COMMONWEALTH SECRETARIAT
& CHATHAM HOUSE

ANTI-CORRUPTION CONFERENCE
THE UN CONVENTION AGAINST CORRUPTION IMPLEMENTATION & ENFORCEMENT: MEETING THE CHALLENGES

CHATHAM HOUSE · LONDON · 24 TO 25 APRIL 2006

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EXECUTIVE SUMMARY

The United Nations Convention Against Corruption (UNCAC) came into force on 14 December 2005 and as prescribed by this convention, the Conference of State Parties will be held later this year in order to promote and review implementation.

The convening of this conference was organised with a view to taking forward the implementation of UNCAC among those States that have signed to it. The presentations focused on key topics with time allocated for discussion on the issues arising out of those presentations.

The objectives of the conference included:

- addressing the problems faced in monitoring implementation by smaller, developing States by identifying those problems and highlighting the lessons from developed States;
- encouraging effective international cooperation;
- assisting participants to identify training and technical assistance needs; and
- for Commonwealth States to take forward the Recommendations of the Commonwealth Expert Working Group on Asset Repatriation as mandated by the Heads of Government at the 2005 Commonwealth Heads of Government Meeting (CHOGM). Those Recommendations include: putting in place comprehensive legislation and procedures for both conviction and non conviction-based confiscation, MLA on the basis of the Harare Scheme and direct enforcement of restraint and confiscation in response to a foreign request.

OVERVIEW OF THE SESSIONS

SESSION ONE

UN CONVENTION & COMMONWEALTH INITIATIVES

Speakers: Martin Polaine & Stuart Gilman

- Disappointment was expressed at the number of discretionary provisions within the preventive chapter of UNCAC. The importance of implementing preventive measures as part of any anti-corruption strategy was emphasised.
- Judicial integrity is a key component to any effective anti-corruption strategy. Article 11 (which deals with measures to strengthen judicial integrity) lacks detail and it would therefore be prudent to consider a range of other initiatives such as the Commonwealth Framework Principles, the Limassol Recommendations on Combating Corruption within the Judiciary and the Nairobi Communique.

- Asset recovery is a fundamental principle of UNCAC. This is an area that requires both international cooperation and a consistent approach. It also requires sufficient resources and demonstrable political will. The importance of international cooperation in effecting asset repatriation and confiscation is addressed in Articles 54 to 57.

- The Commonwealth Expert Working Group on Asset Repatriation recognised that there can be impediments to the successful use of conviction-based confiscation and that therefore in some instances, a complimentary, non-conviction based regime will be useful in pursuing the proceeds of crime.

- The preferred option, particularly for small and developing States with limited resources, is a system of direct enforcement where foreign orders for restraint/seizure and confiscation may be registered and enforced as if issued in the requested State.

- The issue of immunity is a problematic area and current Heads of State/Government still enjoy immunities which are absolute while they remain in office. Immunity from prosecution is addressed in Article 30(2) (a discretionary provision). The Commonwealth Expert Working Group on Asset Repatriation recommended that Heads of Government should commit themselves to removing immunities. However, they also recognised that some States may be at certain stages of transition and therefore may have to have recourse to limited immunity for limited periods of time.

- Any effective anti-corruption strategy must be transparent and those agencies involved in combating corruption must have legal and political independence.

- UNCAC does not require States to establish anti-corruption commissions. However, Article 6 calls on States to ensure that a body or bodies are established to prevent corruption via certain means. While it is acknowledged that there is a need to have independent specialist anti-corruption bodies; a freestanding body may not be appropriate for all States. Attaching an anti-corruption unit to an existing ministry or department may be more appropriate for some States.

- It is important to have realistic budgetary resources and allocations when establishing anti-corruption agencies and when developing policy.

SESSION TWO

MONITORING & MEASUREMENT

Speakers: Graham Rodmell, Nicola Bonnuci & Dr. Maria Gavouneli

- The absence of monitoring provisions within UNCAC was noted in this session and possible monitoring mechanisms were explored. There was an expression of hope that when the Conference of State Parties meet later this year, those participating will consider putting into effect supplemental review mechanisms to assess the measures taken by State Parties to implement the Convention. To that end, it was suggested

that the practical experiences of existing monitoring mechanisms such as those adopted by the OECD and GRECO be considered by the State Parties.

- Any agreement to provide an adequate monitoring process will require a commitment from developed States to lend both technical and financial support to developing States.

- It was suggested by Nicola Bonnuci that the success of monitoring under the OECD Convention can be largely attributed to a strong political will from the key players coupled with adequate financial and human resources. When considering different monitoring options, it will be important that any chosen mechanism responds to the political and economic diversity of those States that have signed to UNCAC.

- Current monitoring mechanisms include both instrument based and non-instrument based mechanisms. The latter can offer a more informal and less costly type of monitoring and can include, for example, the use of surveys and/or questionnaires. However, if such questionnaires/surveys are designed to meet regional standards, it will be important that an underlying consistent standard is in place in order to avoid undermining the objectives of UNCAC.

- The engagement of civil society in the monitoring process is important and permits dialogue and public accountability thereby promoting the transparency and credibility of the process.

- UNCAC lists a series of specific criminal offences and addresses corrupt activity by public officials. However, some of the provisions merely require States to consider establishing offences. Disappointment has been expressed that the offences of 'trading in influence' and 'illicit enrichment' have been couched in discretionary terms.

SESSION THREE

TAKING IMPLEMENTATION FORWARD: ANTI-CORRUPTION STRATEGIES

Speakers: Datuk Seri Zulkipli Bin Mat Noor, Dr. Enery Quinones & Ken Mwige

- Datuk Seri Zulkipli Bin Mat Noor and Ken Mwige discussed the strategies adopted by the Malaysian and Kenyan anti-corruption agencies. The importance of implementing preventive measures was stressed by both speakers. The inclusion of education in any effective strategy was noted as being of particular importance, with Mr. Mwige suggesting that anti-corruption awareness should be inculcated into the national psyche at an early age by making it an examinable subject at school.

- Further, promoting anti-corruption awareness should continue through into working life; not only at the point where an individual joins an organisation, but especially when promotions or changes of position occur.

- Malaysia's anti-corruption strategy forms an integral part of the country's general

policy objectives, which are embodied in it's concept of 'Vision 2020.' There are two pillars to Anti-Corruption Agency's (ACA) strategy; education and prevention. There is a specific anti-corruption law that empowers the ACA to investigate, carry out selections and engage in community education. Further the ACA have powers to carry out selections and engage in community education, in addition to inspecting public offices and agencies to determine and identify areas that are likely to breed opportunities for corruption.

- In Malaysia, every agency must have in place job rotation policies that rotate employees every five years. Further, protection for whistleblowers and witnesses is guaranteed in the provisions of the Anti-Corruption Act.

- Dr. Enery Quinones's presentation focused on how the EBRD promotes integrity and business ethics in the projects they finance.

- Dr. Quinones suggested that working towards harmonising investigative guidelines across all the multi-lateral development banks will facilitate more effective cross debarment and/or lend support for each other's enforcement decisions. She concluded by stating that a co-ordination of efforts by the banks would enhance the work done by individual banks, with the desired longer-term objective being to focus on broad-based prevention and the imposing of sanctions.

SESSION FOUR A

PUBLIC SERVANTS: ANTI-CORRUPTION PREVENTION & DETECTION

Speakers: Marie-Noelle Ferrieux-Patterson, Jean Au Yeung and Muhammad Akram Sheikh

- This session focused on the experiences of three different States in combating corruption within the public sector.

- Marie-Noelle Ferrieux-Patterson described the cultural acceptance of corrupt activity by public officials in Vanuatu as being a major obstacle to combating corruption, particularly in relation to the cultural norm of exchanging gifts.

- It is to be stressed that while the significance of exchanging gifts in certain cultural contexts is generally acknowledged; when legislating on this issue, State Parties need to clearly distinguish between what is deemed to be a an acceptable exchange of gifts and what constitutes a bribe. Over and above this, codes of conduct should spell out in what circumstances a gift may be received, what maximum monetary value it may have, when it should be declined, and whether it should be returned.

- Mr. Sheikh's presentation focused on the 'culture of secrecy' that prevails in Pakistan and how this lack of public accountability and transparency fosters corruption as well as impeding efforts to combat it. Mr. Sheikh stressed that it was important not to alienate States such as Pakistan and called on the international community to support civil society and the judiciary in counteracting the problems presented in undemocratic societies.

- Ms Jean Au Young discussed how ICAC has responded to the evolution of a public/private partnership in Hong Kong. ICAC encourages staff to include codes of conduct with a view to facilitating a new office culture where staff understand the requirements and ethical standards expected of them. The Government has also introduced a post-service sanitisation period for Government employees and senior staff within Statutory Regulatory Public Bodies.

- A robust declaration system has also been established with the key requirement being that individuals must declare their assets on appointment. ICAC officials have a more stringent requirement in that they must declare their assets on an annual basis rather than every two years.

- Ms Young attributed ICAC's success to these strategies in addition to a strong political will and a growing public intolerance of corrupt activity by public officials.

SESSION FOUR B

CORPORATE SOCIAL RESPONSIBILITY

Speakers: Felix Ntrakwah, Wayne Dunn & M K Chouhan

- Felix Ntwarah's presentation focused on the many competing needs and expectations that need to be considered in relation to Corporate Social Responsibility in the context of a State such as Ghana. He emphasised that in relation to Ghana and its mining industry, CSR needs to be considered in the context of the competing needs for investment and the protection of the environment.

- He expressed the view that the average Ghanaian is accepting of the mining industry, but expects that the taxes and royalties generated from the industry will be invested in public works and projects. However, he added that this expectation is not often met as the multi-national's view of CSR is that it is the government who should meet the needs of the community from the taxes and royalties paid.

- Some of the problems that continue to exist in Ghana include pollution, illegal mining, human rights abuses and poverty and unemployment.

- Wayne Dunn discussed how CSR interfaces with corruption and bribery. He described the global context in which CSR must operate i.e. a globalised world increasingly demanding more of business, socially conscious shareholders and the presence of social investment funds and financial markets.

- He stated that CSR is about companies working in partnership with communities and others to address problems, companies promoting good values to their employees, suppliers, customers, customers, partners' companies investing in social and economic development, and companies being good corporate citizens. However, he added that CSR can be amenable to corruption as payments can influence license. Conversely, lack of a license can obstruct access to billions of dollars in wealth. He provided the example of what happened in relation to the nickel deposits in Peru.

- M K Chouhan's presentation emphasised the importance of an individual's integrity, how it evolves in different contexts and the way in which personal ethics interface with collective ethics in the context of CSR.

- Personal integrity and the collective integrity of a group of individuals and their commitment to high moral values and ethics influences Corporate Governance and CSR.

- Corporate, political and bureaucratic leaders need to be sensitised to the need to maintain high ethical standards in business practices.

SESSION FIVE

CRIMINALISATION, INVESTIGATION & PROSECUTION

Speakers: Stephen Foster, Stanley Chan & Emmanuel Akomaye

- Steve Foster's presentation focused on his involvement in the EU Phare Project's development of anti-corruption measures in Romania. An anti-corruption unit was established and its focus was primarily on the conduct of those involved in law enforcement. The unit adopted intelligence-led integrity tests as part of its strategy given the closed nature of the police.

- The intelligence-led test is a valuable investigative tool in anti-corruption cases, particularly in cases involving suspected corrupt behaviour by the police and public servants. However, it is important to note that integrity tests can potentially involve a breach of privacy rights.

- Mr. Foster attributed the success of the unit's work to the intelligence-led testing, the full engagement of NGOs and civil society in the process and the political will to make the changes.

- Stanley Chan's presentation focused on the prosecution of corruption cases and provided an examination of: the range of convention crimes; the elements of UNCAC bribery offences; the 'abuse of functions' provisions as provided under Article 19 of UNCAC; the 'illicit enrichment' provision as provided under Article 20 of UNCAC; and appropriate defences.

- The criminalisation provisions of UNCAC reflect the higher standard of conduct expected of public officials. As some of these provisions are discretionary in nature, it is incumbent on State Parties to establish or maintain a series of specific offences.

- Emmanuel Akomaye's presentation focused on the EFCC's remit in relation to prosecuting and investigating corruption in Nigeria. He stressed that an effective anti-corruption strategy requires demonstrable political will. It is of note however, that in Nigeria, political will is challenged by a constitutional provision that bars prosecutors from prosecuting certain individuals in public office.

- Mr. Akomaye suggested that the intelligence-led approach to investigating suspected

corruption can be useful in that acquiring a lot of intelligence prior to approaching a suspect tends to disable him/her and avoid unnecessary political pressure. Moreover the practitioner is in a stronger position if it becomes necessary to plea bargain.

- The EFCC's remit includes the power to both investigate and prosecute. These fused functions arguably enhance an organisation's commitment to pursue cases from start to finish.

SESSION SIX

CORPORATE GOVERNANCE

Speakers: Sir Brian Fall, Guy Dehn & Guido Penzhorn SC

- Sir Brian Fall spoke about the up-dated version of the ICC Rules of Conduct and Recommendations for Combating Extortion and Bribery. These rules are general in nature and constitute what is deemed to be good commercial practice, but without legal effect. While the highest priority should continue to be directed to ending large-scale extortion and bribery involving politicians and senior officials, the 2005 revision of the Rules also provides for action against facilitation payments to lower level officials.

- The ICC Commission on Anti-Corruption has played an active role in the development of the new framework for combating corruption, and the Commission intends to remain active in relation to the implementation of UNCAC.

- Guy Dehn discussed the kinds of dilemmas faced by those considering raising a concern about suspected corrupt activity. Several States have introduced disclosure laws as part of a growing recognition that whistleblowing protection is necessary. The model used in countries such as the UK, Japan and South Africa focuses on the workplace. It has a tiered disclosure regime which emphasises internal whistleblowing, regulatory oversight and recognition of wider accountability.

- Article 33 of UNCAC (a discretionary provision) encourages States to provide protection to individuals who express their concerns in good faith. It is also incumbent on employers to establish clear and effective internal reporting members. Employees should be given simple and practical options for reporting suspected corrupt activity. They should also be reminded of those options on a regular basis.

- Guido Penzhorn discussed his experience of prosecuting in the Lesotho Highland Water cases. He highlighted some of the common obstacles faced in prosecuting international corruption and emphasised the importance of such factors as the integrity of the prosecuting authority, demonstrable political will, judicial credibility and international cooperation.

- It is imperative that the international community provide assistance (via funding and mutual cooperation) to a small, developing State such as Lesotho, who finds itself having to prosecute a large, complex and expensive case. Such a commitment from

the developed world will, no doubt, serve to encourage such States to continue their efforts in fighting corruption.

- The Lesotho Highlands Water Project cases (particularly the Acres case) illustrates that agreements involving the use of agents and/or intermediaries can be used as mechanisms for bribes. Practitioners need to be alive to indicators (so-called 'red flags') that may indicate that a high risk of bribery exists. Such 'red flags' might include for example, requests for reimbursement for ill-defined or last-minute expenses.

SESSION 7

ASSET REPATRIATION & INTERNATIONAL CO-OPERATION

Speakers: Emmanuel Akomaye, Tim Daniel & Paul Gully-Hart

- Mr. Akomaye outlined the rationale of asset recovery and the particular challenges faced by the EFCC in combating corruption in Nigeria. Globalisation, pressure from civil society and the growing number of democracies in Africa have contributed to steps being taken by States to recover the proceeds of corruption.

- He stated that sometimes it is not practical to press charges when the suspect is willing to co-operate and return the assets. Conversely, deciding not to prosecute has other implications in that, in the absence of a criminal sanction, people may not be discouraged from committing such crimes in the future.

- Given the particular challenges of recovering assets, he suggested that non-conviction based confiscation might be a more effective approach, such as that adopted by South Africa.

- Tim Daniel discussed some of the problems experienced in effecting recovery through the criminal process and explored some of the possible remedies available under civil proceedings. For example, with civil action, an action can be brought against a bank for knowing receipt or failing to make proper enquiries.

- The invocation of immunity as an impediment to successful prosecution was discussed again in this session, most notably in relation to the fact that Nigeria's constitution extends immunity to Heads of State and all 36 State Governors.

- The kind of obstacles encountered in MLA proceedings can be the requirement for dual criminality in addition to a lack of human and financial resources.

- Article 43(2) of UNCAC encourages States to construe the concept of dual criminality widely, by deeming the latter fulfilled if the underlying conduct is a criminal offence under the laws of both State Parties.

- Mr. Gully-Hart discussed the kind of legal and practical difficulties the Swiss authorities have been confronted with in relation to the repatriation of ill-gotten assets. He noted in particular the problems posed by the invocation of immunities and ineffec-

tive MLA, citing well known cases such as those involving Sani Abacha and Ferdinand Marcos.

- Switzerland has responded swiftly to approve the implementation of domestic legislation in order to give effect to the provisions of UNCAC.

- Swiss banking secrecy legislation does not apply to assets of criminal origin and thus does not impede existing preventive or protective measures.

- The Swiss Federal Banking Commission (FBC) issued a money laundering ordinance which became effective in 2003. The ordinance has introduced a bar on accepting the proceeds of corruption or other crimes, even if committed outside Switzerland.

CONCLUSIONS

- There is a need for a co-ordinated anti-corruption strategy which addresses the 5 pillars of UNCAC i.e. prevention, criminalisation, asset recovery, international cooperation and effective monitoring. Achieving such a strategy requires demonstrable political will.

- When considering such strategies, regard must especially be had to those public officials in exposed positions. Reporting responsibilities (in relation to suspected corruption) should be made clear and sanctions should be put in place for those who do not report.

- The importance of education and targeted awareness as an integral part of any anti-corruption strategy should be heeded by States.

- It is acknowledged that there is a need to have independent specialist anti-corruption bodies. However, a freestanding anti-corruption body is not necessarily the answer for all States and it may be more appropriate, depending on the needs of a particular State, to have an anti-corruption unit attached to an existing ministry or department.

- Prosecutors and Investigators involved in the anti-corruption strategy should be specialist and trained and resourced accordingly.

- The implementation of UNCAC requires an effective monitoring system. Those involved in implementation should seek to draw lessons from other initiatives such as the OECD's peer review mechanism. In examining possible means of monitoring and evaluating under UNCAC, the restraints imposed by costs and resources need to be considered.

It might be that monitoring initially focuses on some or all of the mandatory provisions of UNCAC.

It is recognised that inadequate or ineffectual monitoring is worse than no monitoring.

- As recommended by the Commonwealth Expert Working Group on Asset Repatriation, MLA between Commonwealth States should be on the basis of the Harare Scheme, with a wide interpretation being accorded to the dual criminality requirement.

Informal requests for assistance should be used where appropriate, rather than the more formal procedures of MLA.

Careful consideration needs to be given as to how the workability of MLA can be improved in relation to asset tracing and recovery.

- When implementing anti-corruption strategies, governments are encouraged to engage civil society and NGOs in a meaningful and practical way.

- States should be encouraged to implement strong and effective laws and procedures in order to facilitate the tracing and recovery of assets. These should allow for both conviction and non-conviction based asset repatriation. Direct enforcement is likely to be both less problematic and less resource-intensive for small and developing States.

- It is clear from the example of the Lesotho Highland Water cases, that small and developing States mounting a significant corruption prosecution will probably need technical and financial assistance.

- As recommended by the Commonwealth Expert Working Group on Asset Repatriation, Heads of State should commit themselves to removing immunities. However, it is acknowledged that some States may be at certain stages of transition and therefore may have to have recourse to limited immunity for limited periods of time.

- Companies and corporations should be encouraged to have in place codes of conduct which do not tolerate corrupt practice in any guise.

- Public procurement is particularly vulnerable to corrupt practice. There should be awareness or 'triggers' (such as in relation to agents and intermediaries) which may be suggestive of corruption.

- States should have regard to covert and pro-active techniques, including intelligence-lead testing, such as the kind currently being used in Romania. It is recognised that when using covert techniques, consideration must be given to privacy rights and the potential violation of human rights instruments or initiatives.

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INTRODUCTION AND OBJECTIVES

It is to be hoped that the convening of this conference was timely given that the United Nations Convention Against Corruption (UNCAC) came into force on 14 December 2005, whilst the Conference of the State Parties is due to take place in December 2006. This year, will therefore be a crucial one in the international fight against corruption.

UNCAC is the first truly global anti-corruption instrument. To date, there are 140 signatories to the Convention and 50 ratifications. It is an instrument which recognises that corruption undermines good governance, respect for human rights and economic development. As noted in the Commonwealth Secretary-General's Keynote Address; the Work Bank estimates that, in 2004, an amount equivalent to 6% of the world's GDP was paid in bribes.

The objectives of the conference were:

- **to take forward the implementation of UNCAC, and to identify and address the problems faced in implementation by smaller States (particularly in relation to effective detection and investigative processes);**
- **to encourage the taking forward of a co-ordinated anti-corruption strategy, whilst recognising that any effective initiative has to be multi-faceted, targeted and supported by demonstrable political will;**
- **to encourage the creation of a cadre of specialist investigators and prosecutors to address corruption cases;**
- **to examine possible means of monitoring and evaluating under UNCAC particularly taking into account (i) the limited resources of some States, and (ii) the opportunities of regional cooperation;**
- **to encourage, particularly among smaller States, effective international cooperation;**
- **for Commonwealth States, to take forward the Recommendations of the Commonwealth Expert Working Group on Asset Recovery and Repatriation;**
- **for all States, to improve cooperation and co-ordination in relation to the restraint, confiscation and repatriation of assets;**
- **to encourage cooperation, trust and strategic partnerships between Government bodies and Non-Governmental Organisations (NGO's);**
- **to assist participants to identify training and technical assistance needs; and**
- **to encourage States to formulate plans of action to take forward all of the above**

The majority of the presentations focused on the strategies, difficulties and needs of developing States in the fight against corruption. Successful strategies were also discussed, particularly from those speakers representing Hong Kong and Malaysia. Other presentations offered insights and lessons from developed States, most notably in relation to the implementation of the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Convention).

TWO ADDRESSES WERE MADE DURING THE OPENING SESSION:

1. Welcome address by Ms Elizabeth Wilmshurst, International Law Fellow, Chatham House

2. Keynote address by the Rt. Hon Don Mckinnon, Commonwealth Secretary-General

1. Welcome Address by Ms Elizabeth Wilmshurst

Ms Wilmshurst opened her address by noting that the World Bank has identified corruption as the single greatest obstacle to global development and that it estimates that 1 trillion US Dollars is paid in bribes each year.

She welcomed all the participants and explained that 'Chatham House Rules' did not apply unless any speaker during the discussion wanted his/her remarks to remain unattributed.

Ms Wilmshurst then invited the Commonwealth Secretary-General, Rt. Hon Don McKinnon, to deliver his Keynote Address.

2. Keynote Address by Rt. Hon. Don McKinnon, Commonwealth Secretary-General

SUMMARY

The Secretary -General welcomed all the participants to the conference and thanked both Chatham House and members of the Commonwealth Secretariat for organising the event.

The full text of the Keynote Address is attached.

KEYNOTE SPEECH

THE Rt. Hon. DON MCKINNON

Commonwealth Secretary-General

Thank you Elizabeth, and good morning ladies and gentlemen.

Now politicians can sound quite glib about important matters, and I should know… because I was one for over 20 years. 'Education', 'health', 'community': we feel passionately about them, but we often turn people off with soundbytes. So when it comes to 'corruption', we rightly talk about 'the cancer' and 'the scourge', and sometimes I wonder if people roll their eyes and stop listening.

So how can I talk about the ultimate horror that is the C word, and remind people that it's either a death sentence or the cue for serious treatment and serious change of ways?

Perhaps not with rhetoric, but with a look at the last fortnight's newspapers from around the Commonwealth.

That small pack of sharp-toothed Wolfs - '-ensohn' and '-ovitz', James and Paul - are widely quoted for the World Bank's anti-corruption focus – speaking at a huge governance conference in Jakarta; and very publicly holding back over £550 million in aid, which it doesn't trust the Indian health sector to spend responsibly. It has done similar things in Chad and Uzbekistan. It's from the World Bank that we get the estimate that in 2004, 6% of the world's economy was paid in bribes. Meanwhile, at their Spring meeting last week, UK Secretary of State for International Development Hilary Benn has just pushed the Bank and the IMF to go even further, and formalise and codify their anti-corruption codes.

Corruption always makes news, everywhere. Please note: I make no distinctions between the Githongo report in Kenya and the alleged cash for peerages affair here in the UK. On any day of the week I can unearth stories of corrupt people at the very top of governments, almost anywhere in the Commonwealth and beyond: a week ago it was the suspension of four MPs, including a cabinet minister, in Papua New Guinea.

And here are two stories with a twist, at which I think we're allowed to raise the faintest of smiles. First, accusations of corruption … in the Anti-Corruption Committee of Bangladesh, no less. Second, a delay in the Swaziland parliament's debate on the Prevention of Corruption Bill – because a large number of MPs claimed not to have received a copy of the Bill, which had been delivered into all their pigeon holes. Again, you see the double-edged sword of hard-hitting words about corruption: on the one hand, the Minister of Finance claiming that the Swazi economy loses $40 million a month to corruption, and on the other, the people of the country saying that if we can't trust the MPs to look at their mail, then what can we trust them in? I can assure you,

I don't want to point fingers at anyone. In my own arena of international organisations – whether it's the Commonwealth Secretariat, the EU, the World Bank or wherever – there always has been and will be the potential and sometimes the reality of corruption. Throughout the world - in government, in business, in local communities, you name it – I'm afraid that the potential for the abuse of power and money is everywhere…

The point is this. Corruption is a cancer, and a cancer is a deadly thing. Whether it's the first policeman you meet at an airport demanding a bribe to let you through customs, or a government minister hiving off millions, it tears at the very fabric of any society. It is Public Enemy Number One to the two things we hold dearest in the Commonwealth: Democracy and Development. As ever, it tends to be the poor who suffer most: it leads to children without adequate schooling, and to people of all ages without adequate healthcare. It distorts competition and investment; it's an impediment to free and fair trade. It puts up the price of everything. It undermines the democratic and moral standards which underpin the way in which we conduct our lives. Apologies if this sounds like more glib politician's talk. I can assure you it isn't – it's vitally important.

And this event, too, is important, and I sincerely thank Chatham House and my own Legal & Constitutional Affairs Division, especially Betty Mould-Iddrisu and Martin Polaine here, for their work in organising it.

Today's conference has a focus, and that is the 'UN Convention against Corruption', or UNCAC as we'll call it. And it's a timely focus: UNCAC entered into force on 14th December 2005, and the grandly-named Conference of the States Parties is due to take place in December 2006. It was a formal provision that 12 months after UNCAC entered into force, those who had signed it would meet to decide just how to make it work, and how to monitor and measure its performance. And that is what the meeting in Vienna in December is about.

So why do we attach such importance to UNCAC, as opposed to the other anti-corruption initiatives which we have seen over the last 10 years? I may say: 'the other good anti-corruption initiatives of the last 10 years', for instance those within the African Union and the Organisation of American States, and above all within the OECD. The latter's 1999 Convention on the Bribery of Foreign Public Officials in International Business Transactions has a very effective two-phase peer review mechanism, involving on-site visits and interviews and very robust scrutiny. The UK and Germany formally examined Italy, for instance ('interesting'…). France and Canada looked at the UK, and were very critical about loopholes in corporate liability ('even more interesting'…).

The UN Convention was three years in the making. It builds upon that earlier work, and reflects, for the first time, wide international recognition that corruption is a wrong which affects us all and which, in its most serious manifestations, inevitably contains a

trans-national element. This is a reflection of our newly globalised world, where the bad things - like crime, disease and environmental ruin - cross borders as easily as the good things like people, trade, and culture.

UNCAC is also a response to the fact that it is proving hard to find corruption, to prosecute it, and in turn to monitor how well both the finding and the prosecution are going. It also breaks new ground in offering a comprehensive, step-by-step guide to countries on dealing with corruption. Some of its provisions are mandatory – for instance that a specialised anti-corruption body be set up. (UNCAC doesn't see the need to distinguish between those within government, which is often easier for smaller states, or those outside it, like the well known anti-corruption commissions in Hong Kong and Singapore). Other aspects are discretionary, but they involve setting up anti-corruption strategies which are in some senses formulaic. Countries have to tick the boxes: is there an anti-corruption strategy in place? Are there specialised people and bodies in charge of anti-corruption? Is there training for some of the 'lieutenants' who will actually manage and administer the strategy? Is there a programme of public awareness and education?

So UNCAC reaches a big milestone in Vienna in December. And this year has already seen a number of other initiatives unfolding in support of it. In January, the International Group Against Corruption, the IGAC, met in New York to look at improving coordination – shared websites, shared best practice. Bilateral cooperation arrangements came out of that, too, particularly between the Commonwealth Secretariat and the UNODC. And in February in both Georgetown and Pretoria, the UN Office on Drugs and Crime, the UN ODC, organised a series of training meetings for very senior anti-corruption officials.

So UNCAC is moving. 140 countries have signed since it was opened for signing in Mexico in 2003 – and to date 50 have ratified it. In many ways, it's easier to ratify UNCAC in the developing world than the developed, since national laws have to be changed or adopted first, before it can be bolted on to them. All are agreed that UNCAC is solid, that it's right, that it's comprehensive. The challenge is to make it work – and that, of course, is what today's conference is all about.

Where, then, does the Commonwealth fit into this equation?

The Commonwealth has a role to play - in galvanising its members to fight corruption at large, in pushing forward its own initiatives, in providing technical assistance in the form of training or legislative drafting, and in implementing UNCAC in particular.

It has been playing that role since 1991 when the first Expert Group on good governance and the fight against corruption was convened in … Harare, of all places. It led to what we call the Framework Principles – on ethics and integrity in public life and in economic and fiscal policies, on the management of public services, on the judiciary and the legal system, and on civil society. These were endorsed at our 1999 CHOGM in Durban, with an accompanying Call For Action. At the 2003 CHOGM in Abuja - almost at the very time that UNCAC was opened for signature - we set up a Working

Group to draft model laws and help individual countries to implement UNCAC. The story then moves forward to Limassol in 2001, where we agreed parameters on judicial integrity – in essence, how to stop judges taking bribes.

But I'd like to bring you right up to date with a milestone that was reached in November 2005, at the Commonwealth Heads of Government meeting in Malta. There, we 53 countries repeated our commitment to root out, both at national and international levels, systemic corruption, and all the things - including extortion and bribery - which undermine good governance, respect for human rights and economic development. (That's Paragraph 47, for all you serious students of CHOGM.)

They welcomed the-then imminent entry into force of the UNCAC (remember, this was end-November, before UNCAC came into force on 14th December), and urged member states which had not already done so to become parties to the Convention, and to strengthen the fight against corruption. That's Paragraph 48.

They endorsed the recommendations of the Report of the Commonwealth Expert Group on the Recovery and Repatriation of Assets of Illicit Origin. Paragraph 49.

I have just deliberately read you the Chapter and Verse from a political communiqué. Hence the rather dense and impenetrable language. But Chapter and Verse matters. For comparison, and to show how much it matters, let me tell you that in Valletta we also agreed the Commonwealth Statement on Multilateral Trade: 17 unequivocal Points, signed by Heads of Government and then a week later by all Commonwealth Trade Ministers preparing their final negotiating positions for the WTO ministerial in Hong Kong. Here were Britain and Canada agreeing with Bangladesh and Cameroon on an issue as divisive as trade. The Trade Statement was the basis on which each Commonwealth country went into the WTO and also the regional trading groups to which they all belong.

I'd like, if I may, to unpick and unpack those three Paragraphs.

First, Paragraph 47. Are we serious about fighting corruption? Yes, absolutely: but of the 50 who have ratified UNCAC so far, only 12 are in the Commonwealth. Our target is of course for all to sign, and we believe we will reach that. And yet look at Transparency International's annual corruption index, proudly headed by Iceland. But second from bottom is Bangladesh, 6th from bottom is Nigeria, 14th Pakistan and 15th Kenya – all, of course, Commonwealth countries. So we have a distance to travel.

Second, Paragraph 48. As I said, we have 50 signatories, and need more. I also said: the spirit and the letter of the law is good – now, to apply it…

“

And finally Paragraph 49, on assets of illicit origin, and their repatriation. Everybody's favourite example is the Abacha billions – some five billion US dollars illegally taken out of Nigeria and deposited in Swiss bank accounts during the military dictatorship from 1993 to 1998. And if Switzerland and Luxembourg are less favoured repositories

for ill-gotten gains than they were, then the Cayman Islands, Belize, Northern Cyprus and the British Virgin Islands have stepped up in their place.

