief.pdf

(5) Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance.

I. TI's Exporting Corruption Report 2018 (GQ2)

Transparency International's 2018 Exporting Corruption report shows, based on enforcement data, that out of 44 parties to the OECD Anti-Bribery Convention only seven countries are in the top "active enforcement" category and four are in the next "moderate enforcement" category.³ Eleven countries were classified in the third "limited enforcement" category and the rest fell into the lowest "little or no enforcement" category. While there appears to have been a small increase in enforcement, the number of countries in the top two of the four levels has only increased by one and the share of world exports is approximately the same as in our last report in 2015. These enforcement levels are far from sufficient to fulfil the Convention's fundamental goal of mobilising collective action to put a check on corruption in international business transactions and the harm it causes.

In addition, in 2018 we assessed the first time the performance of four non-OECD Convention countries/regions China, Hong Kong, India and Singapore and all fell into the lowest "Little or no enforcement" category. This is disappointing considering that China is now the world's largest exporter with over 10 per cent of world exports in 2018 and the others account for 2 per cent or more of world exports so that together they account for 18 per cent of world exports. All of them are bound by UN Convention against Corruption (UNCAC) provisions requiring criminalisation and sanctioning of foreign bribery.

The 2018 report includes a set of general recommendations to parties to the Convention including calling for them to:

- (1) strengthen anti-money laundering systems to help detection of foreign bribery; this should include creation of public registers of beneficial ownership
- (2) ensure that settlements in bribery cases meet adequate standards of transparency, accountability and due process
 - a. Settlement agreements should be made public, should be subject to meaningful review and provide for effective sanctions
 - b. Settlement procedures should involve countries and groups affected by foreign bribery and as far as possible include compensation as part of the settlement agreement
- (3) publish up-to-date enforcement data and case information, including annual statistics for each stage of the foreign bribery enforcement process as well as on related offences and mutual legal assistance
- (4) increase efforts to improve mutual legal assistance

Additionally, in each of the country reports there are specific recommendations to parties based on their performance.

The report also recommends that the OECD Working Group on Bribery (OECD WGB):

³ Transparency International, *Exporting Corruption – Progress Report 2018: Assessing enforcement of the OECD Anti-Bribery Convention* (2018) https://www.transparency.org/whatwedo/publication/exporting_corruption_2018

- (1) make public its dissatisfaction when countries party to the Convention fail to enforce against foreign bribery, related money laundering offences and false accounting violations. In particular, the WGB should:
 - a. disseminate widely an annual list of countries that have failed to produce meaningful enforcement results in the last 3-4 years, and an annual summary of leading WGB recommendations that Convention parties have failed to comply with;
 - b. publish an annual list of countries that have taken significant steps to improve enforcement – this should expand on what has already been done in the latest WGB paper on enforcement data⁴
 - c. where countries show “continued failure to adequately implement the Convention”, the WGB should publicise widely each of its steps in line with the Phase 4 Guide and should consider suspension from the WGB in case of longstanding failure to enforce.
- (2) increase efforts to improve mutual legal assistance in cooperation with other anti-corruption review bodies
- (3) increase its efforts to persuade China, Hong Kong, India and Singapore to become parties to the OECD Anti-Bribery Convention, including efforts within the G20.
- (4) carry out a horizontal assessment of accessibility of data and case information across all countries party to the Convention, develop guidance in this area and provide technical assistance. This should include an assessment of statistics on mutual legal assistance.
- (5) carry out a horizontal assessment of mutual assistance performance across all parties and work with other anti-corruption review bodies to develop guidance materials and foster exchange of experience at meetings of representatives.
- (6) create an open database of statistical data and case information. This should include detailed annual statistics regarding mutual legal assistance. We note that the OECD already has an internal database of cases which could be tapped.⁵

All of these proposals are relevant in considering revisions to the 2009 Anti-Bribery Recommendation. In the sections below, we elaborate on some of these proposals and recommend additional topics for inclusion in the new Recommendation as well as suggesting revisions to some of the existing recommendations.

⁴ OECD, *2017 Enforcement of the OECD Anti-Bribery Convention* (November 2018) <http://www.oecd.org/daf/anti-bribery/OECD-WGB-Enforcement-Data-2018-ENG.pdf>

⁵ See eg. footnote 228 in OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm

II. Proposed addition of new recommendations

1. Transparency of beneficial ownership of companies and trusts (Question 11)

Secret ownership of companies and trusts is an obstacle to prevention, detection and investigation of corrupt transactions, including laundering of the proceeds of crime in foreign bribery cases.⁶ The OECD WGB's Phase 3 and Phase 4 reports reveal the importance of this subject for foreign bribery enforcement in light of the many cases cited where shell companies were used. Introduction of public central registers of beneficial ownership would reduce bribery and money laundering opportunities and enhance detection and investigation in foreign bribery cases. Transparency International has proposed standards and conducted monitoring on this subject over a period of years.⁷ As indicated above, we included a proposal on this subject in the 2018 Exporting Corruption Report.

Proposal: The OECD WGB should add a new recommendation on beneficial ownership transparency to the new Anti-Bribery Recommendation and should encourage Convention parties to introduce central registers containing beneficial ownership information and make that information public. The recommendation should reference best practice and guidance available in this area. The subject should be systematically reviewed by the OECD WGB.

More specifically, in line with emerging best practice, as proposed by the BOND group, the recommendation should provide that the registers should be made publicly available via searchable web interface as well as via structured data in machine-readable format. They should be available under open data licences. In addition, the recommendation should require State Parties to:

- ensure all beneficial owners report their holding of shares or voting rights in exact percentages;
- use unique identifiers in addition to personal data such as name and month and year of birth;
- use data validation systems such as multiple choice fields to improve data quality; and
- ensure systems are in place to identify potential non-compliance and pro-actively pursue and sanction companies that report non-compliant data.

In the undesirable case that the beneficial ownership registry is not accessible to the public, the WGB should recommend that the legal framework clearly defines that relevant authorities (e.g. financial intelligence unit, tax authorities, public prosecutors, anti-corruption agencies, bodies supervising the implementation of asset disclosure of public officials, etc.) have access to beneficial ownership information and can carry out necessary searches.

⁶ Stolen Assets Recovery Initiative, *The Puppet Masters* (2011) <https://star.worldbank.org/publication/puppet-masters>

⁷ See eg. Transparency International, *Recommendations on Beneficial Ownership Transparency for Open Government Partnership National Action Plans* (July 2018) https://www.transparency.org/whatwedo/publication/recommendations_on_beneficial_ownership_transparency_for_ogp_national_actio

Discussion:

The issue of beneficial ownership transparency has been addressed through standards in other fora including by the FATF,⁸ the G20⁹ and the EU.¹⁰ This provides important guidance and the FATF also conducts monitoring. The value-added of addressing the issue in the work of the OECD WGB would be to (1) spotlight how concealment of beneficial ownership can hinder foreign bribery enforcement; (2) follow best practice in this area; and (3) increase momentum for improvements in this crucial area.

The OECD WGB Phase 4 report on the UK in March 2017 gave special attention to the issue.¹¹ It noted the UK's role as a leading financial services sector, the risks for foreign-bribery related money laundering and the fact that the UK's beneficial ownership initiatives should make it easier to detect and deter foreign bribery. It also noted that "UK law enforcement agencies acknowledge that the opacity of current beneficial ownership arrangements is a significant barrier to tackling money laundering, bribery and corruption, and to successfully recovering stolen assets." It commented that the UK's public central register of company beneficial ownership information for all companies incorporated in the UK that was launched in October 2016 was "one of the initiatives that should make it easier to investigate the complex web of financial structures commonly associated with foreign bribery cases."

The Phase 4 report on the UK recommended maintenance of beneficial ownership registers in the Overseas Territories (OTs) accessible to UK enforcement authorities. The report also cited civil society comments pointing out that the models of registries to be developed in the Crown Dependencies (CDs) and OTs will not meet the UK's Persons with Significant Control (PSC) standards, including regarding their accessibility to the public. Several participants also highlighted the need to further regulate beneficial ownership of land and real estate to address the problem of offshore companies investing the proceeds of corruption in UK property.

⁸ In 2014 the FATF produced a Guidance Note in 2014 on *Transparency and Beneficial Ownership* to assist countries with implementation of its Recommendations 24 and 25 on transparency of ownership of legal persons and legal arrangements <http://www.fatf-gafi.org/media/fatf/documents/reports/Guidance-transparency-beneficial-ownership.pdf>

⁹ The G20 adopted High Level Principles on Beneficial Ownership Transparency stating that it "considers financial transparency, in particular the transparency of beneficial ownership of legal persons and arrangements, is a high priority"

<https://star.worldbank.org/document/g20-high-level-principles-beneficial-ownership-transparency> See for example paragraph 8 which states: Countries should ensure that competent authorities (including law enforcement and prosecutorial authorities, supervisory authorities, tax authorities and financial intelligence units) have timely access to adequate, accurate and current information regarding the beneficial ownership of legal persons. Countries could implement this, for example, through central registries of beneficial ownership of legal persons or other appropriate mechanisms. See also the G20 Anti-Corruption Working Group's Action Plan 2019 (December 2018):

[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/WGB/RD\(2018\)10&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/WGB/RD(2018)10&docLanguage=En) However, Transparency International's 2018 report *Leaders or laggards* found that 15 of the G20 members had weak or average beneficial ownership legal frameworks https://www.transparency.org/whatwedo/publication/g20_leaders_or_laggards

¹⁰ The EU's 5th Money Laundering Directive of 30 May 2018, requires member states to make their registers of beneficial ownership of companies fully public by 2020. This covers half the parties to the Convention.

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843>

¹¹ OECD WGB Phase 4 Report on the United Kingdom (2017) <http://www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf>

In its follow-up report on the UK in March 2019, the OECD WGB noted as a positive development “the deployment of private central registers of company beneficial ownership or similarly effective systems in all three Crown Dependencies (CDs) and in the Overseas Territories (OTs) with major financial centres, which are now effectively sharing company beneficial ownership information with UK law enforcement agencies and tax authorities.”

The UK Phase 4 report makes clear that beneficial ownership transparency is a key issue for prevention, detection and investigation of foreign bribery cases.

Similarly, the OECD WGB Phase 4 review of the Czech Republic in June 2017 noted that since Phase 3, the Czech Republic had taken a number of initiatives to make information about business transactions more transparent and easily accessible to specified stakeholders in the form of three principal registries - beneficial ownership, bank account, and contracts.¹² It found that these initiatives had the potential to make foreign bribery and related investigations more efficient. The evaluation team determined that the Beneficial Ownership Registry could provide significant value-added, but it was still under development, and potential problems had been identified that could undermine its use in foreign bribery investigations. The review decided to follow up on the use of the three registers in foreign bribery investigations.

These reviews highlight the importance of beneficial ownership registries and why this topic should be added to the new Recommendation and systematically covered in all the OECD’s Phase 4 and subsequent country reviews.

2. Victims’ remedies (Question 18)

Foreign bribery misdirects the affected state’s resources and often causes serious harm to the populations affected, including adverse impacts on human rights.¹³ However, neither the OECD Anti-Bribery Convention nor the 2009 Revised Recommendation reference the victims of foreign bribery. This fosters the false notion that foreign bribery is a victimless crime. In practice, state treasuries in supply-side countries are often filled with fines and disgorgement of profits, while the state and people affected by the corruption are “left out of the bargain”.¹⁴ International standards call for harm to victims to be remedied and national legal frameworks and practice described below show how this can be done in the context of foreign bribery cases.

