

Siem Reap Statement on Curbing Foreign Bribery

Siem Reap, 2-3 October 2014

On 2-3 October 2014, high level representatives of the Anti-Corruption Authorities (ACAs) and Central Authorities (CAs) for Mutual Legal Assistance (MLA) of South East Asia and officials working in the area of mutual legal assistance, as well as anti-foreign bribery experts from around the world, gathered in Siem Reap at the invitation of the United Nations Office for Drugs and Crime (UNODC) and of the Anti-Corruption Unit (ACU) of the Kingdom of Cambodia, and with the kind financial support of the Government of Japan, to discuss a set of recommendations for curbing foreign bribery for the effective development and enforcement of foreign bribery laws and mutual legal assistance frameworks.

The participants included officials of anti-corruption authorities and mutual legal assistance central authorities from ASEAN region, Timor Leste, Japan, Australia, US and Switzerland. Representatives from UNODC, the Organisation for Economic Co-operation and Development (OECD), the Asian Development Bank (ADB), ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, the World Bank, the United Nations, the American Bar Association Rule of Law Initiative, Transparency International, U4 Anti-Corruption Resource Center, UNCAC Coalition, ASEAN CSR Network, the Working Group on Business Integrity in ASEAN, representatives from the private sector, international law firms and academics also took part in the proceedings.

The participants reviewed and discussed country experiences from around the world, with a particular focus on Southeast Asia, in developing and implementing foreign bribery legislation and mutual legal assistance mechanisms, the methods and processes to prevent, investigate and prosecute efficiently foreign bribery cases and the mechanisms to effectively ensure mutual legal assistance and international cooperation in the enforcement of foreign bribery laws.

Considering that foreign bribery is a severe threat to fair business competition, good governance, economic development and well-being of societies, and considering that due to its international nature, foreign bribery can only be efficiently fought through joint efforts of States and international cooperation;

Recalling the United Nations Convention against Corruption (UNCAC) and its Articles 16 and 46 pertaining to the criminalization of active and passive foreign bribery and mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to this offence; and **recalling** the obligation of the State Parties to vigorously implement these articles;

Considering the upcoming ASEAN Economic Community and the need of a fair business playing field for its success;

Considering that a number of ASEAN Member States are in the process of developing or reinforcing their foreign bribery framework and international cooperation processes in the investigation, prosecution and judicial proceedings in relation of foreign bribery offences, and **considering** the need for ASEAN Member States to provide better support to MLA and international cooperation and the need for ASEAN Member States to become more active in curbing foreign bribery;

Taking note of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the different Recommendations subsequently adopted for its effective implementation, as well as discussions regarding new rule of law indicators in the future Sustainable Development Goals;

The participants:

1. **Recommend** the following:

Legal Frameworks

- **COMPLIANCE:** States should ensure that their domestic laws and regulations are in compliance with UNCAC provisions, particularly article 16 regarding the criminalization of foreign bribery, article 26 regarding liability of legal person and article 46 pertaining to mutual legal assistance, and should periodically review implementation of such laws to ensure an effective fight against foreign bribery.
- **SPECIFICITY OF FOREIGN BRIBERY OFFENCE:** Where necessary, states should consider enacting a new, specific foreign bribery offence, that can have extraterritorial effect and ensure that the definition of foreign bribery is clear, unambiguous and comprehensive of all the components that constitute such an offence under article 16 of UNCAC including the giving, offering or promising of a bribe, solicitation and acceptance of bribe or its offer or promise, the attempt of bribery, of all forms of undue advantages, the omission, action or refrain from action of the public official, and if the public official acted within or outside his competencies.
- **CLEAR AND UNAMBIGUOUS DEFINITIONS:** The definition of public official, foreign public official and official of a public international organization should be comprehensive enough to comply with Article 2 (a), (b) and (c) of UNCAC, and the use and definition of the terms should be consistent across the different laws of the States in order to avoid any legal uncertainty and interpretation.
- **LIABILITY OF LEGAL PERSONS:** States should ensure that the legal persons can be held liable for the offence of foreign bribery, either on criminal or on civil and administrative grounds. Conviction of a legal person should be made independently from the conviction of the natural person who committed an act of corruption and based on a reasonable evidential threshold. Liability of state-owned and state-controlled companies should also be ensured.
- **SMALL FACILITATION PAYMENTS:** States should consider reviewing their laws in order to include small facilitation payments, when covered by the notion of “undue advantage” under article 16 of UNCAC, in the offence of foreign bribery and ensure that they are not regarded as acceptable practices both by the demand side and the supply side of foreign bribery.
- **EFFECTIVE, PROPORTIONATE AND DISSUASIVE SANCTIONS:** States should take appropriate measure such that the sanctions for the offence of foreign bribery are effective, proportionate and dissuasive, both for natural and legal persons, including by subjecting legal persons to monetary and non-monetary sanctions. Such non-monetary sanctions for foreign bribery may include denial of public advantages such as public subsidies, licences, public procurement contracts, contracts funded by official development assistance and officially supported export credits.
- **ECONOMIC DURESS IS NO DEFENSE:** States should ensure that economic duress cannot be used as a defense for the offence of foreign bribery.