Our Commonwealth Expert Group on the Recovery and Repatriation of Assets of Illicit Origin comprised experts from international organisations, as well as 12 Commonwealth countries. They included luminary figures like Bernard Turner, the Director of Public Prosecutions in the Bahamas. The Group finished its work in August last year. Without reprising every single one of its 58 recommendations, let me highlight just three of the key ideas.

First, that no Commonwealth Head of State or Government, nor their ministers nor any other public officials, should have any kind of immunity from being prosecuted in domestic courts for alleged criminal activity. That is the aim, and we're getting there, not least because some smaller countries actually need immunity to protect themselves against malicious cases brought against them. But this issue is real – and if you don't think so, just look at President Aliev of Azerbaijan, accused of majorly dipping into the till, but standing immune from prosecution.

Second, that Commonwealth countries should put in place comprehensive laws and procedures for 'non conviction-based asset confiscation'. It's clear that the main aim is to confiscate illegally-acquired money on the basis of a conviction, but this new recommendation allows that confiscation without a conviction. It's a powerful riposte to the many layers of money-laundering, where a criminal can deal in illegal millions but only be seen and proved to be guilty in small scams worth hundreds.

Third, that there are mechanisms between countries to speed up and generally facilitate a confiscation or a restraint order made in one country – for money originating in another. We are making it such that an order issued in the UK can be used in, say, Fiji, because the two laws are the same. Already, such reciprocal arrangements are working: a recent UK request to freeze illegal money and property in Spain was concluded in just 24 hours.

So it is in the area of Asset Repatriation that the Commonwealth has been most active in the fight against corruption.

“ *Our activities, though, go further.*

There are piecemeal activities. We have drafted laws, for instance, allowing Uganda to request criminal evidence from other countries, and to receive it from others. In Kenya, we have set up a training programme for the Anti-Corruption Commission. In Fiji this coming May, we will meet countries from across the Pacific region, and agree a coordination and training programme with them. We want the piecemeal to become wholemeal: we have just submitted a £1 million proposal to several donors and most importantly to the UK, for a much more comprehensive training programme.

For UNCAC itself, we have helped to draft laws on criminalisation with the benefit of both Commonwealth Secretariat and UNODC materials. That means that we ensure

that there are indeed laws against bribery, extortion, whatever in their national body of legislation.

And we are starting to see successes. Let me share with you the success of the authorities in Lesotho in the prosecutions for bribery which were made after the award of contracts to build a massive dam in Lesotho in 2001. They successfully prosecuted a local engineer who had been appointed Chief Executive of the Lesotho Highlands Development Authority. He had taken one $500,000 bribe from a Canadian company, and another of $200,000, through an intermediary's wife. Suffice it to say that a consortium headed by the Canadians was duly awarded the contract… We will have the opportunity to hear from Guido Penzhorn of the South African Bar later today. Guido had the difficult task of leading the prosecution against a well-resourced battery of defence lawyers. And all this – with no support from the international community. David slew Goliath.

“

So what can we get out of this conference today? How can we blend this unique combination of experience and influence gathered here into something that advances the anti-corruption cause?

Here are my seven suggestions. Three are about corruption at large; and four specifically concern UNCAC.

First, we need a shared realisation – that adopting legislation is all very well, but enforcing it is quite another. There are so many examples of there being a will, but not yet a way. Sierra Leone in particular has the laws in place, but none of the institutions to enforce them.

Second, we need an agreement that anti-corruption strategies need to be coordinated, multi-faceted, targeted, and supported by demonstrable political will. 'Coordinated' in that they involve so many parties. 'Multi-faceted' in that they encompass the preventive, the investigative, the prosecutory, the educational, and more. 'Targeted' in that they have specific audiences, whether public servants or young people. And obviously 'Supported by demonstrable political will': this can only work if it is driven from above.

Third, with an encouragement for the creation of national cadres of specialist investigators and prosecutors to address corruption cases. Specialisation does not necessarily mean centralisation; there can as easily be regional centres of expertise within a State.

And so to UNCAC itself, and the four things I'd like to see come out of this conference to support it.

First, we need to advance the commitment to implement UNCAC in individual countries, and to identify and address the problems those countries – especially smaller countries – face in doing so. As we see it, some of those main challenges are: actually being able to detect and investigate corrupt public officials; being able to offer protection for those who report corrupt officials; and being able to enforce confiscation orders obtained or sought by other countries. And where there are training and technical

assistance needs to be met, let's identify them – and cost them, and work out how they will be supplied.

Second, we need to advance the commitment to implement UNCAC between individual countries.

Third, we need to ensure that - at both the national and international level - we achieve UNCAC not just by governments acting alone, but by governments acting in dialogue with NGOs. UNODC has already successfully involved NGOs in its consultations. Here today, for instance, we are very pleased to have with us the Zero Corruption Coalition and Transparency from Nigeria, and the Human Rights Department Campaign for Good Governance from Sierra Leone. No one denies that for NGOs to fight governments over corruption is a precarious business – just look at SAHRIT, the Human Rights Trust of Southern Africa, and the threats they have received in Zimbabwe.

And last but not least, fourth or seventh depending on which way you're counting, we need a clearer picture of how we can monitor and evaluate under UNCAC. To do this, we need to take into account the limited resources of some States, and the potential offered by regional cooperation. The Commonwealth is uniquely placed to take forward a regional approach – we can assist our members in their peer review, build on our existing relationships, our pool of expertise here in London, and indeed the resources of our wider family of accredited bodies like the Commonwealth Foundation.

That's quite a challenge – for us in our discussions today, and for UNCAC at large.

But take heart: it's a battle that can be won, as we saw with Lesotho.

There will be more 'big hits', no doubt. And a few misses, no doubt. All we know is that we must attack corruption from top to bottom, and indeed bottom-to-top. And let's show people the greater benefits of life without corruption. If the cancer isn't excised, it will destroy.

Let me end with an accident of history. Very local history, in fact. There is a building in Northumberland Avenue, just up from here behind Charing Cross station, which featured in an 1880s corruption scandal where money changed hands illegally, to allow land to be sold on the cheap. The court case that followed led to the first statutory corruption offence here in the UK. Well, 'the loveliest of lilies can grow in ugly swamps'. You might like to know that the building is at Number 25 Northumberland Avenue … now home to …. The Royal Commonwealth Society!

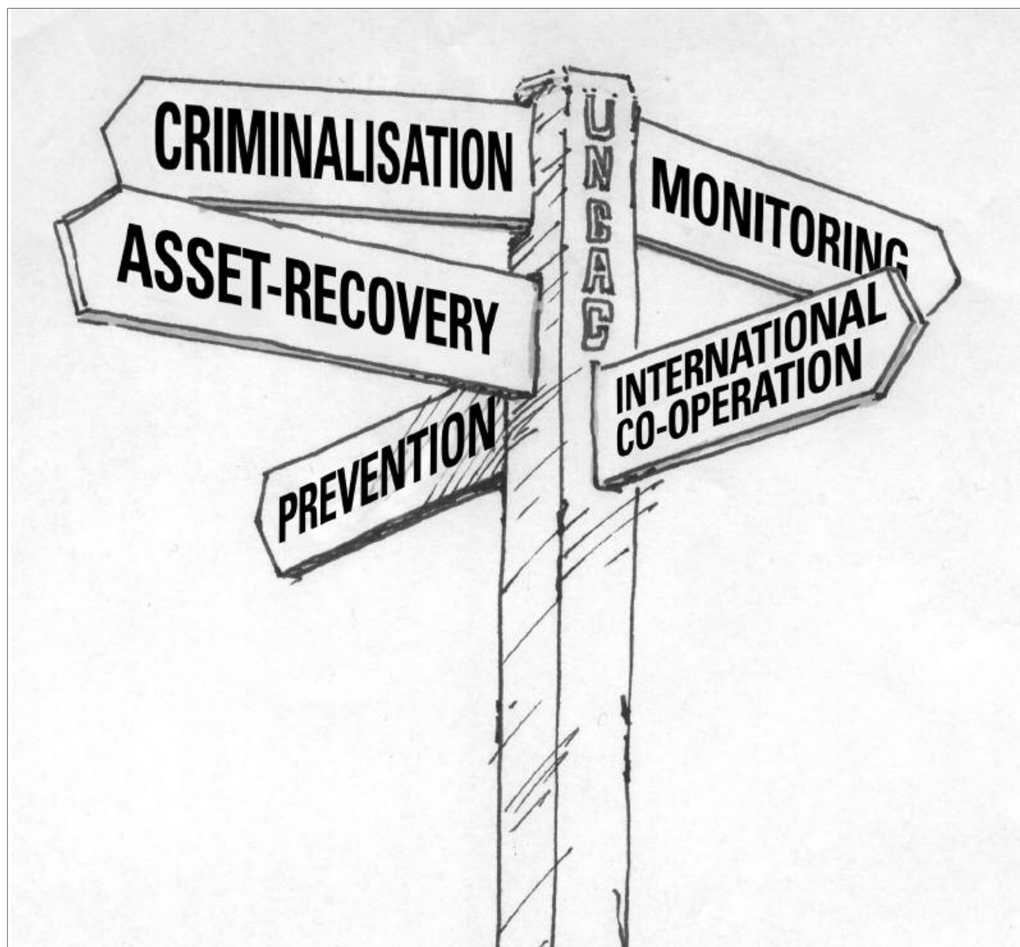
Thank you and good luck!

SESSION 1

UN CONVENTION & COMMONWEALTH INITIATIVES

TOPIC
WHERE ARE WE KNOW?
SPEAKER
MARTIN POLAINE
Consultant, Legal & Constitutional Affairs Division,
Commonwealth Secretariat

TOPIC
CHALLENGES OF IMPLEMENTING THE CONVENTION
SPEAKER
STUART GILMAN
Head of Global Programme against Corruption, United Nations Office on Drugs and Crime (UNODC)



TOPIC
WHERE ARE WE NOW?
SPEAKER
MARTIN POLAINE

A copy of Mr. Polaine's PowerPoint presentation is attached as Annex 1.

SUMMARY

Mr. Polaine provided an overview of the 5 'pillars' of the Convention and his evaluation of the Convention's strengths and weaknesses.

He described UNCAC as being a culmination of several international instruments and initiatives designed to address the problem of corruption. The scope of UNCAC is recognition that corruption is a global problem and that any effective response to corruption needs to be trans-national in nature.

He discussed the importance of prevention and judicial integrity in any effective anti-corruption strategy and stressed the need for sufficient resources to enable States to engage in asset confiscation effectively.

THEMES

UNCAC - Recognition of the need for a multi-faceted approach

A multi-faceted approach is reflected in the '5 pillars' addressed by the Convention. Those 'pillars are:

- Preventive measures
- Criminalisation (to include effective detection, investigation and prosecution)
- Asset recovery
- International cooperation
- Effective monitoring

Strengths of the Commonwealth for the purposes of UNCAC implementation

- Member States are not confined to one region
- In relation to assistance with training on legislative drafting, there is a cadre of specialists and a common language
- There is a common legal tradition
- There are common constitutional principles i.e. the Westminster model underpins most Commonwealth States
- There is a common interest in promoting good governance

Strengths of UNCAC

- Specifically and comprehensively addresses asset recovery

- Has a chapter devoted to prevention
- Addresses money laundering and trading in influence as well as bribery in its criminalisation provisions.

Weaknesses of UNCAC

- UNCAC negotiators were unable to agree on a set of mandatory requirements and thus the convention is a mixture of mandatory and discretionary provisions.

The discretionary provisions allow individual States a discretion in relation to the offences of illicit enrichment and abuse of function, even though the availability of such offences has shown itself to be effective in countering corruption. This might be seen as unfortunate as in the absence of political will and/or sufficient resources; a consistent trans-national approach to combating corruption may be inhibited. Moreover, a patchwork of differing laws and regulations may result.

The importance of Prevention

The importance of prevention as an anti-corruption strategy cannot be over-emphasised, and it is therefore of concern that some of the features of the preventive chapter are couched in discretionary, rather than mandatory, terms.

For example, although Article 3 of the convention highlights the need for State parties to evaluate anti-corruption laws and procedures; this is a discretionary provision.[1]

1 The full text of UNCAC is contained in Annex 23

Similarly, a key issue in any anti-corruption strategy is integrity within the public service; yet the relevant article (Article 7), is couched in discretionary terms.

Judicial Integrity

Judicial integrity is a key component to any effective anti-corruption strategy. This was acknowledged and reflected in the Bangalore Principles drawn up in 2001. These principles addressed the impartiality, training and accountability of judges. It was partly as a result of those principles that, in 2001, the Limassol Colloquium was held.

One of the difficulties encountered by nearly all jurisdictions is the resistance by judges to receive training, particularly from non-judges.

Asset Recovery and Confiscation

Mr. Polaine discussed the issue of asset recovery and confiscation and the need for States to have strong and comprehensive regimes in place. He added that there should be legislative provision for both conviction and non-conviction based confiscation. Asset recovery is a fundamental principle of UNCAC, addressed in Articles 51 to 59, and is also reflected in one of the key recommendations of the Commonwealth Expert Working Group on Asset Repatriation.

He stressed the need for sufficient resources to enable States to engage in asset confiscation effectively.

Furthermore, he expressed the view that direct enforcement is a key component if asset recovery and repatriation is going to work. Indirect enforcement is expensive, time-consuming and resource-intensive; therefore smaller, developing States will need to have recourse to direct enforcement.

TOPIC

CHALLENGES OF IMPLEMENTING THE CONVENTION

SPEAKER

STUART GILMAN

A copy of Mr. Gilman's PowerPoint presentation is attached as Annex 2.

SUMMARY

Mr. Gilman opened his presentation by noting that UNODC is the custodian of UNCAC. He stressed that the Convention is an instrument that provides a general set of principles (rather than rules) and therefore the onus is on the practitioner to provide guidance and ensure that those principles are implemented.

Mr. Gilman's presentation focused primarily on the importance of prevention in any anti-corruption strategy.

THEMES

Prevention

He stressed the importance of prevention as a strategy for combating corruption. The absence of preventive measures may cause political instability and the subsequent erosion of public confidence. That is to say, once corruption has been identified and the perpetrators punished, such as, the dismissal of government Ministers, the recovery time is not as quick as the public might expect. This erosion of public confidence, in turn, undermines the very notion of democratic society.

Mr. Gilman also stressed the importance of transparency in relation to the implementation of anti-corruption strategies.

UNODC will be holding the first of several technical expert meetings to begin dialogue, not on legislation, but, rather, on the practicalities of implementation. Such practicalities would include, for example, the substance and implementation of policy.

Anti-corruption agencies must have political and legal independence. Therefore, when developing these agencies, it is important to consider such issues as the appointment and removal process. However, it may not be realistic for some States to have fully independent anti-corruption agencies, and factors such as geography and population density may determine the extent of independence a particular agency can enjoy. Hong Kong has enjoyed considerable success in its fight against corruption, and Mr. Gilman suggested that this may in part be attributed to its size.

It is also important to have realistic budgetary resources and allocations when developing these policies and agencies.

Defining 'corruption'

Mr. Gilman discussed the public perception of what can be defined as 'corruption' and referred to a UNODC study of the justice system in South Africa. The results of that indicated that it was in fact, the integrity of the court system (for example, procedural incompetence) that was defined as being corrupt; rather than bribery itself.

He concluded his presentation by saying that the Commonwealth initiative on asset recovery is only one of five international initiatives and that these initiatives are all working in different directions. He put it to the audience that it is their job to orchestrate a consistent and unified approach to this facet of the anti-corruption strategy.

He added that in-depth studies in some African States have demonstrated that international cooperation does not always require dual criminality.

COMMENT

Has UNCAC improved the ability of States to get assets returned?

Articles 51, 54 & 57 – UNCAC[2]

2 The full text of UNCAC is contained in Annex 23

The importance of Asset Recovery in any anti-corruption strategy is recognised within the UNCAC provisions. However, it is now necessary to consider how member countries implement these provisions.

This is an area that requires both international cooperation and a consistent approach. It also requires sufficient resources and demonstrable political will.

The importance of international cooperation in effecting asset repatriation and confiscation is addressed in Articles 54 to 57. The need for international cooperation in this area was also emphasised by the Commonwealth Expert Working Group on Asset Repatriation and is reflected in their recommendations.

Moreover, the Group unequivocally recommends that member countries, 'with the support of the Commonwealth Secretariat, should develop and implement programmes for training/capacity building for police, prosecutors and judicial officers in relation to asset confiscation laws and practice.'

It was repeatedly emphasised in this session that in the absence of effective implementation, the objectives of UNCAC cannot be realised. The following are among the initiatives suggested as a means of achieving effective implementation of the asset recovery provisions:

- Strong political will
- A regional approach
- Sufficient resources
- The Commonwealth Secretariat supporting member countries, by offering technical assistance and training programmes (as recommended by the Expert Working Group)
- A direct enforcement scheme (as recommended by the Commonwealth Expert Working Group)

- Mutual Legal Assistance between member countries being available on the basis of the Harare Scheme, without the need for bi-lateral agreements (as recommended by the Expert Working Group)
- A periodic peer review mechanism may also be a useful means of measuring the effectiveness of an individual State's legislative and practical approach to repatriation and confiscation.

Is confiscation in rem an answer?

CONVICTION-BASED CONFISCATION

A criminal conviction is generally a pre-requisite to confiscation. After a person has been convicted there is an opportunity to allow a court to order the confiscation of assets as proceeds or instrumentalities of crime.

CONFISCATION IN REM (OR NON-CONVICTION BASED CONFISCATION)

Allows the State to bring court proceedings against property on the basis that the property constitutes the proceeds or instrumentalities of crime.

Advantages of confiscation in rem:

- It allows liability to be established to the civil standard and without the need for a criminal conviction to be recorded against the person in possession or ownership of the property
- It allows recovery of assets in a victim or receiving State in cases where the accused has died or absconded and the assets cannot be confiscated and otherwise returned
- Assets can still be pursued where an individual is acquitted for whatever reason but there is sufficient evidence on a civil standard that the assets were obtained through illegal activity
- In cases where there are problems surrounding possible prosecution or extradition because of allegations of political motivation, actions can still be taken in respect of the property on the proper evidence.

There are difficulties involved in pursuing conviction-based confiscation and this is discussed in further detail by Mr. Emmanuel Akomaye in his Session 7 presentation on 'Tracking, Seizing and Confiscation'. As suggested by Mr. Polaine, there are advantages to having both conviction and non-conviction regimes in place, depending on context.

The Commonwealth Expert Working Group recognised that there can be impediments to the successful use of conviction-based confiscation, particularly where the perpetrator has died, invoked immunity or where it is impossible to extradite him/her. Given the difficulties that can arise, the Group suggested that a complimentary, non-conviction based regime will be useful in pursuing the proceeds of crime. However, what is stressed in the Group's report, is that either route to confiscation will only be effective if a strong and comprehensive legislative framework is in place.

In relation to international cooperation, is direct or indirect enforcement the correct approach? What does UNCAC demand?

It was the view of the Commonwealth Expert Working Group that, because of significant problems with indirect enforcement experienced by many countries, the preferred option, especially for small and developing States, with limited resources, is a system of direct enforcement where foreign orders for restraint/seizure and confiscation may be registered and enforced as if issued in the requested State. Such a system is simpler to operate, less problematic, and much less resource-intensive.

However, it would be prudent to also consider any impact on an individual's human rights in the case of direct enforcement. Such an infringement may occur because an affected person arguably has no effective remedy regarding the action in the requested State. He/she may have no opportunity for challenges and variation orders that would otherwise be available under domestic law.

Immunity

Immunity from prosecution is addressed in UNCAC, at Article 30(2).[3] Again, this provision is couched in discretionary terms.

3 The full text of UNCAC is contained in Annex 23

This is a problematic area and current Heads of State/Government still enjoy immunities which are absolute while they remain in office.

IMMUNITY FROM PROSECUTION BY OR IN ANOTHER STATE

The Commonwealth Expert Working Group's Report on Asset Repatriation addresses the issue of immunities at some length. It states that there is emerging authority that Heads of State/Government are no longer able to claim immunity in another State where the act in question is governed by a treaty, such as the Torture Convention. There is also authority in support of an exception to 'functional immunity' in cases of crimes under customary international law such as crimes against humanity.

The Report suggests that this is an area where international law can be advanced to extend this exception to corruption crimes, adding that the Commonwealth could, through its recommendations and actions, encourage a movement in international law to extend functional immunity to corruption offences.

IMMUNITIES FROM DOMESTIC PROSECUTION

The Commonwealth Expert Working Group identified the central problem in prosecuting corruption matters as being the existence of immunities under domestic law. Some of these immunities are domestically enshrined and they present a major impediment to both prosecution and the recovery of assets, particularly where only conviction based asset confiscation is available.

The Commonwealth Expert Working Group recommended that Heads of Government should commit themselves to removing immunities. However, they also recognised that some States that may be at certain stages of transition and therefore may have to have recourse to limited immunity for limited periods of time.

The importance of preventive measures

Articles 5 to 14[4]

4 The full text of UNCAC is contained in Annex 23

Chapter II of UNCAC deals with preventive measures in relation to both the private and public sector and includes developing and maintaining effective policies for dealing with corruption and for implementing the various measures identified in it.

POLICY

Article 5 provides model preventive policies, such as the development, implementation and maintenance of effective coordinated anti-corruption policies. However, the establishment and promotion of anti-corruption practices and the periodic evaluation of laws and procedures aimed at combating corruption are couched in discretionary terms.

Article 6 requires States to ensure the existence of an independent anti-corruption body or bodies designed to oversee and coordinate the State's anti-corruption policies.

Given that Articles 5 and 6 lack guidance on the types of measures that could be adopted in domestic law, it may be useful to augment these provisions by considering the recommendations made by the Commonwealth Expert Working Group on Legislative and Related Measures to Combat Corruption in this regard.

PUBLIC SECTOR & CODES OF CONDUCT FOR PUBLIC OFFICIALS

Article 7 addresses probity in the public service and calls on States to endeavour to adopt, maintain and strengthen systems for the 'recruitment, hiring, retention, promotion and retirement of civil servants and, where applicable, other non-elected public officials.' However, there has been concern expressed about the fact that this article contains no mandatory provisions. For example, Article 7(d) merely asks State Parties to promote such programmes which 'may make reference to codes or standards of conduct in applicable areas.'

Article 7(3) calls on State Parties to enhance transparency in the financing of election campaigns and political parties. This is a particularly sensitive issue and the Framework for Commonwealth Principles on Promoting Good Governance and Combating Corruption recognises that there are clear links between inappropriate or inadequate controls on political funding and the prevalence of corruption.

Whilst Article 8 requires State Parties to promote integrity, honesty, and responsibility among their public officials, it is left to individual States to decide how this is done. The Convention merely requires them to 'consider' a series of possibilities such as facilitating whistleblowing by public officials.

PUBLIC PROCUREMENT AND MANAGEMENT OF PUBLIC FINANCES

In accordance with Article 9, transparency and accountability in matters of public finance must also be promoted and specific requirements are established for the prevention of corruption in public procurement.

While Article 9 of UNCAC makes it obligatory for States to have effective provisions to make public procurement transparent and competitive, the particular methods or processes for achieving this objective are not prescribed. The Commonwealth Expert Working Group on Legislative and Related Measures to Combat Corruption recognised that while the law should determine the process, there needs to be equal focus on proper administration. The key to the administration, is how the process is overseen (this would include the proper appointment of personnel, reporting and accounting) and the effective application of sanctions.

JUDICIAL INTEGRITY

Measures relating to judicial integrity are caught by Article 11 of UNCAC which states that '…each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary…'.

Article 11 requires State Parties to take measures to strengthen integrity and to prevent opportunities for corruption amongst members of their judiciaries and prosecution services. The independence of the judiciary is entrenched in most national constitutions but it is the need to take steps to protect and strengthen judicial integrity in practice that is equally important. This must also include the administrative staff of judiciaries as well as prosecutors.

This article lacks detail and it would therefore be prudent to consider a range of other initiatives such as the Commonwealth Framework Principles, the Limassol Recommendations on Combating Corruption within the Judiciary and the Nairobi Communiqué. These latter initiatives provide more comprehensive guidance on the policies and tools which could be adopted by States to strengthen independence and integrity within judicial systems.

PARTICIPATION OF SOCIETY

Article 13 recognises the importance of engaging civil society, non-governmental organisations and community-based organisations in the fight against corruption. This article also calls on States to raise public awareness of corruption and what can be done about it.

CONCLUSION

The articles in this chapter generally contain a mandatory requirement for action by State Parties whilst giving them flexibility in determining the appropriate measures to be adopted in domestic law in order to achieve the overall objectives of the Chapter.

However, the number of discretionary provisions contained within this Chapter has been received with disappointment by some of those involved in the anti-corruption drive. It is therefore suggested that some of the weaker provisions be considered in conjunction with other initiatives that provide more comprehensive guidance in relation to implementation.

Criminalisation

Articles 15-44[5]

5 The full text of UNCAC is contained in Annex 23

The Convention calls on State Parties to establish or maintain a series of specific criminal offences such as bribery, embezzlement, trading in influence and other abuses of official functions.

While some of the provisions oblige States to establish offences; other provisions take into account differences in domestic law, and merely require States to consider establishing offences.

Mandatory provisions include Article 15 which requires each State Party to adopt such measures as may be necessary to establish offences relating to the bribery of national public officials when committed intentionally. These offences include both 'active' and 'passive' bribery.

Article 16 addresses the bribery of foreign public officials and officials of public international organisations with the elements of the offences essentially following those in Article 15. One significant difference from other international instruments, and most notably, the OECD Convention, is that under Article 16(2), State Parties under UNCAC are not required to criminalise 'passive bribery' by a foreign public official.

The Convention also includes several discretionary offences such as trading in influence and illicit enrichment. The offence of illicit enrichment in Article 20, applies where there is a 'significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her income'. This provision is discretionary because of perceived constitutional difficulties for some countries. This could prove problematic because, as the Commonwealth Expert Working Group on Legislative and Related Measures to Combat Corruption has noted, the divergent views between States may adversely affect international cooperation. For example, the lack of dual criminality may make extradition, and sometimes mutual legal assistance, unavailable.

The Group considered that an offence of illicit enrichment can be a very effective provision for combating corruption. It therefore suggested that in the absence of such an offence, it would be prudent to consider other possible offences arising from the facts in order to minimise the problems associated with dual criminality.

CONCLUSION

Like the Prevention Chapter, there has been some disappointment expressed with the number of discretionary provisions contained in the Criminalisation Articles. The International Chamber of Commerce (in their Policy Statement, 'ICC views on the UNCAC') refers to the unevenness of the mandatory obligation to adopt laws regarding the offering of a bribe, and the obligation to only consider legislation to deal with solicitation by foreign public officials as being 'particularly disturbing.' The ICC adds that 'this creates a risk that world business will have to deal with a patchwork of different laws and regulations.'

Given that one of the purposes of the Convention is ‘to promote, facilitate and support international cooperation’ in the fight against corruption; it is unfortunate that the mixture of mandatory and discretionary provisions arguably undermines the objective of developing consistent international rules.

SESSION 2

MONITORING & MEASUREMENT

MODERATOR

GRAHAM RODMELL

TOPIC

TOWARDS AN EFFECTIVE MONITORING PROCESS?

SPEAKER

GRAHAM RODMELL

Transparency International (TI), UK

TOPIC

THE OECD BRIBERY WORKING GROUP: PEER REVIEW – DOES IT WORK?

SPEAKER

NICOLA BONNUCI

Director, Legal Affairs Directorate, Organization for Economic Co-operation and Development (OECD)

TOPIC

ASSESSING PUBLIC SECTOR INTEGRITY: LIMITED POSSIBILITIES?

SPEAKER

MARIA GAVOUNELI

Adviser, Ministry of Justice, Greece; Lecturer, University of Athens; Vice Chair, Organization for Economic C-operation and Development (OECD) Working Group on Bribery

TOPIC

TOWARDS AN EFFECTIVE MONITORING PROCESS?

SPEAKER

GRAHAM RODMELL

SUMMARY

Mr. Rodmell's presentation focused on the need for a successful monitoring system with a sense of mission and strong, credible leadership.

Graham Rodmell opened his presentation by questioning why monitoring is not addressed in the UNCAC and suggested that some States may see themselves as disadvantaged by the monitoring process. He stressed that for a monitoring system to be effective, it must be put in place as a matter of urgency.

THEMES

Strong Secretariat in-put

A strong Secretariat in-put to orchestrate the process was also desirable, with the whole process being characterised by mutual cooperation and mutual accountability.

Funding for technical assistance is going to be required by many countries, and the full engagement of all countries involved; whether they are being reviewed or are monitoring, will be needed.

Monitoring under UNCAC

Mr. Rodmell stated that the biggest question is: how much of UNCAC will be monitored? He went on to suggest that OECD-type monitoring could be adapted in relation to the mandatory provisions of UNCAC.

The success of monitoring will depend on a whole-hearted adoption of the Convention; otherwise there is a risk that countries will try and get away with as little as possible. He added that this applies particularly to the discretionary provisions of the Convention. In that context, the need for a plan of implementation when the Conference of State Parties takes place later this year takes on added importance.

He emphasised the importance of civil society's engagement in the monitoring process, particularly in relation to the discretionary provisions of the Convention.

Mr. Rodmell concluded his presentation by stressing the urgency of putting in place an effective system, as the longer the period between the Convention coming into force and implementation, the less chance of it being effective.

Furthermore, he stated that in practice, smaller, developing States that want to succeed will be looking for technical assistance funding.

TOPIC

THE OECD BRIBERY WORKING GROUP: PEER REVIEW – DOES IT WORK?

SPEAKER

NICOLA BONNUCI

A full copy of Mr. Bonnuci's PowerPoint presentation is attached as Annex 3.

SUMMARY

The OECD Convention was the first international instrument to fight corruption in cross-border business deals. Mr. Bonnuci's presentation focused primarily on an examination of the monitoring process, which is based on a rigorous system of peer review.

Peer review is the systemic examination and assessment of the performance of a State by another State, with the objective of assisting the reviewed State to improve its policy-making, adopt best practices and comply with established standards and principles. In the OECD context, that means compliance with the Convention.

Mr. Bonnuci concluded his presentation by exploring the possibility of exporting or adapting the OECD's peer review mechanism to different contexts.

THEMES

The OECD's Peer Review Mechanism

The peer review mechanism is divided into two phases:

- Phase 1 involves a comprehensive assessment of the conformity of the country's anti-bribery laws with the OECD Convention
- Phase 2 involves an assessment of the effective implementation of the Convention

The OECD is now in the phase 2 stage of the process.

Mr. Bonucci stressed the importance of States being subject to scrupulous follow-up with regards to implementation. He added that it will be at this stage, that what works and what does not in relation to implementation can be more easily identified.

Transparency is fundamental to this process, and the final reports produced as a result of the Phase 2 stage are therefore published.

Mr. Bonnuci outlined what he considers to be the factors which have contributed to the effective implementation of this kind of monitoring system:

- Strong secretariat input
- OECD has a lot of experience with peer review and peer pressure vis a vis economic and agricultural reviews
- Adequate human and financial resources
- The fact that the mechanism was agreed and accepted
- Strong political will
- A very focused Convention

Any future mechanism should respond to credibility, sustainability and cost-effectiveness.

He then explored the possible avenues for a Phase 3. He suggested that such a phase might focus on enforcement, with possibly lighter examination teams and an increasing role for civil society.

Is the OECD model exportable?

Mr. Bonnuci concluded by posing the question as to whether the OECD monitoring mechanism is an exportable model and suggested that monitoring within the OECD context may be easier given that the countries that signed that Convention have the financial and human resources to support the mechanism. Moreover, the OECD Convention is very focused, with a strong political will from key players. However, he added that the OECD's peer review mechanism can be adapted, depending on context.

TOPIC

ASSESSING PUBLIC SECTOR INTEGRITY: LIMITED POSSIBILITIES?

SPEAKER

MARIA GAVOUNELI

A full copy of Dr. Gavouneli's PowerPoint presentation is attached as Annex 4.

SUMMARY

Dr. Gavouneli opened her presentation by providing an overview of existing anti-corruption instruments such as the Inter-American Convention against Corruption, 1996 and the African Union Convention on Preventing and Combating Corruption, 2003.

She discussed criminalisation, the 'indicia of monitoring', and the possible review mechanisms that could be adopted in the context of UNCAC.

THEMES

Criminalisation

Dr Gavouneli then went on to focus on the criminalisation of corrupt behaviour by the public official.

Unlike the OECD Convention, UNCAC does not allow for a general system where any corrupt behaviour can be criminalised. Rather, it lists a series of specific offences; some mandatory and some discretionary. She was of the view that perhaps the plethora of specific offences that have evolved from the more generic definition found in the OECD Convention may be more effectively checked and monitored.