We note that the IBA submission to this consultation on *Structured Settlements* takes the view that “There should also be a concerted effort to address the position of ‘victims of corruption’ within this emerging framework”.¹⁵ The submission from the Recommendation 6 Network

¹² OECD WGB Phase 4 Report on Czech Republic (June 2017) <http://www.oecd.org/corruption/anti-bribery/Czech-Republic-Phase-4-Report-ENG.pdf>

¹³ There is now wide consensus that corruption has adverse human rights impacts. See eg. <https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx>

¹⁴ The Stolen Asset Recovery Initiative publication *Left Out of the Bargain* documents the extent of this problem. ¹⁴ See StAR, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (2014) <https://star.worldbank.org/document/left-out-bargain>

¹⁵ IBA, *Structured Settlements for Corruption Offences, Towards Global Standards?* (December 2018) <http://www.oecd.org/corruption/anti-bribery/IBA-Structured-Settlements-Report-2018.pdf>

Members proposes that “The process of concluding Non-trial Resolutions should where appropriate provide for consideration of potential remedies for injured parties without compromising the goals of law enforcement.”¹⁶ The Network adds in its Explanatory Note 7.3 that “Enforcement agencies that actively pursue international bribery generally resist allocating penalty payments obtained in Non-trial Resolutions to nations that have not actively pursued bribery, challenging those nations to enforce their own laws. Some countries, however, are not well equipped to investigate and prosecute international bribery: substantial cooperation might provide an adequate substitute for independently maintained investigations and prosecutions.” The reluctance of enforcement agencies should not override compensation for victims since this is a matter of justice for the people in the affected state and can also provide an important additional deterrent to foreign bribery. Moreover, there are emerging standards for the transparent and accountable return of assets and models for organising the return that make it possible to meet those standards.

Proposal: The OECD WGB should add a new recommendation on victims’ remedies to the new Anti-Bribery Recommendation and should encourage parties to

- (1) develop principles or guidelines with respect to granting compensation to victims in foreign bribery cases
- (2) provide for timely notice to enforcement authorities in affected states about opportunities to participate in foreign bribery cases at different stages, from investigation (where feasible) to final disposition
- (3) provide for notification, if possible, of other potential affected parties, such as competitors, shareholders, consumers and others who may have been harmed as a result of foreign bribery – this is especially relevant in very large cases
- (4) allow the authorities in victim states to submit claims for reparations or compensation, including social and collective damages, and to present victim impact statements; also allow claims and impact statements by other victims
- (5) follow the Global Forum on Asset Recovery (GFAR) Principles in case of return of funds to affected states or into the hands of representatives of a class of victims
- (6) report to the OECD Working Group on Bribery about their arrangements in this regard

The Working Group on Bribery should systematically review the status of country arrangements for inclusion, representation and standing of victims in foreign bribery cases.

Discussion:

International standards regarding victims’ remedies include the 1985 UN General Assembly Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which provides some guidance in terms of general principles covering the topics of access to justice and fair treatment, restitution, compensation, assistance and victims of abuse of power.¹⁷

¹⁶ Recommendation 6 Network Members, *International Guidelines for Non-Trial Resolutions in Foreign Bribery Cases* (December 2018) <https://www.nhh.no/en/research-centres/corporate-compliance-and-enforcement/guidelines-for-non-trial-resolutions/>

¹⁷ It includes paragraph 10 which says “In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community” Paragraph 21 says “States should ...enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or

UNCAC Article 32 calls on States Parties to protect and enable victims to have their views and concerns presented and considered during criminal proceedings against offenders. UNCAC Article 35 provides for States Parties to introduce measures ensuring that those who have suffered damage from corruption “have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.” The Council of Europe Civil Law Convention against Corruption contains similar language. Other provisions in UNCAC also address victims’ remedies, including Articles 53 and 57 in the chapter on asset recovery.¹⁸

Furthermore, there is growing international recognition of the interlinkages between corruption and human rights violations and of the need for states and multinational companies to remedy adverse impacts on human rights.¹⁹ The revised *OECD Guidelines for Multinational Enterprises* adopted in 2011 includes a new human rights chapter consistent with the *UN Guiding Principles on Business and Human Rights* adopted earlier in the same year. It states that multinational enterprises should “Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.”

In addition, the *OECD Guidelines Commentary on General Policies* addresses due diligence (applicable to both human rights and bribery) and includes a requirement to address actual impacts through remediation.²⁰ With foreign bribery, the remediation mechanism is a state-based process such as prosecution and it is up to the States to ensure that the process allows for remediation in the sense of making good the adverse impact.

The general situation under national law with regard to compensation of victims is summarised in a 2016 Note by the United Nations Office on Drugs and Crime (UNODC).²¹ Many States

economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.”

<http://www.un.org/documents/ga/res/40/a40r034.htm>

¹⁸ UNCAC Article 34 addresses consequences of corruption and encourages States Parties to consider corruption a relevant factor in legal proceedings to annul or rescind a contract. Article 42 explicitly encourages States to increase the means of establishing jurisdiction over corruption offences, such as those committed against a State Party or its national(s), thus removing potential obstacles to the initiation of legal proceedings against alleged criminals. Article 53(b) also requires States Parties to permit their courts to order corruption offenders to pay compensation or damages to foreign States that have been harmed by corruption offences. Article 57 (3)(b) refers to “when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property” (c) refers to returning confiscated property, inter alia, to its prior legitimate owners or compensating the victims of the crime.

¹⁹ In 2011, the United Nations Human Rights Council unanimously endorsed the *UN Guiding Principles on Business and Human Rights*, a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations. This implemented the UN’s 2008 “Protect, Respect and Remedy Framework”. See also OHCHR on Corruption and Human Rights, <https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx>

²⁰ Commentary on General Policies, no. 14: “For the purposes of the *Guidelines*, due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the *Guidelines*. Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation.”

²¹ UNODC, *Good Practices in Identifying Victims of Corruption and Parameters for their Compensation*, (4 August 2016) <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604993e.pdf>. See also, StAR, *Report on Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (2015), pp. 96-9 and StAR, *Asset Recovery Handbook: A Guide for Practitioners* https://star.worldbank.org/sites/star/files/asset_recovery_handbook_0.pdf

accord victims the right to participate in criminal proceedings as “*partie civile*” and be awarded compensation as part of the judgement of conviction. In some states, the amount may be awarded out of a fine or from money in the possession of the offender. In others, the victim, his/her legal representative or the prosecutor on instructions from the victim may apply for compensation after conviction and prior to sentencing. Many States permit a victim to seek compensation through civil or administrative proceedings either in lieu of these avenues or as an additional one.

Further, various forms of settlements are also used in criminal and civil proceedings to compensate victims. Some states permit procedures similar to settlements in the context of criminal proceedings through the use of plea agreements that can include victim compensation.

It should be noted that in some jurisdictions, such as the United States, a state claimant must waive sovereign immunity to bring a civil action. Waiver could expose it to the risk of counter-suits and to having to produce material about its internal deliberations during pre-trial investigation that could be embarrassing and this may deter some states from presenting claims.

a. London Anti-Corruption Summit Commitments

The May 2016 London Anti-Corruption Summit final Communique of 42 participating countries stated that “Compensation payments and financial settlements, in countries whose legal systems and domestic policies accommodate, can be an important method to support those who have suffered from corruption. Those countries that accommodate such payments will work to develop principles to ensure that such payments are made safely, fairly and in a transparent manner to the countries affected.”²²

In their country statements for the Summit, eight OECD Convention countries - Australia, Italy, Mexico, the Netherlands, New Zealand, Norway, Switzerland and the United Kingdom- included commitments to develop common principles governing the payment of compensation “to the countries affected”.²³ A ninth country, Nigeria also made this commitment, specifically referencing foreign bribery.²⁴

²² *London Anti-Corruption Summit Communique* (12 May 2016)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522791/FINAL_-_AC_Summit_Communique_-_May_2016.pdf

²³ See the statement from Australia: “We will work with other countries to develop common principles governing the payment of compensation to the countries affected, to ensure that such payments are made safely, fairly and in a transparent manner.” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522699/Australia.pdf The other similar statements can be found at this link:

<https://www.gov.uk/government/publications/anti-corruption-summit-country-statements>

²⁴ “We will develop common principles governing the payment of compensation to the countries affected, **(including payments from foreign bribery cases)** to ensure that such payments are made safely, fairly and in a transparent manner.”

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/523799/NIGERIA-_FINAL_COUNTRY_STATEMENT-UK_SUMMIT.pdf

b. Notification and participation of victim states

The notification and participation of authorities from countries affected by foreign bribery in investigations (where feasible), prosecutions, civil actions and the development of non-trial resolutions is desirable to ensure that those authorities can have their views and interests represented, present claims and participate in a joint resolution, where appropriate, or are better able to pursue those involved in that bribery scheme within their own jurisdictions. Additionally, victims should be provided the opportunity to present victim impact statements in sentencing proceedings or proceedings to approve a non-trial resolution.²⁵

There will be cases where participation at all stages is not feasible such as where, for example, some of those implicated in the wrongdoing are still in office and the risk is that the investigation will be compromised if the victim state is notified.

c. Notification and participation of other victims

Other victims, where they can be identified, should be accorded rights to notice and participation in proceedings and to make claims for restitution.²⁶

d. Basis for compensation

Compensation may be sought by states on the basis of contractual restitution, tort damages or unjust enrichment.²⁷ In the context of procurement corruption, for example, the government of an affected state may seek to recover the financial damages resulting from paying higher prices, obtaining lesser quality of goods and services or obtaining incomplete performance of the contract that was procured through bribery by the contractor – or from a completely unnecessary procurement.²⁸ It may also seek compensation for damages resulting from corruptly obtained business authorisations, licences or permits; or due to revenues lost due to corruption, for example lost tax or customs revenues.²⁹

Corruption may also cause severe harms that are diffuse, indirect, and widely shared and this will pose difficulties of proof. However, the law on diffuse harm in many states is evolving as it did when environmental crimes first became actionable. OECD Convention states that already allow a compensation claim for diffuse harm from corruption include France where courts have

²⁵ Prof Paul G. Cassell has provided at least four reasons for victim impact statements. Such statements provide information to the sentencing judge or jury about the true harm of the crime - information that the sentencer can use to craft an appropriate penalty. Second, they may have therapeutic aspects, helping crime victims recover from crimes committed against them. Third, they help to educate the defendant about the full consequences of his crime, perhaps leading to greater acceptance of responsibility and rehabilitation. And finally, they create a perception of fairness at sentencing, by ensuring that all relevant parties - the State, the defendant, and the victim-are heard

²⁶ 18 U.S.C. § 3771, <https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman/victims-rights-act>

²⁷ See *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (2014) <https://star.worldbank.org/document/left-out-bargain>

²⁸ OECD-StAR, *Identification and Quantification of the Proceeds of Bribery: A joint OECD- StAR analysis* (2012) <https://www.oecd.org/corruption/anti-bribery/50057547.pdf>

²⁹ See also SERAP v. Nigeria (2011) <http://serap-nigeria.org/ecowas-court-orders-nigeria-to-provide-free-and-compulsory-education-to-every-child.ngo/>

granted reputational damages³⁰ and moral damages³¹ and Costa Rica, which recognises social damages.³² The general rule appears to be that they should not be disproportionate.³³ Interestingly, US law recognises the possibility of “community restitution” in connection with certain drug offenses where there is no identifiable victim but the offence causes “public harm.”³⁴

Costa Rica, a pioneer with regard to social damages, defines it as “the impairment, impact, detriment or loss of social welfare (within the context of the right to live under a healthy environment) caused by an act of corruption and suffered by a plurality of individuals without any justification whereby their material or immaterial diffuse or collective interests are affected, and so giving rise to the obligation to repair.” The concept of social damage is recognised in a number of states and is associated with compensation for damages to the public interest (including damage to the environment), to the credibility of institutions, or to collective rights such as health, security, peace, education or good governance.

