

# Normas internacionales para la responsabilidad de las personas jurídicas

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# Overview

- OECD/UN standards of corporate liability
- Models for liability of legal persons
- Corporate liability caselaw

# OECD Anti-Bribery Convention

- Entered into force 9 December 1999, 40 States Parties, including Argentina, Brazil, Chile, Colombia and Mexico.
- **Article 2, commentary 20 and 2009 Recommendation, Annex I set out the standards for corporate liability.**
- Working Group on Bribery in International Business Transactions (WGB) and the peer-review process.

# UN Convention against Corruption

- Entered into force 14 December 2005, 165 States Parties, only 6 out of 34 Parties to the IACAC have not yet ratified UNCAC.
- **Article 26 sets out the requirements for corporate liability.**
- Mechanism for the Review of Implementation of UNCAC (IRG) and the peer-review process.

# Common Standards for Corporate Liability

- Establish the liability of legal persons for corruption/foreign bribery offences.
- Liability may be criminal, civil or administrative.
- Liability should not be restricted to cases where the natural person(s) who perpetrated the offence are prosecuted or convicted.
- Legal persons held liable should be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.



# Sanctions for Legal Persons

- Monetary sanctions
- Confiscation of the bribe and its proceeds
- Loss of tax benefits
- Corporate monitoring
- Debarment
- Reparation
- Suspension
- Dissolution



# OECD model for liability of legal persons

## Annex I: Good Practice Guidance on Implementing Specific Articles of the Anti-Bribery Convention

- Liability of the legal person **separate** to liability of the related natural person
- Flexible to allow for **different corporate systems**, but corporate liability must be triggered when:
  - Manager offers, promises, or gives a bribe;
  - Manager directs a lower level person to bribe; and
  - Manager fails to prevent a lower level person from bribing.
- Companies should not be able to avoid liability by using intermediaries, including **related legal persons**.

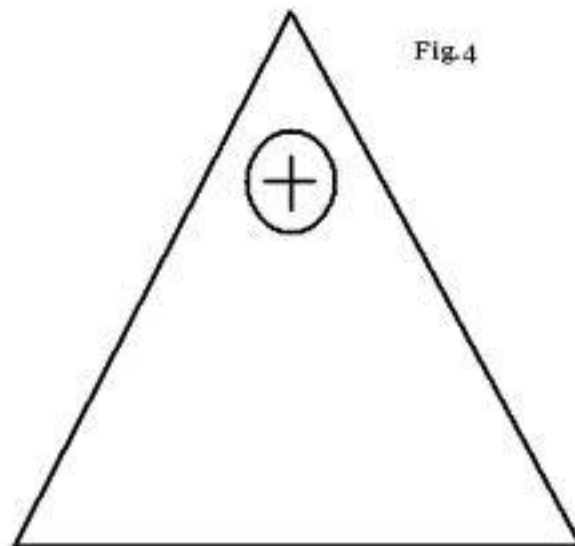
# Additional Considerations

- Corporate entities covered: SOEs and NGOs
- Corporate liability for all offences, or specific offences only
  - Criminal Code offences
  - Bribery and corruption/false accounting/AML/CFT
- Jurisdiction over Legal Persons
  - Nationality Jurisdiction vs. Territoriality Jurisdiction
- Liability for the acts of Subsidiaries
  - Bribery through intermediaries
- Defences and mitigating factors



# Forms of Corporate Liability

- Model 1: Identification Doctrine (Ireland/NZ)
  - “Directing mind and will”
  - Mental state and action at the top of the company
  - No aggregate intent



# Forms of Corporate Liability

- Model 2: Vicarious Liability (U.S.)
  - Acting within scope of employment
  - For benefit of the company
  - Add up intent



# Forms of Corporate Liability

- Model No 3: Failure to prevent
  - Look at whether act alone is illegal
  - Then look at corporate culture, policies and implementation



# Examples of “Failure to Prevent”

- Chile Law on Criminal Responsibility of Legal Persons
  - Article 3: Legal persons shall be responsible ... provided that the commission of the offence results from the breach of the legal person’s direction and supervisory functions.
  - The direction and supervisory functions will be satisfied if, before the commission of the offence, the legal person had adopted and implemented the ‘Offences Prevention Model’ (contained in Article 4).
- Australia Criminal Code
  - Division 12: a company is liable if its “corporate culture” encouraged, tolerated or led to the offence, or if it failed to create and maintain a “corporate culture” that required compliance with the relevant law.
- Canada Criminal Code
  - Section 22.2: “With the intent at least in part to benefit the organisation, one of its senior officers”: [...] 3. Knowing that a representative of the organisation is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.



# From theory to practice ...

- To date:
  - 90 entities have been sanctioned in criminal proceedings for foreign bribery in 14 States Parties to the Anti-Bribery Convention;
  - 55 entities have been sanctioned for foreign bribery in administrative and civil cases; and
  - the highest sanction for a company is 1.5 billion euros.

# Questions?