The criminalisation of corrupt activity by public officials is addressed in several Articles within the Convention. As has already been addressed in previous presentations, whilst some of these Articles are mandatory, others are discretionary.

The Indicia of Monitoring

Dr. Gavouneli outlined the indicia of monitoring, which includes:

a) the offence;
b) the tools; and

c) the aftermath

In relation to the tools used in monitoring, she emphasised the need for technical expertise in order to move against the offence.

She added that the legal 'tools' or measures available include:

- freezing;
- seizure & confiscation; and
- the protection of witnesses.

Furthermore, the protection of witnesses is built into already existing legislation and stressed that use should always be made of existing legislation.

In relation to 'the aftermath', Dr. Gavouneli noted that the standard practice within the public sector, particularly in Europe and the US, is to award compensation to the victim of corruption.

Articles 34 and 35 of the UNCAC address the consequences of corruption.[6]

6 The full text of UNCAC is contained in Annex 23

Article 35 specifically states that 'Each State party shall take such measures as may be necessary, in accordance with the principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.'

Prevention

Dr. Gavouneli then addressed the issue of preventive measures and in relation to Article 5, refers to what she describes as the 'effective coordinated policies' listed therein.

She then focused on Article 7, which specifically relates to preventive measures within the public sector. She expressed the view that encouraging citizen involvement and access to information, while subtle in nature, can serve as an effective tool for monitoring the effectiveness of public participation.

Dr. Gavouneli concluded by exploring the different review mechanisms that could be engaged and refers specifically to the following:

- National Anti-Corruption Bodies;
- Peer Review; and
- Third party review

National Anti-Corruption Bodies

Dr. Gavouneli expressed the view that national anti-corruption bodies can be problematic in themselves and should also be subject to monitoring given that they are also public administration bodies. She suggested that using a correct and properly functional anti-corruption body as a focal point together with other similar bodies to create a comprehensive system might be useful.

Peer Review

Dr. Gavouneli also expressed the view that peer review can be time-consuming. She also posed the question as to what standard should the review mechanism be applied? i.e. to regional standards? partial standards? She added however, that the mechanism can be played around with provided that effective implementation of UNCAC is achieved.

Third Party Review

Dr. Gavouneli suggested that third party review, by for example, a Secretariat, might be more problematic in relation to the UNCAC given there are 150 signatories, rather than the 37 signatories to the OECD Convention.

DISCUSSION

? Mr. Akram Sheikh asked whether tax evasion by a public official is capable of amounting to illicit enrichment.

In response, Dr. Gavouneli stated that the parameters will become more defined as time goes on and best practices will develop.

? A question was then asked by Daisy Cooper (Commonwealth Secretariat) in relation to peer review. She raised concerns about what she perceived to be the limited involvement of civil society in the peer review mechanism, adding that Governments shouldn't be accountable to other governments in exchange for aid; but rather to their own people.

Nicola Bonucci responded by saying that international obligations, by their very nature, mean governments are accountable to one another. In relation to the issue of further engagement by civil society; he noted the problem of determining, for example, which NGOs are credible and which NGOs are not. Moreover, this leads to the further question of whether different standards of credibility would be expected of different States.

Mr. Bonnuci concluded by saying that maximum transparency is what is important, as in the absence of transparency; civil society can do very little.

Dr. Stuart Gilman contributed to the discussion by noting that Article 13 of the UNCAC guarantees civil society's contribution.

Dr. Gavouneli added that the main reason for the success of the OECD Convention is that everyone is involved and mutual obligation is coupled with accountability.

COMMENT

The Absence of Monitoring Provisions within the UNCAC

The absence of monitoring within UNCAC has been noted by many individuals and organisations involved in the anti-corruption drive. UNCAC's failure to recognise monitoring as part of any anti-corruption strategy is in contrast with the OECD Convention, where Article 12 guarantees that monitoring is part of the process.

The question then becomes: how can the absence of monitoring within the Convention be addressed?

The Conference of the State parties will be asked to address this later in the year. Article 63, Paragraph 6 mandates the conference to:

> *'acquire the necessary knowledge of the measures taken by State Parties in implementing the Convention and the difficulties encountered by them in doing so through information provided by them and through such supplemental review mechanisms as may be established by the Conference of the State Parties.[7]*

7 The full text of UNCAC is contained in Annex 23

Article 63, paragraph 6, then calls on State Parties to provide the necessary information as required by the Conference. It also calls on the Conference to determine the most effective way of receiving and acting on such information and clarifies that it may use information from State Parties, competent international organisations and, if it chooses, relevant non-governmental organisations.

In view of the Conference's mandate, it is hoped that this occasion will provide an opportunity for representatives from the State Parties to consider putting into effect supplemental review mechanisms to assess the measures taken by State Parties to implement the Convention. Any agreement to provide an adequate monitoring process will also require a commitment from developed States to lend both technical and financial support to developing States.

One of the objectives of this conference was to explore the lessons that can be learnt from the implementation of the OECD Convention, particularly in relation to the monitoring process.

The presentations and subsequent discussions in this session provided an opportunity to explore the possibility of modifying the OECD's peer review mechanism to suit the UNCAC context.

Nicola Bonucci expressed the view that the OECD model could be adapted depending on context. However, he noted that in the OECD context, there was a strong political will from the key players coupled with adequate financial and human resources.

It is important to note that there are 37 parties (some signed and ratified, others acceded) to the OECD Convention compared to the 140 States which have signed to UNCAC. Those States are diverse, both politically and economically and the sheer number involved may present impediments to an effective adoption of the peer review mechanism.

Given that the vast majority of signatories to the OECD Convention are developed States, they have the financial resources and technical expertise to facilitate effective implementation of the

peer review mechanism. Moreover, given that all 30 of the OECD member states are home to most major multinational/international companies; they arguably share a common interest and political will to achieve an effective monitoring mechanism.

As stated by Mr. Bonucci, the OECD Convention is very focused. It pertains only to combating the bribery of foreign public officials in the context of international trade. Conversely, the scope of the UNCAC is wide-reaching and aims to address a broad spectrum of corrupt activity within both the private and public sector.

Furthermore, the obligations imposed by Article 1 of the OECD Convention are mandatory, and underpinning the OECD Convention (including its mandatory provisions) is the principle of 'functional equivalence'. Functional equivalence relates to the measures taken by the Parties to criminalise and sanction bribery of foreign public officials. Its premise is goal-oriented, rather than the standardisation of national laws. It recognises that legal measures need to be tailored to the needs and traditions of an individual legal system.

Monitoring Options

The practical experiences of existing monitoring mechanisms such as the OECD Convention, GRECO and the African Peer Review Mechanism should be considered when the Conference of State Parties meets later this year. It is hoped that the experiences gained from these various mechanisms will provide the basis on which the State Parties can formulate an appropriate monitoring mechanism for use within the UNCAC context. Moreover, careful consideration (and the possible integration of aspects) of these different mechanisms will hopefully facilitate the adoption of a monitoring system that reinforces the need and desire for a co-ordinated approach.

Current monitoring mechanisms in use include: those based on international instruments, those based on regional or national instruments and those of a more general nature.

The advantage of using monitoring mechanisms based on instruments is that the legal framework is defined and clear. Examples of such international instruments include the OECD Convention and the International-American Convention Against Corruption. Examples of regional instruments include the OECD/ADB Anti-Corruption Action Plan for Asia and the Pacific and the various monitoring exercises within the European Union.

THE OECD CONVENTION – AN INTERNATIONAL INSTRUMENT

The OECD Convention created the first multilateral mutual evaluation mechanism for monitoring commitments to combat corruption and aims to correct compliance weaknesses and use peer pressure as means of ensuring that each signatory enforces its new laws by criminalising the bribery of foreign public officials. Furthermore, the Convention requires that reports of the discussions on implementation be made available to the public. As noted by Mr. Bonnuci, this publicity serves to promote transparency and thereby encourage States to facilitate more effective measures.

THE OECD/ADB ANTI-CORRUPTION ACTION PLAN – A REGIONAL INSTRUMENT

Prior to the inception of OECD/ADB Anti-Corruption Plan, the Asia-Pacific region did not have any regional anti-corruption instruments. However, an initiative by the Asia Development Bank (ADB) and the OECD saw the development, in 2000, of an Action Plan.

The implementation of the Action Plan is based upon two core principles: i) establishing a mechanism by which overall reform progress can be promoted and assessed; ii) providing specific and practical assistance to governments of participating countries on key reform issues.

The Action Plan acknowledges that the situation and needs of each country may be specific and in order to address these differences, each participating country is required to identify, in consultation with the Secretariat of the Initiative, up to three priority areas for reform. The review process focuses on the priority reform areas selected by participating countries and monitoring is based on self-assessment reports followed by a procedure of plenary review by the Steering Group Committee.

NON-INSTRUMENT BASED MECHANISMS

Below are examples of non-instrument based mechanisms currently used to monitor the effectiveness of national anti-corruption strategies.

Surveys/Questionnaires

Surveys have been used by some States in order to monitor the effectiveness of national anti-corruption strategies. For example, in Lithuania and Poland, surveys are used to monitor the effectiveness of their respective anti-corruption strategies.

In Romania, monitoring takes place on the basis of questionnaires rather than a legal instrument. The questionnaire consists of relevant questions on national policies and legislation.

One of the obvious advantages of using surveys and/or questionnaires as a means of monitoring is that it is significantly less costly than on-site visits, for example. However, the difficulty in adopting this model for the purposes of monitoring UNCAC provisions will be in achieving consistent standards across participating States. If such questionnaires are designed to meet regional standards, it will be important that an underlying consistent standard is in place in order to avoid undermining the objectives of UNCAC.

The Role of NGOs

NGOs can make both an important and necessary contribution to the monitoring process. NGOs have been actively involved in the development of several anti-corruption instruments, including UNCAC. Moreover, they have evolved methodologies for questionnaires and surveys used as part of the monitoring process.

Transparency International and the Independent Anti-Corruption Commission in Hong Kong are examples of two NGOs that play a role in measuring both corruption and the effectiveness of anti-corruption measures.

Transparency International (TI)
TI's Corruption Perception Index (CPI) seeks to provide a composite view of corruption in an individual country as perceived primarily by the international private sector. While the CPI is merely an indices for registering the level of corruption, the publicity it generates can serve as an important mechanism in promoting more effective measures.

TI has also launched the GCB (Global Corruption Barometer) as a new instrument that will complement the CPI. Unlike the CPI, the GCB has diagnostic features and enables reliable comparisons over time. Its objective is to assess public opinion on corruption, particularly perception of sectors most affected by corruption, experience of bribery, and expectations of future levels of corruption. The instrument provides public feedback on the extent of corruption, and the credibility of anti-corruption efforts.

TI also carries out National Integrity System Surveys based on a standard methodology. The objectives are:
- *to develop a baseline through factual assessments of national integrity systems;*
- *to provide a qualitative assessment of anti-corruption programmes; and*
- *facilitate trans-national comparisons and comparisons over time.*

Independent Commission Against Corruption (ICAC)
ICAC in the Hong Kong Administrative Region (SAR) conducts an annual independent survey that measures the trust level between ICAC and the public, the prosecution rate, as well as the levels, types and the causes of corruption.

The Role of Multi-lateral Development Banks
As a priority the International Monetary Fund (IMF) and multi-lateral development banks (MDBs) must ensure that their in-house operations meet high integrity standards and that their interventions in member countries promote good governance. They can leverage the anti-corruption conventions by using them as blueprints for guiding their own good governance programmes in member countries. They can use their procurement experience to help combat bribery of officials in member countries through the disbarment and cross-disbarment of firms that in engage in corrupt activity. By promoting transparency across all government operations, they empower civil society and permit accountability.[8]

8 See Annex 6 in relation to the EBRD

The Engagement of Civil Society
Peer review with ample opportunities for civil society participation has proven to be an effective model. An example of this is the contribution of civil society in the formulation and implementation of the OECD Convention.

As stated in this session, transparency is an essential ingredient in any effective monitoring mechanism. In the absence of transparent procedures, the monitoring process will fail to inspire public confidence. The full engagement of civil society permits dialogue and public accountability and thereby ensures the credibility of the monitoring process. In the case of the OECD's Working Group on Bribery recognised the importance of transparency and the Phase 1 and Phase 2 final reports are therefore made available to the public. Moreover, while non-governmental actors do

not participate in the evaluation meetings of the Working Group on Bribery, they are invited to express their views in writing, participate in consultation meetings in addition to being formally invited to participate in the Phase 2 on-site visits.

CONCLUSION

In June 2005, a Corruption Monitoring Workshop was held in Sofia. Some of the discussions focused on considering monitoring options under UNCAC with a view to preparing submissions for the information and consideration of the Conference of State Parties (to be held in September 2006).

Some of the basic parameters that emerged from the discussions at that meeting included the following:

- Monitoring should initially remain moderate and focused in scope and objectives. One option would be to start with the monitoring and measuring of corruption as described by the mandatory offences contained in UNCAC.
- Technical assistance should be factored into the monitoring/measuring system.
- Monitoring and measuring exercises must be conducted periodically to allow for determining progress over time, the identification of good practices and the re-adjustment of anti-corruption policies and measures as required.

SESSION 3

TAKING IMPLEMENTATION FORWARD: ANTI-CORRUPTION STRATEGIES

MODERATOR

BETTY MOULD-IDRISSU

TOPIC

ANTI-CORRUPTION STRATEGIES: PULLING MANY STRANDS TOGETHER

SPEAKER

DATUK SERI ZULKIPLI BIN MAT NOOR

Director General, Anti-Corruption Agency (ACA), Malaysia

TOPIC

ANTI-CORRUPTION STRATEGIES: APPLYING INTERNATIONAL STANDARDS TO PRIVATE SECTOR OPERATIONS

SPEAKER

DR. ENERY QUINONES

Chief Compliance Officer, European Bank for Reconstruction and Development (EBRD)

TOPIC

THE APPLICATION OF ANTI-CORRUPTION MEASURES IN KENYA

SPEAKER

KEN MWIGE

Principal Attorney & PA to the Director/Chief Executive for the Kenyan Anti-Corruption Commission

TOPIC

ANTI-CORRUPTION STRATEGIES: PULLING MANY STRANDS TOGETHER

SPEAKER

DATUK SERI ZULKIPLI BIN MAT NOOR

A copy of Datuk Seri Zulkipli Bin Mat Noor's PowerPoint presentation is attached as Annex 5.

SUMMARY

Datuk Seri Zulkipli's presentation focused on the Anti-Corruption Agency's strategies and objectives. He emphasised that a significant factor in the success of this strategy has been the Malaysian Government's commitment to combating corruption.

He discussed the kinds of preventive measures adopted by the ACA and concluded his presentation by outlining the 5 national targets to be achieved by 2008.

THEMES

National policy objectives

Malaysia's anti-corruption strategy forms an integral part of the country's general policy objectives, which are embodied in it's concept of 'Vision 2020'.

The requirements, to translate these policy objectives into practice, include:

- A strong and continuous political and administrative will – this is evidenced by the existence of the Anti-Corruption Agency
- An effective criminal justice system; evidenced by the fact that there have not been any prosecutions of judges
- Legal powers; there is statutory legislation pertaining to this area, including a specific anti-corruption law that empowers the ACA to investigate, to carry out selections and engage in community education, in addition to inspecting public offices and agencies to determine and identify areas that are likely to breed opportunities for corruption
- Sufficient logistical support; a cadre of specialists such as accountants, economists, civil engineers and business analysts
- Good internal cooperation

There are two pillars to the ACA's anti-corruption strategy:

- Education
  the ACA is committed to educating the public about corruption.
- Prevention

The national strategy is following the prevention stream with the aim of developing within society a strong level of integrity. The Malaysian premise is that corruption occurs because of a low level of integrity.

Protection for whistle-blowers and witnesses

This is guaranteed in the provisions of the Anti-Corruption Act; i.e. the ACA is bound not to reveal the identity of the informers and the substance of the information given.

Malaysia intends to ratify UNCAC. However, before ratification takes place, it has to implement a proper witness/informer protection programme.

Integrity Management Committee (IMC)

The aim of this committee is to enhance efforts in combating corruption, abuse of power and malpractice and to undertake initiatives to resolve problems and overcome weaknesses in the public administration. All government departments will have their own IMCs.

ACA act as coordinators, receiving reports from all other agencies/departments which they then compile and report to a special cabinet committee headed by the Prime Minister.

Significantly, it is within the IMC's remit to make recommendations to the ACA in relation to legislation. It is then for the ACA to report to the Cabinet Committee.

Job rotation

Datuk Seri Zulkipli stressed the importance of job rotation and transfers on the basis that long term positions foster corruption. Based on IMC recommendations, every agency must have in place job rotation policies that rotate employees every five years.

As a result of a survey conducted in 2001, a National Integrity Plan was established with a view to strengthening the machinery of the public and private sector through systemic, integrated and continuous action towards the development of a nation based on noble values and ethics.

The Malaysia Institute of Integrity is a result of the plan and it is therefore their responsibility to co-ordinate and fulfil the objectives of the plan within the public and private sectors.

The five National targets to be achieved by 2008:

- Effectively reduce corruption, malpractices and abuse of power;
- Improve efficiency in the public service system and overcome bureaucratic red tape;
- Enhance corporate governance and business ethics;
- Strengthen the family institution; and
- Improve the quality of life and people's well-being

TOPIC

ANTI-CORRUPTION STRATEGIES: APPLYING INTERNATIONAL STANDARDS TO PRIVATE SECTOR OPERATIONS

SPEAKER

DR. ENERY QUINONES

A copy of Dr. Quinones's PowerPoint presentation is attached as Annex 6.

SUMMARY

Dr. Quinones's presentation focused on how the EBRD promotes business ethics and integrity and how fraud and corruption are prevented in the projects they finance.

She stressed that a commitment by multi-lateral development banks to adopt a co-ordinated approach was important in increasing effective cross-debarment and enforcement.

THEMES

The EBRD

The EBRD was established in 1991 to promote the transition to open market economies in 27 countries from Eastern Europe to Central Asia.

Dr. Quinones explained that the ERBD mainly operates in the private sector, adding that part of the bank's remit is to take integrity and reputational risks that the private sector may not want to.

More investments will be going into Russia and Central Asia, and less into central Europe as these countries gradually finalise their accession into the European Union. This shift provides a lot of challenges and the EBRD will be working more with countries that are integrity-challenged and where development is held back by their poor performance in tackling the area of corruption.[9]

9 The poor rankings of some of these countries on the latest Transparency International corruption perception index can be found in Annex 6

The Office of the Chief Compliance Officer

Dr. Quinones went on to explain the remit of the Office of the Chief Compliance Officer.

The bank does not have an external regulator and it was thought that the Office of the Chief Compliance Officer could keep abreast of international laws, standards and practices in this area and ensure that the bank was complying with those standards. It is also responsible for promoting within the EBRD and in EBRD projects.

In the EBRD itself, this means the office is responsible for the implementation of the Code of Conduct and investigates allegations of misconduct on the part of staff, consultants and experts who work with EBRD. It is also responsible for integrity and ethics training.

The Office of the Chief Compliance Officer is also the focal point for anti-corruption work. It ensures that the integrity procedures that the bank has in place are complied with. These procedures ensure that integrity and reputational risks are properly assessed.

The integrity due diligence procedures involve a very in-depth 'know your customer' procedure which ensures the bank does not fall foul of its own integrity guidelines. The ERBD does not finance convicted criminals or individuals who are black-listed by an international black-list.

When exiting a commercial relationship, particularly where the bank is looking to sell some of its equity positions, it will assess to who they are going to sell as well as enquiring as to the source of wealth the purchasers will be intending to use to buy the shares.

Dr. Quinones stated that the EBRD are spending an increasing amount of money on assessing the integrity and reputational profiles of some of their clients. They are also contracting independent firms to conduct independent investigations.

The Public Sector

Only 25% of the EBRD's investment is in the public sector and a large part of this is done through public procurement. Most of this public procurement is done through open tenders.

Monitoring

Dr. Quinones stressed that it is important that not only should integrity due diligence be done up-front, but also the same vigilance should be carried out through the lifetime of that project. Therefore integrity checks are done on a continual basis.

The EBRD has created a very high level of management position which is responsible for looking only at monitoring issues. Monitoring is considered an essential way to promote transition because it helps to ensure that whatever covenants the bank has put in place as a condition for doing the transaction are respected. It also helps to flag up early on any issues that may arise and thereby avoid abuse.

An important part of the transition process is how the bank structures a transaction in order to balance whatever residual integrity and reputational risks there may be attached to the project. Some of the techniques engaged by the bank include:

- Using legal covenants that allow the bank to accelerate the loan or to put their shares to other shareholders
- Invoking fault clauses in order to exit any relationship where it is felt clients are not living up to the standards they profess to
- Undertaking to benchmark anti-money laundering and counter-terrorist financing processes and procedures in order to help their clients benchmark themselves against international standards
- Working with their companies to eliminate dubious tax schemes

Working with clients

Dr. Quinones then went on to discuss how the EBRD helps their clients to establish a diagnostic for identifying weaknesses and deficiencies they may be facing in their own companies. It then helps the client set up a blue-print for reform. This blue-print will serve as a yardstick for measuring how the bank will continue to be involved with the transaction.

Moreover, once weaknesses within a company have been identified, the bank works with donors to find funds to provide appropriate technical assistance and training to their companies.

International Co-operation

A recent meeting took place in Washington between the Presidents of the multi-lateral development banks. It was decided at that meeting that the banks would work together to establish a joint framework which would address and standardise the definitions of fraud and corruption across the institutions.

Dr. Quinones suggested that working towards harmonising investigative guidelines across all the multi-lateral development banks will facilitate more effective cross debarment and/or lend support for each other's enforcement decisions; thus if a company is black-listed in one bank, the company needs to be forthcoming as to why another bank should take a different decision. She added that this is a way to increase the effectiveness of what the individual multi-lateral development banks have been doing themselves by simply co-ordinating efforts.

Longer term objective

Dr. Quinones stressed the importance of the taskforce and banks focusing on broad-based prevention in addition to imposing sanctions when something goes wrong.

TOPIC

THE APPLICATION OF ANTI-CORRUPTION MEASURES IN KENYA

SPEAKER

KEN MWIGE

A copy of Mr. Mwige's presentation summary is attached as Annex 7.

SUMMARY

Mr. Mwige opened his presentation by speaking about the sweeping anti-corruption measures taken in 2002 by the newly-elected Government in Kenya. 70% of the Judiciary were dismissed and the Government took administrative measures to eradicate most of the public sector corruption.

He outlined the ACA's strategy and emphasised that education is an important preventive measure in combating corruption.

THEMES

A new government in Kenya

A performance-driven results-based management style was introduced by the newly-elected government and legislative reforms designed to address existing corruption-facilitating systems, processes and procedures were enacted.

The Anti-Corruption and Economic Crimes Act 2003 is the main statute that embodies the anti-corruption strategy of the Government. This Act established the Anti-Corruption Commission and an Advisory Board, the latter of which is drawn from all sectors of society. The purpose of the Advisory Board is to give the management of the Anti-Corruption Commission guidance on how it is running its business and also to give feed-back.

Mr. Mwige went on to say that the application of the anti-corruption strategy in Kenya has been borrowed heavily from the Malaysian model. Like Malaysia, the Kenyan Anti-Corruption Commission has no powers of prosecution. The former Kenyan Anti-Corruption Authority did have the power to prosecute. However, that authority only survived for two years. Mr Mwige attributed this to the fact that the authority became a focal point of suspicion and resentment by the political and economic elite.

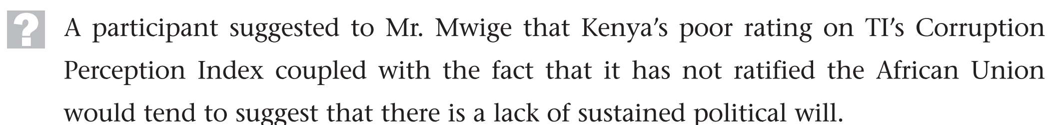
The Government of Kenya's strategy is 3-pronged:

- Investigation;
- Public education/advisory; and
- Civil recovery/restitution

Mr. Mwige emphasised the importance of public education in preventing corruption. He stated it was important to inculcate anti-corruption awareness from an early age i.e. primary school and make it an examinable subject.

He concluded by suggesting that the effect of all these changes in Kenya has been to reduce political interference, increase sensitivity to corruption and lead to greater public intolerance of corruption. However, he did add that there was a resulting 'chill' factor from these dramatic changes. For example, public projects are being stalled as people are over-cautious to the point of doing nothing.

DISCUSSION



A participant suggested to Mr. Mwige that Kenya's poor rating on TI's Corruption Perception Index coupled with the fact that it has not ratified the African Union would tend to suggest that there is a lack of sustained political will.

Mr. Mwige responded by saying that the fact that grand corruption in Africa invariably has ties to the international community poses challenges in relation to combating corruption. Moreover, the passage of time and the vast amounts of money involved pose impediments to investigating and prosecuting.

Further, the Attorney-General has security of tenure and can only be removed on the grounds of ill-health, mental incapacity or conviction of a criminal offence.

Mr. Mwige also briefly discussed the on-going issues around anglo-leasing and the Goldenberg case.

Datuk Seri Zulkipli was asked what factors will determine the size of the Anti-Corruption Commission. He responded by saying that this will depend on the nature of the tasks that have to be undertaken. In Malaysia, there are a total of 123 provinces and each province has an ACA office. The ACA also has 17 branches at the district level.

Datuk Seri Zulkipli then went on to stress the importance of international cooperation, both in relation to MLA and mutual cooperation, adding that the latter could be facilitated through multi-lateral arrangements whereby anti-corruption entities can cooperate.

Ms. Mould-Iddrisu added that the Meeting of Law Ministers in 2005 mandated the Commonwealth Secretariat to concentrate on specific international initiatives to enhance work in the areas of MLA and mutual cooperation.

Mr. Tim Daniel asked Datuk Seri Zulkipli why there had been no mention of asset recovery or repatriation in his presentation. Datuk Seri Zulkipli responded by saying that individuals can be asked to declare their assets in the course of an investigation, that in some cases, Malaysia has enjoyed international cooperation in relation to tracing assets. However, he added that the 'layering' of ill-gotten gains produces its own challenges in relation to asset recovery. Given that financial dealings have become so sophisticated, experts such as forensic accountants and engineers are needed.

Datuk Seri Zulkipli was then asked the question as to how the anti-corruption agencies can remain immune from corruption given the low wages that prevail within the developing world. He responded by saying that anti-corruption personnel are career officers. They cannot be removed from office, even by the Prime Minister.

COMMENT

Job rotation

Enhancing staff mobility can substantially augment integrity and Datuk Seri Zulkipli stressed the importance of job rotation and transfers on the basis that long term positions can foster corruption. Based on the Integrity Management Committee's (IMC's) recommendations, in Malaysia every agency must have in place job rotation policies that rotate employees every five years.

Article 7(b)(a discretionary provision) calls on State Parties to consider including procedures for job rotation for those 'considered especially vulnerable to corruption.' [10] *Whilst Article 7 is a discretionary provision, it is important that State Parties consider implementing policy that encourages the implementation of staff rotation policies in order to minimise the risk of corruption, both individual and systemic.*

10 The full text of UNCAC is contained in Annex 23

The Importance of Education and Training

The inclusion of education and training in any anti-corruption strategy was emphasised by both Mr. Mwige and Datuk Seri Zulkipli. As stated by Mr. Mwige, anti-corruption awareness should be inculcated into school curricula at a very early stage. As indicated by some of the other speakers, there is often a public acceptance of corruption in developing States, particularly in relation to accepting bribes. Changing the public perception of corruption at a young age is arguably likely to be more effective and long-lasting than attempting to re-educate adults on the issue.

Promoting anti-corruption awareness should continue through into working life; not only at the point where an individual joins an organisation, but especially when promotions or changes of position occur. Individuals can be particularly vulnerable to corruption when assuming a position of power or responsibility.

Education should be focused and targeted with curricula and/or training programmes reflecting the needs and risks associated with the specific audience.

It is unfortunate perhaps that the provisions within UNCAC relating to the development of anti-corruption education and training programmes for members of the public service have been couched in discretionary, rather than mandatory terms.

SESSION 4a

PUBLIC SERVANTS : ANTI-CORRUPTION, PREVENTION & DETECTION

MODERATOR

PROFESSOR JOHN HATCHARD

TOPIC

CONFLICTS OF INTEREST IN A SMALL STATE

SPEAKER

MARIE-NOELLE FERRIEUX-PATTERSON

President, Transparency International, Vanuatu

TOPIC

CONFLICTS OF INTEREST, ASSET DECLARATION AND PUBLIC SERVANTS

SPEAKER

JEAN AU YEUNG

Assistant Director, Corruption Prevention Department, Independent Commission Against Corruption (ICAC), Hong Kong

TOPIC

PREVENTION AND DETECTION WITHIN THE PUBLIC SECTOR

SPEAKER

MUHAMMAD AKRAM SHEIKH

Senior Advocate, Pakistan

TOPIC

CONFLICTS OF INTEREST IN A SMALL STATE

SPEAKER

MARIE-NOELLE FERRIEUX-PATTERSON

A copy of Ms. Ferrieux-Patterson's PowerPoint presentation is attached as Annex 8.

SUMMARY

Ms Ferrieux-Patterson's presentation focused on the socio-economic factors that have fostered corruption in Vanuatu. She discussed some of the impediments faced by those who seek to combat corruption, and concluded by outlining some of the government's current anti-corruption strategies.

THEMES

Corruption in Vanuatu

Ms Ferrieux-Patterson opened her address by noting the ubiquitous nature of corruption within the State of Vanuatu. Most notably, she suggested that not only is corrupt activity prevalent amongst public officials, but that Government Ministers are also known to participate in such activity.

She went on to say the there is a public expectation, and almost acceptance that corrupt activity exists and that such behaviour is only addressed when dedicated whistleblowers are willing to come forward.

Fighting corruption in a small, developing State is not made easier by the fact that corruption takes place in the developed world.

She provided examples of the kind of corrupt activities which perennially take place in Vanuatu. Such examples include:

- Government Ministers using disaster funds for their own political funding
- Official appointments made on the basis of political loyalty rather than merit
- Contracts tendered on behalf of family and friends

Economic stagnation is the consequence of leaders ignoring their populace and money being invested in inefficient projects.

The strong cultural tradition of giving gifts and participating in 'pay-backs' almost guarantees that conflicts of interests will arise and thereby only encourage widespread corruption.

She alluded to the devastating results of corruption within the Solomon Islands, another small developing State, which she described as being on the 'verge of economic collapse and social disintegration.'

Existing anti-corruption strategies

Some changes have been made with a view to addressing these problems. Notably, the following improvements have been made:

- There is no longer free access to the public purse
- Access to financial loans has been restricted
- There is a prohibition on leaders acting when a conflict of interest arises.
- There is a strong independent judiciary. However, she added that a robust judiciary is of little use if acts of serious misconduct are not prosecuted

TOPIC

CONFLICTS OF INTEREST, ASSET DECLARATION AND PUBLIC SERVANTS

SPEAKER

JEAN AU YEUNG

A copy of Ms Yeung's PowerPoint presentation is attached as Annex 9.

SUMMARY

Ms Yeung's presentation focused on conflicts of interest and asset repatriation within the Hong Kong context. She emphasised the rising public expectation in the integrity of public officials, and explained how this is reflected in ICAC's anti-corruption strategy.

She discussed the kinds of preventative strategies adopted by ICAC such as job rotation and the post-service sanitisation period.

THEMES

Public perception

Ms. Yeung opened her presentation by suggesting that a major problem in addressing the issue of Conflicts of Interest is in relation to the different interpretations and perceptions of what constitutes 'conflict of interest.'

She described Hong Kong as a rapidly changing public sector environment with an increasingly demanding constituency. She suggested that this constituency perceive conflict of interests as constituting corrupt behaviour and this has resulted in a rising public expectation in the integrity of public officials.

Given that in Hong Kong there is a new mode of cooperation between the private and public sector, manifested by a free flow of human capital and personnel between those sectors, public and private partnership can easily give rise to allegations of conflict of interest.

Because the regulators can now become the regulated, the public needs to be assured that all government officials are acting impartially when performing their public duties.