Claims for compensation may also potentially be made by competitors, shareholders, consumers or others adversely affected by foreign bribery. This could include, for example, people whose health or livelihood has been damaged due to the corrupt granting of a permit or licence. As Professor Matthew Stephenson points out in a paper on standing “if a building collapses because an inspector took bribes to overlook substandard construction, or a business loses a contract because a rival paid off the procurement officer...then there may be identifiable plaintiffs (tenants in the building, the business that lost the contract...) who can show a direct, personal, concrete injury.”³⁵ With respect to certain types of foreign bribery it may also be possible to identify the members of a broad class of victims that have suffered a direct, personal, concrete injury, for example where the bribery can be shown to have led to higher utility or telecoms prices for users or to the consumption of tainted food or medicine or other specific harms. In assessing damages, general or specific, consideration should be given to the gendered impact of corruption.

³⁰ See the case where the town of Cannes sued for damages after their mayor had been convicted of corruption C. cass., ch. Crim 14 March 2007, no. 06-81010. The case was handled by the *Cour de cassation* which disallowed material damage but made an award in relation to moral damage. The facts of this case are as follows: the mayor, after receiving a bribe, had allocated a gambling licence to a company without complying with legal requirements. The judges recognised that loss of reputation qualifies as damage, accepting that the party suffering the said loss of reputation is in fact a legal person (in this case, the town of Cannes). The town alleged that they had suffered a loss of reputation worldwide, in the context of their role as host of the prestigious film festival. The mayor of the town was the main person involved but corruption resulted from the behaviour of the defendant who had paid the bribe. In this case, damages were quantified at €100.000 EUR. The *Cour de cassation* also reserved the possibility of compensation for the “loss of chance” in an *obiter dictum*. <https://halshs.archives-ouvertes.fr/halshs-01469762/document>

³¹ See 2007 French money laundering case against a former Nigerian energy minister Dan Etété which awarded Nigeria €150,000 as recompense for *prejudice moral* (nonpecuniary damages).

³² In Costa Rica the Attorney General is authorised to file a civil suit for compensation when the offence caused damage to society. The conference of Ministers of Justice of the Ibero-American countries held in Madrid in 2011 (COMJIB) agreed to use Costa Rica’s proposal to create a concept of social damage.

³³ Additionally, some states provide for compensation “in kind”, such as the issuance of a public apology or a declaration to help restore the reputation of the victim; the publication of the judgement of conviction as a means to repairing non-proprietary damage; and the publication of the case in a newspaper.

³⁴ 18 U.S.C. § 3663 (a)(6)

³⁵ Matthew Stephenson, *Standing Doctrine and Anti-Corruption Litigation: A Survey* (2016) https://www.opensocietyfoundations.org/sites/default/files/legal-remedies-2-20160202_0.pdf

Compensation claims should be seen within the OECD Convention's framework which foresees not only fines but also confiscation of the bribe and the proceeds of the bribery. (OECD Convention Article 3).³⁶ The OECD WGB has opined that confiscation is not a sanction; consequently, confiscated proceeds should be available for compensation purposes. In some states, fines can also be allocated for compensation.³⁷

e. Experience in OECD Convention countries

A new OECD report on non-trial resolutions outlines the opportunities for direct compensation of victims in the 27 jurisdictions surveyed.³⁸ Some countries, like the UK and the US allow compensation to affected states and such payments have been made in a limited number of cases, providing some experience to draw on. Some countries, like Switzerland, allow a restricted form of "reparations" including the possibility of a payment to a domestic charity or NGO.³⁹ According to the new OECD report, a small number of OECD Convention countries provide for payments to a foreign charity or NGO.

United Kingdom

The UK has taken the lead in giving policy priority to compensation to victim countries in foreign bribery cases. The Crown Prosecution Service (CPS), the National Crime Agency (NCA) and the Serious Fraud Office (SFO) have adopted a common framework of principles, published in June 2018, with respect to providing compensation to victim countries as part of the resolution of foreign bribery cases.⁴⁰ Pursuant to these principles, the agencies work collaboratively with the Department for International Development (DfID), the Foreign and Commonwealth Office (FCO), the Home Office and Her Majesty's Treasury to identify potential victims overseas, assess the case for compensation, obtain evidence in support of compensation claims, ensure the process for the payment is "transparent, accountable and fair", and identify means by which compensation can be paid to avoid the risk of further corruption.

This framework was preceded by several cases involving reparations payments, as outlined in the UK Phase 3 and 4 reviews and highlighted in a recent OECD publication on non-trial

³⁶ Commentary 21 of OECD Anti-Bribery Convention

³⁷See OECD WGB Phase 4 Report on Switzerland (March 2018), page 43: "However, it is worth emphasising that confiscation is not a sanction within the meaning of Article 3(1) of the Convention (it is covered by another provision). The aim of confiscation measures is to deprive the offender of additional pecuniary benefits resulting from the offence (the proceeds) and not to strip him/her of assets by way of reparation for the consequences of an act which is punishable under criminal law."

<http://www.oecd.org/corruption/anti-bribery/Switzerland-Phase-4-Report-ENG.pdf>

³⁸ OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm

³⁹ According to the OECD WGB Phase 4 Report on Germany, when a suspended prison sentence is imposed on a natural person, the court can set conditions including payment of a sum of money to the treasury or to a charitable organisation (Section 56b(2) 2, N°3 and 4 CC).³⁹ Restitution to the victim is also available (Section 56b(2)1.CC). Further, an exemption or termination of proceedings under section 153a CCP provides for a conditional exemption or termination of prosecution in return for payment of a sum of money, either to the treasury or a non-profit organisation. However, none have been used in a foreign bribery case to date. Further, these avenues are not currently available with respect to liability of legal persons.

⁴⁰ New joint principles published to compensate victims of economic crime overseas (1 June 2018)

<https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/>

resolutions.⁴¹ These included two pre-Bribery Act cases. Under a 2009 plea agreement between the UK construction firm *Mabey & Johnson* and the Serious Fraud Office (SFO) the company agreed to pay reparations to Iraq, Ghana and Kenya.⁴² In 2010, *BAE Systems* agreed to pay Tanzania *ex gratia* a reparations payment of almost £30 million in settling a case of alleged bribery in the sale to Tanzania of an outdated, superfluous military air traffic control system costing about £26 million.⁴³ In the UK's first Deferred Prosecution Agreement (DPA) in November 2015, *Standard Bank*, agreed to pay a \$16.8 million fine and about \$500,000 to cover costs as well as to disgorge \$8.4 million of profit, and pay \$7.05 million compensation to the Tanzanian government.⁴⁴ Compensation has also been provided to foreign countries in three other UK foreign bribery cases, *Smith & Ouzman*, *Oxford Publishing Limited (OPL)* and another case for which reporting restrictions apply.⁴⁵

United States

In the US, the Crime Victims Rights Act (CVRA) provides crime victims with a list of rights, including the right to timely notice of any proceeding involving the accused, the right not to be excluded from these proceedings, the right to be reasonably heard at sentencing, and the right “to full and timely restitution as provided in law.”⁴⁶ The CVRA defines a “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense.” The Mandatory Victim Restitution Act and the Victims and Witness Protection Act also provide rights for victims, including restitution.⁴⁷

As Richard Messick explained in a 2016 paper “in the US a foreign government that is a victim of an FCPA violation can assert the full panoply of rights accorded crime victims during an FCPA criminal enforcement action. For foreign governments, the most important right granted a

⁴¹ (OECD 2019) *Resolving Foreign Bribery Cases with Non-Trial Resolutions Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* <http://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf>

⁴² Mabey and Johnson had been charged with inflating contract prices to fund kickbacks to Iraqi officials involved in a major contract to build bridges in Iraq, as well as paying bribes to officials in Ghana and Jamaica. The court ordered Mabey to pay reparations in the total amount of £1,415,000 consisting of £658,000 for Ghana, £139,000 for Jamaica, and £618,000 for Iraq). See StAR, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (2014) <https://star.worldbank.org/sites/star/files/9781464800863.pdf>

⁴³ The Tanzanian government and UK Department for International Development (DfID) decided to use the funds for education projects. Books and classroom desks were supplied to primary schools across Tanzania.

⁴⁴ UK Serious Fraud Office: <https://www.sfo.gov.uk/2018/11/30/uks-first-deferred-prosecution-agreement-between-the-sfo-and-standard-bank-successfully-ends/> The UK explained that as the corporate benefit was shared between a UK and Tanzanian company, Tanzania had potential jurisdiction. The UK agreed with Tanzania that the SFO would take the lead on the basis that the SFO could sanction the conduct and obtain compensation. In providing the payment to Tanzania, the SFO was assisted by the FCO and DfID working in collaboration with the Ministry of Finance of the Government of Tanzania.

⁴⁵ In *Smith & Ouzman*, compensation was not ordered by the court, but the SFO worked with DFID and FCO to organise GBP 395 000 compensation to Mauritania and Kenya through the exercise of executive power. In Mauritania, the UK made a payment to the World Bank to fund infrastructure projects in the country. In Kenya, the UK agreed the funds would be spent on purchasing ambulances for the country. In *Oxford Publishing Limited (OPL)*, in addition to the £1.9 million civil recovery order, OPL unilaterally offered to contribute £1.2 million to not-for-profit organisations for teacher training and other educational purposes in sub-Saharan Africa. This benefit to the people of the affected region has been acknowledged and welcomed by the SFO, but the SFO decided that the offer should not be included in the terms of the court order, as the SFO considers it is not its function to become involved in voluntary payments such as this.

⁴⁶ 18 U.S.C. § 3771, <https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman/victims-rights-act>

⁴⁷ <https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg1248.pdf>

crime victim is the right to compensation for losses the offense caused. Whenever a bribe-payer is found guilty of, or pleads guilty to, conspiring to violate the FCPA, then under both the Victims and Witness Protection Act and the Mandatory Victim Restitution Act⁴⁸ a foreign government ‘directly harmed’ by the conspiracy has a claim for damages.”⁴⁹

Messick cites five cases where a foreign government has received restitution or compensation for an FCPA violation but in none was there an explanation of why the US Department of Justice (DOJ) conditioned the plea bargain on payment of compensation nor the rationale for the amount. In the two most recent cases, the governments of Thailand and Haiti were compensated in 2009 and 2010 respectively in accordance with this provision. In both cases, the court ruled the two governments were “directly harmed” by a criminal conspiracy to bribe government officials. Thailand received \$250,000 and Haiti \$75,000. In neither case did the victim country file a claim. In the Thai case, the court used its discretion in determining the amount of damages, and in the Haitian Teleco case the prosecution proposed and the court accepted that the damages were equal to about the amount of the bribe, with the court referring to the Government of Haiti as the “victim” of the bribery scheme.⁵⁰

Several other US examples of restitution have been cited by StAR that were made in connection with US enforcement actions against foreign corruption in the UN Oil-for-Food-Programme in Iraq.⁵¹

On the other hand, a compensation petition submitted by Costa Rica’s state-owned Instituto Costarricense de Electricidad’s (ICE) in *United States v. Alcatel–Lucent France, SA* was denied. The DOJ opposed the petition arguing that because so many ICE employees had been involved in the bribery scheme, the company was not a victim but a co-conspirator. Even if ICE were a victim, it contended, compensation should not be ordered because the Mandatory Victims Restitution Act provides an exception to compensation where determining the amount would be so complex that it would unduly delay resolution of the criminal case. The trial court agreed with both arguments, holding that ICE was a co-conspirator not a victim and that in any event the computation of damages would take too long. This decision was upheld on appeal.⁵² However, had the Government of Costa Rica have been the one claiming compensation, the opinion suggests the result would have been different.