- **FREEZING, SEIZURE AND CONFISCATION:** States should ensure that bribes and proceeds of corruption, including converted proceeds, can be identified, traced, frozen, seized, confiscated and recovered. State should consider implementing measures to confiscate proceeds of corruption even when no conviction was made for the offence that gave rise to the proceeds or when it is in the possession of a third party not legally entitled to it. Confiscation of equivalent value should be considered when the confiscation of the bribe or of the proceeds of corruption is impossible.
- **TAX LEGISLATION:** States should review their tax legislations, regulations and practices, to ensure that they are not directly or indirectly supportive of foreign bribery. States should consider prosecuting persons participating in making or receiving bribes for tax as well as bribery offences.
- **REGIONAL HARMONIZATION OF LAWS:** ASEAN Member States can consider harmonizing their laws in the area of foreign bribery and mutual legal assistance.

Enforcement

- **POLITICAL WILL:** States should endeavor to demonstrate political will in taking actions against cases of corruption notwithstanding the identities, positions and connections of the legal or natural persons involved.
- **DISCOVERY:** All stakeholders, including financial institutions, auditors, companies, public procurement entities, tax authorities and public officials including diplomats, civil society and the media, should report on alleged acts of foreign bribery and/or suspicious transactions to facilitate the discovery of such offences by ACAs and law enforcement entities and facilitate a discussion on the harm to society of such acts.
- **REPORTING:** State should ensure that appropriate provisions, measures and channels of communication are in place to facilitate the reporting of foreign bribery to law enforcement authorities, including for the tax authorities, private companies, external auditors, civil society and for public officials at home and abroad. Complaints and allegations should be seriously investigated and assessed.
- **WHISTLEBLOWING AND WITNESS PROTECTION:** States should consider appropriate measures to provide incentives to whistleblowers, provide a range of disclosure channels, and ensure that no retaliatory action can be taken against persons who report in good faith and on reasonable grounds alleged facts of foreign bribery to the competent authorities and that legal and practical mechanisms are in place to protect such individuals.
- **INVESTIGATION AND PROSECUTION:** States should engage in the investigation and prosecution of foreign bribery cases, whether the cases involve legal or natural persons, whether it is the supply or demand side, whether the case is already investigated or prosecuted or settled abroad provided there is no issue of double jeopardy, whether the crime of foreign bribery was committed domestically or abroad involving a domestic legal person.
- **INDEPENDENCE:** The investigation and prosecution of foreign bribery cases should be made independently of any kind of pressure. There should be no interference for reasons of national security, national economic interest, diplomatic concern including the potential effect upon relations with another State, or political or personal interests in the investigation and prosecution of foreign bribery cases. Enforcement agencies should ensure their independence and ability to resist undue interference and influence.

- **ADEQUATE AND SUFFICIENT RESSOURCES:** States should endeavor to allocate adequate resources are provided to investigation and prosecution authorities to enhance the effective enforcement and implementation of foreign bribery laws. These resources could include human resources and financial resources, as well as expertise and knowledge of the staff, and the adequate powers and tools to investigate and prosecute cases of foreign bribery.
- **COOPERATION AND COORDINATION:** Cooperation and coordination should be encouraged between the national enforcement authorities, particularly through streamlined processes of cooperation as well as informal channels of communication.
- **SPECIAL INVESTIGATION TECHNIQUES:** In order to investigate foreign bribery cases, special investigation techniques should be provided to enforcement authorities with clear and streamlined conditions, regulations and procedure to use them.
- **FINANCIAL RECORDS:** Laws and regulations on banks and other financial institutions should ensure the appropriate storage of records and that law enforcement authorities can access them for inspection and investigation.
- **SETTLEMENTS:** States should, subject to their domestic laws and where appropriate, proactively disclose the settlement, meaning any procedure short of a full trial, of foreign bribery cases in order to ensure transparency and to enable States affected by the foreign bribery case to investigate and prosecute those other States' legal or natural national person(s) involved in the offence.
- **STATUTE OF LIMITATIONS:** Limitation period should be sufficiently long for the investigation and prosecution of foreign bribery cases and States should consider the suspension or interruption of limitation period for the investigation and prosecution or pending completion of MLA request of offences of foreign bribery in line with UNCAC.
- **BANK AND TAX SECRECY:** States should ensure clear and explicit rules that allow the lifting of bank and tax secrecy for the purpose of the investigation of foreign bribery cases in line with UNCAC.