ICAC's strategies

Ms Yeung addressed how ICAC has responded to the evolution of this public/private partnership:

- ICAC supports and advises Government Departments on establishing Codes of Conduct for civil servants. They encourage management to include conflict of interest in the code with a view to facilitating a new office culture where staff understand the requirements and ethical standards expected of them
- Government has introduced a post-service sanitisation period[11]
- Officers are required to report conflict of interest when it arises
- The 'Sunshine Test' i.e. being direct with the official and asking them if they are prepared to discuss the matter openly when asked to do so.
- A robust declaration system has been established. The key requirement is that individuals must declare their assets on appointment. This system involves two tiers:

  Tier One - the policy makers - 23 key government posts

  Tier Two - Directorate Officers and designated posts[12]

11 Further details of the various post-sanitisation periods can be found in the copy of Ms Yeung's PowerPoint presentation contained in Annex 9

12 Further detail on this declaration system can be found in the copy of Ms Yeung's synopsis contained in Annex 9

Privacy rights vs. right to know?

Ms. Yeung then referred to the interface between the requirement to declare one's assets and the issue of a person's right to privacy. She suggested that this system of declaration does not necessarily conflict with an individual's human rights as long as the balance between the public's right to know and an individual's privacy rights are balanced. This balance, she believes, is consistent with and guaranteed within the Bill of Rights; an instrument which allows declaration to the extent that it is commensurate with the need and it serves a legitimate purpose.

Enforcement

If a public official accepts an advantage in connection with their public duty, he has committed an offence under the Prevention of Bribery Ordinance. In the absence of proof that the offence of bribery has taken place, the alleged offender cannot be prosecuted. However, conflict of interest is a common law offence and conflict of interest still constitutes misconduct in office.

TOPIC

PREVENTION AND DETECTION WITHIN THE PUBLIC SECTOR

SPEAKER

MUHAMMAD AKRAM SHEIKH

A copy of Mr. Sheikh's PowerPoint presentation is attached as Annex 10.

Excerpts of Mr. Sheikh's PowerPoint presentation have been included in the summary below.

SUMMARY

Mr. Sheikh's presentation focused on some of the factors that have fostered corruption in Pakistan. He discussed the obstacles to implementing effective anti-corruption strategies in an undemocratic society and discussed some well known examples of the government's failure to account to its constituency.

THEMES

The National Accountability Bureau

Mr. Sheikh suggested that one of the dilemmas in Pakistan is that of selective accountability.

In October 1999, the National Accountability Bureau (NAB) was established by the present military regime and sought to demonstrate that it was independent. Unfortunately the people who tend to be subject to investigation by the NAB are often opponents of the military regime.

Culture of Secrecy

He attributed Pakistan's lack of good governance and inefficient public service to what he described as the 'culture of secrecy' that prevails in Pakistan; adding that this gives rise, amongst other things, to arbitrary decision making, financial corruption and a lack of public accountability. In this context, the most restrictive law is the Official Secrets Act, which has not been amended in any significant way since its enactment in 1923.

Mr. Sheikh provided some well known examples of the Pakistani Government's failure to account to the public, citing such cases as the assassination of Liaqat Ali Khan and the Ojri Camp Blast.

He stated that there would be no possibility of anti-corruption measures in the absence of democracy, emphasising that there must be a move towards a more open society that is transparent.

Strategies

Mr. Sheikh's PowerPoint presentation outlines the strategies that should be included to combat corruption:

- Strengthening law enforcement mechanisms, including the role of the judiciary and the provision of witness protection programmes

- Increasing transparency through the establishment of competitive public procurement procedures

- Developing codes of ethics in public administration to be enforced by strong sanctions

- The adoption of Freedom of Information laws[13]

13 A more comprehensive list of Mr. Sheikh's proposed strategies can be found in Annex 10

On a positive note, the Freedom of Information Ordinance was enacted in 2002. Despite its limitations i.e. a considerable number of exemptions and a weak implementation mechanism, the Ordinance provides for the first time, a legal basis for citizens to assert their right to access information.

Mr. Sheikh concluded his presentation by highlighting the important role the Pakistani press has played in exposing sham deals among public officials. Notably this is often at the expense of their own liberty.

DISCUSSION

Combating Corruption in Undemocratic Societies

? One of the main discussion points was the problem of implementation in undemocratic societies. The absence of public accountability and transparency is clearly an obstacle to implementing anti-corruption strategies. However, Mr. Sheikh stressed that it was important not to alienate States such as Pakistan; but rather to keep the channels of dialogue open and for the international community, including the Commonwealth Secretariat, to support civil society and the judiciary in counteracting the obstacles presented by undemocratic Governments.

He expressed the view that the Harare Declaration has given a clearer mandate for the international community to bear pressure on States such as Pakistan. Mr. Sheikh suggested that the Commonwealth Secretariat, could for example, monitor elections in order to prevent vote-rigging.

Mr. Sheikh reiterated the important role which can be played by the press. While Mr. Sheikh suggested in his presentation that there have been journalists willing to expose corruption within public office; freedom of the press has been severely inhibited in Pakistan to the extent that many journalists have been sanctioned for reporting misconduct in public office. This is unfortunate given the influence the press can bear on public opinion in relation to corruption. Hong Kong is an example of where the press has played a vital role in exposing grand corruption and thereby contributing to the rising public intolerance of corrupt activity in public office.

? A further question was raised in relation to the National Accountability Bureau in Pakistan and whether it was in fact, a 'sham' organisation.

Mr. Sheikh responded by saying that when the bureau was established, it was created with representatives from Transparency International in the hope that this would

enhance international recognition. However, he added that this has proven to be ineffective, and that in fact, the bureau is comprised of military representatives and has the regulatory powers to detain people for 90 days without questioning.

Hong Kong - ICAC

Ms Yeung was firstly asked what is required of ICAC officials in relation to declaration of assets and the sanitization period.

Ms Yeung responded by saying that ICAC officials have a more stringent requirement, in that they must declare their assets on an annual basis rather than every two years.

Ms Yeung was then asked how the public outcry in Hong Kong was achieved.

She responded by saying that ICAC is indirectly responsible for that outcry because it asked and encouraged members of the public to make complaints, directly to ICAC.

It is also of note that just prior to the inception of ICAC, there had been a public outcry over suspected unearned wealth of a Chief Police Superintendent, Peter Godber. Mr. Godber managed to slip out of the territory undetected during the week given to him by the Attorney General to explain the source of his assets. Mr. Godber's escape unleashed a public outcry, manifested in a huge student rally. This incident contributed to the climate of change which ultimately resulted in the creation of ICAC.

Vanuatu

Ms Marie-Noelle Ferrieux-Patterson was asked whether the small population size of Vanuatu has impacted on the issue of investigation and monitoring, given that many of those involved may be related to, or know of, the suspects involved.

She responded by saying that this is a particular problem. Furthermore, because the population in general, lacks education; they are afraid of the consequences of whistle-blowing. For example, they are afraid of losing their jobs. Moreover, many people in Vanuatu believe in consequences such as black magic i.e. a disgruntled individual may perform black magic rites as a mode of retaliation.

COMMENT

The Developed World

Ms Ferrieux-Patterson has made an important point in relation to the interface between the developing and developed world in the context of corruption. Whilst the developed world enjoys a significantly higher standard of education and a fairer distribution of wealth, some of its citizens, public officials and Ministers of States are also either guilty of, or impacted by, corrupt activity. The developed world need to recognise that the developing world sees this but also looks to the developing world to act as an example.

Cultural context

Another significant point made by Ms Ferrieux-Patterson is the fact that gifts and pay backs form part of the cultural tradition. Changing this mind-set within the national psyche is arguably an onerous task. Cultural acceptance of such activity also exists in many other countries, particularly within the developing world.

The question is how does an effective strategy address a norm or tradition which is perceived as being positive in nature?

While the significance of exchanging gifts in certain cultural contexts is generally acknowledged; it is important, when legislating, for State Parties to clearly distinguish between what is deemed to be an acceptable exchange of gifts within a particular cultural context and what constitutes a bribe. Over and above this, codes of conduct should spell out in which circumstances a gift may be received, what maximum monetary value it may have, when it should be declined, and whether it should be returned.

Hong Kong - A Success Story

The ICAC was established in 1974 and was born out of mounting public pressure in Hong Kong for a truly independent body to investigate corruption in public office. It was recognised by the Government of the day, that in order to restore public confidence, this body had to be completely separate from the Government and the Police.

The importance of any anti-corruption agency being politically and legally independent was emphasised in Stuart Gilman's presentation. Such independence is imperative in ensuring the integrity and impartiality of the agency. It also fosters public confidence in the process and arguably encourages individuals to come forward with information.

As noted in Ms Yeung's presentation, ICAC staff are also subject to the post-employment sanitisation period in addition to an obligation to declare one's assets on an annual basis.

ICAC has arguably worked as an effective anti-corruption agency for the following reasons:

- *the political will to establish and sustain a truly independent anti-corruption body;*
- *declaration of assets;*
- *post-employment sanitisation period;*
- *an acceptance that the concept of 'shame' can play a vital role in obtaining information about suspected corrupt activity - manifested in the 'Sunshine test'; and*
- *the vital role played by ICAC in supporting and advising Government bodies in relation to the substance and implementation of Codes of Conduct within the public sector*

Prior to the inception of the ICAC, corruption had been endemic in Hong Kong. The rising public expectation of integrity in public office and the role of the press in exposing examples of corruption cannot be over-stated as vital contributors to the changes that came about

in Hong Kong. The public's perception that conflict of interest constitutes corrupt activity, is in stark contrast to the situation in Vanuatu, where there remains a public perception that conflict of interest in public office is both expected and accepted.

SESSION 4b

CORPORATE SOCIAL RESPONSIBILITY

MODERATOR

ALAN BACARESE

TOPIC

CORPORATE SOCIAL RESPONSIBILITY (CSR): THE GHANA EXPERIENCE IN THE MINING INDUSTRY

SPEAKER

FELIX NTRAKWAH

Managing Partner, Ntrakwah & Co, Lawyers, Ghana

TOPIC

MITIGATING THE RISKS OF CORRUPTION THROUGH CSR PROGRAMMES

SPEAKER

WAYNE DUNN

Wayne Dunn & Associates, Canada

TOPIC

ENHANCING BUSINESS ETHICS, CORPORATE GOVERNANCE AND CORPORATE SOCIAL RESPONSIBILITY

SPEAKER

M. K. CHOUHAN

Chairman, Mahendra & Young, Mumbai, India

TOPIC

CORPORATE SOCIAL RESPONSIBILITY (CSR): THE GHANA EXPERIENCE IN THE MINING INDUSTRY

SPEAKER

FELIX NTRAKWAH

A copy of Mr. Ntwarah's presentation summary is attached as Annex 11.

SUMMARY

Mr. Ntwarah's presentation focused on the many competing needs and expectations that need to be considered in relation to Corporate Social Responsibility in the context of a State such as Ghana. He stressed that in relation to Ghana and its mining industry, CSR needs to be considered in the context of the competing needs for investment and the protection of people and the environment.

THEMES

Mining in Ghana

Mining is governed by 25 laws and regulations. There are three categories of miners:

1. Multi-national companies
2. Small scale miners
3. Illegal miners

The Average Ghanaian's view of CSR

The average Ghanaian is accepting of the mining industry, but expects that the taxes and royalties generated from the industry will be invested in public works and projects.

Multi-nationals' view of CSR

- They have borrowed money to set up operations
- They pay taxes and royalties
- They pay 10% of profits to government
- They have an obligation to their shareholders
- The government should therefore meet the needs of the community from the taxes and royalties paid

Small companies view of CSR

'If we find gold, we will build you a school.'

Illegal Miners' view of CSR

They disregard CSR, and are only concerned about their livelihood.

State responsibility and CSR

According to Mr. Ntrakwah, the President of the Bar in Ghana recently gave a speech in which he suggested that the mining companies should set aside 10% of their profits for the benefit of the community. Mining companies responded saying that clearly the Bar President was not aware of what the mining companies were doing for the community in providing job opportunities and social interventions, (for example, a malaria control programme). The mining industry expressed the view that it was the government's responsibility to meet the needs of the community from the taxes and royalties paid by them.

Ghana Chamber of Mines

The chamber has adopted a code of conduct. However the requirements are not very stringent.

The State and the Law

Mr. Ntrakwah noted that there is a new mining law yet to be passed and that the present mining law is unconstitutional as it does not make provision for compensation of appropriated land. He added that the new bill addresses this.

He suggested that to tackle corruption the Minister must give reasons for refusing to grant mineral rights to mine.

The damage caused by mercury and cyanide used in processing gold is yet to be overcome and environmental damage is of huge concern to the community. He added that the Environmental Protection Agency (EPA) is not properly resourced to enable it to adequately carry out its function. The Environmental Protection Agency Act 1994 provides that the source of revenue of the Environmental Protection Agency includes gifts. It was suggested by Mr. Ntwarah that the law needs to be amended to remove provisions related to gifts, as it is debatable whether the EPA will have the courage to sanction a mining company for infractions of the environmental law if it has received a gift from the mining company.

Unresolved Problems

Mr. Ntwarah concluded his presentation by outlining some of the unresolved problems that exist in Ghana:

- Diseases
- Human Rights Abuses
- Pollution
- Men and their complaints (Unemployed men lose their women to men who obtain work at the mines)
- "Galamsey"- illegal mining
- Poverty and unemployment

TOPIC

MITIGATING THE RISKS OF CORRUPTION THROUGH CSR PROGRAMMES

SPEAKER

WAYNE DUNN

A copy of Mr. Dunn's PowerPoint presentation is attached as Annex 12.
Excerpts from that presentation have been included in the summary below.

SUMMARY

Mr. Dunn provided a definition and overview of CSR and how it interfaces with corruption and bribery.

He also discussed examples of CSR in operation.

THEMES

Overview

- What is CSR?
- Where does it come from?
- What does it look like?
- How does it provide a sustainable competitive advantage?

The World Business Community defines CSR as '...the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well of the local community and society at large.'

Mr. Dunn stressed that CSR must be sustainable especially where the resource is non-renewable.

CSR Drivers/Corruption Challenges

- The globalised world is demanding more of business
- Emergence of global standards
- Socially conscious shareholders
- Social Investment funds
- Financial markets

Mr. Dunn suggested that CSR, thus framed, is a recent invention, post-1997. Social Licence is another term of recent invention. Mr. Dunn explains Social License in his PowerPoint Presentation[14] as an emerging phenomenon based on the principle that communities and local interests have a valid role in determining whether or not a project will proceed.

14 Please see Annex 12

He added that CSR is based on the principle that communities and local interests have a valid role in determining whether a project goes on. This is amenable to corruption as payments can influence licence. Conversely, lack of a licence can obstruct access to billions of dollars in wealth. He provided the example of what happened in relation to nickel deposits in Peru.

Placer Dome Care Project

Mr. Dunn stated that this project was a good example of CSR in operation.

This project led the mining industry in CSR. For example it was the first time that women and children benefited from severance payments. It created a lot of good will and enhanced the companies' reputation.

Other projects where CSR has featured are Eldorado, Kislada Turkey and Progera in Papua New Guinea.[15]

15 Further details in relation to these projects can be found in Annex 12.

Mr. Dunn concluded his presentation by stating that bribery and/or corruption are not sustainable because ultimately access to money is finite and the corrupt will be identified.

Case studies are available from Wayne Dunn at wayne@waynedunn.com

TOPIC

ENHANCING BUSINESS ETHICS, CORPORATE GOVERNANCE AND CORPORATE SOCIAL RESPONSIBILITY

SPEAKER

M. K. CHOUHAN

A copy of Mr. Chouhan's PowerPoint presentation is attached as Annex 13.
Excerpts from that presentation are included in the summary below.

SUMMARY

The emphasis of Mr. Chouhan's presentation was very much on the importance of an individual's integrity, how it evolves in different contexts, and the way in which personal ethics interface with collective ethics in the context of Corporate Social Responsibility.

He opened his presentation by saying that corruption is dependent on wealth and wealth is generated by companies, either public or private. Therefore, corporate governance is inextricably intertwined with public governance.

He concluded by stating that corporate, political and bureaucratic leaders need to be sensitised to the need to maintain high ethical standards in business practices.

THEMES

Definition of Ethics

Mr. Chouhan quoted the Institute of Global Ethics definition of 'ethics' as being 'the obedience of the unenforceable.'

He states in his presentation summary[16] that an individual forms the nucleus of any company, community or society. The personal integrity and collective integrity of a group of individuals and their commitment to high moral values and ethics influences Corporate Governance and CSR. Seeds of ethics are sown in the family where one learns the concept of ethics. However, it is only when an individual enters the working environment that personal ethics evolve into collective ethics.

16 Please see Annex 13

Corporate Governance

Mr. Chouhan stated that Directors should possess the key qualities of vision, integrity and courage. He stressed the importance of the individual integrity of board members and that a board should strive to strike a balance between the interests of shareholders and other stakeholders in the community.

Basic Principle of Management

Sixty-five per cent of the world earns less than US $2000.00 per year. There is a huge market to be exploited once living standards are raised.

He noted that consistency in the behaviour of a company not to bribe officials means that eventually the company will be respected. A good example of such a company is the Tata Bus Company in India. This company introduced an 8 hour work day and leave for workers before the government required it through legislation. They set the best practice standard which was then adopted by the government for everyone.

He stated that corporate, political and bureaucratic leaders need to be sensitised to the need to maintain high ethical standards in business practices.

DISCUSSION/COMMENT

? Wayne Dunn was asked what the redundancy programme cost Placer Dome. Mr. Dunn responded by saying that it cost the company $4M. CIDA gave $2M. However, he added that we must not however judge the value of a company's CSR only in terms of the amount of money spent.

? The panel of speakers were asked how do we distinguish between a company's duty to the government and its duty to the community especially in a context where government claims to be the sole legitimate right to speak on behalf of the community. Further, can any legal obligation be placed on a company to benefit the local community?

Mr. Ntwarah explained that this was a difficult question as if you legislate, what are you legislating? Is it from the community's view or the government's view? He also reiterated comments from his presentation i.e. the company pays taxes and royalties and often wants to leave it at that whereas the communities' view is, "what have you done for me lately?"

Wayne Dunn alluded to a model which is utilised in some countries where some taxes are paid by the company to the local government which is then allocated at the local level in the community.

Mr. Chouhan reiterated comments from his presentation in relation to the importance of focusing on rules rather than principles. He provided the example of the Tata Bus Company which introduced an 8 hour working day and prior to any Government

initiative. He added that the best practice standard which was set by Tata was then adopted by the government for everyone.

Questions were then raised by the Chair of Transparency International in Ghana: 1) In Ghana, is the process by which concessions are granted by the Ministry transparent and independent of the need to give reasons for the decision? 2) the Minister of Finance sat on the board of the largest mining company. Wasn't this a conflict of interest? 3) Do bigger companies find it easier to resist inappropriate mining than smaller ones?

Mr. Ntwarah explained that there are processes for enhancing transparency such as requiring applications for licences to be posted in post offices and in the newspaper and inviting objections before a licence is granted. However as there is a high level of illiteracy, this is often of little value. He added that the sanctions imposed where there is a breach of the Chamber of Mines Code is an apology or suspension. In relation to environmental approval; he stated that only certain agencies are recognised so it would appear that there are conflict of interest issues.

A question was asked in relation to the process of licensing being used sometimes for corrupt activity. For example, Shering –Plough in the USA obtained licences through inappropriate dealings with the wife of a Minister in the name of CSR. The participant asked whether the licensing process should be subject to some internal review mechanism of policy such as has been adopted by the World Bank?

Wayne Dunn responded by saying that what Shering-Plough did was not CSR. However, he did say that inappropriate dealings do take place and quoted the example of Enron.

A question was asked as to whether there is an issue of proportionality/intent in determining whether one is looking at CSR as opposed to Corruption. Wayne Dunn stated that CSR involves a strategic melding of the companies' objectives with the needs of the community. CSR is going beyond the law, rather than trying to circumvent it.

SESSION 5

CRIMINALISATION, INVESTIGATION AND PROSECUTION

MODERATOR

MARTIN POLAINE

TOPIC

A NEW APPROACH TO INVESTIGATIONS: PRO-ACTIVITY AND THE INTELLIGENCE LED INTEGRITY TEST

SPEAKER

STEPHEN FOSTER

EU Pre-Accession Adviser, UK

TOPIC

PROSECUTING CORRUPTION CASES

SPEAKER

STANLEY CHAN

Senior Assistant Director of Public Prosecutions, Department of Justice, Hong Kong

TOPIC

INVESTIGATING & PROSECUTING CORRUPTION IN NIGERIA

SPEAKER

EMMANUEL AKOMAYE

Director General, Economic and Financial Crimes Commission, Nigeria (EFCC)

TOPIC

A NEW APPROACH TO INVESTIGATIONS: PRO-ACTIVITY AND THE INTELLIGENCE LED INTEGRITY TEST

SPEAKER

STEPHEN FOSTER

A copy of Mr. Foster's PowerPoint presentation is attached as Annex 14.

SUMMARY

Mr. Foster provided a background to the issue of corruption in Romania and provided a comprehensive account of the EU Phare Project's development of anti-corruption measures in Romania.

He concluded his presentation by emphasising the importance of such factors as promoting transparency and the inclusion of civil society in any anti-corruption strategy.

THEMES

Corruption in Romania

After the fall of Communism, nationalised industries were sold off with the result that many individuals in powerful positions became very wealthy. This was supported by extensive corruption in State institutions and only served to contribute to the acceptance of corruption

Strand 1 - Legislation

This involved implementing principles and values which both the Ministry of Interior staff the public could understand

These principles and values were based on European Convention of Human Rights articles.

He added that the focus was on the conduct of those engaged in law enforcement and defining the relationship between the police and the public.

Integrity testing was introduced. This method of testing is compliant with the ECHR articles and serves as an invaluable tool in the fight against corruption. It is intelligence-lead and is used as a last resort where other methods have been tried and are unlikely to succeed given the nature of the corruption.

Any test employed must follow the original intelligence which lead to the test being engaged. The Authorising Officer may have to address any issues of legality if the testing involves intrusive surveillance or interference.

Mr. Foster suggested that the deterrent effects of Integrity Testing have a significant impact on those who are corrupt or are seeking to be corrupt.

Strand 2 - Assessing the structure in order to detect corrupt practices

Mr. Foster explained that this was a difficult task as it involved questioning and challenging senior staff. Experts consulted widely with key stakeholders both inside the Ministry of Interior, as well as NGO's, an EC delegation and the international community.

The result of this consultation revealed, via a lack of tangible response, that there was an un-coordinated approach to detection and prosecution and that a dedicated agency with proactive intelligence gathering was the best way forward.

The newly-established anti-corruption unit set a purpose; that being, to prevent and detect corruption. It was decided early on that it had to have a system to prioritise intelligence according to risk, and that the design had to be proactive in approach. This proactive approach was necessary in that a closed organisation such as the police requires active collection of intelligence. To that end, a confidential hot-line was established.

The unit established a strategic desk which was able to analyse intelligence and assess where the problems were.

Much of the intelligence being received indicated that the level of bureaucracy was encouraging bribery. Mr. Foster illustrated this point with the example of what he described as the protracted process of issuing driving licenses. In response to this problem, changes were then made to the function of issuing driving licenses and thereby the opportunity for bribery to occur was reduced.

Strand 3 – improve transparency and accountability by forming partnership with Civil Society

1. A transparency advisory forum was established and 122 primary NGO's were approached with a view to trying to influence the Ministry of Interior to address corruption in a robust and transparent manner

2. A Strategic Committee was established and is comprised of representatives of Head of Command within the Ministry of Interior, representatives from the Prosecuting Agency and 3 NGO's to guide and oversee the work of the anti-corruption agency

Mr. Foster expressed the view that this kind of transparent strategy reduces the opportunity for high-ranking officials to conceal corrupt activity.

Strand 4 reducing the opportunity of corruption and the causes; introducing training.

Mr. Foster expressed the view that ensuring that the right staff are recruited is as important as is leadership. Careful selection of people for posts is vital. Vetting procedures such as polygraph testing are used.

CONCLUSION

Mr. Foster concluded his presentation by stressing the importance of:

- conducting strategic intelligence assessments;
- improving openness and transparency;
- engaging civil society to challenge the key institutions;
- the drive for change must be supported by the international community; but with sensitivity to the particular national environment;
- the political will to make the changes and follow the intelligence wherever leads irrespective of potential embarrassment to those implicated; and
- adequate funding.

He added that since the establishment of the unit, 7 integrity tests have been conducted, boding well for the future.

TOPIC

PROSECUTING CORRUPTION CASES

SPEAKER

STANLEY CHAN

Mr. Chan made this presentation on behalf of his colleague, Ian McWalters, Senior Assistant Director of Public Prosecutions, Department of Justice, Hong Kong

A full copy of Mr. McWalter's paper is attached as Annex 16.

A full copy of Mr. Chan's PowerPoint presentation is attached as Annex 15.

Below is a summary of Mr. Chan's presentation. There are also some additional paragraphs inserted from Mr. McWalters's presentation paper

SUMMARY

Mr. Chan's presentation provided an examination of:

- the range of convention crimes;
- the elements of UNCAC bribery offences;
- the 'abuse of functions' provision as provided under Article 19 of UNCAC;
- The 'illicit enrichment' provision as provided under Article 20 of UNCAC; and
- defences.

He stressed that a comprehensive networks of laws will be ineffective without the necessary political will to confront corruption and implement the measures to overcome it.

THEMES

(1) Creating an effective range of Convention Crimes

The starting point for the effective criminalisation of corruption is to put in place the appropriate range of offences which adequately covers the conduct to be prescribed.

Rarely will one offence of bribery be enough and there will need to be a range of offences, each targeting different forms of corrupt conduct.

In this respect, the public sector and private sector will require different considerations.

A higher standard of conduct is expected of public officials and this is reflected in the range of offences that are created to deal with them. Thus in UNCAC, there is not just bribery (Article 15), there is also misappropriation (Article 17), trading in influence (Article 18), abuse of office (Article 19) and illicit enrichment (Article 20).

Society has now changed and there is an expectation that people who enjoy the privileged position of occupying a public office will discharge their duties properly and in the public interest. The key element of a public office is that it is an office of trust.

UNCAC clearly encourages State parties to draft bribery offences as separate offences for each act of offering, soliciting and accepting. This has the important consequence that one activity does not depend upon the other for the bribery offence to be committed. It then does not matter that the recipient of a corrupt offer is not actually induced to corrupt himself corruptly, or even agrees to do so.

By specifically requiring that State Parties 'establish as criminal offences' the acts of offering, soliciting and accepting and by including conduct of an unconcluded bribery transaction, UNCAC clearly encourages State Parties to draft their bribery offences as separate offences for each act of offering, soliciting and accepting. Furthermore, the fact that UNCAC criminalises the mere promise of a bribe is a clear indicator to State Parties that it should not matter that the bribe was never paid, and that events after the making of the offer should only be relevant in so far as they might reveal the state of mind of the offeror.

(A) The Elements of UNCAC Bribery Offences

- The acts of offering, soliciting and accepting

The Convention requires that each activity be covered whether committed directly or indirectly and whether the undue advantage is to be for the benefit of the corrupt agent or another person or entity. UNCAC demands indirectly, directly… etc.

- 'Undue advantage'

The UNCAC term used to describe the bribe is 'undue advantage', but no guidance is given as to what meaning is to be given to these words.

It is crucial to the effectiveness of the anti-corruption legislation that the 'bribe', whether it be termed 'undue advantage', 'advantage', 'gratification' etc., be exhaustively defined so that it encompasses every conceivable kind of benefit which one person can confer on another.

- describing the corrupt purpose

This is the element of the offence which transforms what might otherwise be an innocent transaction into bribery. The Convention describes it in terms of:

> '…in order that the (public) official act or refrain from acting in the exercise of his or her official duties.'

Similar language is used for foreign public officials and private sector agents. However, the corrupt purpose must in some way be linked to the corrupt person's duties in relation to his employer or principal.

- Proving the corrupt purpose

It is a notorious feature of corruption offences that they are difficult to prove as frequently there is no direct evidence of the reason why one party offered an advantage to the other. In such circumstances, prosecutors will ask the tribunal of fact to infer that that the advantage was offered or accepted for a corrupt purpose. The inference will be drawn from the overall circumstances of the case, including such facts as the existence of official dealings between the offeror and the acceptor, the absence of a social relationship between the two, efforts made to conceal or launder the proceeds of the transaction etc. This inevitable reliance upon inference is reflected in Article 28 of UNCAC which says:

Knowledge, intent of purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

- Hong Kong's Prevention of Bribery Ordinance (POBO)

Hong Kong's POBO defines separate offences for public sector corruption and private sector corruption that prohibit the offering to or solicitation or acceptance by a person of a particular defined status (i.e. prescribed officer, public servant or agent) of unauthorised advantages. However there is no mention of the word corruption, or variants of it, in these offences. Proof of corruption comes from establishing that the advantage was offered, solicited or accepted "as an inducement to, reward for or otherwise on account of" the public servant doing an act in his capacity as a public servant (section 4), or giving assistance or using influence in the procuring etc. of contracts (section 5) or the private sector agent doing an act in relation to his principal's affairs or business (section 9). By concentrating on the acts which underlie the offences the law has avoided becoming tangled up in the meaning to be given to words such as corrupt or corruptly when they are used to describe the mental element of the offence. Instead of having to prove that the accused had a corrupt state of mind, it is only necessary to show that he intended to do the acts prohibited by the section.

(B) Abuse of Functions: Article 19 of the UNCAC

A broad definition of corruption, encompassing abuse of office, has long been recognised by the law.

A measure by which the adequacy of a country's anti-corruption offence provisions can be judged is their ability to catch conduct that is within the broad concept of corruption rather than just its narrow manifestation of bribery. This raises the question of how the criminal law responds to conduct which, though it does not amount to bribery is corrupt in this broader sense. UNCAC answered this question by creating the Article 19 offence of abuse of functions. To this UNCAC added the Article 20 offence of illicit enrichment i.e. the circumstance of a public official having no outward signs of bribery but possessing more wealth than his public service income would appear to justify.

Hong Kong found that the means of attacking conduct that constituted an abuse of position lay in the common law offence of misconduct in public office. This offence fulfils the obligation imposed by Article 19 of UNCAC which requires States Parties to consider adopting measures to establish as a criminal offence:

> '... when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.'

The offence of misconduct in public office had been rarely used in Hong Kong, but in the early 1990s the Hong Kong Independent Commission Against Corruption (ICAC) started to detect cases where public officers abused their position and powers for the benefit of themselves or others but their conduct did not involve the solicitation or acceptance of advantages.

(C) Illicit Enrichment: Article 20 of UNCAC

Article 20 of UNCAC requires that each State Party shall consider adopting such measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

This offence is particularly useful when there is reason to believe that a public official is corrupt but there is insufficient evidence to prosecute him for bribery. In a sense illicit enrichment is an offence of last resort in that it will usually be only charged when the circumstances surrounding a public official's apparent affluence are suspicious but an investigation of his affairs has failed to discover evidence of actual corruption.

(D) Defences

What defences are appropriate for particular offences will very much depend on the way those offences are drafted. A more helpful way of considering the issue may be to identify what defences may be appropriate and what defences should not be available for fear of undermining the effectiveness of the offence provisions.

For example, the local custom or the claims by a corrupt agent or public official that he lacked due power to fulfill the offeror's expectations of him; that he never intended to do what he had agreed to do, or that he did not in fact do what he agreed to do.

SUMMATION

From this discussion of the major UNCAC offence provisions it is suggested that amongst the issues that governments should focus on when implementing their Convention obligations in respect of these offences are the following. Governments should:

(i) examine the local circumstances to assess whether more than one bribery offence is needed and how particular forms of corrupt conduct might need to be treated;

(ii) ensure that the law does not prevent a prosecution where the payment of the bribe is effected extraterritorially;

(iii) provide for the criminal liability of intermediaries and persons who assist the principal offender in his commission of the Convention crime by the doing of acts before or after the offence is committed;

(iv) draft the bribery offences as separate offences of offering soliciting and accepting that are complete upon the acts of offering, soliciting and accepting taking place;

(v) broadly define the elements of the bribery offences so that no loopholes are created as, for example, in the meaning to be given to the word that is used to describe the bribe;

(vi) draft the bribery offences by concentrating on the acts which constitute the offences and avoid requiring proof of a corrupt state of mind;

(vii) ensure that the bribery offences do not require that:
(a) the bribery transaction be concluded;
(b) the soliciting or accepting agent have the power to do what he promises to do or is asked to do;

(viii) allow proof of the corrupt purpose by means of inferences drawn from circumstantial evidence;

(ix) ensure that the offences allow for a relatively simple and easy to apply test for determining whether the act that the public official or private sector agent is being asked to perform is one that is in the exercise of his official duties;

(x) allow the corrupt act to be non-specific in nature, such as the agent simply remaining favourably disposed to the offeror of the undue advantage in the course of their official dealings with each other;

(xi) be alert to ensuring that defences allowed to persons charged with a bribery offence do not undermine the very purpose for which the bribery offence was created;

(xii) legislate offences which cover non-bribery forms of corrupt conduct;

(xiii) ensure that the country's fraud offences are modern and equal to the task required of them. Consideration should be given to legislating a continuing fraud and /or organised crime offence.