⁴⁸ 18 U.S.C. § 3663 (a)(1)(A) The court, when sentencing a defendant convicted of an offense under this title..., may order...that the defendant make restitution to any victim of such offense....The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense....

(3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.

⁴⁹ Richard Messick, *Legal Remedies for Victims of Bribery under US Law* (June 2016)

https://www.opensocietyfoundations.org/sites/default/files/legal-remedies-5-messick-20160601_1.pdf

⁵⁰ *United States v. Diaz*, No. 20346-CR-JEM (S.D. Fla. 2009) (plea agreement) (defendant ordered to pay \$73, 824 to the government of Haiti, its fee for serving as intermediary in bribery scheme between government officials and U.S. firm); *United States v. Green*, No. CR 08-00059(B)-GW (C.D. Cal. 2010) (conviction) (DoJ sought compensation of \$1.8 million, total bribes paid Thai officials; court reduced to \$250,000 without explanation).

⁵¹ See StAR, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (2014) pages 92 - 93

⁵² The 11th Circuit ruled that the “pervasive, constant, and consistent illegal conduct” of ICE employees that the trial court had identified was enough for it to conclude that ICE “actually functioned as the offenders’ co-conspirator.”

France and Switzerland

As explained in StAR's 2014 book *Left Out of the Bargain*, in some civil law countries, the *partie civile* route may offer countries harmed by corruption the possibility of damage awards. Under the French Criminal Procedure Code, victims who have been harmed, including states, may apply to be a *partie civile* and be a full party to the criminal proceedings. Under Article 2 of the Code, victims can bring a claim and obtain civil compensation from a criminal court when they can show personal and direct damage from the crime. In 2007, Nigeria became a *partie civile* in France to a money laundering case against a former Nigerian energy minister Dan Etété. He was convicted and sentenced to three years in jail, and as a civil party to the criminal action, Nigeria was awarded €150,000 as recompense for *prejudice moral* (nonpecuniary damages).⁵³

In Switzerland, crime victims have the right to participate as a private claimant (*partie civile*) in the investigation, prosecution, and trial of a criminal defendant and to submit a claim for damages to be determined if the defendant is found guilty. This status has been granted to several states including Brazil, Nigeria and Tunisia in money laundering cases, but no damages were awarded.⁵⁴

Switzerland also has a special procedure for reparations, though not specifically intended for use in relation to countries affected by foreign bribery. According to the OECD WGB's Phase 4 report on Switzerland in March 2018 "the method of calculation and the choice of beneficiary remain obscure."⁵⁵ The report described two cases where this procedure was used, one involving a payment of CHF 125,000 to the International Committee of the Red Cross (ICRC) and one involving a payment of CHF 31 million to the Canton of Geneva.⁵⁶ In two other cases involving Alstom⁵⁷ and Siemens, reparation was paid to the International Committee of the Red Cross, to the Geneva foundation "La maison de Tara" and to SOS Kinderdorf e.V., Munich. According to the authorities, the recipients of the reparations payments were decided in

⁵³ Ibid. Even though Nigeria reportedly failed to pursue an appeal, and consequently did not ultimately receive the damages owed, the reasoning remains valid as a precedent for future claims by states harmed through the bribery of their officials.

⁵⁴ Ibid. The cases involving Tunisia and Nigeria were settled short of a final verdict, and assets repatriated pursuant to an UNCAC Article 57(5) agreement. The case involving Brazil concerned several Brazilian tax inspectors, who had extracted bribes in exchange for ending inspections and/or reducing fines and deposited some of the proceeds in Swiss bank accounts. The court found that the laundered proceeds included funds due to the state of Brazil and that Brazil could therefore contend that it had suffered damage as a result of a crime and could thus lay legitimate claim to recompense. However, Brazil was not awarded any damages upon the facts of the case. The defendants had argued that since the crime of corruption was committed against "the collective interest," rather than specifically against the Brazilian state, Brazil could not claim to have been immediately and directly harmed by it.

⁵⁵ OECD WGB Phase 4 Report on Switzerland (March 2018)

⁵⁶ The first case involved a Swedish company (Company S) that allegedly paid illegal commissions to Gazprom executives to secure the sale of turbines for a gas pipeline. Apart from the reparation payment to the ICRC, the company had illegal assets confiscated to the value of the illicit gain (USD 10.6 million). In a case involving an oil company that had paid tens of millions into the bank account of a Nigerian law firm, the case was closed when the company paid the CHF 31 million in reparations to the Canton of Geneva <http://www.oecd.org/corruption/anti-bribery/Switzerland-Phase-4-Report-ENG.pdf>

⁵⁷ In 2011, the authorities found that Alstom SA, using its Swiss subsidiary, Alstom Network Schweiz AG, had engaged in a scheme to pay bribes to obtain contracts in Latvia, Tunisia, and Malaysia. By summary punishment order, Alstom Network was fined CHF 2.5 million together with a confiscation penalty of CHF 36.4 million, calculated on the basis of the profits earned by the entire group through the contracts involving bribery, as well as procedural costs (about CHF 95,000). In the companion case concerning Alstom SA, the company agreed to pay CHF1 million in voluntary reparations to the International Committee of the Red Cross (ICRC), to be used in its projects in Latvia, Malaysia, and Tunisia for the benefit of the people of those countries. See StAR, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (2014) <https://star.worldbank.org/sites/star/files/9781464800863.pdf>

consultation with the accused and taking into account their not-for-profit activities in the countries affected.

Greece

Greece has also demonstrated the possibility of reparations in a domestic bribery case involving Siemens which included novel compensation arrangements. In April 2012, Greece concluded via parliamentary action a settlement of foreign bribery allegations against Siemens by multiple public entities that had contracts with the company. Siemens agreed to waive €80 million in obligations owed to it by the Greek government and also agreed to provide €90 million to finance various entities and endeavours advancing the Greek public interest (including supporting the country's anticorruption platform); to invest €100 million in Siemens' activities within Greece; and to carry out a structured plan to consider and develop further investment opportunities within Greece.⁵⁸

These examples show that there should be no barrier in principle to introducing better procedural arrangements for compensation of victims in foreign bribery cases and that practical challenges can be addressed.

f. Return of assets

In its UK Phase 4 report, the OECD WGB recommended that the UK should ensure that "payments of reparations and compensation to foreign countries by defendants are not lost to corruption."

In the event that compensation is awarded to affected states, there are new international standards emerging about how the return of these assets should be made, namely the Principles agreed among Nigeria, Sri Lanka, Tunisia, Ukraine, the UK and the US at the Global Forum on Asset Recovery in December 2017.⁵⁹ These include the principles of partnership, mutual interests, early dialogue, transparency and accountability, beneficiaries, strengthening anti-corruption and development, case-specific treatment, possible use of an UNCAC Article 57(5) agreement, preclusion of benefit to offenders and inclusion of non-governmental stakeholders.

The GFAR principles include the following key items:

- Principle 4: Transparency and accountability: "Transferring and receiving countries will guarantee transparency and accountability in the return and disposition of recovered assets. Information on the transfer and administration of returned assets should be made public and be available to the people in both the transferring and receiving country..."

⁵⁸ Ibid

⁵⁹ Annex to the Communique of the Global Forum on Asset Recovery (December 2017)
https://star.worldbank.org/sites/star/files/20171206_gfar_communique.pdf

- Principle 5: Beneficiaries: “Where possible, and without prejudice to identified victims, stolen assets recovered from corrupt officials should benefit the people of the nations harmed by the underlying corrupt conduct.”
- Principle 6: Strengthening anti-corruption and development: “Where possible, in the end use of confiscated proceeds, consideration should also be given to encouraging actions which fulfil UNCAC principles of combating corruption, repairing the damage done by corruption, and achieving development goals.”
- Principle 10: Inclusion of non-government stakeholders: “To the extent appropriate and permitted by law, individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, should be encouraged to participate in the asset return process, including by helping to identify how harm can be remedied, contributing to decisions on return and disposition, and fostering transparency and accountability in the transfer, disposition and administration of recovered assets.”

Further, as discussed below, in cases of grand corruption courts should have the option to grant standing to representatives of victims other than the state and to make special arrangements for a victims’ fund.

Several models for the return of assets have been used to date to achieve accountability. One oft-cited example is the not-for-profit-foundation used in the Mercator/James Giffen case, where \$115 million in assets (\$84 million plus accrued interest) were returned to Kazakhstan. The funds had been frozen and seized in Switzerland at the request of the United States in a forfeiture action related to alleged foreign bribery in Kazakhstan. Based on an MOU in 2007 between Kazakhstan, Switzerland and the US, the funds were used to establish the BOTA Foundation, which had the purpose of improving the lives of Kazakh children and youths living in poverty. The foundation’s financial management was overseen by a board of trustees and by the World Bank and the funds were disbursed through three programmes: conditional cash transfers, scholarships to attend Kazakhstan higher education institutions, and grants to support innovative social service provision. At the 2014 close of the programme an external evaluation gave the foundation high marks for seeing that all monies reached the intended recipients.⁶⁰

3. Grand corruption issues, including standing and demand side of foreign bribery (Question 4)

There is a growing recognition in the international community of the need for special measures to counter grand corruption, as evidenced by UNCAC resolution 7/2 in 2017 on Preventing and combating corruption involving vast quantities of assets and the Lima Statement on Corruption

⁶⁰ Richard Messick (March 2016) *How asset return agreements can bolster reform: The Kazakh experience* : <https://globalanticorruptionblog.com/2016/03/03/how-asset-return-agreements-can-bolster-reform-the-kazakh-experience/>

Involving Vast Quantities of Assets agreed by an Expert Meeting in December 2018.⁶¹ The experts at that meeting encouraged the development of innovative ways to adequately investigate, prosecute and sanction those individuals involved in acts of corruption involving vast quantities of assets. This approach is consistent with national legal frameworks that already provide for aggravated corruption offences (bribery, embezzlement, money laundering etc) or aggravating circumstances and associated special measures.

Proposal: The OECD WGB should add a new recommendation on grand corruption to the new Anti-Bribery Recommendation that encourages parties to introduce special measures in grand corruption cases including:

- (a) provide for non-state actors, including CSOs, to replace representatives of the affected state in representing victims and allow them to make claims and present victim statements
- (b) make special arrangements for a victims' fund, where appropriate
- (c) criminalise the demand side of foreign bribery in grand corruption cases

The recommendation should also include an instruction to the Working Group on Bribery to include implementation and enforcement of these corruption offences in its systematic follow-up and monitoring, as it does with other recommendations.