International cooperation and mutual legal assistance

- **MUTUAL LEGAL ASSISTANCE AND EXTRADITION FRAMEWORK:** States should ensure that MLA and extradition in relation to foreign bribery offences is possible, in accordance with their obligations under UNCAC. The legal framework for cooperation should consist of clear provisions and reasonable conditions for the provision of assistance, particularly with regards to evidentiary threshold and reciprocity. Full use should be made of agreements and arrangements, including UNCAC, for MLA and extradition.
- **DUAL CRIMINALITY:** States should, where appropriate, consider abolishing the requirement for dual criminality, or deem the requirement to be fulfilled irrespective of categorization or terminology if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both requesting and requested States, in order not to raise obstacles to the prosecutions of foreign bribery offenders.
- **INDEPENDENCE:** There should be no interference with MLA requests and extradition demands for reasons of national security, national economic interest, diplomatic concern including the potential effect upon relations with another State, or political or personal interests.
- **CLEAR AND STREAMLINED PROCESSES:** Processes for requesting and responding to MLA and extradition requests should be clear and streamlined. States should consider providing clear,

accessible and exhaustive information about the procedural requirements for MLA, including authorized agency to engage in MLA, updated information on the Central Authority, and the official language used for their MLA process. The use of websites, or regional MLA Guides should be seriously considered.

- **THOROUGHNESS OF MLA REQUESTS AND RESPONSES:** States should ensure that MLA requests are clear in substance and form and responses are comprehensive and matching the requests and meet the requirements of the requested State, including the language requirements.
- **TIMELY PROCESSING:** States should endeavor to process MLA requests and respond to queries by requested States in a timely manner and avoid delay by ensuring the efficient coordination of national competent authorities.
- **RESOURCES:** States should provide sufficient resources and adequate capacity to competent authorities to carry out or follow up on MLA requests, which include technical expertise, human and financial resources.
- **INFORMAL COOPERATION:** States should encourage and engage, subject to domestic laws, in exchange of information and evidence relating to foreign bribery cases outside the MLA framework, particularly at an early stage of an investigation. The informal exchange of information can particularly be used as a preliminary way to gather information before sending a MLA request after building trust and ensuring observation of confidentiality requirements.
- **SHARING OF INFORMATION:** States should, subject to domestic laws, spontaneously or upon request provide information through formal or informal mechanisms. States pursuing investigation or settlement of cases should proactively transmit information to other affected States and inform them of the legal avenues both criminal and civil to participate in the investigation.
- **JOINT AND/OR PARALLEL INVESTIGATIONS:** Joint and/or parallel investigations of foreign bribery offences and coordinated work of law enforcement authorities should be encouraged.
- **SETTLEMENTS:** Settlements are any procedure short of a full trial. States should, subject to their domestic laws and where appropriate, proactively share information on foreign bribery cases which have been settled with other States affected by such cases. Subject to their legal principles, such as the principle against double jeopardy, the resolution of a foreign bribery case by way of consensual settlement in one State should not constitute an obstacle to the investigation and prosecution of related legal or natural persons in another State.
- **COORDINATION ON SETTLEMENTS:** Jurisdiction negotiating settlements should proactively inform other affected States of the legal avenues, both criminal and civil, available to them to seek redress and to recover assets.
- **ASSET RECOVERY:** States should engage in asset recovery by pursuing legal proceedings even when a settlement of foreign bribery case has taken place or is under way in another jurisdiction, and systematically engage in the investigation/prosecution of suspected cases of foreign bribery offence committed partially or entirely under their jurisdiction. States entering into foreign bribery settlements should consider sharing the proceeds with the source State where the bribe occurred. Where appropriate, they should consider involving civil society or third party mechanisms to ensure that the proceeds shared accrue to the genuine benefit or indigenous populations of the source State.
- **REGIONAL FORUMS AND COOPERATION:** States should make full use of existing regional and international forums, including the South East Asia Parties Against Corruption (SEA-PAC), the Asia-

Pacific Economic Cooperation Network of Anti-Corruption Authorities and Law Enforcement Agencies (APEC ACT-NET), the Asia Pacific Group on Money Laundering (APG), the Egmont Group, the Interpol-StAR Asset Recovery Focal Points and the Asset Recovery Interagency Network-Asia Pacific (ARIN-AP), to harmonize MLA procedures, and strengthen international cooperation and contacts between officials involved in transnational corruption cases.