(3) Prosecuting UNCAC Crimes

(A) Involvement in the investigation prior to charge

Hong Kong's criminal justice system is based on the British model which creates a demarcation between investigation and prosecution. There is, therefore, little scope for the involvement of prosecutors in the investigative process. This is not necessarily a good thing as many fraud and corruption cases benefit from legal guidance through the course of their investigation.

However, there are still two areas of the investigative process where a prosecutor does become involved and they are areas that are particularly important in a corruption investigation:

They are:

(i) approving undercover operations in which the participant (civilian informants of the law enforcement agency or its own undercover officers) are likely to commit offences; and

(ii) approving the taking of non-prejudicial statements from persons suspected to have participated in the corrupt conduct

(B) Issues Concerning Witnesses

Persuading a person to be a prosecution witness in a corruption trial raises a number of issues. These will include putting in place measures to conceal his identity or protect his safety and, if he has participated in the corrupt transaction, offering him immunity from prosecution.

Measures are needed that will reduce the risk of personal harm in doing so. However, it is necessary to balance the interests of the witness and the interests of society in procuring his testimony against the interests of the defendant.

(C) Procedural and Evidential Matters Relating to the Trial Process

Legal provisions which help the prosecutor to place evidence before a court without diluting the fairness of the defendant's trial may be necessary.

Corruption trials encounter problems in two main areas, witnesses and records. When there is a lack of witnesses, many of the primary facts from which a court will be drawing its inferences will be facts contained in documents and official records. Proving these records and properly understanding their probative value is crucial to the success of a corruption prosecution. The law must ensure that the corrupt cannot gain protection from overly technical and outdated laws governing criminal procedure and evidence.

CONCLUSION

It matters not how comprehensive a network of laws a country puts in place, there has to be political will to confront corruption, to understand its causes, and to take vigorous measures to overcome it.

Morale will be undermined and rather than doing what is right, those involved in implementing the government's anti-corruption strategy will spend their time trying to assess what is acceptable. If corruption is to be aggressively pursued governments must ensure that those they appoint to perform this task are not left isolated and unsupported. They must not allow the anti-corruption battle to itself become politicised. Rather they must show that even if one of their own is under suspicion, whether he be a senior bureaucrat or an influential politician, he is not above the law and that they will support the law taking its normal course.

TOPIC
INVESTIGATING & PROSECUTING CORRUPTION IN NIGERIA
SPEAKER
EMMANUEL AKOMAYE

Mr. Akomaye made his presentation on behalf of his colleague, Mr. M Ribadu, Chairman, EFCC
A copy of Mr. Ribadu's PowerPoint presentation is attached as Annex 17.

SUMMARY

Mr. Akomaye's presentation focused on the EFCC's remit in relation to prosecuting and investigating corruption in Nigeria.

He discussed the legal instruments enacted to tackle corruption in Nigeria and described the particular dilemmas posed in deciding to prosecute individuals suspected of corrupt activity.

He concluded by noting the advantages of the intelligence-lead approach and stressed the importance of investigation teams having integrity and focus.

THEMES

Political will

Mr. Akomaye opened his presentation by stating that corruption cannot be fought in the absence of democracy. He added that it is only with the installation of a democratically appointed government, that corruption in Nigeria is now being addressed.

He stressed the importance of political will in the fight against corruption, adding that political will must emanate from the top, as members of one's own political party may be implicated in corrupt activity and must be subject to the same scrutiny and sanctions as everyone else.

He noted however, that political will is challenged by a constitutional provision which bars prosecutors from prosecuting certain individuals in public office. In Nigeria, this includes the President, Vice-President, Governors and Deputy-Governors.

He stated that corruption had been endemic in Nigeria for 40 years and there was a general acceptance of it by the public at large. In light of this, deconstructing corrupt behaviour is a challenging task in the Nigerian context.

The EFCC

The EFCC was established in 2002 and complies with most of the UNCAC provisions. The EFCC is unique in that its remit is to both investigate and prosecute. Mr. Akomaye suggested that this is an advantage in that it encourages both investigations and prosecutions to be pursued with a passion that was lacking when the two functions were dealt with separately by the Police and Ministry of Justice respectively.

He added that domestic law fully protects both witnesses and whistle blowers and that previously it had been difficult to get witnesses to come forward as the latter were often subject to threats from suspected offenders.

When deciding to prosecute, the questions asked by the agency include:

- Is the suspect a politically exposed person?
- What is the desired result? i.e. recovery and/or prosecution?
- What are the legal and constitutional impediments?
- Would witnesses be willing to testify?
- In the event that you decide to testify; what sort of team should you constitute? What sort of strategy should you pursue? Overt or covert?

The intelligence-lead approach is a useful one in that if an investigator or prosecutor has acquired a lot of intelligence prior to approaching the suspect; this tends to disable him/her and avoid too much political pressure. Moreover, the practitioner is in a stronger position if it becomes necessary to plea-bargain.

Mr. Akomaye concluded his presentation by stressing the importance of having investigation teams who have both integrity and focus. These teams must look beyond the overt and consider such indicators as unexplained wealth.

COMMENT

Integrity testing

Integrity tests are becoming increasingly used as an investigative tool in anti-corruption investigations.

There are two types of integrity tests:

> *'random virtue' testing which is used by institutions in the United Kingdom and elsewhere to highlight the presence of issues or abuses which may not amount to criminal offences but which are of corporate concern; or*

'intelligence-led' tests which arise where there is information or intelligence that an individual or group of individuals is committing criminal or serious disciplinary offences.

The intelligence-led test, (discussed by Mr. Foster in relation to the anti-corruption project in Romania) is particularly valuable in cases of suspected corrupt behaviour by police officers and public servants.

For those States that have ratified the European Convention of Human Rights, integrity tests can potentially involve a breach of Article 8 i.e. right to respect for private and family life. States that are not party to that particular convention will be party to regional human rights initiatives, all of which will recognise the right to privacy.

There must be a basis in law for any intelligence-led integrity testing, and as a covert investigation, it should satisfy the following criteria:

1) *there is reliable intelligence or information;*

2) *the scenario of the test seeks to replicate as closely as possible the nature of the intelligence;*

3) *the test is truly a test, in the sense that it is capable of being passed or failed;*

4) *there should be complete audit trail;*

5) *at all stages of the test, actions undertaken must be necessary and proportionate – thus, as mentioned by Mr. Foster, it might be decided that an integrity test should only be run as a final option, once other means of investigation have been discounted;*

6) *the test should require the target to take action or respond in a way with which he or she is familiar through training and through the normal course of their duties;*

7) *the involvement of third parties and the risk of collateral intrusion should be kept to a minimum;*

8) *those responsible for the test should have in mind that an evidential product might result – therefore presentational issue for court, along with disclosure implications, should be addressed at each stage of planning and implementation; and*

9) *each action carried out by the investigative team should be addressed at each stage of planning and implementation;*

Engagement of Civil Society

The anti-corruption measures adopted in Romania included the active engagement of civil society through their inclusion in both the Transparency Advisory Forum and the Strategic Committee.

Mr. Foster stressed that this kind of transparent strategy where NGOs are included in a real and practical way reduces the opportunity for corrupt activity to be concealed. The on-going success of the anti-corruption strategy in Romania reinforces the importance of engaging civil society in a meaningful way.

Effective Range of Convention Crimes

UNCAC clearly encourages State Parties to implement a range of convention crimes. It addresses money laundering, trading in influence, the bribery of both national and foreign public officials and other abuses of official functions.

In his presentation, Mr. Chan discussed the criminalisation provisions of UNCAC in some detail, noting that these offences reflect the higher standard of conduct expected of public officials. As discussed in session one, some of these offences are discretionary in nature and it is therefore incumbent on State Parties to establish or maintain a series of specific offences.

Alternative offences which may be valuable to common law jurisdictions include misconduct in public office as utilised by prosecutors in Hong Kong to reflect abuse of function.

The power to prosecute corruption by an anti-corruption agency varies from State to State. As noted by Mr. Akomaye, the EFCC's remit is to both investigate and prosecute. He expressed the view that these fused functions are an advantage in that it enhances the organisation's commitment to pursue cases from start to finish.

In common law countries, consent of the Attorney-General is often necessary to institute proceedings. Given the often political nature of the office, this is a position that can cause difficulties because he or she is making prosecutorial or judicial decisions. An Attorney-General may have a number of different roles and consent should not be influenced by political interference.

SESSION 6

CORPORATE GOVERNANCE

MODERATOR

COLIN NICHOLLS, QC

TOPIC

CODES OF CONDUCT AND SAFEGUARDING INTEGRITY

SPEAKER

SIR BRIAN FALL

Rio Tinto, Chairman of the International Chamber of Commerce (ICC) Committee Against Corruption, UK

TOPIC

MAKING WHISTELBLOWING WORK

SPEAKER

GUY DEHN

Public Concern at Work, UK

TOPIC

LESOTHO HIGHLAND WATER: A CASE STUDY

SPEAKER

GUIDO PENZHORN SC, SOUTH AFRICA

Prosecuting Counsel in Lesotho Highland Water Cases

SESSION 6: CORPORATE GOVERNANCE

TOPIC

CODES OF CONDUCT AND SAFEGUARDING INTEGRITY

SPEAKER

SIR BRIAN FALL

SUMMARY

Sir Brian Fall spoke about some of the issues on the current agenda of the ICC Committee Against Corruption as well as the relative advantages and disadvantages of the voluntary and mandatory approaches to conduct. He concluded that we would be best served by a combination of both approaches.

THEMES

The ICC Rules of Conduct and Recommendations for Combating Extortion and Bribery

In 2005, the ICC Commission on Anti-Corruption published a revised and up-to-date version of the ICC Rules of Conduct and Recommendations for Combating Extortion and Bribery.

These Rules of Conduct are general in nature and constitute what is deemed to be good commercial practice, but without legal effect. All enterprises should conform to the relevant laws and regulations of the countries in which they operate, and should observe both the letter and the spirit of these Rules. While the highest priority should continue to be directed to ending large-scale extortion and bribery involving politicians and senior officials, the 2005 revision of the Rules also provides for action against facilitation payments to lower-level officials.

The ICC has emphasised that enterprises that have self-imposed rules based on their own values should consider compliance as critical.

The ICC Commission on Anti-Corruption

The ICC Commission on Anti-Corruption has played an active role in the development of the new framework for combating corruption, and the Commission intends to remain active in relation to the implementation of UNCAC by:

- encouraging governments to ratify UNCAC promptly. UNCAC should secure balanced support from industrialised countries, as well as developing countries;
- supporting the establishment of an effective follow-up monitoring programme to ensure parties implement and enforce UNCAC; and
- urging international donor agencies such as the World Bank, to help governments that need technical assistance to implement UNCAC.

TOPIC

MAKING WHISTELBLOWING WORK

SPEAKER

GUY DEHN

A copy of Mr. Dehn's PowerPoint presentation is attached as Annex 18.

This summary below is taken mainly form Mr. Dehn's PowerPoint presentation.

SUMMARY

Mr Dehn discussed the kinds of dilemmas faced by those considering raising a concern about suspected corrupt activity. He discussed the growing recognition that whistelblowing protection is necessary and cited examples of States who have introduced disclosure laws.

THEMES

Dilemmas for Whistleblowers

Mr. Dehn opened his presentation by noting examples of well-publicised whistleblowing cases such as BCCI's collapse following the disclosure of fraud, the Matrix Churchill case and Watergate.

He went on to discuss some of the dilemmas an individual may face when deciding whether or not to disclose his/her concerns about suspected malpractice. Some of those include:

- Apprehension as to the truth of the allegation in the absence of tangible proof
- A belief that no-one will be interested in receiving the information
- Apprehension about causing trouble
- Not wanting to be perceived as a sneak

Mr Dehn then highlighted the different kinds of dilemmas faced in relation to raising a concern either internally or externally:

- Raising a concern internally may lead to considerations about how informing might be perceived by colleagues, in addition to apprehension about proving the allegation itself.
- Raising a concern externally, such as to the press, may involve considerations around who one should tell, whether or not to leak it anonymously and the ramifications of informing.

Mr. Dehn's PowerPoint presentation refers to an important point made by the UK Committee on Standards in Public in relation to whistleblowing. The Committee stated that, where it is felt that the overall management is engaged in an improper course, staff should be able to by-pass the direct management line when deciding to inform.

Whistleblower protection

Article 33 (a discretionary provision) encourages States to provide protection to individuals who express their concerns in good faith.

The tenor of emerging whistleblower policy and legislation is to protect witnesses. The hope is that by providing safeguards to witnesses, there will be fewer anonymous informers. One of the difficulties of anonymity is the lack of independent corroboration; a point illustrated with the example of Watergate.

Mr. Dehn discussed disclosure laws in the UK, Japan and South Africa. The model used in these countries focuses on the workplace. It has a tiered disclosure regime, which emphasises internal whistleblowing, regulatory oversight and a recognition for wider accountability. It promotes and protects open, rather than anonymous, whistleblowing.

A practical policy solution to the dilemmas faced by potential informers is to introduce a law that provides an incentive to employers to give their staff a safe alternative to silence, for both internal and, where justified, external whistleblowing.

Such a solution will:

- deter corruption;
- detect corruption; and
- promote good governance

TOPIC

LESOTHO HIGHLAND WATER: A CASE STUDY

SPEAKER

GUIDO PENZHORN SC, South Africa

Prosecuting Counsel in Lesotho Highland Water Cases

A copy of Mr. Penzhorn's presentation summary is attached as Annex 19.

SUMMARY

The focus of Mr. Penzhorn's presentation was to share his experience of prosecuting in the Lesotho Highland Water cases. He highlighted some of the common obstacles faced in prosecuting international corruption and emphasised the importance of such factors as the integrity of the prosecuting authority, demonstrable political will, judicial credibility and international cooperation.

Mr. Penzhorn's presentation summary provides a comprehensive account of the issues around the prosecutions in Lesotho from the vantage point of the demand side, i.e. the country hosting the project which is the subject matter of corruption and whose officials are then the ones who are corrupted.

THEMES

Some of the significant issues included:

- ***Political will***

– the public perception that the money spent in prosecuting corruption cases would be better spent on public services impacts on the political will which is so necessary to bring prosecutions.

- ***The integrity of the Prosecuting Authority***

– Prosecuting authorities can be influenced and compromised by those individuals involved in corrupt activity. This in turn can arguably undermine the entire proceedings and the credibility of any consequent convictions.

- ***Reputation of the Court***

– defendants may try to question the court's credibility (both nationally and internationally) in an attempt to undermine possible convictions. The integrity and impartiality of the court is therefore imperative and, in this case, the international standing of the Lesotho courts had the effect of dispelling any suggestion by foreign companies that the convictions were not credible.

- ***International Assistance***

– Prosecutions such as these, and particularly a small State like Lesotho, are not feasible without international assistance. In this particular case, the cooperation of the Swiss authorities, OLAF, the EU anti-corruption agency and the World Bank was invaluable.

- ***The wall of silence***

– met by those who try to prosecute international corruption is largely due to the fact that there is no obvious victim in these cases. Consequently, there is no-one willing to tell what transpired. Moreover, those who know about the crime are also often involved in the corrupt activity itself.

The public perception that the crime of bribery is not necessarily morally reprehensible compounds this wall of silence.

Mr. Penzhorn stated that if international institutions were to act firmly against contractors and consultants involved in third world corruption, it would:

- deter corruption of the kind involved in this case
- encourage countries such as Lesotho in their own fight against corruption
- send the message that corrupting officials in the developing world is not condoned by the authorities in the countries concerned or by the donor/lending agencies.

Given that the prosecutions in Lesotho are viewed from the vantage point of the recipients of the bribes, problems around prosecuting the payers of the bribe need to be resolved. Mr. Penzhorn suggested that the obvious solution is for the, typically,developed countries to prosecute the bribe payers. It would then not be necessary for a State such as Lesotho to seek to prosecute the alleged payers, with all the attendant difficulties.

He added that the difference between prosecuting a natural person and prosecuting a company relates to punishment. A company cannot be sent to prison. Therefore, the best the courts can do, as happened in Lesotho, is to impose fines. In most cases the companies can easily pay out of their profits. However, sometimes the companies will fail to pay

the fine; a problematic occurrence given that criminal sanctions such as fines are normally not enforceable in other countries.

COMMENT

Whistleblower Protection Legislation

Article 8 of UNCAC requires State Parties to promote integrity, honesty and responsibility among their public officials. This is a discretionary provision that merely requires States to 'consider' a series of measures including the possibility of facilitating whistleblowing by public officials.[17]

17 The full text of UNCAC is contained in Annex 23

Recognition in recent years of the potential value of internal whistleblowing has given rise to an increasing trend towards adopting legislation which protects whistleblowers from reprisal.

Article 33 of UNCAC encourages States to provide protection to individuals who express their concerns in good faith. Again this is a discretionary provision, and the Expert Working Group on Legislative and Related Measures to Combat Corruption recommended a legislative provision on employment protections for whistleblowers and asked that this be included in the model law. By way of example, they referred to the United Kingdom's Public Interest Disclosure Act 1999.

The Public Interest Disclosure Act 1999 affords protection for both public and private sector employees in relation to disclosures made in good faith. This legislation also recognises the potential benefits of internal (rather than external) disclosure and creates incentives for employers to put into place internal reporting procedures

Given the common difficulties experienced by most jurisdictions in relation to combating corruption, there is a need to provide protection (through legislation) to those who report suspected corrupt activity.

Clear and effective internal reporting mechanisms

As stated by Mr. Dehn, the most important element of whistleblowing is that staff are made aware of the whistelblowing avenues; that those avenues are simple and practical; and that staff are regularly reminded of the options open to them.

Lesotho – Agents and Intermediaries

It is not unusual for an agency or representation agreement to involve a local person agreeing to act as the agent of a corporation, particularly for example, where that corporation is entering a new field/country and is reliant on local advice and influence.

However, the Lesotho Highlands Water Project (LHWP) illustrates that such agreements can be used as mechanisms for bribes. The case of Acres International Ltd v The Crown, Court of Appeal of Lesotho, 2003 (the first of the LWHP international contractors to be charged) highlights the obligation on corporations to refrain from (and be alerted to) the abuse of agents/representatives agreements in international business contracts. Practitioners need to be alive to certain so-called 'red-flags' that may indicate that a high risk of bribery exists. These situations include some of the following:

- *requests payment in cash or to a numbered account to the account of a third party*
- *requests payment in a country other than the intermediary's country of residence or the territory of the sales activity, and especially if it is a country with little banking transparency*
- *requests payment in advance or partial-payment immediately prior to a procurement decision*
- *requests reimbursement for extraordinary, ill-defined or last-minute expenses*
- *has a family member in a government position, especially if the family member works in a procurement or decision-making position or is a high-ranking official in the department that is the target of the intermediary's efforts*[18]

The Acres case also emphasises the importance of the recent work on developing international best practice on the use of agents. The Business Principles for Countering Bribery, developed by Transparency International, and Social Accountability International in conjunction with several international corporations, provide as follows:

- *the enterprise should not channel improper payments through an agent*
- *the enterprise should undertake due diligence before appointing an agent*
- *compensation paid to agents should be appropriate and justifiable remuneration for legitimate service rendered*
- *the relationship should be documented*
- *the agent should contractually agree to comply with the enterprise's anti-bribery Programme*
- *the enterprise should monitor the conduct of its agents and should have a right of termination in the event that they pay bribes.*

Companies are increasingly complying with such principles and they serve as a useful measurement of a company's commitment to develop effective anti-corruption strategies while also offering protection to reputable agents and representatives.

International Assistance

It is imperative that the international community provide assistance (via funding and mutual cooperation) to any small or developing State, such as Lesotho, who finds itself having to prosecute a large, complex and expensive case. Such a commitment from the developed world will, no doubt, serve to encourage such States to continue their efforts in fighting corruption.

Moreover, as stated by the Lesotho Court of Appeal in the case of Lahmeyer International GmbH v The Crown, C of A (CRI), 2002, '… it is also incumbent on the international community and particularly the funding agencies to revisit those practices and procedures it has in place and to use those sanctions it has the power to impose whenever contraventions of the kind proved in this project occur.'[19]

18 This is a list developed by TRACE International, an NGO that specialises in working with companies and intermediaries to reduce the risks of corruption in international business transactions)

19 Please see Annex 19, pg. 9

SESSION 7

ASSET REPATRIATION AND INTERNATIONAL CO-OPERATION

MODERATOR

MONTY RAPHAEL

TOPIC

TRACKING, SEIZING & REPATRIATING THE PROCEEDS OF CORRUPTION: N AFRICAN PERSPECTIVE

SPEAKER

EMMANUEL AKOMAYE

Director-General, Economic & Financial Crimes Commission, Nigeria (EFCC)

TOPIC

RECOVERY THROUGH THE CIVIL COURTS: WILL IT CONTINUE?

SPEAKER

TIM DANIEL

Partner, Kendall Freeman & Co., Solicitors

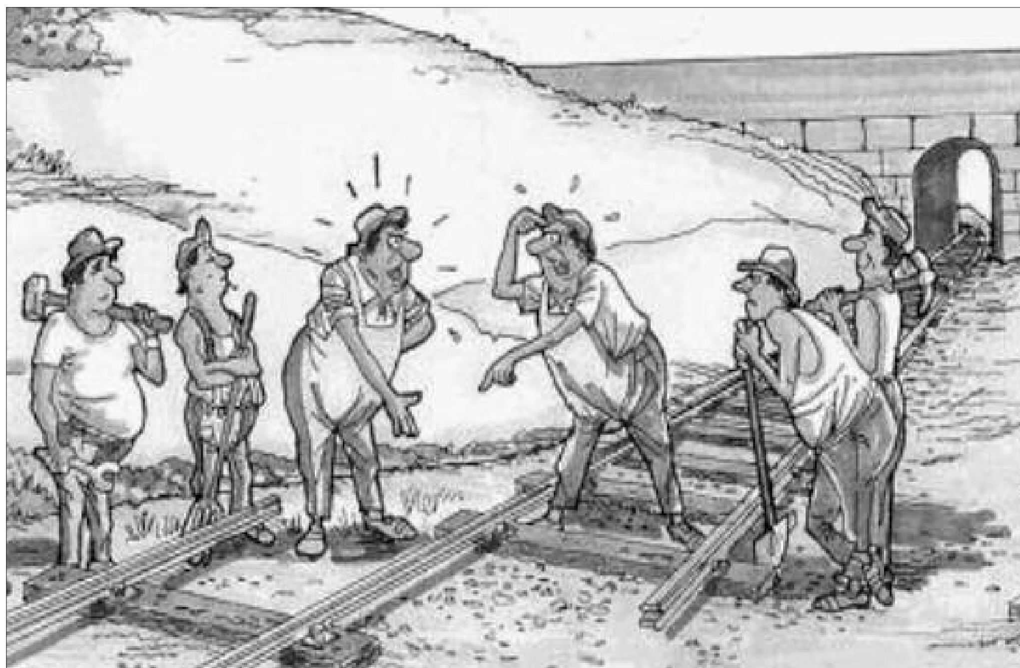
TOPIC

THE EXPERIENCE OF A CIVIL LAW COUNTRY

SPEAKER

PAUL GULLY-HART

Former Chairman, Business Crime Committee of the International Bar Association, Switzerland



TOPIC

TRACKING, SEIZING & REPATRIATING THE PROCEEDS OF CORRUPTION: N AFRICAN PERSPECTIVE

SPEAKER

EMMANUEL AKOMAYE

A copy of Mr. Akomaye's PowerPoint presentation is in Annex 20.

SUMMARY

Mr. Akomaye outlined the rationale of asset recovery and the particular challenges faced by the EFCC in combating corruption in Nigeria.

He stated that the recovery of the proceeds of corruption has never been a priority in many African States; often because some of the leaders of these States were implicated in corrupt activity themselves. However, globalisation, pressure from civil society and the growing number of democracies in Africa have contributed to steps being taken by States to recover the proceeds of corruption.

He discussed the impediments to recovering assets and prosecuting those suspected of corrupt activity. He concluded by suggesting that, given some of the particular challenges experienced, non-conviction based confiscation might be more effective in a State such as Nigeria.

THEMES

The asset forfeiture process

The rationale of asset recovery is to restore to the victims what they have lost through the criminal act of corruption and to take the proceeds of crime away from criminals.

Mr. Akomaye identified five stages of the asset forfeiture process:

- Identification of assets involved in crime
- Freeze/immobilise/seize/restrain
- Maintain/Preserve value
- Forfeiture
- Disposal

He noted that each of these stages has its own peculiar challenges, but that the ultimate objective is to have the assets returned back to the victim.

The EFCC and the Independent Corrupt Practices (And Other Related Offences) Commission (ICP) remain the two institutions in Nigeria that deal with asset confiscation. Record-keeping is still very poor, so trying to trace a transaction that involves documentation is problematic.

It is of note that the formal MLA procedure is not often used by the EFCC because it is time-consuming and bureaucratic.

Challenges

Mr. Akomaye suggested that a proportionality test needs to be applied when deciding whether the costs associated with recovery make the exercise worthwhile. A determination obviously depends on the expected value of what is to be recovered.

He went on to suggest that one must also consider what the overall objective of the recovery is just to recover the assets; or to both recover and prosecute.

He added that sometimes it is not practical to press charges when the suspect is willing to co-operate and return the assets. However, deciding not to prosecute has other implications, in that, in the absence of a criminal sanction, people may not be discouraged from committing such crimes in the future.

Restraint

In Nigeria, the law permits the EFCC to freeze assets through a court order. However, restraint must be effected only when reasonably sufficient facts have been gathered. Mr. Akomaye provided examples of the kinds of practical problems associated with the restraint of assets:

- Proportionality of the identified property;
- Forfeiture of assets if the accused is discharged on technical grounds. 'Technical grounds' are not defined. This then begs the question as to who defines these in any given case;
- An absence of provisions on the management of assets under restraint;
- A co-mingling of legitimately acquired assets with those derived from crime; and
- The burden of proof is on the prosecution to link the origin of the property with the alleged crime.

Mr. Akomaye suggested that because of these practical difficulties, many jurisdictions have adopted the non-conviction based approach to restraint and confiscation. He added that this strategy appears to have been very effective in South Africa.

Mutual Legal Assistance

Mr. Akomaye posed the question as to whether MLA is really assistance or a contest. It has, in his opinion, assumed the character of the latter because many jurisdictions have

set out to make it almost impossible to get assets back. He described an attitude of 'apathy and foot-dragging' by many requested States and said if MLA is worth continuing there must be a radical change in the way it is applied.

Mr. Akomaye provided a comprehensive list of frustrations that arise from the traditional MLA approach.[20]

20 Please see Annex 20

The Nairobi Declaration

Transparency International officials from seven African States met on 7 April 2006. The declaration which came out of that meeting reflects the challenges faced by some African States in recovering assets.

That declaration also admonished nationals of the world's wealthier nations who are 'enjoying measures of impunity despite their corrupt practices in Africa.'

Mr. Akomaye concluded his presentation by emphasising that nations need to engage rigorously in introducing institutional reforms that incorporate transparency and accountability. Furthermore, he argued that law enforcement and judicial capacities need to be strengthened.

TOPIC

RECOVERY THROUGH THE CIVIL COURTS: WILL IT CONTINUE?

SPEAKER

TIM DANIEL

A synopsis of Mr. Daniel's presentation is attached as Annex 21.

SUMMARY

Mr. Daniel's presentation focused on an examination of the civil recovery process as an addition to recovering assets through the criminal process. He highlighted some of the problems experienced in effecting recovery through the criminal process by citing well known examples such as the Sani Abacha case. He noted in particular the failings of MLA and discussed the challenges posed by the invocation of immunity, particularly in relation to Nigeria.

He concluded his presentation by exploring the possible remedies that might be available by way of the civil process.

THEMES

Sovereign Immunity

Mr. Daniel discussed the issue of both state immunity and immunity extended to individuals such as Heads of State and State Governors within the Nigerian context. He illustrated the problems associated with the invocation of immunity by providing examples.

Mr. Daniel expressed the view that a law is needed to prevent Heads of State from being able to invoke immunity. He noted that Nigeria suffers particularly from the problems associated with immunity, in that s.308 of the Constitution provides that immunity (both civil and criminal), is not only extended to the Head of State, but also to all of the 36 State Governors.

Whilst the Nigerian Constitution may recognise the immunity of State Governors, it was held in a recent case before the U.K courts that a Nigerian State Governor could not invoke sovereign immunity. The court did not regard an individual state (a member of a federation) as being qualified to extend immunity to the Governor, even though such immunity was guaranteed in the constitution.

Mr. Daniel noted that civil recovery is only addressed under Article 53 of the UNCAC.

Mr. Daniel stressed the importance of the civil recovery process as an addition to the criminal recovery process. However, he added that whilst in theory, organisations such as the United Kingdoms Assets Recovery Agency (ARA) may be able to assist in the Nigerian recovery effort, they are not necessarily able to do so due to lack of resources. Moreover, the U.K Government is unlikely to want to spend taxpayers' money pursuing proceeds of crime that will ultimately be returned to Nigeria and will therefore not benefit the U.K.

It seems that a government's accountability to its electorate and/or lack of financial resources pose obstacles to MLA, but Mr. Daniel went on to discuss other impediments to the successful use of the MLA process:

Mutual Legal Assistance

Mr. Daniel noted that the difficulties arising out of the attempts to trace and repatriate the billions looted by General Sani Abacha serve to demonstrate how unwieldy and limited in value the MLA can be.

After the death of Abacha, the Swiss Government responded enthusiastically to requests from the newly elected democratic Government in Nigeria to locate and freeze the looted assets. However, the Swiss were still faced with significant procedural hurdles and it was 6 years after the investigation began, that the Federal Supreme Court in Switzerland ruled that sums totalling $480 million be returned to Nigeria. There is still an estimated $3 billion that has yet to be traced.

He added that one of the obstacles encountered in MLA proceedings can be the requirement for dual criminality, and that this requirement was one of the delaying factors in the Abacha Proceedings.

Dual Criminality

He cited the requirement for dual criminality as being another obstacle encountered in MLA proceedings, adding that this was a delaying factor in the Abacha case.

Interest on ill-gotten gains

Mr. Daniel then addressed the question of who receives the interest on ill-gotten gains. It was held by the Privy Council in the case of *Attorney General for Hong Kong K v Reid (1994) 1 AC 324, PC* that the benefactor must account if a profit is made. However, there is still the question of who makes up the loss if the proceeds of crime have diminished in value.

Foreign Banks

With civil action, an action can be brought against a bank for knowing receipt. Moreover, if it can be shown that the bank did not make proper enquiries about the origin of the monies, it may be possible to take civil action.

Extensive pre-action discovery of banking records etc can be obtained by seeking a Bankers' Trust v Shapira order in civil courts. However, the court will not force disclosure by the foreign branch of an English bank by means of an order obtained against the English branch.

In order to obtain information concerning assets held in foreign bank accounts for use in proceedings in England, the claimant will need to issue a Letter of Request to the judicial authorities of the foreign country under the Civil Procedure Rules.

Remedies

Mr. Daniel referred to the prosecutions in Lesotho and the fact that the criminal penalties that had been obtained were inadequate. He added that under English law it is possible to seek recovery of monies paid in bribes, but only from the recipient of the bribes but also from the person paying the bribe.

Mr. Daniel illustrated the potential benefits of using civil remedies for recovery by citing a recent case in South Africa where it was held that a losing bidder could recover the profits they would have made from the company guilty of bribing for the purposes of winning a bid.

He concluded by suggesting that, in relation to the Abacha case, we should think about civil proceedings in relation to the remaining looted money. He added that UNCAC is reliant on there being a successful MLA regime in place as the Convention's edifice is built on States introducing legislation to assist each other in the criminal process. He expressed the view that given MLA has not been successful to date; the criminal recovery process under UNCAC may not be successful.

TOPIC

THE EXPERIENCE OF A CIVIL LAW COUNTRY

SPEAKER

PAUL GULLY-HART

A copy of Mr. Gully-Hart's PowerPoint presentation and synopsis is attached as Annex 22.
The summary below includes excerpts from Mr. Gully-Hart's synopsis

SUMMARY

Mr. Gully-Hart's synopsis provides the range of legal instruments and measures available in Switzerland for identifying, freezing and returning assets of criminal origin.