Discussion:

Transparency International defines grand corruption as the abuse of high-level power that benefits the few at the expense of the many, and causes serious and widespread harm to individuals and society. It often goes unpunished because domestic authorities are unable or unwilling to act.

In 2016 Transparency International also proposed a legal definition of grand corruption and is currently working on a revised version that includes three main elements:

- Any corruption offence under UNCAC Articles 15 -25
- Involvement of a high-level official
- Causing serious harm

We propose that countries introduce a grand corruption offence with associated special measures such as more extensive jurisdiction, longer statutes of limitation, trial *in absentia*, higher sanctions and standing for victims' representatives. Both the opprobrium and the consequences should be greater in relation to grand corruption.

⁶¹ "The experts were concerned about the staggering amounts of assets stolen by PEPs, often using those assets for financing political campaigns and acquiring luxury goods such as yachts, private jets, premium real estate and jewellery. The experts highlighted such large-scale corruption as depriving States of the resources required to provide vital public services such as health care, education, housing, food or basic infrastructure. Preventing and combatting large-scale *corruption would thus contribute to domestic resource mobilization for the achievement of the sustainable development goals.*" https://www.unodc.org/documents/corruption/LimaEGM2018/Outcome_Statement_Lima_EGM_2018.pdf The statement was adopted by an Expert Group Meeting convened to further the implementation of resolution 7/2 of the Conference of States Parties to the Convention, adopted in November 2017.

This approach follows the logic of national legislation that provides for aggravated bribery offences⁶² or that takes into account aggravating circumstances in determining sanctions.⁶³ Under that legislation, factors that are considered include the large scale of corruption, whether it is continuous or systematic or multiple or committed by an organized group of persons, the amount of the benefit and the amount of the loss or harm. The criminal law of many countries includes aggravated bribery offences or provides for consideration to be given to aggravating circumstances in determining sanctions, including in foreign bribery cases. The factors considered include the scale of the corruption, the extent of the loss and the extent of the gain. Likewise, because of the gravity of grand corruption and the associated problem of impunity in the home country, it warrants additional special measures.

In 2016, the US Congress enacted the “Global Magnitsky Human Rights Accountability Act”. (Global Magnitsky Act for short) which allows the executive branch to impose visa bans and targeted sanctions on individuals anywhere in the world responsible for committing human rights violations or acts of significant corruption.⁶⁴ Sec (3)(a)(3) includes among the foreign persons subject to sanctions “a government official, or a senior associate of such an official, that is responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption, including the expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation or transfer of the proceeds of corruption to foreign jurisdictions”. Sanctions deny individuals entry into the US, allow the seizure of any of their property held in the country, and effectively prevent them from entering into transactions with large numbers of banks and companies.⁶⁵ Other countries have also passed similar legislation.

More recently, the June 2018 US Financial Crimes Enforcement Network (FinCEN) issued an Advisory on Human Rights Abuses Enabled by Corrupt Senior Foreign Political Figures and their Financial Facilitators which says:

“High-level political corruption undermines democratic institutions and public trust, damages economic growth, and fosters a climate where financial crime and other forms of lawlessness can thrive. Corrupt senior foreign political figures, their

⁶² The Finnish Penal Code defines aggravated bribery as the giving of bribes “with the result of considerable benefit to the briber or to another person or of considerable loss or detriment to another person.” Finnish Penal Code, Chapter 16, Section 14 <http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf> The German Criminal Code defines aggravated bribery in the public sector as occurring where the offence relates to a ‘major benefit’ or the offender continuously pays or accepts benefits and their purpose is the continued commission of such offences: <http://www.kwm.com/en/knowledge/insights/anti-bribery-and-corruption-guide-germany-20160801>

⁶³ In Germany, aggravating factors can include size of benefit, whether the criminal connection continues over a longer period of time and whether the offender is a member of a gang having the purpose of continued commission of the offence. In France, an aggravating factor for money laundering is whether the offence is committed in an organised gang and In Russia if the crime was committed by an organized group of persons. Under the Swedish Penal Code aggravating circumstances, include: 2. whether the accused manifested especial ruthlessness; 4. whether the accused grossly exploited his position or otherwise abused a special confidence or trust; 6. whether the crime was part of a criminal activity which was especially carefully planned or carried out on a large scale and in which the accused had a significant role..., <http://www.government.se/contentassets/5315d27076c942019828d6c36521696e/swedish-penal-code.pdf> at page 135. In the US the 2018 US Sentencing Guidelines scale up punishment based on factors such as number of offences and whether there is “systematic or pervasive corruption of a government function”. <https://www.uscourts.gov/guidelines/2018-guidelines-manual>

⁶⁴ <https://www.congress.gov/bills/114th-congress/senate-bill/284/text>

⁶⁵ For example, in 2017 the Canadian Parliament passed into law *The Justice for Victims of Corrupt Foreign Officials Bill (Sergei Magnitsky Law)*

subordinates and facilitators, through their corrupt actions, often contribute directly or indirectly to human rights abuses, which have a devastating impact on individual citizens and societies, undermining markets and economic development and creating instability in a region.

Therefore the US is using tools that include the ability to sanction corrupt actors and human rights abusers around the world under an Executive Order implementing the Global Magnitsky Act of 2016, enforcement action against financial facilitators of corrupt senior foreign political figures, as well as issuing advisories to financial institutions to help them identify, mitigate, and report on these risks.”⁶⁶

Combined with the Lima Statement, these statements and measures show a developing consensus in favour of individual countries assuming responsibility for addressing high-level political corruption outside their jurisdictions in light of its serious adverse consequences and the associated impunity. We argue that it should also be possible to bring criminal charges for corruption offences in other jurisdictions and for a range of special measures to be introduced.

a. Standing for non-state representatives and creation of a victims’ fund

One special measure that supply side states should consider in foreign bribery cases involving grand corruption is recognising standing for non-state representatives of victims to bring compensation claims on behalf of a victim population. The affected state is often unable or unwilling to intervene to pursue a claim precisely because of serious corruption of state institutions.⁶⁷ Moreover, as in cases in the US involving Costa Rica and Iraq cited above, in some jurisdictions national courts may not allow compensation based on claims by the state in which the demand side offence occurred. Consideration might also be given as to whether the demand-side state has held the demand side perpetrators to account and this may not have occurred.

In grand corruption cases, the injured population is denied recourse at home by a flawed justice system where public prosecutors or judges fail to carry out their duties faithfully. That population should not be deprived of legal remedies for its injury. This means recognising standing for non-state representatives to initiate cases on behalf of the injured population, including making claims for damages. Any damages awarded will need to be administered carefully, potentially through use of a victims fund or arrangements such as the BOTA Foundation in Kazakhstan, described above.

⁶⁶ <https://www.fincen.gov/news/news-releases/fincen-issues-advisory-human-rights-abuses-enabled-corrupt-senior-foreign>

⁶⁷ Beyond that, the successor government in an affected state may in some cases be excluded from pursuing a claim on grounds of complicity or “*in pari delictu*” See for example THE REPUBLIC OF IRAQ, including as PARENS PATRIAE on behalf of the 08 Civ. 5951 (SHS) CITIZENS of the REPUBLIC OF IRAQ, Plaintiff, -against- ABB AG, et al., OPINION & ORDER (SDNY 6 February 2013) Affirmed on appeal by Second Circuit Court of Appeals, 18 Sept. 2014 <https://www.courtlistener.com/opinion/2734038/republic-of-iraq-v-abb-ag/>

b. Demand side of foreign bribery

In foreign bribery cases that are at the level of grand corruption, there is invariably impunity on the demand side. This is also often true in less egregious cases. The OECD's "flip side" paper published in December 2018 asked whether in 55 concluded foreign bribery cases that ended with sanctions on the supply side the public officials involved in the scheme were also sanctioned or otherwise disciplined. They found that while there were investigations (30) and some enforcement actions (20) targeting demand side officials the rate of sanctioning was not very high, namely in only one-fifth of the cases.⁶⁸ In an additional one-fifth of the cases enforcement action was pending. The study also found that the media plays a major role in the international flow of information and that international cooperation is not a major source of detection in demand side cases.

One avenue to pursue to address impunity on the demand side is to increase international cooperation and technical assistance efforts to help demand side countries sanction demand side officials, where they are willing.

However, in cases where demand side countries are unwilling to sanction their high level officials, this could be addressed if OECD Convention countries criminalised demand side offences. While there are examples of countries charging foreign public officials with money laundering or conspiracy charges or pursuing civil asset forfeiture or issuing Unexplained Wealth Orders (France, UK, US) in grand corruption cases there is a strong justification for supply side countries to create a broader legal basis for pursuing the corrupt officials outside their home jurisdiction.

The UN Convention against Corruption (UNCAC) Article 16 (2) requires each State Party to consider criminalising passive foreign bribery and has been ratified by all 44 OECD Convention parties.⁶⁹ The Council of Europe Criminal Law Convention against Corruption Article 5 requires 29 of 44 OECD Convention parties to criminalise "passive bribery" of foreign public officials i.e. "the request or receipt by any of its public officials, directly or indirectly, of any undue advantage, for himself or herself or for anyone else, or the acceptance of an offer or a promise of such an advantage, to act or refrain from acting in the exercise of his or her functions."

The Explanatory Report to the Criminal Law Convention (paragraph 49) clarifies that Article 5 "provides for the criminalisation of bribery of foreign public officials of any foreign country" [...] *the inclusion of passive corruption of foreign officials in Article 5 seeks to demonstrate the solidarity of the community of States against corruption, wherever it occurs. The message is clear: corruption is a serious criminal offence that could be prosecuted by all Contracting Parties and not only by the corrupt official's own State.*"

Some countries already hold foreign public officials to account in foreign bribery cases via conspiracy and money laundering charges. For example, in January 2019 the US Department of Justice (DOJ) announced the prison sentence handed to Colombia's former National Director of

⁶⁸ OECD, *Enforcement Survey: What happens to public officials who take bribes?* (December 2018)

<https://oecdonthellevel.com/2018/12/11/enforcement-survey-what-happens-to-public-officials-who-take-bribes/>

⁶⁹ See also UNCAC Article 18(b)

Anti-Corruption in a federal court in Miami for his participation in a conspiracy to launder money with the intent to promote foreign bribery.⁷⁰

In March 2019, the DOJ brought charges of conspiracy to commit money laundering against Gulnara Karimova, described as “a former Uzbek official who allegedly had influence over the Uzbek governmental body that regulated the telecom industry... Gulnara Karimova stands accused of exploiting her official position to solicit and accept more than \$865 million in bribes from three publicly traded telecom companies, and then laundering those bribes through the U.S. financial system.”⁷¹ In announcing the charges, Assistant Attorney General Benczkowski referred to “the Department’s comprehensive approach to foreign corruption: we will aggressively pursue both corrupt foreign officials and the companies and individuals who bribe them in order to gain unfair business advantages, and we will do everything we can to keep the proceeds of that corruption out of the U.S. financial system.”

In the UK and France, foreign public officials have been held to account in a number of money laundering cases. Most recently, in December 2018, UK authorities were reportedly investigating a former Nigerian oil minister but Nigeria has now made an extradition request.