- **INTERNATIONAL DEVELOPMENT PARTNERS:** Donors, bilateral and multilateral development partners can engage in technical assistance, facilitating the flow of information, building political will, restitution, monitoring and managing returned funds, and prevention in private sector.

Prevention

- **AWARENESS RAISING OF THE SUPPLY AND DEMAND SIDE:** States should make efforts to raise awareness amongst the private sector and public officials regarding foreign bribery laws domestically and abroad and in order to prevent solicitation and acceptance and offer and payment of bribes and detect foreign bribery. SMEs and MNEs could be separately addressed, taking into account their different needs and structures. Specific attention should be given to high risk sector firms.
- **INTERNAL CONTROLS, ETHICS AND COMPLIANCE PROGRAM:** States should encourage, where appropriate, internal controls, ethics and compliance programmes or measures and collective action should be encouraged for the prevention and detection of foreign bribery, notably through incentives for compliance. For instance, the quality of the compliance and/or certification programmes could be a mitigating factor or defense or a criteria for the award of public procurement contracts. Business organizations and professional associations should be encouraged to assist companies, in particular SMEs in the development of such measures. Financial institutions should do enhanced due diligence to detect cases of foreign bribery.
- **REPORTING AND WHISTLEBLOWING PROTECTION MECHANISMS:** Companies should ensure appropriate channels of communication and whistle blowing protection to ensure the reporting of suspected acts of bribery and such reports should be actively and effectively responded to.
- **BOOK KEEPING:** States should ensure through the law that books, records accounts and financial statements of companies should be kept thoroughly with effective, proportionate and dissuasive civil, administrative or criminal penalties in case of omission or falsifications, or establishment of off-the-books accounts or transactions for the purpose of bribing foreign public officials.
- **EXTERNAL AUDIT:** External auditors should be required to report to the competent authorities suspected acts of foreign bribery. They should be guaranteed their independence, notably through their protection from legal action when they report such alleged acts.
- **PUBLIC AND PRIVATE COOPERATION:** Private sector and civil society should be engaged in the fight against corruption and the design and concept of the law and governments should effectively put in place a dialogue with companies and civil society.
- **ACCOUNTABILITY PROCESSES:** States should provide and enhance accountability processes and mechanisms within the public and private sector to enable social control in the fight against foreign bribery.

2. **Encourage** States and their relevant agencies to take stock of the good practices identified during this workshop and in publications of UNODC, OECD and of other international organizations or civil society groups in order to put in place the most efficient frameworks of legislations, policies and measures in order to effectively combat foreign bribery and engage successfully in international cooperation for the investigation and prosecution of foreign bribery cases;
3. **Encourage** ACAs, CAs for MLA and Law Enforcement Entities to promote these recommendations within their respective agencies, States and regional/international networks including SEA-PAC, ARIN-AP and APEC ACT-NET;
4. **Encourage** ACAs, CAs for MLA and Law Enforcement Entities to promote these recommendations in order to assist members of the executive and the legislature and the judiciary, the private sector and the public in general, to better understand and support foreign bribery laws in their development and enforcement;
5. **Call upon** ACAs, CAs for MLA and Law Enforcement Entities to appeal to their respective Governments and other stakeholders to promote the above recommendations in international anti-corruption fora and more generally to promote the inscription of the fight against foreign bribery as a priority on the agenda of the different networks and international organization they are part of;
6. **Call upon** ACAs, CAs for MLA and Law Enforcement Entities to appeal to their respective Governments to encourage ASEAN to make the fight against foreign bribery a priority in the ASEAN Economic Community;
7. **Welcome** the commitment of the host country to raise these recommendations at the 6th Session of the Conference of the State Parties to the UNCAC and *encourage* other participating States to support this initiative;
8. **Express** appreciation and gratitude to the Anti-Corruption Unit of Kingdom of Cambodia for hosting the Regional Meeting on Curbing Foreign Bribery in ASEAN Economic Community with support from the United Nations Office on Drugs and Crime to reflect and agree on these Recommendations for Curbing Foreign Bribery.