In his presentation, he discussed the kind of legal and practical difficulties the Swiss authorities have been confronted with in relation to the repatriation of ill-gotten assets, citing well known cases such as those involving Sani Abacha and Ferdinand Marcos.

THEMES

Legal Instruments

Switzerland was one of the first countries to ratify the OECD Convention On Combating Bribery of Foreign Public Officials in International Business Transactions. Further, it has responded swiftly to approve the implementation of domestic legislation to give full effect to the provisions of UNCAC

Switzerland has a comprehensive range of legal instruments and measures in place for identifying, freezing and returning assets of criminal origin. Swiss banking secrecy legislation does not apply to assets of criminal origin and thus does not impede existing preventive or protective measures.

Switzerland has joined the European Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime and the UNCAC.

In addition to treaty law, Switzerland has enacted legislation which embraces all forms of mutual assistance in criminal matters. The Federal Act on International Mutual Assistance in Criminal Matters (IMAC) was adopted in 1981 and amended in February 1997. The amendments include increased cooperation in relation to the transfer of assets claimed by foreign states (Articles 74 and 74a IMAC).

Under Article 18 IMAC, a requesting State may obtain urgent interim relief prior to the transmission to Switzerland of a formal request for mutual assistance, provided that the Requesting State announces its intent to forward such a request. The only legal requirements are urgency and proportionality (i.e. the freeze order should not unduly interfere with other legally protected interests).

The Assets Sharing Act is the legal foundation for international asset-sharing agreements. As a rule, such agreements do provide for equal sharing between Switzerland and the Requesting State, but the Act contains a provision allowing departure form this general rule. Moreover, it is possible to return all the confiscated assets to the foreign State for

compelling reasons, such as the nature of the offence, the degree of participation, the degree of captivation of the State in the investigation, the international context or the amount of damage that the wrongdoing has caused to the interests of the foreign State.

The Federal Act on Prevention of Money Laundering in the Financial Sector 1998 (MLA) is to all financial intermediaries. The MLA imposes on those financial intermediaries extensive customer identification, record-keeping and reporting obligations.

The Swiss Federal Banking Commission (FBC) issued a money laundering ordinance which became effective in 2003. It contains more stringent due diligence requirements for banks, managers of funds and securities dealers and regulated by the FBC. The ordinance co-exists with the Agreement on the Swiss Banks' Code of Conduct with regard to the exercise of due diligence signed by the Swiss Bankers' Association and all Swiss banks.

The ordinance has introduced a bar on accepting the proceeds of corruption or other crimes, even if committed outside Switzerland. The decision to initiate business relationships with Politically Exposed Persons (PEPs) from abroad must be taken by the bank's senior executive body. The proceeds of criminal conduct include all assets obtained through corruption, misappropriation of public funds, abuse of official duties or dishonest dealings by a public official.

Mr. Gully-Hart cited examples of significant cases involving Politically Exposed Persons (PEPs) such as Ferdinand Marcos, Sani Abacha, and Sese Seko Mobutu.[21]

21 A summary of those cases can be found in Annex 22

Legal issues and practical difficulties

Mr. Gully-Hart discussed the kind of legal and practical difficulties the Swiss authorities have been confronted with in relation to the repatriation of ill-gotten assets.

Immunity

He mentioned the fact that Heads of State still enjoy immunity from accusations of corruption, misappropriation of funds etc.

Mutual Legal Assistance

Factors such as political influence or lack of good governance may sometimes hinder the Requesting State's ability to collect enough evidence against a former Head of State regarding breaches of his public duties. An example is the case of Mobutu where the Swiss Federal Government ruled that the assets of the deceased ruler were to remain frozen for a further three years given that the Swiss judicial authorities had resolved to close the legal assistance proceedings that had been in progress since 1997 due to a lack of cooperation on the part of the authorities Kinshana to release the frozen assets.

Restitution

Direct restitution is not always feasible or appropriate. For example, the relevant country may still be facing serious problems of corruption and bad governance. The Swiss authorities may also have to consider legitimate private and public interests in the assets other than those claimed by the Requesting State.

Conviction-based Confiscation

Mr Akomaye discussed the impediments to successful conviction-based confiscation in the Nigerian context. The problems encountered by the EFCC lend support to the views expressed by the Commonwealth Expert Working Group on Asset Repatriation[22] Mr. Akomaye suggested that given these difficulties, the adopting of a non-conviction based approach to restraint and confiscation may be more practical.

22 Further details in relation to the Commonwealth Expert Working Group on Asset Repatriation is contained in Session 1.

Mutual Legal Assistance

The impediments to effective mutual legal assistance were discussed by all three speakers.

As noted by Mr. Daniel, the effective implementation of UNCAC is reliant on international cooperation. Given that there have been shortcomings in the MLA process to date; questions have been raised as to how successful it will be under UNCAC.

A lack of the necessary financial and human resources by many States has been a particular challenge in sustaining the process. As noted by the Commonwealth Expert Working Group on Asset Repatriation, this lack of resources has caused considerable delays in the legal assistance process. These delays are particularly damaging in relation to asset confiscation given the speed at which assets can be dispersed.

It is acknowledged that the absence of dual criminality can hinder the use of MLA for some States.

The Commonwealth Expert Working Group addressed the problems posed by the requirement for dual criminality in relation to cross border enforcement of restraint or confiscation orders. The Group considered that countries should examine their systems and determine whether it is strictly necessary to require dual criminality for the cross border enforcement of foreign restraint and confiscation orders.

The Group accordingly recommended that Commonwealth countries should have the legal capacity to render legal assistance in relation to requests for restraint and confiscation from another country in the absence of dual criminality.

Article 43(2) of UNCAC also encourages States to construe the concept of Dual Criminality widely, by deeming the latter fulfilled if the underlying conduct is a criminal offence under the laws of both State Parties.[23]

23 The full text of UNCAC is contained in Annex 23

However, one of the main ideas behind UNCAC has been to lessen reliance on the findings of domestic courts as a component of MLA and pursuant to Article 46(1), State Parties are required to afford one another the widest measure of mutual legal assistance in investigations, prosecutions, and judicial proceedings in relation to Convention offences. The Article emphasises such features as the requirement to establish a central authority to receive, execute and transmit requests; the need for confidentiality as to the fact and substance of the request; and the need for flexibility in dealing with requests.

UNCAC has addressed the issues in relation confiscation, repatriation and extradition in detail. However, while it has provided fresh obligations, there is still no internationally binding legal instrument that sets out a comprehensive mandatory regime for the repatriation of assets.

MUTUAL ASSISTANCE AS AN ALTERNATIVE TO MLA

It is important to remember that there are more informal approaches, i.e. informal assistance, that can be adopted as an alternative to working within the formal procedures and frameworks afforded by MLA.

Prosecutors and investigators should consider whether they really need a formal request to obtain a particular piece of evidence.

There are several types of enquiries that can be made informally, subject of course, to variations from State to State. Examples include:

- *If the enquiry is a routine one and doesn't require the country of whom the request is made to seek coercive powers, then it may well be possible for the request to be made and complied with without a formal letter of request.*
- *Potential witnesses may be contacted to see if they are willing to assist the authorities of the requesting country voluntarily.*
- *It should be remembered that the regime of MLA is for the obtaining of evidence; thus, the obtaining of intelligence and the locating of suspects or fugitives should only be sought by way of informal mutual assistance to which, of course, agreement may or may not be forthcoming.*

There are certain key considerations which a prosecutor must consider when deciding whether evidence is to be sought by informal means from abroad:

- *it must be evidence that could be lawfully gathered under the requesting State's law, and there should be no reason to believe that it would be excluded in evidence when sought to be introduced at trial within the requesting State;*
- *it should be evidence that may be lawfully gathered under the laws of the requested State;*
- *the requested State should have no objection;*
- *the potential difficulty in failing to heed these elements might be that (in States with an exclusionary principle in relation to evidence) such evidence will be excluded;*
- *inappropriate actions by way of informal request may well irritate the authorities of the foreign State who might therefore be less inclined to assist with any future request.*

The golden rule in relation to the above is to ensure that any informal request is made and executed lawfully.

Any consideration of mutual assistance should not overlook the use to which it can be put in order to pave the way for a later, formal request.

Immunity

The invocation of immunity as an impediment to successful prosecution was discussed again in this session, most notably, in relation to the fact that Nigeria's constitution extends immunity to Heads of State and all 36 State Governors.

As noted in session one, the Commonwealth Expert Working Group on Asset Repatriation recommended that Heads of Government should commit themselves to removing such immunities.

Article 30(2) of UNCAC requires State Parties to take necessary measures to ensure an appropriate balance between any immunities or jurisdictional privileges accorded to public officials and the need for effective investigation and prosecution of corruption offences.

CONFERENCE CONCLUSIONS AND THE WAY FORWARD

- There is a need for a co-ordinated anti-corruption strategy which addresses the 5 pillars of UNCAC i.e. prevention, criminalisation, asset recovery, international cooperation and effective monitoring. Achieving such a strategy requires demonstrable political will.

- When considering such strategies, regard must especially be had to those public officials in exposed positions. Reporting responsibilities (in relation to suspected corruption) should be made clear and sanctions should be put in place for those who do not report.

- The importance of education and targeted awareness as an integral part of any anti-corruption strategy should be heeded by States.

- It is acknowledged that there is a need to have independent specialist anti-corruption bodies. However, a freestanding anti-corruption body is not necessarily the answer for all States and it may be more appropriate, depending on the needs of a particular State, to have an anti-corruption unit attached to an existing ministry or department.

- Prosecutors and Investigators involved in the anti-corruption strategy should be specialist and trained and resourced accordingly.

- The implementation of UNCAC requires an effective monitoring system. Those involved in implementation should seek to draw lessons from other initiatives such as the OECD's peer review mechanism. In examining possible means of monitoring and evaluating under UNCAC, the restraints imposed by costs and resources need to be considered.

It might be that monitoring initially focuses on some or all of the mandatory provisions of UNCAC.

It is recognised that inadequate or ineffectual monitoring is worse than no monitoring.

- As recommended by the Commonwealth Expert Working Group on Asset Repatriation, MLA between Commonwealth States should be on the basis of the Harare Scheme, with a wide interpretation being accorded to the dual criminality requirement.

Informal requests for assistance should be used where appropriate, rather than the more formal procedures of MLA.

Careful consideration needs to be given as to how the workability of MLA can be improved in relation to asset tracing and recovery.

- When implementing anti-corruption strategies, governments are encouraged to engage civil society and NGOs in a meaningful and practical way.

- States should be encouraged to implement strong and effective laws and procedures in order to facilitate the tracing and recovery of assets. These should allow for both conviction and non-conviction based asset repatriation. Direct enforcement is likely to be both less problematic and less resource-intensive for small and developing States.

- It is clear from the example of the Lesotho Highland Water cases, that small and developing States mounting a significant corruption prosecution will probably need technical and financial assistance.

- As recommended by the Commonwealth Expert Working Group on Asset Repatriation, Heads of State should commit themselves to removing immunities. However, it is acknowledged that some States may be at certain stages of transition and therefore may have to have recourse to limited immunity for limited periods of time.

- Companies and corporations should be encouraged to have in place codes of conduct which do not tolerate corrupt practice in any guise.

- Public procurement is particularly vulnerable to corrupt practice. There should be awareness or ‘triggers’ (such as in relation to agents and intermediaries) which may be suggestive of corruption.

- States should have regard to covert and pro-active techniques, including intelligence-lead testing, such as the kind currently being used in Romania. It is recognised that when using covert techniques, consideration must be given to privacy rights and the potential violation of human rights instruments or initiatives.

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ANNEX 7

THE APPLICATION OF ANTI-CORRUPTION MEASURES IN KENYA

THE COMMONWEALTH SECRETARIAT AND CHATHAM HOUSE
ANTI-CORRUPTION CONFERENCE,
24th – 25th April 2006, LONDON

SPEAKING NOTES
24th APRIL 2006

Content

1. The Kenya Anti-Corruption Commission; history and antecedents
2. The Anti-Corruption and Economic Crimes Act 2003
3. Application: The Government of Kenya's approach to the war on corruption

Kenneth N. Mwige, LL.M (Cantab.), Advocate, CPS(K)
Kenya Anti-Corruption Commission

1. THE KENYA ANTI-CORRUPTION COMMISSION

1.1 The Prevention of Corruption Act 1956

1.1.1 Brown-envelope type corruption

1.1.2 No convictions for decades

1.1.3 Inability of statute to keep up with technological development; white-collar/economic crime; resort to The Penal Code offences of Abuse of Office and Conspiracy to defraud.

1.2 Change of Government following General Elections in December 2002 mainly on the platform of the war on corruption, and institution by Government of various administrative and legislative measures to stem the river of official corruption, arrest the situation, and set the foundation for future engagement. Examples are

1.2.1 'Radical Surgery on the Judiciary' where 50% of Judges in the Court of Appeal, 50% of Judges in the High Court and 50% of the Magistracy were removed through the Ringera Committee.

1.2.2 Abolition of Harambee in Government offices and proscription of public servants

from engaging in Harambee by administrative fiat, and through The Public Officer Ethics Act 2003

1.2.3 The immediate end of 'land-grabbing' in Kenya.

1.2.4 The enactment of the foundational legislation to fight corruption – The Anti-Corruption and Economic Crimes Act 2003 and The Public Officer Ethics Act 2003.

1.2.5 The establishment of commissions of inquiry with a clear mandate and responsibility to address and resolve significant existing problems, e.g. the Goldenberg Report and the Ndung'u Land Commission on irregular and illegal allocations of public land in Kenya since Independence – the Ndung'u Report, now under implementation by the KACC.

1.2.6 Introduction of a professional, performance-driven results-based management style of government.

1.2.7 The overhaul of the administration of parastatals and Semi-Autonomous Government Agencies through execution of service charters, execution of performance contracts by Chief Executive Officers and the implementation of a Monitoring and Evaluation system by the central government.

1.2.8 Legislative reforms geared to address existing corruption-facilitating systems, processes and procedures, e.g The Public Procurement and Disposal Act 2005 that is already enacted and is only now awaiting publication of Regulations to come into effect.

1.2.9 Enhancement and improvement of democratic space, transparency and accountability everywhere in Kenya, most notably in the hitherto closed world of military and security procurement.

2. THE ANTI-CORRUPTION AND ECONOMIC CRIMES ACT 2003

2.1 Establishes the KACC; advisory board, Director and Assistant Directors, Parliamentary oversight and reporting – Commission to AG (S. 35), Commission's Quarterly Reports (S. 36) and AG's Annual Report to Parliament (S. 37).

2.2 Defines corruption and economic crimes in very broad terms, to include bribery, fraud, embezzlement or misappropriation of public funds, abuse of office by public servants, breach of trust, any offence involving dishonesty with regard to tax or election laws, and public procurement type issues.

2.3 For purposes of international cooperation and Mutual Legal Assistance, the KACC is a competent authority of the Government of Kenya, alongside the traditional office of the Attorney General (S. 12[3]).

2.4 The Statute was enacted in May 2003. Director and Assistant Directors appointed for-

mally in September 2004. Recruitment and Establishment of the KACC has taken the better part of one year to September 2005. KACC at full strength from December 2005 with about 200 full-time staff.

3. APPLICATION OF ANTI-CORRUPTION MEASURES IN KENYA

3.1 The Government of Kenya's strategy is 3-pronged; investigation, public education/advisory and civil recovery/restitution. This is in S.7 of The AC & EC Act 2003. There are NO powers of prosecution – vested in the Attorney General.

3.1.1 Under the Advisory Function: Examinations of Systems and Processes with a view to identifying and sealing corruption-facilitative loopholes; The Nairobi City, The Kenya Human Rights Commission, The Motor Vehicle Licensing Department of the Kenya Revenue Authority & the Immigration Department.

3.1.2 Under the Public Education and Corruption Prevention Function: Training of Integrity Assurance Officers in the public sector; Development of materials for public distribution, noting that the average percentage of 14% relevance of all complaints brought or referred to the KACC, with 86% being referred by KACC to other more relevant agencies; Inculcation of anti-corruption content in educations system syllabi, from primary school to University level; Prime Time Television Anti-Corruption messages on various Television and Radio programmes.

3.1.3 Under the Restitutionary Function: The Anti-Corruption and Economic Crimes Act 2003 emphasises prevention of corruption and restitution of ill-gotten wealth; KACC has issued 62 Notices under S. 26 of The Anti-Corruption and Economic Crimes Act 2003 to persons it suspects of being corrupt or having committed an economic crime; KACC has also began the process of restitution directly with persons who admit their culpability and who are making payments to the Government in satisfaction of Orders. The KACC has advanced Mutual Legal Assistance with selected foreign countries known to have been considered as safe havens by persons involved in corruption and economic crime in Kenya.

3.1.4 Under the Investigative Function: In Year 2005, the KACC received and processed 5,676 reports of corruption and economic crime from Kenyans. Of these 755 were taken up by the KACC, representing 13.3% of all these reports. The remaining 4,921 reports, representing 86.7% of all reports made to the KACC, were referred to other Government agencies and departments. This means that an average of 16 reports of alleged corruption and economic crime are made every day to the KACC, 7 days a week and 365 days a year. During the first quarter of 2006, the KACC received 1958 reports. The comparative figure over the same period in Year 2005 is 672 reports. The expression of confidence is clear (or the need for the office of Ombudsman, depending how you want to look at it)

3.2 Public confidence and Reports handled by the KACC vs. other institutions for the last six months.

OMBUDSMAN?

3.3 Cumulative Corruption Reports as of March 2006

3.4 What is the effect of all this good work by Government?

3.4.1 Opening up of political space by the new administration; increased sensitivity to corruption and greater public intolerance to corruption.

3.4.2 Historic resignations of Ministers of Government on public suspicion of involvement or cover up of corrupt transactions – Minister for Finance, Minister for Justice and Constitutional Affairs, Minister for Internal Security in the Office of the President – charged in court, and the Governor of the Central Bank of Kenya – charged in court.

3.4.3 The 'Chill Factor' – unquantifiable slow-down of the corruption economy. The networks are cautious to the point of doing nothing. Junior civil servants are now spilling the beans on what goes on (Governor, Central Bank of Kenya anonymous reports by staff).

3.4.4 UNCAC: Kenya was famously the first Government to sign the Convention in Merida, Mexico. Compliance is high overall – anti-corruption legislation; administrative measures; Codes of conduct for public officials (The Public Officer Ethics Act 2003); public procurement law; Permanent Integrity Committee of the Judiciary; private sector covered in the definitions of corruption and economic crime in The Anti-Corruption and Economic Crimes Act 2003; Money laundering Bill is under preparation and spirited consultations are ongoing; Witness Protection Bill is under consultation; Mutual Legal Assistance programme at the KACC and the assistance of foreign governments, notably the UK and Switzerland;

3.5 Prosecution update

CASES FINALISED IN COURT FROM MAY 2003 TO DATE (NAIROBI ONLY)

NO OF CONVICTIONS	11
DISCHARGE UNDER S 87 (a) OF THE CPC	20
DISCHARGE UNDER S 89 (5) OF THE CPC	9
ACQUITTALS	8
TOTAL	48

CASES PENDING BEFORE COURT

INVESTIGATED BY THE ACPU	33
INVESTIGATED BY KACC UP TO AUGUST 2004	27
INVESTIGATED BY KACC FROM SEPTEMBER 2004 TO DATE	106
TOTAL NUMBER OF CASES	166

STATISTICAL SUMMARY OF FILES FORWARDED TO THE ATTORNEY GENERAL

Total No. of files forwarded to the Attorney General	135
No. of files recommended for prosecution	100
No. of files recommended for administrative or other action	5
No. of files recommended for closure	30
No. of files where recommendation to prosecute accepted	87
No. of files where recommendation to prosecute accepted but files referred to CID for re-evaluation of evidence	9
No. of files where recommendation for administrative or other action accepted	2
No. of files where recommendation for closure accepted	22
No. of files where recommendation to prosecute not accepted	3
No. of files where recommendation for administrative or other action not accepted	0
No. of files where closure not accepted	3
No. of files awaiting Attorney General's action	12

3.6 Conclusion

- Kenya is a good case study of how far political will can take a country before corruption fights back, and of the measures possible in a country in a political transition following decades of corrupt rule.

- Corruption, and the local and international networks that sustain it, are not to be underestimated. They are motivated by the most powerful human emotion – greed – and

do not operate in a bureaucratic milieu. They are incredibly quick, networked, monied and are able to employ the best brains available in the world. They are 100 times more agile than Government systems and procedures. Yet, they are susceptible to the antiseptic of light in darkness, and of public information in the place of 'Official Secrets' and 'National Security'. This is the single most powerful administrative action a Government can take that is more reliable than political will.

● In the last 3 and a half years, Kenya has made great strides towards lighting up the dark world of corruption and economic crime to public scrutiny. Changes in the political elite at the General Elections are unlikely to roll-back these gains. Coupled with the other administrative and legislative measures I have outlined, Kenya is on the mend, and intends to maintain its No. 1 Global UNCAC Ratification ranking.

ANNEX 16

The Commonwealth Secretariat & Chatham House Anti-Corruption Conference –
The United Nations Convention Against Corruption Implementation & Enforcement: Meeting the Challenges
London, 24-25 April 2006

Prosecuting Corruption Cases
Ian McWalters, SC Senior Assistant Director of Public Prosecutions The Hong Kong Special Administrative Region of the People's Republic of China

Prosecuting Corruption Cases
Introduction
1. 1. In determining what should be taken as a guide to the minimum internationally accepted set of standards and best practices in an anti-corruption strategy, recourse can now be had to the United Nations Convention Against Corruption (the UNCAC). It represents the culmination of an enormous amount of effort and the consensus of a large number of countries. Consequently when governments are deliberating on how they can create an anti-corruption strategy tailored to the needs of their society they should take as their starting point the measures recommended by the Convention.
2. 2. It is important to have a clear understanding of the UNCAC, in order to fully appreciate the extent to which the criminalisation of corrupt conduct and the successful prosecution of the corrupt forms part of the Convention's anti-corruption strategy. The Convention tackles corruption in two ways. First with measures to prevent it occurring and secondly with measures to effectively combat it once it has occurred. In practice there is of course, an interaction between the two, for the existence of measures to combat corruption are intended to act as a deterrence (or to use the language of the Convention to be dissuasive) to corruption. Thus the goal of preventing corruption can be achieved both directly, through adopting the pro-active measures suggested in Chapter II, and indirectly through the dissuasive effect that is a beneficial consequence of adopting the measures contained in Chapters III-VI.
3. 3. But what stands out clearly from the UNCAC is a focus on combating corruption through the criminal justice process. Though recognising the importance of corruption prevention and the provision of civil law remedies for the victims of corruption, it is apparent that the UNCAC regards the criminalisation of corrupt conduct and the punishment of the corrupt as a cornerstone of a country's anti-corruption strategy.

(i) Prosecuting the corrupt
4. A successful prosecution of any criminal conduct requires firstly that there be appropriate offences available to the prosecutor that deal specifically with the activities in

which the defendant is alleged to have been involved and secondly that there be sufficient evidence that the prosecutor can produce to the court trying the defendant that will enable this court to convict him of the

offences with which he is charged. Appropriate offence provisions are the everyday tools of the prosecutor. He must have them. Equally he cannot go to court unless he has sufficient credible evidence that will give him a reasonable prospect of conviction.

2. 5. Even though the prosecutor may have little input to the drafting of the laws creating the offences or the work of the investigators gathering the evidence, it is necessary to examine each of these processes as they contribute so significantly to whether there will be a prosecution and, if so, whether it will be successful.

(1) Creating An Effective Range of Convention Crimes

1. 6. The starting point for the effective criminalization of corruption is to put in place an appropriate range of offences which adequately covers the conduct to be proscribed. Each country must examine its corruption problem to see what kind of conduct might need specific treatment. Rarely will one offence of bribery be enough and there will need to be a range of offences, each targeting different forms of corrupt conduct.

2. 7. In this respect the public sector and the private sector will require separate consideration. In the public sector higher standards of conduct are expected of public officials and this is reflected in the greater range of offences that are created to deal with them. Thus in the UNCAC there is not just bribery (Article 15), there is also misappropriation (Article 17), trading in influence (Article 18), abuse of office (Article 19) and illicit enrichment (Article 20).

3. 8. Bribery has traditionally been seen as an offence committed by public officers and many countries may thus regard it as essentially a public sector phenomenon. This is not surprising given the importance of the role that the public official plays. Society has always had an expectation that persons who enjoy the privileged position of occupying a public office will discharge their duties faithfully and in the public interest, and so, unsurprisingly, the key element of a public office is that it is an "office of trust". The criminal law targets public officials to deter them from subordinating the public interest to private ends, and to punish them when they do so.

9. But the importance of preserving the integrity of public officials must not detract from efforts to ensure that corruption is prevented from making inroads to the private sector. The range of offences necessary to protect the private sector may be less but the goal is equally important. With the public sector it is easy to see how the corruption of a public official can prejudice the public interest. In the private sector the impact on the public interest may not be as obvious or direct but, ultimately, it can be just as damaging. If seen as nothing more than a way of doing business, corruption is destructive of the integrity of all it touches and undermines the values of honesty and fairness that society is trying to maintain and inculcate in its younger generation.

4. 10. Thus the UNCAC provides for both public sector and private sector bribery offences; for non-bribery manifestations of corrupt conduct in the form of trading in influence, abuse of office and illicit enrichment; for conduct which might accompany

bribery or reflect an abuse of office in the form of embezzlement of property; and for conduct which might be the consequence of corruption or fraud, namely the laundering of the proceeds of crime, the concealment of the proceeds of crime and the obstruction of justice. This is what the UNCAC regards as an appropriate range of offences in order to effectively combat corruption. Though some may only be recommended rather than mandatory, it is fair to say that the more a country departs from these recommendations the less effective its efforts will be in dealing with corruption.

(A) The Elements of the UNCAC Bribery Offences

11. I wish to discuss now some of the issues which should be considered when drafting bribery offences.

(i) The parties to the bribery offences

12. The parties to a bribery offence will effectively be the party offering the bribe and the party soliciting or accepting it. The UNCAC uses similar language. It refers to solicitation and acceptance but employs three words to describe the conduct of the offeror, namely "the promise, offering or giving". The status of the party offering the bribe is irrelevant but the status of the party soliciting or accepting it is all important. The latter person will either be a public official, foreign public official or a person who directs or works, in any capacity for a private sector entity. But it is not enough that the criminal law catch just these principal offenders; others may be involved as intermediaries and the criminal law should also be wide enough in its scope to catch those who assist in the commission of a bribery offence. Thus Article 27(1) of the UNCAC makes it clear that a State Party must criminalize "participation in any capacity such as an accomplice, assistant or instigator" in a Convention crime. Additionally a State Party may criminalize attempts to commit crimes[1] and the doing of acts preparatory to the commission of a Convention crime[2].

(ii) Separate offences for each form of bribery

1. 13. Making each of the activities of offering, soliciting and accepting separate offences has the important consequence that one activity does not depend upon the other for the bribery offence to be committed. Thus the response of the other party to the bribery transaction (that is, the public official or private sector agent to whom the corrupt offer is made or the person to whom a corrupt solicitation is made), will not determine whether an offence is committed. It then does not matter that the recipient of a corrupt offer is not actually induced to conduct himself corruptly, or even agrees to do so. Likewise when a corrupt public official or private sector agent solicits an advantage the offence will thereupon be committed irrespective of how the person being solicited responds to the solicitation.

2. 14. By specifically requiring that States Parties "establish as criminal offences" the acts of offering, soliciting and accepting and by including conduct of an unconcluded bribery transaction (the promise) the UNCAC clearly encourages States Parties to draft their bribery offences as separate offences for each act of offering, soliciting and accepting. Furthermore the fact that the UNCAC criminalises the mere promise of a bribe is a clear indicator to States Parties that it should not matter that the bribe was never paid, and

1 Article 27(2).

2 Article 27(3).

that events after the making of the offer should only be relevant in so far as they might reveal the state of mind of the offeror.

(iii) The acts of offering, soliciting and accepting

1. 15. The scope of the criminal law in attacking all three forms of corrupt activity must be broad. The Convention requires that each activity be covered whether committed directly or indirectly and whether the undue advantage is to be for the benefit of the corrupt agent or another person or entity.

2. 16. The Convention refers to "the promise, offering or giving" and in so doing encourages a broad definition that will encompass conduct less than and prior to an actual offer (the promise) and conduct which may take place after an offer and which implements that offer (the giving). Though it will frequently be the case that the offer and the giving occur at the same time.

3. 17. Definitions that are quite broad in scope and encompass conduct other than a clear and obvious offer of, or demand for, an advantage and conduct preceding a physical acceptance of an advantage will prevent the corrupt from circumventing the operation of the legislation by conducting their bribery outside of the jurisdiction. If a bribe payment takes place outside of a country's territorial boundaries but it can be proven to be referable to an agreement reached within those territorial boundaries then a broad definition will ensure that the corrupt do not escape justice.

(iv) The undue advantage

1. 18. The UNCAC term used to describe the bribe is "undue advantage" but no guidance is given in Article 2, which contains definitions of terms used in the Convention, of the meaning to be given to these words. Nor do the travaux preparatoires (i.e. the interpretative notes for the official records) provide any assistance. It will thus be left to each State Party in its domestic legislation to draft a suitable definition for whichever term it chooses to refer to a bribe. By "undue" the Convention would seem to mean no more than an advantage to which the agent is not otherwise entitled i.e. but for the offer of it by the briber, the agent would have no legal right to receive it.

2. 19. It is precisely because a bribe may take a multitude of forms that the definition must be broad. A narrow definition simply becomes an escape route for the corrupt. The law must recognize that the only limitation on the form a bribe may take is the imagination of the parties to the corrupt transaction. Thus it is crucial to the effectiveness of any anti-corruption legislation that the "bribe", whether it be termed "undue advantage", "advantage", "gratification" etc., be exhaustively defined so that it encompasses every conceivable kind of benefit which one person can confer on another.

(v) Describing the corrupt purpose

20. As to the corrupt purpose, that is, the element of the offence which transforms what might otherwise be an innocent transaction into bribery, the Convention describes it in terms of:

... in order that the (public) official act or refrain from acting in the exercise of his or her official duties.

Similar, but not always identical, language is used for foreign public officials and private sector agents. However the corrupt purpose is described it must be linked in some way to the corrupt person's duties in relation to his employer or principal.

21. In Hong Kong this is done in two ways; first by describing the reason for the payment, and secondly by describing the link to the duties of the person being offered the bribe. As to the former the POBO uses the words (borrowed from United Kingdom legislation) "as an inducement to, reward for or otherwise on account of". These words equate to the Convention words of "in order that" and have been construed by Hong Kong appellate courts as, respectively prospective (i.e. looking to the performance of a future act) retrospective (looking to the past performance of an act) and generic (looking to an unidentified act, such as simply remaining favourably disposed to the offeror but one which is clearly referable to the agent's duties). It is this latter interpretation of the words "otherwise on account of" that give the phrase its teeth. By departing from the requirement of having to prove a specific corrupt act (what is sometimes referred to as the quid pro quo), the corrupt purpose element of the offence is given a much broader scope and allows the offence to catch a much greater range of corrupt conduct.

2. 22. The next issue is how to describe the link to the duties of the person being offered the bribe. In the UNCAC the words are quite simple. For public sector corruption they are "that the official act or refrain from acting in the exercise of his or her official duties" and for persons working for a private sector entity they are that such a person "in breach of his or her duties act or refrain from acting". The form of words should focus on the employee's duties and create a demarcation line between a public official's or private sector agent's private life and work life. What form of words is most appropriate for a country is for its government to decide. But it is important that countries implementing domestic law allow for a relatively easy and straightforward means of distinguishing between the employee's private life and his official duties. It is not at all unusual for the distinction to, at times, become quite blurred.

3. 23. In Hong Kong the public sector bribery offence requires that it be proven that the act the subject of the bribe is an act that is performed in the public official's capacity as a public servant. There is a difference between an act being performed in the official's capacity as a public servant and in his private capacity. The test for determining in which capacity the act is performed was proposed by Leonard J in Kong Kam-pui v R [1973] HKLR 120 in the following terms:

Would that gift have been given or could it have been effectively solicited if the person in question were not the kind of public servant he in fact was. If the answer is "of course not" as it is in this case then the gift has been solicited or given to him in his capacity as a public servant and is a corrupt one ...

24. Hong Kong has found that this test has worked well. It is relatively simple to apply and it advances the purpose of the section. It is a practical, workable test. If legislation is silent on how to distinguish between a public and private act then the courts will have to devise their own test, and it must of course relate to the language of the legislation

being interpreted and must be one which those enforcing the law will be able to readily understand and apply.