The passive bribery offence has already been introduced in countries party to the Council of Europe Criminal Law Convention, though it is apparently seldom used. The case for its introduction in the US was made in a December 2018 article by two lawyers from the prominent law firm Baker & McKenzie.⁷² One of the points they made is that the Global Magnitsky Act is not an adequate substitute for an appropriate criminal statute. “The GMA does not carry criminal penalties and therefore does not create a risk of arrest or extradition to the United States, which means that it does not have the same deterrent effect as criminal charges. In addition, sanctions under the GMA are imposed by the State Department and the Treasury Department without being vetted by a grand jury and are not subject to the same kind of judicial review as a criminal indictment. They therefore tend to be perceived as more political than legal, and for that reason have less credibility in world public opinion than criminal charges.”

In grand corruption cases, assumption of jurisdiction over the demand side should be an option since the chances of accountability at home are small, at least until a transition takes place. However, in general, assumption of jurisdiction over the demand-side foreign bribery cases is not the preferred option. The first preference is for the demand side official’s state to handle the case. If they are willing and need technical assistance, this should be offered by OECD countries and by the OECD itself.

⁷⁰ <https://www.justice.gov/usao-sdfl/pr/colombia-s-former-national-director-anti-corruption-and-foreign-attorney-sentenced>

⁷¹ <https://www.justice.gov/opa/pr/mobile-telesystems-pjsc-and-its-uzbek-subsidiary-enter-resolutions-850-million-department>

⁷² Thomas Firestone and Maria Piontkovska, *Two to Tango: Attacking the Demand Side of Bribery* (December 2018): <https://www.the-american-interest.com/2018/12/17/two-to-tango-attacking-the-demand-side-of-bribery/>

4. Non-trial resolutions, including settlements (Question 14)

As we noted in our Exporting Corruption Report 2018, there is an increasing trend towards companies and governments settling foreign bribery cases out-of-court, with recent legal changes in this area having come or about to come into force in several countries. While non-trial resolutions are cost-saving and incentivise companies to self-report, they should meet adequate standards of transparency, accountability and due process and should not be used in a way that undermines the justice system or public confidence in it. Transparency International welcomes the OECD's excellent recent report on non-trial resolutions.

Proposal: The OECD WGB should add a new recommendation on non-trial resolutions to the new Anti-Bribery Recommendation that encourages parties to the Convention to ensure that settlements and other non-trial resolutions meet adequate standards and include detailed provisions establishing that they should:

- (1) publish information including:
 - a. the terms of the agreement
 - b. a detailed justification as to why a non-trial resolution is suitable for the case
 - c. an agreed statement of facts which reflects a recognition of responsibility for wrongdoing and provides a significant level of detail; an admission of guilt is often appropriate
 - d. In addition, details of performance of the non-trial resolution should also be published.
- (2) provide for effective, proportionate and dissuasive sanctions and should not preclude further sanctions subject to *non bis idem*;
- (3) be subject to meaningful judicial review, including an opportunity for affected stakeholders to be heard;
- (4) provide for senior level accountability;
- (5) enable inclusion and reparation of affected country authorities and victims;
- (6) arrange for multi-jurisdictional settlements, where appropriate.

Discussion:

Non-trial resolutions can take various forms depending on the country, including plea bargains, non-prosecution agreements (NPAs), deferred-prosecution agreements (DPAs), leniency agreements and conduct-adjustment agreements. While they differ in form, they often require an admission of wrongdoing on the part of the company, cooperation with authorities, the imposition of a compliance programme and/or an external monitor, and a return of the undue benefit.

The OECD WGB has gently criticised a number of countries for weaknesses in their arrangements for non-trial resolutions. For example, in the Phase 4 report on Germany, it stated that "With over two thirds of the sanctions imposed in foreign bribery cases decided through conditional exemptions and terminations of prosecution, it has also become urgent that Germany add accountability, raise awareness, and enhance public confidence in these resolution tools." The Phase 4 report on Switzerland in March 2018 said: "The examiners

understand the need of prosecution authorities for a simple and effective procedure for resolving foreign bribery cases. They recommend that Switzerland consider, where necessary taking existing procedures as a basis, the introduction of an alternative procedure to prosecution which has a strict framework, allows for the application of effective, proportionate and dissuasive sanctions and respects the necessary rules of predictability and transparency that are essential in this type of procedure. Such a procedure could be used in relation to economic crime, including cases of foreign bribery.”⁷³

Parties should ensure that non-trial resolutions meet adequate standards, as outlined in Transparency International’s 2015 policy paper on settlements and in the December 2018 CSO letter sent to the OECD Secretary General by Transparency International, Corruption Watch, Global Witness and the UNCAC Coalition with suggestions regarding non-trial resolutions focused on seven key areas.⁷⁴

Public access to information about non-trial resolutions is key, especially in view of the increasing use of such case dispositions. The OECD WGB made this point in the Czech Republic Phase 4 review where it commented, as it had in Phase 3, that Agreements on Guilt and Punishment should be published *including the rationale for using AGPs, the identities of the convicted persons involved and the sanctions and terms imposed*. In the Phase 4 review of Switzerland they called for Switzerland to publish “promptly and in conformity with the applicable procedural rules, certain elements of these summary punishment orders including the legal basis for the choice of procedure, the facts of the case, the natural and legal persons sanctioned (anonymised if necessary), and the sanctions imposed.”⁷⁵

In the Phase 3 review of the UK in 2012, the examiners went much further saying “The lead examiners are extremely concerned that many key details about the SFO’s civil settlements of foreign bribery cases remain private. SFO press releases about these settlements contain skeletal information, The lead examiners therefore recommend that the UK authorities, where appropriate and in conformity with the applicable procedural rules, make public in a more detailed manner sufficient information for determining whether civil settlements of foreign bribery cases are consistent with the Convention. This should include all of the key facts, court documents, and the settlement agreement in each case. The UK authorities should also avoid confidentiality agreements with defendants that prevent the disclosure of such information. Confidentiality agreements undoubtedly encourage companies to resolve investigations. However, they minimise the settlements’ deterrent impact.”⁷⁶

⁷³ OECD WGB Phase 4 Report on Switzerland (March 2018) <http://www.oecd.org/corruption/anti-bribery/Switzerland-Phase-4-Report-ENG.pdf>

⁷⁴ Transparency International, *Can justice be achieved through settlements?* (2015) https://www.transparency.org/whatwedo/publication/can_justice_be_achieved_through_settlements; *Joint CSO letter to OECD Secretary General on Principles for the use of non-trial resolutions in foreign bribery cases* https://uncaccoalition.org/en_US/cso-letter-to-oecd-on-principles-for-the-use-of-non-trial-resolutions-in-foreign-bribery-cases/

⁷⁵ OECD WGB Phase 4 report on Czech Republic (June 2017), <https://www.oecd.org/corruption/anti-bribery/Czech-Republic-Phase-4-Report-ENG.pdf>

⁷⁶ OECD WGB Phase 3 Report on the UK (March 2012) <https://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf>

The WGB has emphasized that transparency is necessary to increase impact, foster consistency, provide guidance, increase awareness and ensure educational value. In the Phase 4 review of Switzerland the report stated:

“The evaluation team has reviewed the summary punishment orders handed down by the OAG in foreign bribery cases and recognises that they have unquestionable qualities: they set out in detail the facts, the evidence and the methods and principles on which calculation of the fines and confiscation measures are based. However, the failure to publish orders (anonymously where necessary) is regrettable, and could minimise their impact, undermine the transparency of enforcement actions and deprive the public, including companies and commentators, of their educational value. They consider that the availability of orders for consultation at the OAG for 30 days after their adoption is useful but does not allow sufficient dissemination of these decisions, in particular over time. Much wider publicity of these procedures, which do not call for the intervention of a judge (unless contested), is essential in order to guarantee their predictability and transparency. The fact that they are equivalent to a judgment should encourage the OAG to insure the widest possible publicity.”⁷⁷

In the Phase 3 evaluation of Brazil the OECD WGB stated that a “lack of guidance, coupled with the lack of publication of cooperation agreements, creates a risk that cooperation agreements may be applied in an inconsistent manner, including in foreign bribery cases.”⁷⁸ By bringing visibility to a country’s enforcement practices, publication of concluded resolutions also contributes to raising awareness and provides guidance to practitioners.” The WGB has also stated that the most important elements of the resolution should be disclosed, to ensure greater transparency, raise awareness and increase confidence in enforcement of the foreign bribery offence.

The valuable guidance on transparency offered in all these examples should be combined into one set of guidelines to be included in the new Anti-Bribery Recommendation.

5. Transparency of enforcement data and case dispositions (Question 17)

Transparency International’s 2018 Exporting Corruption report found that OECD Convention countries are failing in relation to transparency of foreign bribery enforcement data and case dispositions. This is despite the fact that the OECD WGB has explicitly recognised the importance of making this information publicly available. In the absence of such information it is difficult to assess a country’s performance. It has also opined that publication of judgments is necessary to ensure that sanctions for foreign bribery are effective, proportionate and dissuasive and also for raising public awareness of the risks of foreign bribery and how companies can manage those risks and for enhancing public discussion and debate.⁷⁹ And

⁷⁷ OECD WGB Phase 4 Report on Switzerland (March 2018), page 39, <https://www.oecd.org/corruption/anti-bribery/Switzerland-Phase-4-Report-ENG.pdf>

⁷⁸ OECD WGB Phase 3 Report on Brazil (October 2014) <https://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf>

⁷⁹ See OECD WGB Phase 4 Report on Czech Republic (June 2017) <https://www.oecd.org/corruption/anti-bribery/Czech-Republic-Phase-4-Report-ENG.pdf>

likewise for non-trial resolutions, as discussed above and succinctly stated in the OECD's recent publication on non-trial resolutions: "The WGB has always considered that publishing information on concluded resolutions helps ensuring transparency and consistency in enforcement practices".⁸⁰

Proposal: The OECD WGB should add a new recommendation on transparency of data and case dispositions to the new Anti-Bribery Recommendation calling for parties to the Convention to

- (1) publish annual statistics on foreign bribery enforcement which cover each stage of the foreign bribery enforcement process, in line with the data required in the OECD WGB Phase 4 review questionnaire.³¹ They should include not only the foreign bribery offence, but also related money laundering, tax and accounting violations, and handling of mutual legal assistance requests
- (2) publish court judgments including names of the defendants (especially legal persons); the facts; the legal basis; the sanctions; and the reasoning
- (3) publish non-trial resolutions including the elements indicated in the section above on non-trial resolutions
- (4) The recommendation should also include instructions to the OECD Working Group on Bribery to
 - a. carry out a horizontal assessment of accessibility of data and case information across all countries party to the Convention, develop guidance and provide technical assistance.
 - b. create a public database of statistical data and detailed case information. This could include publically available information about investigations as well as the complete text of judgments or other dispositions of cases, both interim and final.
 - c. publish an annual report which should include updated year-on-year data on foreign bribery enforcement, as well as new developments and challenges

Discussion:

In 37 of the 42 OECD Convention countries surveyed in Transparency International's 2018 Exporting Corruption report, there are no published statistics on foreign bribery enforcement or only partial information is published and access to court judgments and non-trial resolutions is limited.⁸¹

a. Statistics

To enable informed debate and decision-making on a country's enforcement system, it is essential that the state regularly publish updated statistics on criminal, civil and administrative investigations, charges, proceedings, outcomes and mutual legal assistance activity. These

⁸⁰ OECD (2019), *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm

⁸¹ While all countries provide some information on some court decisions, many publish only partial information on those decisions and offer only limited access to lower court decisions and out-of-court dispositions such as settlements. In some countries no access is provided at all to those decisions, and some offer practically no available written justification for outcomes and sanctions determined via out-of-court dispositions. To the extent decisions are published, most courts within the EU render them anonymous beforehand.

statistics should be disaggregated by offence, including a separate category for foreign bribery. While there are legitimate reasons to ensure confidentiality with regard to ongoing investigations, there is no reason why general, anonymised data on the number of investigations cannot be published.

