Executive Summary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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