(vi) Proving the corrupt purpose

25. It is a notorious feature of corruption offences that they are difficult to prove as frequently there is no direct evidence of the reason why one party offered an advantage to the other. That is, proof of the corrupt purpose from those involved will be lacking. In such circumstances prosecutors will ask the tribunal of fact to infer that the advantage was offered or accepted for a corrupt purpose. The inference will be drawn from the overall circumstances of the case, including such facts as the existence of official dealings between the offeror and the acceptor, the absence of a social relationship between the two, efforts made to conceal or launder the proceeds of the transaction etc. This inevitable reliance upon inference is reflected in Article 28 of the UNCAC which says:

Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

A country's domestic law must allow for this method of proof.

(vii) Hong Kong's Prevention of Bribery Ordinance

26. I shall briefly mention the structure of Hong Kong's corruption offences to illustrate the points I have made. Hong Kong's POBO defines separate offences for public sector corruption and private sector corruption that prohibit the offering to or solicitation or acceptance by a person of a particular defined status (i.e. prescribed officer, public servant or agent) of unauthorised advantages. However there is no mention of the word corruption, or variants of it, in these offences. Proof of corruption comes from establishing that the advantage was offered, solicited or accepted "as an inducement to, reward for or otherwise on account of" the public servant doing an act in his capacity as a public servant (section 4), or giving assistance or using influence in the procuring etc. of contracts (section 5) or the private sector agent doing an act in relation to his principal's affairs or business (section 9). By concentrating on the acts which underlie the offences the law has avoided becoming tangled up in the meaning to be given to words such as corrupt or corruptly when they are used to describe the mental element of the offence. Instead of having to prove that the accused had a corrupt state of mind, it is only necessary to show that he intended to do the acts prohibited by the section.

2. 27. The POBO bribery offences are composed of a number of common elements. They are:

(1) the offer, solicitation or acceptance;

(2) without lawful authority or reasonable excuse;

(3) of an advantage;

(4) by or to:

  (i) a public servant (section 4, section 5), or

  (ii) an agent (section 9);

(5) as an inducement to, reward for, or otherwise on account of;

(6) (a) the doing of an act:

  (i) by the public servant in his capacity as a public servant (section 4); or

  (ii) by the agent in relation to his principal's affairs or business (section 9).

(b) the public servant's giving assistance or using influence in the promotion, execution, procuring on payment of any contract with a public body (section 5).

The prosecutor bears the burden of proving all these elements (other than element 2) to the standard of beyond reasonable doubt. He does not have to prove element 2 because that is the statutory defence made available to the charged person. Under section 24 of the POBO the burden of proving this defence of lawful authority or reasonable excuse lies upon the accused. Thus the offences, with their in-built statutory defence, operate in the following way:

□ (1) at the end of the prosecution case all the elements of the offence must have been established to the standard of prima facie case;

□ (2) if that has been done, then the accused must decide whether he should give or call evidence for the purpose of :

□ (a) disputing any or all of the elements of the offence;

□ (b) establishing the statutory defence of lawful authority or reasonable excuse.

□ (3) at the end of the trial the prosecution must have established all the elements of the offence to the standard of beyond reasonable doubt;

□ (4) if it has done so then the accused must be convicted unless he has established the statutory defence to the standard of the balance of probabilities.

28. It is important to understand that the offence provision does not shift the burden of proof onto the accused in any significant way. Even if the accused does not adduce any evidence he cannot be convicted unless the prosecution has proven beyond reasonable doubt all the elements of the offence which, when taken together, are all that the prosecution would ever have to prove in order to establish bribery as most people would understand it. It is for this reason also that it becomes unnecessary to add to the offence a mental element other than that the accused intended to commit the acts prohibited by the offence. For example, for the offence of offering a bribe, what more should have to be proven than that a person offered an undue advantage to a public official for the purpose of inducing him to do an act in his capacity as a public official? To act in this way is to act corruptly and it does not add anything further to the offence to require proof that the accused corruptly offered an advantage.

(B) Abuse of Functions: Article 19 of the UNCAC

1. 29. In approaching the issue of what offences are needed for the public sector it must be remembered that the misconduct to be covered is not just bribery but corruption in the broadest sense of the word. A broad definition of corruption, encompassing abuse of office, has long been recognised by the law. Thus corrupt conduct is not confined to bribery but includes the behaviour of a public official deliberately acting contrary to the duties of his office in order for him to gain a private advantage for himself. Put simply, breaching the public trust by subordinating the public interest to private gain.

2. 30. A measure by which the adequacy of a country's anti-corruption offence provisions can be judged is their ability to catch conduct that is within the broad concept of corrup-

tion rather than just its narrow manifestation of bribery. This raises the question of how the criminal law responds to conduct which, though it does not amount to bribery is corrupt in this broader sense. The UNCAC answered this question by creating the Article 19 offence of abuse of functions. To this the UNCAC added the Article 20 offence of illicit enrichment i.e. the circumstance of a public official having no outward signs of bribery but possessing more wealth than his public service income would appear to justify.
3. 31. Hong Kong found that the means of attacking conduct that constituted an abuse of position lay in the common law offence of misconduct in public office. This offence fulfils the obligation imposed by Article 19 of the UNCAC which requires States Parties to consider adopting measures to establish as a criminal offence:

... when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.
The need for such an offence can best be appreciated by explaining how Hong Kong came to realise what an important role it could play in combating corruption in the public sector.
32. The offence of misconduct in public office had been rarely used in Hong Kong, but in the early 1990s the Hong Kong Independent Commission Against Corruption (ICAC) started to detect cases where public officers abused their position and powers for the benefit of themselves or others but their conduct did not involve the solicitation or acceptance of advantages. The following are examples of the conduct that the ICAC encountered:
(1) A civil servant allegedly delayed publication of a government decision so that his family could profit.
(2) A postal officer allegedly purchased a large quantity of stamps in advance of restricted public sale and subsequently sold them to stamp dealers for profit.
(3) A civil servant exerted pressure on subordinates to purchase insurance policies from his wife.
(4) A civil servant allegedly exerted undue influence over restaurateurs to order supplies from a firm in which he had a financial interest.
(5) A law enforcement officer allegedly persuaded a person to make a false witness statement in the course of an investigation.
(6) A law enforcement officer used the authority of his office to induce a private company to provide him with information and documents that were for the personal use of a friend.
(7) A civil servant who was responsible for selecting printing contractors, caused printing contracts to be awarded to her husband's firm without revealing her conflict of interest.
(8) A member of the Legislative Council failed to disclose to a Legislative Bills Committee the fact that he represented and was paid by a body which had an interest in the bill being considered

by the Committee.
(9) Two principal inspectors of the Education Department failed to observe the proper procedures of the government procurement system and awarded contracts to the same contractor without going through a properly conducted tender process.

(i) Elements of the offence of misconduct in public office
1. 33. The first prosecution to result in a definitive statement of the law on the offence of misconduct in public office was Shum Kwok-sher v HKSAR (2002) 5 HKCFAR 381. Mr Shum was the Chief Property Manager of the Government Property Agency. It was alleged that he had misused his office by exerting improper influence over the award of management contracts which were worth more than $150 million to a company in which the brothers of his sister-in-law had a financial interest. Essentially his criminality related to two distinct areas. Firstly he had caused this company to be wrongfully pre-qualified for the Government tender process by making misrepresentations as to its experience and this resulted in the award of two large contracts to it. Secondly in respect of smaller value contracts which Mr Shum himself had authority to award he manipulated the tender process so that his relatives' company received over 90% of the contracts. Throughout all of this he of course failed to disclose the conflict of interest that arose from his relationship to the proprietors of this company that was bidding for public contracts.
2. 34. After examining both ancient and modern authority on the offence the Hong Kong Court of Final Appeal accepted that the object of the offence was:

... to ensure that an official does not, by any wilful act or omission, act contrary to the duties of his office, does not abuse intentionally the trust reposed in him.
□ 35. The Shum Kwok-sher decision was followed by another judgment of the Court of Final Appeal in respect of a quite different type of misconduct. This was the case of Sin Kam–wah & anor v HKSAR (2005) 8 HKCFAR 192. In this case the Appellants were a Senior Superintendent of Police and a woman who had proprietary interests in night-clubs through which prostitution services were offered. On three occasions the woman arranged and paid for prostitutes to provide free sexual services to the Senior Superintendent. Under Hong Kong law it is an offence for a person to exercise control, direction or influence over a
□ woman for the purpose of or with a view to the woman's prostitution. Furthermore Hong Kong law has a licensing regime of nightclubs and if a nightclub is found to be a centre for vice or other illegal activity it can have its licence revoked. Inspections of nightclubs to ensure that they are complying with the terms of their licence are conducted by the Police. The Senior Superintendent was not involved, either personally or through subordinates, in the process of checking the woman's establishments but he was posted to a police formation that investigated organized crime and, later, to one which investigated the trafficking in narcotics.
2. 36. The Senior Superintendent was charged with three counts of misconduct in public office and the woman with, apart from vice offences, three counts of offering an advan-

tage to a prescribed officer contrary to section 8 of the POBO. Section 8 is not a bribery offence in that it does not require proof of a corrupt purpose. All it requires is proof that the offeror of the advantage had dealings of any kind with the Government department in which the prescribed officer worked. It has been found to be a very useful offence when it can be shown that an advantage was offered to a public official in very suspicious and highly improper circumstances but actual bribery cannot be proven. Its usefulness flows from the absence of any requirement that corruption be proven and from the breadth of the phrase "dealings of any kind". It has been said of this phrase that it will be enough if companies in which the accused has an interest have such dealings and, in respect of the dealings themselves, that there does not have to be an actual dealing on foot when the offer is made so long as it is made against a background of a course or pattern of regular dealings.
3. 37. In its judgment the Court of Final Appeal identified the elements of the offence of misconduct in public office, saying that it was committed where:
□ 38. In this case the court said that the Senior Superintendent's misconduct had the necessary relationship with his office and was culpable and serious because it involved his participation in the acceptance of free sexual services
□ with the knowledge that they were provided by prostitutes over whom his co-accused exercised control, direction or influence, that being a serious criminal offence.
4. 39. Hong Kong has found that this old offence plays a very useful role in filling a gap in corruption law by enabling serious misconduct not involving the offer or acceptance of bribes to be prosecuted. Furthermore its experience has provided it with a salutary lesson in respect of the fight against corruption. It is that the nature of corruption is ever changing. Close one door to the corrupt and they will grope their way to another and prize it open. Thus it will always be necessary to review the adequacy of the anti-corruption laws to ensure that they are sufficient to meet the needs of the society that they serve. Such a need for regular review is in fact reflected in the UNCAC where, in Article 5(3), States Parties are required to:

(1) a public official;
(2) in the course of or in relation to his public office;
(3) wilfully misconducts himself; by act or omission for example, by wilfully neglecting or failing to perform his duty;
(4) without reasonable excuse or justification; and
(5) where such misconduct is serious, not trivial, having regard to the responsibilities of the office and the officeholder, the importance of the public objects which they serve and the nature and extent of the departure from those responsibilities.

... endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

40. Countries that do not have an offence that encompasses abuse of office will have to consider drafting an offence which targets this form of corruption. This will not be an

easy task and countries may find that a constant review of the offence is needed in order to evaluate its effectiveness and assess the need for any amendment to it.

(C) Illicit Enrichment: Article 20 of the UNCAC

41. Article 20 of the UNCAC requires that each State Party shall consider adopting such measures as may be necessary to establish as a criminal offence,

... when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

This offence is particularly useful when there is reason to believe that a public official is corrupt but there is insufficient evidence to prosecute him for bribery. In a sense illicit enrichment is an offence of last resort in that it will usually be only charged when the circumstances surrounding a public official's apparent affluence are suspicious but an investigation of his affairs has failed to discover evidence of actual corruption.

42. In Hong Kong the offence of illicit enrichment is contained in section 10 of the POBO. Section 10, which was frequently charged in the early years of the operation of the POBO in fact creates two offences. One for a prescribed officer to maintain a standard of living incommensurate with his official income (section 10(1)(a)); the other for a prescribed officer to possess pecuniary resources or property disproportionate to (section 10(1)(b)), his official income. An unusual feature of these offences is that they place the burden upon the prescribed officer of providing a satisfactory explanation as to how the criminalized state of affairs (i.e. the incommensurateness or disproportion) came about.

(i) The operation of the offence

□ 43. In summary the prosecution of the section 10 offences proceeds as follows:

□ (1) At the end of the prosecution case, the prosecutor must have established a prima facie case that:

□ (i) the accused is or was a prescribed officer;

□ (ii) during the charge period (for s.10(1)(a) offences) or at the date particularised in the charge (for s.10(1)(b) offences) the accused -

□ (a) maintained a standard of living above that commensurate with his present or past official emoluments (for s.10(1)(a) offences); or

□ (b) was in control of pecuniary resources or property disproportionate to his present or past official emoluments (for s.10(1)(b) offences).

□ (2) At the end of the prosecution case the accused may call evidence. If he does so, it may be with a view to disputing any of the matters in (1) above or to give a satisfactory explanation in respect of any incommensurateness or disproportion as set out in (1)(ii) above.

□ (3) At the end of the trial the accused cannot be convicted unless:

□ (i) the prosecution has proven the matters in (1) above to the standard of beyond reasonable doubt; and

□ (ii) any explanation he might give as to the incommensurateness or disproportion is

found by the judge or jury not to be, on the balance of probabilities, a satisfactory one.

□ 44. Thus at the close of the prosecution case, if the prosecutor has established the elements of the offence to the standard of prima facie case, then the judge will find a case to answer and the accused knows that a prima facie incommensurateness or disproportion has been established. The accused must then decide what to do. He may decide to rely on the defence of satisfactory explanation or he may simply put the prosecution to strict proof to establish the elements of the offence beyond reasonable doubt. If he decides to rely on the statutory defence then the onus of proof shifts to him to give a satisfactory explanation. The explanation will only be a satisfactory one if it:

□ (i) reasonably accounts for such incommensurateness or disproportion as is found by the court to be proven beyond reasonable doubt; and

□ (ii) does so in a way that is legally acceptable. It will be legally acceptable if it shows upon a balance of probabilities, that the incommensurate standard of living had been paid for with money the ultimate source of which was untainted by any corruption on the part of the accused.

2. 45. If he chooses not to advance a satisfactory explanation and the tribunal of fact is satisfied beyond reasonable doubt of the incommensurateness or disproportion, then the accused must be convicted.

3. 46. However the offence is drafted, it should be regarded as an indispensable weapon in the anti-corruption armoury. When all else fails and evidence of bribery is lacking, an illicit enrichment offence may be the only means of bringing the corrupt to justice.

4. 47. The biggest limitation on the use of the offence is the difficulties in proving the wealth of a suspect. In the modern world it is so much easier for people to own property abroad, to operate bank accounts in foreign jurisdictions and to conceal ownership of property. But once this hurdle is overcome an illicit enrichment offence can be effectively deployed to target those against whom the proof of bribery is lacking but whose corruption is evident simply from their wealth and the lifestyle they enjoy.

(D) Defences

48. The UNCAC specifically reserves to each State Party's domestic law the drafting of Convention crimes "and of the applicable legal defences or other legal principles controlling the lawfulness of conduct ... and that such offences shall be prosecuted and punished in accordance with that law"[3]. What defences are appropriate for particular offences will very much depend on the way those offences are drafted. A more helpful way of considering the issue may be to identify what defences may be appropriate and what defences should not be available for fear of undermining the effectiveness of the offence provisions.

3 Article 30(9)

(i) Principal's consent

49. Bribery is often referred to as a secret crime because it takes place without the knowledge of the principal of the corrupt agent. A defence which removes the secrecy deprives the acceptance of the advantage of its corrupt nature. Thus if an agent informs his principal either before or immediately after accepting the advantage and obtains his

principal's consent to so doing or having so done, then that should be a defence. But it should not be a defence if it is not shown that the consent is a fully informed, considered consent. Although principal's consent may be appropriate in the private sector, it should be regarded as inappropriate for the public sector where a stricter attitude to payments to public officials should prevail. It can never be in the public interest for an official to receive an undue advantage for performing his public duties.

(ii) Local custom

50. Local custom, be it domestic or foreign, should not operate as a defence. To allow it to do so is to create a defence that is difficult to control. Issues arise of whether custom has itself become corrupted and what in its original form it might have allowed. If thought desirable, custom could operate to reduce the sentence to be imposed but it should not be allowed to be a complete defence.

(iii) Extortion

51. Frequently the offeror of a bribe will claim that he had no real choice but to offer the bribe. This may sometimes be linked to the "local custom" defence or sometimes it may simply be an attempt to portray the acceptor as the more venal party to the corrupt transaction. Extortion should have no role as a defence and it should be limited to being a mitigating feature for the purposes of sentencing.

(iv) Lack of power and intent

52. The acceptor of a bribe will frequently claim that he lacked the power to fulfil the offeror's expectations of him, that he never intended to do what he agreed to do, or that he did not in fact do what he agreed to do. These claims may justify a court assessing the culpability of the offender as less than it might otherwise have done, but should not be a defence. Likewise for the offeror. If the offeror mistakenly believes that the corrupt agent has the power to help him it should be no defence that in reality the agent has no such power.

(v) Defences for legal persons

53. Countries will need to decide whether they wish to allow any defence to a legal person or whether to make it strictly liable for the acts of its employees. Defences, when allowed, usually focus upon the measures taken by the legal person to prevent the offence from occurring. These "due diligence" defences require a certain level of preventive action by the legal person and care must be taken when drafting such defences to ensure that the level of action set is not so low as to easily enable the legal person to escape prosecution.

(E) Economic Crime Offences

(i) The link between corruption and economic crime

54. Experience has shown that it is not enough to create offences that target corrupt conduct. Corruption is often seen in the guise of a facilitator crime, easing the commission of other offences, most commonly fraud offences and organized crime offences.

Fraud offences are, of course, necessary in any society's criminal law but their significance to anti-corruption work is that they are frequently revealed in the course of a corruption investigation. Furthermore the disposition of the proceeds of corruption, and of any other crimes it has facilitated, inevitably involves money laundering. This link between corruption and other crime is recognised in the Preamble to the UNCAC where the States Parties express themselves as:

Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money laundering.

55. The other link to corruption flows from abuse of office by persons who through their position (whether in the public or private sector) have the means and opportunity to divert the assets of their employer. The UNCAC recognises this link to corruption by requiring in Article 17 that States Parties

establish as criminal offences the intentional embezzlement, misappropriation or other diversion by a public official, for the benefit of himself or another, of any public or private property entrusted to him by virtue of his position.

2. 56. In respect of the private sector the UNCAC recommends in Article 22 that States Parties establish as a criminal offence the intentional embezzlement in the course of economic, financial or commercial activities, by a person who directs or works, in any capacity, in a private sector entity, of any property entrusted to him by virtue of his position.

3. 57. It is important, therefore, that countries have offences which can effectively target fraud, moneylaundering and organized crime.

(ii) Economic crime offences

58. All countries will have, in some form or another, a range of economic crime offences but whether they remain effective given the huge changes that have taken place in recent years in the worlds of finance and commerce, is an issue that needs to be addressed. As with any criminal offence it is not enough that they be on the statute book. The offences must be effective in performing the task required of them. In the area of economic and organized crime that task may have altered over the years as the activities of those involved in these fields of criminal conduct have evolved to meet the needs of an ever changing world. Countries must examine carefully their existing laws and critically assess their effectiveness in achieving what is required of them. The major problem most likely to arise in respect of these offences is that they may not have kept up with current commercial and banking practices, the increasing use of technology in financial transactions and the more imaginative methods employed by those involved in the commission of economic crimes. If they are deficient then they should be amended or replaced, for having the right offences is a crucial part of law enforcement's armoury of weapons to combat those who seek to undermine a country's social order in the pursuit of profit through crime.

(iii) Organised and continuing criminal conduct

59. A large fraud may involve the commission of a great number of economic crime offences, e.g. forgery, false accounting, theft, obtaining money by deception, that are committed over a period of time. Rather than charging a large number of offences it is desirable to have a single offence which can be used against a course of conduct rather than being confined to targeting specific criminal acts. A single offence which embraces all the activities in which an individual or number of individuals have been engaged over a period of time

allows the prosecutor a simple and easy means of placing before the court the entirety of an accused's fraudulent conduct and enables the court to obtain a more complete picture of the criminality of the accused.

2. 60. Such an offence is important not just for the efficient prosecution of fraud, but also of organized crime. An organized crime offence is more difficult to draft than a fraud offence for it will need to encompass a broader range of criminal activity and is likely to continue over a longer period of time. An example of such an offence is that contained in the American Racketeering Influenced and Corrupt Organizations Act (RICO). This federal statute was enacted to combat organized crime groups and it makes it unlawful to conduct or to conspire to conduct an enterprise whose activities affect interstate commerce by committing or agreeing to commit a pattern of racketeering activity.

Summation

61. From this discussion of the major UNCAC offence provisions it is suggested that amongst the issues that governments should focus on when implementing their Convention obligations in respect of these offences are the following. Governments should:

□ (i) examine the local circumstances to assess whether more than one bribery offence is needed and how particular forms of corrupt conduct might need to be treated;

□ (ii) ensure that the law does not prevent a prosecution where the payment of the bribe is effected extraterritorially;

□ (iii) provide for the criminal liability of intermediaries and persons who assist the principal offender in his commission of the Convention crime by the doing of acts before or after the offence is committed;

□ (iv) draft the bribery offences as separate offences of offering soliciting and accepting that are complete upon the acts of offering, soliciting and accepting taking place;

□ (v) broadly define the elements of the bribery offences so that no loopholes are created as, for example, in the meaning to be given to the word that is used to describe the bribe;

□ (vi) draft the bribery offences by concentrating on the acts which constitute the offences and avoid requiring proof of a corrupt state of mind;

□ (vii) ensure that the bribery offences do not require that:

(a) the bribery transaction be concluded;

(b) the soliciting or accepting agent have the power to do what he promises to do or is asked to do;

(c) the soliciting or accepting agent have the intention to do the corrupt act that he has agreed to do.

□ (viii) allow proof of the corrupt purpose by means of inferences drawn from circumstantial evidence;

□ (ix) ensure that the offences allow for a relatively simple and easy to apply test for determining whether the act that the public official or private sector agent is being asked to perform is one that is in the exercise of his official duties;

□ (x) allow the corrupt act to be non-specific in nature, such as the agent simply remaining favourably disposed to the offeror of the undue advantage in the course of their official dealings with each other;

□ (xi) be alert to ensuring that defences allowed to persons charged with a bribery offence do not undermine the very purpose for which the bribery offence was created;

□ (xii) legislate offences which cover non-bribery forms of corrupt conduct;

□ (xiii) ensure that the country's fraud offences are modern and equal to the task required of them. Consideration should be given to legislating a continuing fraud and or organized crime offence.

(2) Investigating Convention Crimes

62. Armed with an effective range of offences the law enforcement agency must turn its attention to how to investigate them. Two major issues arise in respect of investigating corruption offences. They are, firstly the need for special powers of investigation and secondly the use of special techniques of investigation. Both of these issues will have a direct and significant impact upon the ultimate success of the investigation in providing admissible evidence that will allow the prosecutor to charge the corrupt and have them convicted of their crimes. I shall briefly discuss the key aspects of each of these issues.

(A) Special Powers of Investigation

(i) Introduction

63. There is little point in creating special offences and establishing a dedicated anti-corruption law enforcement agency to investigate them unless it is armed with appropriate legal weapons to enable it to operate successfully. Governments must therefore be willing to consider granting special powers of investigation to their anti-corruption bodies to ensure that they are able to perform their operational and corruption prevention roles effectively. It is in these two areas that the need for special powers will have to be considered, though it is largely in the area of investigating corruption that they will be used. In the area of investigation what makes a power special is that it usually will not be possessed by other law enforcement agencies and it will be a power which intrudes more into the human rights of the citizen. Every anti-corruption agency that performs law enforcement functions will need the standard powers of arrest, detention, interview, search and seizure. The question is whether these will be enough and, if not, what more will be needed. The answer to this question lies in an examination of the nature of the corrupt conduct in a particular society and an assessment of whether the powers of arrest, search and interview will be sufficient to effectively investigate it and whether the society is

willing to pay the price of granting more intrusive powers to this specialised law enforcement agency. What is provided must be no more and no less than is necessary. If the powers are excessive there is the risk of them being abused; if the powers are inadequate then the anti-corruption agency will be unable to be effective in its work.

(ii) Why special powers are necessary

1. 64. The reason why special powers are needed is explained by the unique features which characterise corruption crime. One such feature is that it will not involve a large number of people and those participating in it will be content with the unlawful agreement that they have reached. This is the satisfied party situation where there is no true victim eager to cooperate with the anti-corruption agency. The absence of an individual victim (as opposed to society as a whole which is the real victim of corruption) creates a veil of secrecy that protects the culprits and which has prompted corruption to be described as an invisible crime. This secrecy surrounding corruption makes it especially difficult to detect and to successfully investigate.

65. Another feature of corruption is the lack of evidence proving it has taken place. There is no crime scene, no injured victim anxious to cooperate, no DNA evidence linking the corrupt to their crime. There are difficulties in showing that an undue advantage has been paid, that it was paid as a bribe and the reason it was paid. This can be because the advantage may not have been money and because the person accepting it may not have been required to perform an act but rather not to perform an act. Bribery is not only secret, it is frequently subtle and it will often be difficult for the investigator to identify, let alone prove, the corruption that is occurring. Relationships between certain persons, such as a public official vested with certain power and a private businessman dependant upon the favourable exercise of that power, may give rise to suspicion but that of course is just the beginning. If then becomes the duty of the investigator to determine whether beneath the smoke of suspicion the flames of corruption are burning.

2. 66. So when special powers are said to be needed they are for the purpose of responding to and overcoming these features that make corruption crime so difficult to investigate. Special powers of investigation can be a means of penetrating the veil of secrecy and of obtaining evidence of the corruption crime by compelling the reluctant to talk, of obtaining access to confidential documents and forcing the production of records held by third parties.

3. 67. Tactically special powers of investigation can be very useful when the corruption investigation is still in its covert stage. During this stage the anti-corruption agency must collect as much information as possible so that when the investigation is turned overt it will be able to surprise the corrupt with its knowledge and create distrust and disharmony amongst them. Whereas formerly there was unity, now there is disunity as those who participated in the corruption are prompted to look to their own interests rather than protecting their corrupt associates. When fear of the consequences to themselves becomes their dominant consideration they are more likely to cooperate with the law enforcement agency and turn against those with whom they were previously united in their corrupt endeavours. It is the very old and very simple tactic of divide and conquer

by appealing to self-interest.
4. 68. Of course special powers do not guarantee a successful investigation and prosecution. Even when faced with the exercise of these powers against them the corrupt may destroy evidence, lie and intimidate witnesses. Ultimately all these powers can do is to reduce the advantage which the corrupt may otherwise have over the investigators because of the unique features that characterise corruption crime.

(iii) The powers
69. The powers that many countries have found necessary are powers to access income tax records and bank records and compel witnesses and even suspects to give statements or produce materials. The powers can be separately considered according to the person against whom they are to be used. As each power is considered two issues should be borne in mind. The first is whether such a power is necessary and the second is who, if the power is determined to be necessary, should authorize its use. In respect of the second issue the control of the power can be vested in a body independent of the anti-corruption agency, such as the judiciary, or the power can be made self-authorising by the investigating body.

(a) Powers against suspects
1. 70. These are the most controversial of powers as they are seen as infringing upon the suspect's right of silence and every person's right not to incriminate themselves. The powers will be needed to identify the suspect's wealth (assets, income, expenditure, liabilities, bank accounts and overseas remittances), including property held on his behalf by third parties. This can be achieved by compelling him to produce documents and to obtain from him his explanation in respect of all aspects of his wealth and how he came to be able to afford the acquisition of his assets. This information can extend to his relationship with other persons and any financial transactions he might have with them.
2. 71. The power is fact and information focussed and does not exist to enable the investigator to put to a suspect that a particular asset was a bribe from Mr X. This type of accusatory interrogation is done at the end of the investigation when the suspect can exercise his right of silence if he so chooses. The power to compel a suspect to disclose information is solely for the purpose of enabling the collation of data so that the investigation can be carried forward. Armed with this data the investigators can then determine whether:
3. 72. If the answers are both complete and truthful then the power will operate to short circuit the investigation and enable the investigators to quickly realize that their suspicions (or the complaint they are investigating) is baseless. However if the suspect is corrupt then his answers are likely to be both incomplete and partially (and perhaps, at times wholly) untruthful. Answers such as these may delay and even, for a while, frustrate the investigation, but if they are ultimately proven to have been deliberate lies then it provides the investigator with ammunition for a later accusatory interview and perhaps even of evidence in court.

(a) it is complete i.e. whether the suspect has revealed all that has been required of him or he has sought to conceal some information and mislead the investigator with incomplete answers; and
(b) it is truthful.

(b) Powers against witnesses

1. 73. The persons who are likely to have useful information for a corruption investigation are the relatives, friends and colleagues of a suspect. Bonds of blood, friendship and workplace loyalty will all operate to dissuade these people from cooperating with the investigators and from what they may perceive as betraying their relative, friend or colleague. Special powers can be used to break these bonds and enable the person to overcome any feelings of guilt or pangs of conscience by hiding behind the compulsion of the law. The powers that will be needed will be a power to produce documents, records, or any other property belonging to the suspect or concerning his activities and also a power to compel the provision of any information (by answering questions under oath) relevant to what is being produced and to the investigation generally.

2. 74. Although Hong Kong has found such a power to be useful, especially in the circumstances already described, it has only very limited effectiveness against those determined not to cooperate. For even if a wilful refusal to provide the information sought is made an offence, it is difficult to prove that a claim of memory lapse, incomplete recollection or denial of knowledge is not true. As with all the special powers, it can provide advantages to the investigator but should not be seen as a substitute for a professional, persistent and thorough investigation.

(c) Powers against holders of confidential records

1. 75. The main holders of confidential records are bodies in the private sector. Though governments hold much personal information on individuals, that which is most sensitive and most likely to be relevant to a corruption investigation is the information held by the tax collecting authority. In the private sector the organisations most likely to hold information relevant to a corruption investigator are banks, organisations providing financial services and stock brokers. Where bribes are in the form of monies they will invariably pass through the hands of one of these bodies. This may be for the purpose of laundering the monies by transforming them into a legitimate asset or concealing their ownership by placing them under the control of a trusted third party.

2. 76. These kinds of confidential records are crucial to a corruption investigation. Access to them must always be available, at the very least by some form of judicially issued search warrant. The issue is not whether they should be available, for they have to be available. The issue is whether because they are so fundamental to a corruption investigation requiring access to them on almost a daily basis, the head of the anti-corruption agency should have the power to authorize his officers to access these kinds of records. Self-authorization has the benefits of allowing speedy deployment of the power and limiting the number of persons aware of the exercise of the power. This latter benefit is particularly important because the power is most likely to be used in the covert stage of

the investigation. If a power is to be used in the covert stage of an investigation then there will also need to be offences created to protect the secrecy of its use. Such offences operate as dissuasive measures against the employees of these companies and businesses who might otherwise be tempted to forewarn their clients that they are under investigation.

Bank secrecy laws

77. Access to bank records is needed in every corruption investigation and it will usually be sought in the covert stage of the investigation. Bank secrecy has long been the nemesis of the investigator of corruption and fraud offences. Again and again the investigator finds that his pursuit of the money trail comes to a dead end as it hits the wall of bank secrecy. Total secrecy is no longer acceptable and privacy rights are no longer absolute. Like any individual right they must sometimes give way to a greater countervailing public interest. In Article 40 of the UNCAC each State Party is required to ensure that in the case of domestic criminal investigations of Convention crimes:

... there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

Taxation records

78. The ability to access taxation records is crucial to a corruption investigation. Amongst other things they will show whether payments of bribes have been revealed in a disguised way by either the offeror or acceptor and whether property held on trust for a suspect by a third party has been revealed by the third party as his own. If the corruption is within the taxation system itself then the records of the taxpayer who has tried to minimize his tax liability by bribery are indispensable to the investigation. The power to access tax records must, therefore, be made available.

(B) Special Investigative Techniques

79. The difficulties inherent in investigating and proving a secret crime necessitate the use of imaginative and less traditional methods of investigation.

Some mention is made in the UNCAC of the tools for investigating corruption. In Article 50 there is reference to what are called "special investigative techniques" and States Parties are encouraged to take such measures to allow for the use of these techniques. They are:

- (i) controlled deliveries;
- (ii) electronic and other surveillance;
- (iii) undercover operations.