The OECD WGB has called for improved statistics in a variety of areas in numerous country reviews. For example, the Phase 4 report on Germany in 2018 noted that the lack of statistics collected at Federal and *Länder* level has been an obstacle in assessing Germany's enforcement efforts and recommended that Germany compile at the Federal level, or ensure consistent compilation at *Länder* level of information and statistics relevant to the monitoring and follow-up of the enforcement of the German legislation implementing the Convention.⁸² More specifically, it noted that the lack of complete statistics and data was a challenge for assessing Germany's performance in seeking and providing MLA. The Phase 4 report on Switzerland in 2018 recommended that Switzerland collect exhaustive statistics on the number of concluded cases at cantonal and federal levels and more detailed statistics on MLA requests received, sent and rejected that relate to money laundering where foreign bribery is the predicate offence.

The Phase 3 review of Brazil in 2014 recommended that it maintain data and statistics at the federal level regarding the confiscation of the proceeds of foreign bribery and other corruption and serious economic crimes as well as statistics on investigations, prosecutions and sanctions for money laundering, including data on whether foreign bribery is the predicate offence.⁸³ The Phase 3 and 4 reviews of Czech Republic in 2017 recommended statistics on the number of formal mutual legal assistance requests sent and received, including on the offence underlying the requests, and the outcome and time required for responding. The Phase 3 follow-up report on Portugal in 2015 recommended detailed statistics on investigations, prosecutions and sanctions for false accounting and money laundering; confiscation in foreign bribery cases; pre-trial seizures; and expiry of the statute of limitations.⁸⁴

These examples indicate that the new Recommendation should emphasize the importance of a wide range of country data on enforcement and the need for improvement in this area.

b. Judgments and non-trial resolutions

As the OECD WGB has pointed out, publication of judgments is necessary to ensure that sanctions for foreign bribery are effective, proportionate and dissuasive; for raising public awareness of the risks of foreign bribery and how companies can manage those risks; and for enhancing public discussion and debate.⁸⁵ Published case dispositions also serve to make possible debarment and other non-criminal sanctions, civil actions, pursuits of foreign public officials as well as research and scrutiny by journalists, academics and civil society groups. In

⁸² The OECD WGB Phase 4 report on Germany noted that the following Phase 3 recommendation was one of those that had not been implemented: Strengthen its efforts to compile at the federal level, for future assessment, information and statistics relevant to monitoring and follow-up of the enforcement of the German legislation implementing the Convention [Convention, Article 12; 2009 Recommendation III.(ii) and V];

⁸³ OECD WGB Phase 3 Report on Brazil (October 2014) <https://www.oecd.org/daf/anti-bribery/Brazil-Phase-3-Report-EN.pdf>

⁸⁴ OECD WGB Phase 3 Follow-up Report on Portugal (November 2015) <https://www.oecd.org/daf/anti-bribery/Portugal-Phase-3-Written-Follow-Up-Report-ENG.pdf>

⁸⁵ See OECD WGB Phase 4 Report on Czech Republic (2017) <https://www.oecd.org/corruption/anti-bribery/Czech-Republic-Phase-4-Report-ENG.pdf>

most cases, the public interest in knowing details of case dispositions outweighs the defendants' right to privacy or the public interest in rehabilitation of offenders.

NRGI has submitted a valuable paper to this consultation outlining some of the arguments in favour of publication of case dispositions.⁸⁶ Two recent blog posts are also important contributions to this discussion, one by Angela Reitmaier of Transparency International Germany on "*Anti-bribery enforcement: The case for making court decisions freely available in Germany*"⁸⁷ and one by Rahul Rose of Corruption Watch on "*Closed courts: how could open data help the fight against corruption in the UK?*"⁸⁸

c. OECD horizontal assessment, public database and annual report

In view of the challenges in accessing annually updated public information on foreign bribery enforcement in OECD Convention countries, it is time for the OECD WGB to take steps to improve the situation.

As we proposed in TI's Exporting Corruption Report 2018, the OECD WGB should carry out and publish a horizontal assessment of accessibility of data and case information across all countries party to the Convention, develop guidance and provide technical assistance.

We also proposed that the OECD create a publically accessible database with enforcement data and information on case dispositions. This would serve several purposes. It would assist other jurisdictions, including on the demand side; increase awareness among businesses and the public; aid the media, including investigative journalists; and assist researchers and policy-makers.

By way of precedent, the World Bank/UNODC Stolen Asset Recovery (StAR) "Asset Recovery Watch," has created an Excel database that is available on the StAR web site. The information there consists of international asset recovery cases initiated in 1980 or later, completed or underway, where i) there has been a public indictment alleging a corruption offense defined in UNCAC and ii) some or all the proceeds from the offense are in a second country. The data was

⁸⁶ NRGI, *Positive Effects of Publishing Foreign Corruption Case Materials* (December 2018)

<http://www.oecd.org/corruption/anti-bribery/NRGI-White-Paper-Court-Case-Disclosures-Dec-2018.pdf>

These arguments include the following:

One: Disclosure spurs government action

- Disclosure lays an evidentiary foundation for related investigations and sanctions in the same jurisdiction.
- Disclosure provides information and impetus for legal action in other jurisdictions.

Two: Disclosure influences private sector behaviour

- Disclosure helps businesses avoid certain types of corruption risks.
- Disclosure helps businesses choose whether to offer services.
- Disclosure helps businesses report more effectively to regulators and law enforcement.

Three: Disclosure supports oversight actors, researchers, and victims of corruption

- Disclosure helps oversight actors identify bribe recipients.
- Disclosure helps oversight actors identify facilitators and other implicated parties
- Disclosure helps oversight actors sift through large data stores
- Disclosure helps oversight actors review the due diligence that went into investment decisions with high corruption risks
- Disclosure helps oversight actors effectively intervene in ongoing cases
- Disclosure helps those harmed by corruption to bring shareholder suits

⁸⁷ <https://oecdonthellevel.com/2017/12/05/anti-bribery-enforcement-the-case-for-making-court-decisions-freely-available-in-germany/>

⁸⁸ <https://oecdonthellevel.com/2018/06/28/closed-courts-how-could-open-data-help-the-fight-against-corruption-in-the-uk/>

first assembled in 2011 from State Parties' responses to a UNODC request. StAR asked parties to furnish information on each case in which it had been involved, identifying the other jurisdictions participating in the action; the amount; whether the assets were frozen, confiscated, or repatriated; the provisions of UNCAC governing recovery proceedings; and the text of any repatriation agreement. StAR supplemented the responses with information from legal databases, media reports, and other sources and has continued to update the information as time and resources permit.

The OECD WGB should also publish an annual report with updated year-by-year data on foreign bribery enforcement, as well as new developments and challenges. This could build on the existing report on enforcement

6. Facilitation payments (Question 22)

The UN Convention against Corruption (UNCAC) requires criminalisation of foreign bribery. It makes no exception for facilitation payments. All the parties to the OECD Anti-Bribery Convention are also parties to the UNCAC. Including a facilitation payments exception creates the risk of loopholes and minimises the harm and injustice arising from such payments.

Proposal: The OECD WGB should add a new recommendation on facilitation payments to the new Anti-Bribery Recommendation instructing countries to remove any exemption for those payments.

III. Proposed revisions to existing recommendations

1. Recommendation III Awareness-raising (Question 53 cooperation)

Recommendation III recommends that Member countries take steps to examine “awareness-raising initiatives in the public and private sector for the purpose of preventing and detecting foreign bribery;...”

Civil society organisations have a crucial watchdog role and other members of civil society may also witness foreign bribery, want to report corruption offences or are direct victims of foreign bribery. Other parts of civil society such as academics, policy analysts and journalists carry out important research and analysis. For this reason, all these members of civil society should be beneficiaries of awareness-raising and cooperation. Additionally, civil society in countries frequently targeted by foreign bribery should be included in awareness-raising and collaboration efforts.

We commend the OECD WGB for its increased awareness-raising efforts and outreach towards civil society and recommend testing new approaches to involvement of civil society that we have proposed in previous reports and statements. Still more steps should be taken to bring civil society representatives closer to the review discussions and the challenges of foreign bribery enforcement, whether at national level or in the WGB meetings.

Multilateral development banks, international funds (such as the climate funds and public disaster relief funds) have their own integrity frameworks that include prevention, detection, investigation and sanctioning of corruption. These frameworks have limitations, since responsible entities in these international organisations can act only within their own system and at the same time often need the cooperation of national criminal justice bodies.

Proposal: The OECD WGB should revise Recommendation III on awareness-raising to provide

- (1) **Awareness-raising and cooperation with civil society:** Recommendation III. paragraph i) should be revised to also cover civil society. To enhance awareness and cooperation:
- i. representatives of civil society should be invited to attend as observers parts of the meetings of the OECD WGB – the experience with the Istanbul Action Plan reviews shows that this is possible.⁸⁹
 - ii. countries party to the OECD Convention should conduct multi-stakeholder dialogues at home following WGB reviews and publish plans of action to implement the recommendations, with public reporting on steps taken
 - iii. the OECD WGB should invite stakeholders from countries most affected by foreign bribery to OECD WGB consultations

(2) **Cooperation with multilateral financial institutions:**

Recommendation III. should include a new paragraph encouraging Member countries to examine the issue of cooperation with multilateral development banks

- i. A further recommendation should provide details on how Member countries should ensure that both normative and practical measures are in place for international cooperation.
- ii. Recommendation XI. paragraph ii) should be extended to multilateral financial institutions and funds.
- iii. Recommendation XIII. paragraphs i), ii) and v) should include multilateral financial institutions and funds.

2. Recommendation IX. Reporting Foreign Bribery (Question 29)

TI's 2018 Exporting Corruption report found inadequacies in whistleblower protection in numerous OECD Convention countries suggesting that additional focus is needed in this area and could be aided by a revision and strengthening of the outdated guidance of Recommendation IX.

Several international and regional organisations, including the OECD, as well as CSOs such as Transparency International have developed guidance for the adoption of whistleblowing legislation, to ensure that whistleblowers are afforded proper protection and disclosure

⁸⁹ Transparency International, *Transparency and Participation – An Evaluation of Anti-Corruption Review Mechanisms* (2017) https://www.transparency.org/whatwedo/publication/transparency_participation_an_evaluation_anti_corruption_review_mechanisms

opportunities.⁹⁰ The language of Recommendation IX in the 2009 Recommendation is not aligned with those international standards and best practice.

Proposal: Revise and expand Recommendation IX to encourage countries to adopt effective and comprehensive whistleblower protection legislation in line with international standards and best practice such as TI International Principles for Whistleblowing Legislation⁹¹ including with respect to Scope of application; Conditions for Protection; Protection; Confidentiality; Disclosure Procedures; Follow-Up; Relief; Enforcement; and Stakeholders Involvement as described in detail the discussion section below.

Discussion:

The OECD found that only 2% of foreign bribery cases resulting in sanctions were detected by whistleblowers, even though they are an important source and often provide pivotal evidence for successful prosecution.⁹² Indeed, reporting often comes with high personal risk. Whistleblowers may be fired, sued, blacklisted, arrested, threatened or, in extreme cases, assaulted or killed. Effectively protecting whistleblowers can embolden people to report wrongdoing and thus increase the likelihood that wrongdoing is uncovered and penalised. As stressed by the OECD, "whistleblower protection is the ultimate line of defence for safeguarding the public interest."⁹³

Recommendation IX should be revised and expanded to fit with international standards and best practice in the following ways:

- **Scope of application:** It should be as wide as possible to cover every possible whistleblowing situation and ensure that all whistleblowers are protected. A wide range of categories of wrongdoing should be covered and a wide definition of whistleblower (beyond traditional employee-employer relationship) should be provided. Both the private and public sector should be covered.
- **Conditions for protection:** The motives of a whistleblower in reporting information that they believe to be true should be unequivocally irrelevant to the granting of protection. (The reference to "good faith" should be removed as it can have the negative effect of shifting the focus from assessing the merits of the information provided to investigating the whistleblower's motives, exposing him or her to personal attacks.)

⁹⁰ G20 Anti-Corruption Action Plan *Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation*: <http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>; UNODC, *Resource Guide on Good Practice in the Protection of Reporting Persons* (2015); OECD/G20, *Study on Whistleblower Protection Frameworks: Compendium of Best Practices and Guiding Principles for Legislation* (2011), Council of Europe, *Protection of Whistleblowers, Recommendation CM/Rec(2014)7 and Explanatory Memorandum* (2014); OAS, *Draft Model Law to Facilitate and Encourage the Reporting of Acts of Corruption and to Protect Whistleblowers and Witnesses* (2013); Transparency International, *International Principles for Whistleblower Legislation* (2013).

⁹¹ Transparency International, *International Principles for Whistleblower Legislation* (2013)

https://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation

⁹² OECD (2017), *The Detection of Foreign Bribery, Chapter 2. The Role of Whistleblowers and Whistleblower Protection*, www.oecd.org/corruption/the-detection-of-foreign-bribery.htm, p 15.

⁹³ OECD (2016), *Committing to Effective Whistleblower Protection*, p.11.

- **Protection:** Whistleblowers should be protected against all forms of retaliation, disadvantage or discrimination, including against legal proceedings. (The current language of recommendation IX.iii) seems to limit protection to retaliation in the workplace.)
- **Confidentiality** of the identity of the whistleblower should be guaranteed and allowing anonymous disclosures should be considered. Confidentiality should apply not only to the name of the whistleblower, but also to “identifying information”. (The current recommendations fail to provide for the protection of the identity of the reporting person).
- **Penalties** should apply to persons who attempt to identify a whistleblower, hinder reporting or retaliate against whistleblowers.
- **Disclosure Procedures:** Multiple avenues for making a disclosure should be provided.
 - Whistleblowers should be able to make reports internally to their organisation or directly to the competent authorities. There should be no restrictions or extra burden on whistleblowers who wish to report directly to regulators and the authorities. (The current language of recommendation IX.ii) suggests that providing only an internal reporting mechanism for public officials or only a channel to the authorities is sufficient (“directly *or* indirectly through an internal mechanism, to law enforcement authorities”).
 - Disclosure to the public should be allowed in certain circumstances.
 - There should be avenues for whistleblowers to make disclosures involving matters of national security and official secrets, including through an independent oversight body. Matters falling within that category should be narrowly and clearly defined. Special rules should apply only in view of the category of information being disclosed, without consideration being given to the person making the disclosure.
 - It should be mandatory for a wide range of public and private sector organisations to set up internal whistleblowing mechanisms and have procedures to protect whistleblowers. Internal whistleblower regulations and procedures should be highly visible and understandable; maintain confidentiality or anonymity (unless explicitly waived by the whistleblower); ensure thorough, timely and independent investigations of whistleblowers’ disclosures; and have transparent, enforceable and timely mechanisms to follow up on whistleblowers’ retaliation complaints (including a process for disciplining perpetrators of retaliation)⁹⁴
- **Follow-up:** There should be an obligation to follow up on reports and to keep the whistleblower informed, within a reasonable timeframe.
- **Relief:**
 - A full range of remedies should be provided, financial and other, covering all direct, indirect, past and future consequences of unfair treatment, including interim relief. Where possible, the whistleblower should be restored to a situation he/she would have been in had he or she not suffered unfair treatment.

⁹⁴ For more detailed recommendation on internal whistleblowing mechanisms, see Transparency International, *A Best Practice Guide for Whistleblowing Legislation* (2018), www.transparency.org/whatwedo/publication/best_practice_guide_for_whistleblowing_legislation, p. 31-37.

- The **burden of the proof** should be placed on the employer to establish that any detriment suffered by the whistleblower is not linked to his/her disclosure.
- Providing legal and financial assistance to whistleblowers should be considered.
- **Enforcement:** An independent agency should be responsible for the oversight and enforcement of whistleblowing legislation. It should have sufficient power and resources to operate effectively. It should be competent to:
 - receive, investigate and address complaints of unfair treatments and improper investigations of whistleblower disclosures
 - provide advice and support to whistleblowers
 - monitor and review whistleblower frameworks, collect and publish data and information regarding the functioning of whistleblowing laws and frameworks
 - raise public awareness to encourage the use of whistleblower provisions, and enhance cultural acceptance of whistleblowing.
- **Stakeholders involvement:** The design and periodic review of whistleblowing laws, regulations and procedures must involve key stakeholders including employee organisations, business/employer associations, civil society organisations and academia.

3. Recommendation X Accounting Requirements, External Audit, and Internal Controls, Ethics and Compliance (Question 30)

Recent foreign bribery enforcement actions exposed new forms of foreign bribery-related money-laundering and accounting offences. In these cases, instead of simple off-the-book accounts and transactions, foreign bribery perpetrators purchased majority shares of entire banks to circumvent anti-money laundering infrastructure and used these institutions to pay bribes without hindrance.

Furthermore, external auditors play an important role in the detection of suspicious transactions, which is why they are considered to be an important element in implementation of money laundering and terrorist financing prevention measures.

Finally, it should be noted that the Financial Action Task Force Recommendation 22 goes beyond OECD Working Group on Bribery Recommendation X. The FATF recommendation covers not only accountants and external auditors, but also designated non-financial businesses and professions (DNFBPs), including lawyers, notaries, other independent legal professionals, as well as trust and company service providers.

Proposal: Revise Recommendation X, including part B, to encourage parties to

- mandate their financial supervisory authorities to pay extra attention to financial institutions in which a company with international business profile directly or indirectly exercises a dominant influence.
- notify suspicious transactions to the country's financial intelligence unit if they encounter any suspicious activities when performing their duties.
- incentivize compliance officers to self-report when they identify misconduct

- extend relevant procedures to DNFBPs in their functions of providing services for international business transactions

The recommendation should also include instruction to the OECD WGB, as a minimum, to consider in its systematic follow-up and monitoring the findings of FATF reviews and ideally to include in their own reviews the implementation of these extended recommendations.

4. Recommendation XI on Public Advantages including Public Procurement (Question 42)

Best practices in the field of public procurement have evolved since 2009 when the Revised Recommendation was issued and it should be updated. The new Recommendation should reflect the fact that public information about procurement in OECD Convention countries would make it easier to detect foreign bribery occurring between those countries as well as in other countries that adopt open contracting standards. Further, public information about sanctions for foreign bribery would act as a deterrent to foreign bribery in public procurement.

Recommendation XI (iii) references the 2008 recommendation on public procurement and will presumably be automatically updated to refer to the 2015 Recommendation on the same topic. However, the 2015 recommendations are lacking in some respects – only addressing vertical accountability mechanisms and disregarding the relevance of more horizontal accountability mechanisms. This is partly covered by the 2015 G20 Principles for promoting integrity in public procurement and these should be referenced.⁹⁵

Recommendation XI (i) and other sections discuss the issue of debarments. It is not clear from the recommendations how various public bodies should debar if they cannot get access to details of sanctions on foreign bribery, for example on the name of individuals or legal persons who were held liable. This issue should be addressed.

Proposal: The OECD WGB should revise and expand Recommendation XI (i) to encourage parties to

- (1) require public authorities, as proposed by the BOND group
 - to fully publish all public contracts and amendments, except in cases where release would cause serious, demonstrable harm
 - to collect, publish and regularly analyse public procurement data as structured open data, ideally through the Open Contracting Data Standard
 - publish information about bids and implementation to strengthen the ability of public institution, private sector and civil society to spot bribery and corruption establish comprehensive, independent validation processes within government to ensure that data is accurate and complete, whilst highlighting concerns for the public

⁹⁵ <http://www.seffaflik.org/wp-content/uploads/2015/02/G20-PRINCIPLES-FOR-PROMOTING-INTEGRITY-IN-PUBLIC-PROCUREMENT.pdf>

- establish effective and constructive feedback channels, open to stakeholders across government, industry and civil society, ensuring decisions are made taking into account the needs of affected communities
- (2) make sanctions decisions publicly accessible
 - (3) adopt laws on the possibility of cross-debarments by national authorities.

Recommendation XI (ii) should be amended to say that in accordance with the 2015 G20 principles “..., member countries should support efforts to provide opportunities for input from civil society and the general public on the public procurement processes and participation, during the pre-tendering phase, of relevant stakeholders, including representatives of suppliers, users and civil society consistent with law. “

5. Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance (Question 7)

The OECD Guidelines for Multinational Enterprise set due diligence standards with regard to Human Rights, Employment and Industrial Relations, Environment, Combating Bribery, Bribe Solicitation and Extortion, Consumer Interests and Disclosure.⁹⁶ The Due Diligence Guidance for Responsible Business Conduct, adopted by the OECD Council at Ministerial Level on 30 May 2018, provides a common understanding of due diligence.

In the OECD consultation on 22 March 2019 one of the participants noted that a holistic risk assessment is increasingly done by enterprises – risk and compliance are not discrete areas and should be cross-referenced in-house.

Because of the interrelatedness of the links between risk assessment and compliance as well as the connections between human rights and corruption, Annex II should be revised to reflect the new Due Diligence Guidance for Responsible Business Conduct⁹⁷ in the OECD Guidelines for Multinational Enterprises.

Proposal: The OECD WGB should Revise Annex II Good Practice Guidance in accordance with the OECD Due Diligence Guidance to call for enterprises to conduct foreign bribery risk assessments following the six steps outlined in the Guidelines for Multinational Enterprises consisting of

- (1) embedding responsible business conduct into policies and management systems
- (2) identifying and assessing adverse impacts
- (3) ceasing, preventing, and mitigating adverse impacts
- (4) tracking implementation and results
- (5) communicating how impacts are addressed and
- (6) providing for, or cooperating in remediation should be included in the Good Practice Guidance on Internal Controls, Ethics, and Compliance. In particular, communication and

⁹⁶ *OECD Guidelines for Multinational Enterprises* (2011 edition) <http://www.oecd.org/investment/mne/1922428.pdf>

⁹⁷ <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>

remediation should be added to address concerns of victims' rights and participation voiced above.

In addition, the new guidance should encourage companies and business organizations to recognize gendered forms of corruption, including sextortion, in their codes of conduct and compliance regulations.