(i) Controlled deliveries

1. 80. Controlled deliveries can take many forms. In non-corruption offences the controlled delivery will usually be of an illicit commodity such as drugs or firearms, frequently through legitimate postal or courier services. In some cases the commodity

will be greater in volume and the means of transmission may be illegal, as when large quantities of goods are smuggled across borders. The commodities involved could even be humans who are being illegally trafficked. These types of deliveries may also occur in corruption cases where corruption is employed to facilitate another crime. The investigation of that other crime inevitably becomes part of the investigation of the corruption crime.

□ 81. But in corruption cases the payment of the bribe monies can be viewed as a type of controlled delivery. Where the anti-corruption agency receives information that the payment of a bribe is to take place at a certain time and place then it can lay an ambush and arrest the parties at an appropriate time after the payment has been made. Knowledge that such a meeting will take place can come from many sources, from telephone interception to a paid informant or it may even come from the offeror of the bribe where he is the passive receiver of a corrupt solicitation for a bribe and immediately upon this solicitation being made he reports its making to the anti-corruption agency. The agency will then try and arrange a meeting between the complainant and the person soliciting the bribe so it can monitor the bribe payment and launch an ambush operation after the monies have changed hands. These types of operations may involve the following investigative tactics:

□ (iii) the use of marked money to be retrieved from the suspect after the payment has taken place;

□ (iv) the installation of listening devices in vehicles or premises where the money is to change hands; and

□ (v) the use of physical and video surveillance to monitor the scene.

2. 82. Where you do not have a cooperating complainant and the source of information is intelligence then the investigator will be forced to rely very heavily on physical and electronic surveillance in order for the controlled delivery to have a successful outcome. A successful outcome is one which results in evidence becoming available that will be admissible in a court to prove the crimes committed by the suspects.

3. 83. In the UNCAC a controlled delivery is, not surprisingly, limited to its transnational form being defined to mean:

(i) the covert recording of phone conversations between the complainant (with his cooperation and consent) and the person soliciting the bribe;

(ii) the use of recording or transmitting devices attached to the body of the complainant when he meets with the corruption suspect;

the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

Though there will be occasions when the controlled delivery crosses international borders, the bulk of an anti-corruption agency's investigations are likely to be domestic

in character and any controlled deliveries likely to be in the form of ambush payments within the country's territorial borders.

(ii) Electronic surveillance

84. Intrusive electronic surveillance is essentially composed of two elements:

- (i) the covert use of surveillance devices such as tracking devices, video devices and listening devices (LD); and
- (ii) the interception of telecommunications (TI).

Both LD and TI are designed to capture the conversation of suspects and that is why they are regarded as highly intrusive forms of electronic surveillance. Under human rights law the use of such devices is considered an invasion of the right of privacy. Devices that do not capture the conversation of suspects, such as a video recording made some distance from those being recorded, is another form of electronic surveillance but is not intrusive in that it does little more, in evidential terms, than to produce an independent record in support of human observation. Tracking devices which do no more than monitor the movements of a vehicle may also be regarded as a less intrusive form of surveillance.

85. As in any jurisdiction the use of intrusive investigative techniques is a delicate policy issue, and opinions are divided, even among law enforcement agencies, on how extensively they should be deployed and what should happen with the product they generate. In the investigation of certain secret offences, such as organised crime and corruption, electronic surveillance is an investigative technique that can provide evidence where none might otherwise be available and can greatly reduce dependence on the evidence of accomplice witnesses. Electronic surveillance, properly controlled and monitored by an independent body, such as the judiciary, can be a powerful weapon for both law enforcement agencies and prosecutors. Nowadays legislation is regarded as essential to regulate these two techniques as both impact upon the human rights of others – both of potential suspects and innocent third parties caught up in the investigation.

(a) Surveillance devices

86. Generally there are four typical means by which law enforcement will seek to capture the private conversations of suspects, sometimes supplemented by a video record of the event. They are:

(i) (a) the covert installation of a LD in private premises (home and office) used by the suspect and in any other private location regularly used by him, such as a car or a boat. It may even extend to a place he regularly frequents, such as a restaurant, if he is a creature of habit;

(b) the use of devices externally that are able to capture conversations taking place inside the premises;

(ii) the use of recording devices by surveillance officers who may place themselves in close proximity to the suspects and seek to capture their conversation by sensitive, targeted devices;

(iii) the use of recording devices by an undercover officer who is wearing the device or a transmitter which relays the captured audio to a remote recording facility; and
(iv) the use of a cooperating accomplice to make a recorded telephone call to the suspect for the purpose of engaging him in conversation in which he will reveal his complicity in the criminal activity. This is sometimes referred to as participatory audio surveillance or participatory monitoring.

Whichever method is used to capture the suspect's conversation legislation may be needed to make the product of it admissible in evidence. This will ultimately depend on the laws of a particular country.

87. Other electronic surveillance devices that can be deployed are video devices that record image only or image and audio, tracking devices and data surveillance devices that capture the input of information into computers. Tracking devices can be installed either internally or externally to the vehicle and legislation will also usually be needed to authorize these forms of electronic surveillance.
(b) Telephone interception
□ 88. The two key issues with telephone interception are:
□ (i) should the right to use it be controlled by the executive or by the courts; and
□ (ii) should the product of interception be used for criminal intelligence purposes only or should it be used as evidence in court.
□ 89. Its value in corruption cases is enormous. As an intelligence tool it enables the investigation to be carried forward, but unless the product can be used in evidence then the anti-corruption agency is faced with the dilemma of how to acquire admissible evidence when its intelligence-led investigation is turned overt. The answer to this question inevitably tends to be:
□ (i) persuade the suspects to confess their crimes; and
□ (ii) turn one of the suspects so that the prosecution case can be proven through the mouth of one of the accomplices.

The reason why it is inevitable that there is such a heavy dependence on these two forms of evidence is simply because corruption is such a secret crime. What telephone intercept product can do is to overcome the dependency on these forms of evidence and allow the prosecution of all those involved in the corruption. If a country wishes to have a TI regime which allows evidential use of product then it would be desirable to have judicial control over law enforcement access to it.

(iii) Undercover operations

90. Undercover operations usually take place as part of a proactive approach to investigating crime, though they can of course be part of a reactive

response to a complaint based investigation. A true proactive investigation involves a much greater use of informants and of the intelligence they are able to generate by a law enforcement agency so that it can mount, on its own initiative, undercover operations.

One of the great problems with corruption investigations is obtaining admissible evidence against all the participants, especially the person who is the true offeror of the bribe. The more serious the corruption the more likely it will be that the beneficiary of the corrupt conduct will distance himself from the bribery by effecting payment of the bribe through intermediaries. But an undercover operation which can successfully penetrate the criminal group will be able to obtain evidence against more senior members of that group, and sometimes even against its head. However undercover operations are expensive, resource intensive and stressful on those taking part. Though they cannot always be deployed they should be regarded as an essential component of the anti-corruption agency's investigative strategy.

2. 91. Any kind of surveillance will impact, to a greater or lesser degree, on the privacy of an individual. If a country's laws protect the privacy of its citizens then it may be necessary to enact legislation that regulates non-electronic covert surveillance. Laws may also be needed to allow the fabrication and use of official documents in order to create false identities, and to allow for law enforcement officers and their civilian informants to participate in criminal activities without being at risk of prosecution. Australia has, at both the Commonwealth and State level, legislation conferring and regulating the right of a law enforcement agency to embark upon controlled operations and its powers in the course of so doing. The United Kingdom also has legislation which regulates the use of what it calls covert human intelligence sources in order to be compliant with the European Convention on Human Rights.

(3) Prosecuting Convention Crimes

92. Proving corruption focuses on the role of the prosecutor. In examining the difficulties he faces in convicting the corrupt I wish to discuss three aspects of his work. They are:

- (i) his involvement in the investigation prior to charge;
- (ii) issues he has to confront concerning witnesses; and
- (iii) procedural and evidential matters relating to the trial process.

I shall deal with each of these in turn.

(A) Involvement in the investigation prior to charge

1. 93. The extent which the prosecutor will be involved in the investigation of criminal conduct and the gathering of evidence will vary from country to country depending upon the nature of each country's criminal justice system.

2. 94. In my jurisdiction of Hong Kong we have the British model which creates a demarcation between investigation and prosecution. The law enforcement agencies have operational independence and as a consequence there is little scope for involvement of prosecutors in the investigative process. This is not necessarily a good thing as many fraud and corruption cases benefit from legal guidance through the course of their investigation. Indeed it is not at all unusual nowadays for law enforcement agencies to employ lawyers to advise them on operational matters or for specialist bodies, such as the Serious Fraud Office, or more recently the Serious and Organized Crime Agency, to have lawyers

represented in the investigation teams.

3. 95. However even within the limited role I have in Hong Kong there are still two areas of the investigative process where a prosecutor does become involved and they are areas that are particularly important in a corruption investigation.

□ 96. They are:

□ (i) approving undercover operations in which the participant (civilian informants of the law enforcement agency or its own undercover officers) are likely to commit offences; and

□ (ii) approving the taking of non-prejudicial statements from persons suspected to have participated in the corrupt conduct.

(i) Undercover operations

97. In Hong Kong prosecutors don't become involved in all undercover operations but only those where the participants are likely to themselves commit offences in the course of their undercover work. In this situation the prosecutor has to decide whether it is appropriate to give an undertaking not to prosecute for those anticipated offences. Without such an undertaking the undercover operation cannot take place. The prosecutor will take into account a number of factors in making this decision, such as the seriousness of the conduct being investigated, the type of offences likely to be committed by the undercover officers/agents, the likelihood that admissible evidence of substantial probative value will be obtained from the undercover operation and the availability of other more traditional methods of detection to effectively investigate the conduct.

2. 98. In the area of corruption crime I have found pro-active investigations to be particularly helpful. But they can come with a price and where that price involves the commission of other offences, a careful balancing act has to be performed in order to properly identify where the public interest lies.

(ii) Non-prejudicial statements

99. A non-prejudicial statement (NPS) is only taken from a person suspected to be involved in criminal conduct. It contains a preamble designed to reassure the person making the statement that its contents cannot be used in evidence against him. The preamble is as follows:

The statement to be provided hereunder will be a full and truthful account of all matters within my knowledge relating to the investigation. I understand that the making of this statement does not necessarily mean that I will be granted an immunity from prosecution but that if any criminal conduct on my part is revealed in this statement, the statement will not be used in evidence against me in any subsequent proceedings unless it is later found to be intentionally false or misleading.

100. The taking of a NPS is an exceptional course of action and circumstances must exist which justify taking this exceptional course. Normally those circumstances will be:

☐ (i) the ICAC is investigating conduct of a serious level of criminality;
☐ (ii) the investigation of that serious conduct is stalled and cannot be carried forward by normal investigative techniques; and
☐ (iii) there are reasonable grounds for believing that a person or persons, who are not the primary targets of the investigation, possess information which would enable the investigation to overcome the impasse it is presently facing and that these person or persons might be agreeable to providing a NPS.

101. All of these conditions must normally be present in order to justify the taking of a NPS. It will rarely be possible to satisfy the last two conditions unless the operation has progressed beyond the preliminary stage. The circumstances have to be right for its use. Generally it would be inappropriate to take a NPS from a public official in a corruption investigation unless it was very clear that that officer was not the primary target of the investigation.

102. Though a NPS can be enormously useful to the investigator it can lead to problems for the prosecutor. This is because the taking of a NPS inevitably creates two impressions in the mind of the statement maker:

(i) that he is now in the category of a cooperating witness and so can talk freely of anything without being at risk of further investigation or prosecution;
(ii) that he will not be investigated or prosecuted for any conduct other than that which is the subject of the ICAC investigation in which he is currently involved.

103. What impact these impressions might have upon a future prosecution can never be known for sure but that they may become a problem is almost inevitable. It is therefore desirable that a NPS not be taken from persons whose status remains unclear. The taking of a NPS requires a balancing of immediate operational benefit against any possible disadvantages flowing on to future prosecutions or other investigations of the person from whom the NPS is to be taken.

104. In the course of discussing with a suspect the possibility of giving a NPS great care must be taken to ensure that the prospective statement maker does not become misled or confused as to his legal position. The suspect must not be promised an immunity from prosecution and must not be given any undertaking that he will not be prosecuted for a part or the whole of his criminal conduct. It must be made very clear to the suspect that the provision by him of an NPS is in no way to be taken by him as an indication that he might ultimately be offered an immunity from prosecution, and that notwithstanding the fact that he might cooperate with the ICAC, he is still at risk of prosecution for his involvement in this conduct.

(B) Issues Concerning Witnesses

105. Having persuaded a person to be a prosecution witness in a corruption trial a number of issues will arise. These will include putting in place measures to conceal his identity or protect his safety and, if he has participated in the corrupt transaction, offering him immunity from prosecution.

(i) Concealing a witness' identity

106. A trial courtroom is a public forum and in some cases it may be desirable to conceal a witness' identity. For law enforcement officers this may be to enable them to continue performing surveillance duties or to participate in future undercover operations. For a civilian it may be necessary to conceal his identity for personal protection and, in respect of informants, to enable him to continue assisting the authorities in the future.

107. When anonymity is necessary the witness can give evidence in court behind a screen or out of court by video link with his image altered and voice distorted. The level of anonymity provided can be varied according to the circumstances of each case. Usually the judge, jury, counsel and defendant will see the witness and the judge will know his true identity. However sometimes a higher degree of anonymity may be necessary.

108. The need for these measures is recognised by the UNCAC, in Article 32(2)(b), which recommends as one of the measures for the protection of witnesses:

Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to given through the use of communications technology such as video or other adequate means.

109. Of course the use of any form of anonymity preserving device impacts upon the fairness of the trial and conflicts with the concept of open and public justice. Courts will therefore need a clear and strong justification before allowing a witness to give evidence under these circumstances. Ultimately a balance has to be struck between competing public interests; the public interest of open and public justice and the public interest in ensuring that those guilty of crimes do not avoid justice because witnesses are too frightened to testify.

(ii) Concealing a person's informant status

110. Persons upon whose complaint the investigation against the defendant was initiated may want their informant status concealed. Whether this request can be accommodated will depend upon whether such persons are to be called as witnesses and, if so, the importance of their testimony and the relevance of the fact that they were the informant. If they revealed their identity and cooperated with the LEA on the condition that they would not be required to testify at any subsequent trial then it may be easier to justify concealing their existence and their identity. Much will depend on whether they

possess knowledge of matters relevant to the trial and likely to be of assistance to the defendant and the domestic law of the country on the disclosure of informant information. If they are to be called as a witness then it may be harder to justify concealing their informant status for such a status will be relevant to their credibility and defence lawyers may wish to suggest that the fact they informed on the defendant shows that they harbour a malicious hostility towards him. These questions will have to be addressed in the context of the law of the country relating to the prosecutor's disclosure obligation (especially in respect of informants), and a defendant's right to a fair trial. If a country does not have laws regulating this important issue then such laws may need to be enacted.

(iii) Use of accomplice witnesses

111. The prosecutor who has little in the way of untainted independent evidence is called upon to decide whether to prosecute a person whom he is convinced is guilty but against whom the only available evidence is that of an accomplice who is demanding a full immunity from prosecution in order to ensure that he testifies for the state. Does the prosecutor put aside his qualms and make a deal with the corrupt in order to charge one or some of the culprits?

112. It has been the experience in Hong Kong that in no other area of prosecution work are so many immunities granted and is there such heavy reliance on accomplice testimony. The success of many of Hong Kong's corruption prosecutions often relies on 'turning' one of the participants in the corrupt transaction. Of course if it can be avoided then so much the better but if there is no other means of proving a case and if the prosecutor is persuaded that he can put the accomplice forward as a witness worthy of belief then the deal is made. Reluctantly and with a great sense of frustration the prosecutor lets one fish go in order to catch another.

113. The danger for the prosecutor lies in assessing which of the accomplices is the big catch and which is the small fry. If he errs in this assessment then he looks foolish and brings the criminal justice system into disrepute. The prosecutor has to be very careful in identifying those persons to whom it would be proper to offer immunities and those to whom it would not. As long as prosecutors remain conscious of the dangers associated with this type of adventurous prosecution and vigilant to any abuse in the granting of immunities then accomplice evidence can be a very important tool in bringing the corrupt to justice.

114. The UNCAC, in Article 37, recognizes the importance of gaining the cooperation of those who have participated in a Convention crime. Thus it encourages States Parties to adopt measures which will prompt this cooperation. Such measures can include allowing cooperation to mitigate any penalty that might be imposed on that person for his conduct (Article 37(2)) and granting him immunity from prosecution (Article 37(3)).

(iv) Witness protection

115. Witness protection can be informal in the sense of very temporary assistance provided for a short period of time or a more formal process involving induction into a witness protection programme. The latter type of protection is expensive to maintain as it may involve providing accommodation, living expenses and 24-hour physical security to a witness. Fortunately such a complete level of security is not often needed and even when provided may be gradually downgraded over time.

116. Article 32 of the UNCAC requires States Parties to provide protection from potential retaliation or intimidation for witnesses and those close to them who give evidence in trials of Convention Crimes. The Article emphasizes that the measures envisaged are not to prejudice the right of the defendant to a fair trial.

(v) Video evidence

117. Provision for video evidence is desirable as corruption nowadays is very much a transnational crime and so not infrequently some of the prosecution witnesses will reside overseas. Witnesses in any kind of criminal case will often be reluctant to testify but even more so in corruption cases. Corrupt conduct is something with which people don't want to be associated and even if they are innocent of any wrongdoing may not want to endure the publicity of giving evidence in an open court. The option of video evidence may be enough to persuade overseas witnesses, whose testimony cannot be compelled, to overcome their anxieties and to cooperate. Here video evidence is not being used to ensure anonymity but simply to allow the witness to give his evidence remotely rather that in the court of trial.

Summation

118. It is hard enough to persuade people to assist a corruption investigation; it can be even harder to persuade them to give evidence in a public court with the defendant staring at them and the media reporting their every word. Yet prosecutions cannot be instituted and the corrupt convicted without the testimony of witnesses. Measures are therefore needed which will not only lessen the hardship and emotional trauma of giving evidence but also reduce the risk of personal harm in doing so. The problem that such measures cause is that they may impact upon the fairness of a defendant's trial. If that happens it becomes necessary to balance the interests of the witness and the interests of society in procuring his testimony against the interests of the defendant in securing a fair trial.

(C) Procedural and Evidential Matters Relating to the Trial Process

119. Legal provisions which assist the investigator to uncover, access and obtain evidence contribute enormously to the success of the law enforcement agency in discovering what took place in the corrupt dealings between the suspects. But being in a position to know what happened is quite different from being able to prove what happened. Information and intelligence has to be transformed into admissible evidence. Provisions which help

the prosecutor to place this evidence before a court without diluting the fairness of the defendant's trial may be necessary. The following are some examples:

□ (i) complicated rules of evidence in relation to accomplices should be eliminated. Persons who have not initiated the corruption should not be regarded as accomplices. It should be left entirely to the trial judge to determine the weight to be given to any witnesses' evidence and he should be allowed to do this unrestricted by any technical legal rules of evidence;

□ (ii) courts should be allowed to use evidence of unexplained prima facie excessive wealth, as a primary fact for the purpose of drawing an inference that a particular benefit given to a defendant was accepted by him as an undue advantage4;

□ (iii) there should be simple methods of proving non-contentious issues, such as a defendant's employment in the civil service and his income from that employment. This simple method could be, for example, by a certificate signed by an appropriate official;

□ (iv) in respect of banking records, whether from inside or outside the jurisdiction, the law should allow for their production by affidavit. Banking records should be non-contentious and there should be no need for a representative of the bank to be called simply for the purpose of producing them;

□ (v) in proving any corruption or fraud charge it is almost inevitable that the prosecutor will have to adduce documentary records of businesses or organisations that have been either manually created or computer generated. It is important therefore that there exists modern evidence legislation which enables, by simple means, the production of documentary records as proof of their contents;

Such a provision would reflect the spirit of Article 28 of the UNCAC which provides that: Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

(vi) there should be provisions allowing simplified proof of computer generated records whether these records are produced by a bank or any private or public sector entity. This should include proof of data found on a suspect's computer and emails and data preserved by internet service providers;

(vii) the law should allow for expert accountants or bankers to report on their analysis of banking and financial records and to assist courts in understanding their evidence by reference to charts, schedules, graphs and other presentational aids. It is important that the court not be confused by complicated financial transactions and voluminous records;

(viii) the law should allow for the use of depositions of witnesses who have died before trial or whose attendance at trial, for one reason or another cannot be obtained.

120. Corruption trials encounter problems in two main areas, witnesses and records. When there is a lack of witnesses it may be necessary to rely on inference and many of the primary facts from which a court will be drawing its inferences will be facts contained in documents and official records. Proving these records and properly understanding their probative value is crucial to the success of a corruption prosecution. The law must ensure that the corrupt cannot gain protection from overly technical and outdated laws governing criminal procedure and evidence.

Conclusion

121. The UNCAC exists to provide a means for countries to break the cycle of corruption and to embark on the process, gradual and lengthy though it might be, of eradicating corruption from their societies. It provides them with a starting point, a foundation on which to build. But it is only a beginning and much persistence, courage and determination will be needed to ensure that the process does not falter and stall.

122. Of course signing the Convention is not, on its own, enough. That is just a gesture. What is required is that a government put in place laws that will implement the measures required or recommended by the UNCAC. This will provide it with the legal infrastructure that will enable it to effectively tackle corruption. This legal infrastructure provides a government with a roadmap for the way forward. It guides government in the direction it must take when embarking on its journey towards a corruption free society.

123. But ultimately it matters not how comprehensive a network of laws a country puts in place, there has to be the political will to confront corruption, to understand its causes, and to take vigorous measures to overcome it. Without this kind of determination at the highest levels of government the law enforcers and prosecutors will be left rudderless, not knowing in which direction to steer their efforts and how much support they will receive in their endeavours. Morale will be undermined and instead of doing what is right, those involved in implementing the government's anti-corruption strategy will spend their time trying to assess what is acceptable. If corruption is to be aggressively pursued governments must ensure that those they appoint to perform this task are not left isolated and unsupported. They must not allow the anti-corruption battle to itself become politicised. Rather they must show that even if one of their own is under suspicion, whether he be a senior bureaucrat or an influential politician, he is not above the law and that they will support the law taking its normal course. When this happens those involved in investigating and prosecuting corruption can get on with job without being distracted by fears of the consequences that might flow to them or their agency because of the person they are investigating.

Ian McWalters
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ANNEX 19

LESOTHO HIGHLANDS WATER : A CASE STUDY
by Guido Penzhorn SC

PAPER PRESENTED BEFORE THE COMMONWEALTH SECRETARIAT AND CHATHAM HOUSE ANTI-CORRUPTION CONFERENCE

24 – 25 April 2006

1. In this paper I will briefly set out the work done in combating bribery in Lesotho involving multi-national construction companies and consultants. I will then express a few thoughts and make some, hopefully helpful, suggestions from my experience in leading these prosecutions.

2. The Lesotho Highlands Water Project is the result of a treaty between South Africa and Lesotho dating back to 1986 in terms of which water is dammed in the mountains in Lesotho for the purposes of supplying water to the Gauteng province of South Africa as well as hydro-power to Lesotho. Phases 1A and 1B have largely been completed and negotiations are underway in respect of phase 2. This is a multi-billion dollar project and in fact one of the biggest dam projects in the world. An audit by Ernst & Young in the early 1990's uncovered certain irregularities which in turn led to the dismissal of the Chief Executive of the project authority, Mr Masupha Sole. This was followed by civil litigation against him in the course of which it was discovered that he had bank accounts in Switzerland. An application to the Swiss authorities followed from which it was discovered that he was receiving large sums of money, mostly through intermediaries, from contractors and consultants involved in the water project.

3. Having been involved on behalf of the project authority in the civil litigation against Mr Sole, I was briefed in the first half of 1999 to lead the prosecution of Mr Sole and the contractors / consultants and intermediaries involved in these payments. This was after I had advised the Lesotho Attorney-General on the prospects of successfully prosecuting those involved.

4. Mr Sole was the first to be charged. He was convicted and on appeal[1] sentenced to 15 years imprisonment. Acres International, a firm of consulting engineers from Canada, followed and also on appeal[2] was fined R15 million (the exchange rate between the US dollar and the RSA rand is currently about 6.1 to 1). Lahmeyer International, the engineering consultancy from Germany, was then prosecuted, convicted and sentenced to a fine of R10.6 million. It appealed against the convictions and on appeal the fine was increased to R12 million. Judgement on appeal was delivered in April 2004[3]. In June

1 M E Sole v The Crown, Lesotho Court of Appeal, case number C of A (CRI) 5 of 2002, judgement delivered on 14 April 2003. Smalberger JA, Melunsky JA (both former judges of the South African Supreme Court of Appeal) and

Gauntlett JA (Senior Counsel in South Africa and former Chairman of the South African Bar Council).

2 Acres International Limited v The Crown, Lesotho Court of Appeal, case number C of A (CRI) 8 of 2002 delivered on 15 August 2003. Steyn President of the Court, Ramodibedi JA and Plewman JA (a former judge of the South African Supreme Court of Appeal).

3 Lahmeyer International GmbH v The Crown, Lesotho Court of Appeal, case number C of A (CRI) 6 of 2002, delivered on 7 April 2004. Steyn, President of the Court, and Grosskopf JA and Smalberger JA (both former judges of the South African Supreme Court of Appeal).

(All three judgments referred to are electronically available.)

2003 one Du Plooy, the intermediary who acted on behalf of Impregilo of Italy, the lead partner of the consortium that built the main dam in the project, pleaded guilty to bribing Mr Sole on behalf of Impregilo. In exchange for cooperation with the prosecution he was fined R500 000, coupled to a lengthy period of imprisonment which was conditionally suspended. In February 2004 Schneider Electric SA (formerly Spie Batignolles), the multi-national French construction company involved in building the transfer tunnels, pleaded guilty to 16 counts of bribing Mr Sole. A fine of R10 million was agreed with the prosecution and was paid. We are currently prosecuting Impregilo and the trial is due to commence in September this year. We have also recently instituted a prosecution against the previous chief delegate of Lesotho on the Highlands Water Commission, a Mr Mochebelele, as well as his deputy. This Commission, on which both the Lesotho and South Africa have three delegates, oversees the water project and Mr Mochebelele's position in the overall picture of the water project was at the same level as that of Mr Sole. This prosecution has inter alia been the result of Lahmeyer International, the alleged briber, assisting the prosecution, to which I will make further reference below.

5. We initially charged everyone together, that is the contractors and consultants involved, one of the intermediaries, and Mr Sole. The overseas consultants and contractors not being impecunious, this had the result of a battery of lawyers from South Africa, including some high profile ones, descending on the small town of Maseru, armed with what appeared to be every legal point in the book. The lawyers had clearly decided among themselves who would take which legal point and when, which is what then happened. The preliminary issues argued included territorial jurisdiction, the definition and ambit of common law bribery, the manner of bringing a corporate body before court, the criminal liability of a corporate body as separate from its officers, the doctrine of common purpose, and so on. The presiding judge was Mr Justice Cullinan, a former chief justice of Lesotho, now retired in South Africa, who was brought back to hear this joint trial. He dealt with all these preliminary issues and to the extent that they were challenged in subsequent appeals before the Lesotho Court of Appeal they were all confirmed. One of the rulings made by Judge Cullinan was that the different accused be tried separately. He then presided over the first trial, that of Mr Sole.

6. The rulings and judgements in the various cases run to several thousand pages. In this paper I do not propose giving a synopsis of the legal learning which flows from these. The intention rather is to share with this conference what I have learnt in rather more practical terms about the problems around prosecuting international corruption and what can be done to overcome them. In this regard I am obviously looking at it from the vantage point of the demand side, that is the country hosting the project which the subject matter of the corruption and whose officials are then the ones who are corrupted.

7. The first potential obstacle is the prosecuting authority itself. The resolve necessary to prosecute corruption presupposes non corrupt officials who take the decision to prosecute or not. The one way to ensure that you are not prosecuted in the country in which you propose doing business is to compromise the prosecuting authority itself. This may

explain why in so many countries, also in Africa, nothing seems to be done about what from the outside appears to be obvious corruption. In Lesotho we had a taste of this. It was only after an obstructive Director of Public Prosecutions was removed that these prosecutions could actually get under way. Thereafter we were fortunate to have an Attorney-General who gave us his full backing and also an open mandate to do what we considered had to be done.

8. Of equal importance in a country such as Lesotho (or for that matter South Africa) is the necessary political will. In the first world the debate around the positive versus the negative effects of bribery has largely been resolved and it is accepted that the negative effects greatly outweigh any positive spin-offs such as "greasing of the wheels". In the Southern African context things are not that clear cut. Here bribery, being a crime without an obvious victim, is often perceived as colourless and the bribe recipient as not necessarily a villain. Why then spend all this time and money on prosecuting these cases when there is not only a large backlog of ordinary criminal cases to be dealt with, but also where the money spent on expensive foreign lawyers and accountants could instead be spent on fighting Aids or building schools? This was the type of resistance that these prosecutions were initially met with in Lesotho and it came from influential persons, both in parliament and in public life.

9. These attempts to discourage or undermine these prosecutions also go to illustrate the very nature of the crime of bribery in the sense that one does not know where it starts and where it ends. It may well be that such criticism stems from persons who genuinely believe for instance that these prosecutions are cost wise not warranted and that the money could be better spent elsewhere. On the other hand, the motivation for such criticism may lie quite simply in the need to keep a lid on things. One simply does not know.

10. An example in South Africa of the necessary political will is the current prosecution for corruption of the former deputy president, Jacob Zuma. (In this case I have been retained by the South African government as outside counsel to advise the prosecutors.) It took a lot of political courage to get this prosecution off the ground. Even now there are concerted efforts to discredit the Scorpions, the investigating and prosecuting arm of the National Prosecuting Authority tasked to deal with this case.

11. Particularly when dealing with foreign accused, i.e. international contractors, you also need a court that is respected even beyond its own borders. Even before verdict some of the foreign companies we charged sought to question both the competence and impartiality of the Lesotho courts, clearly in an attempt to discredit in advance any adverse finding. Fortunately Lesotho is blessed with a Court of Appeal of international standing, manned as it is by senior judges drawn for instance from the ranks of former members of the South African Supreme Court of Appeal. Once this court’s judgments were placed before the World Bank this had the effect of dispelling any suggestion that the convictions, which were now the subject matter of debarment proceedings, were the result, as one enterprising first world lawyer put it, of jungle justice. Here I would venture

to suggest that a reading of these judgements will show that they are comparable to judgements emanating from the highest courts of any first world country.

12. In most of these cases payments to the bribee were made through an intermediary. This was then also the basis of the defence in these cases, namely that this intermediary was a legitimate agent and the monies paid to him were for actual services rendered by him in connection with his work on behalf of the contractor / consultant in Lesotho. This would then allow the contractor to claim that it did not know about the bribes paid by the agent.

13. Clearly, however, if the agent is given carte blanche to secure the contract and on the basis of a contingency fee, this amounts to an invitation to commit bribery. In this context the presiding judge in the Sole case had the following to say, which it is hoped will preclude contractors / consultants from claiming in the future that they did not know or could not have foreseen what their agent was up to (at pp 203 – 204 of the judgement):

"If the consultant is bribing a public official, then he is doing so for a purpose: either he is securing confidential information leading to an award of a contract, or he is securing such award outright. Surely, in that case, the results produced by the consultant speak for themselves? How can the principal be unaware of the consultant's activities, particularly where they are extended over a period?

It will be seen that under the consultancy agreement between HWV and Mr du Plooy, the latter undertook to supply not alone the necessary information, but also undertook in effect to secure the award of the contract that is, to the extent that his fee would only become payable with the award of the contract. How can a consultant give such an undertaking bona fide? Surely the consideration which he offers and which he executes is the services which he renders and not the results thereof. In some jurisdiction legal practitioners have been known to offer their services on a result basis; while the system does not gain general approval, it cannot be said to be mala fide: there the confidence of the practitioner is based upon the strength of his client's case. The construction industry gives rise to different considerations, however. Where many tenderers are involved, vying with one another for the award of a contract at an undisclosed sum, there is little basis for confidence, and any agreed undertaking by a consultant to secure the award, is then surely suggestive of bribery on the part of both consultant and principal: indeed it suggests that the consultant has already prepared the ground for such undertaking."

I will return to the use of agents in a somewhat different context below.

14. Prosecutions such as these and particularly for a small country like Lesotho are not feasible without international assistance. To give a few examples.

14.1 These prosecutions are largely based on bank records received from the Swiss authorities in terms of the Swiss mutual assistance legislation. The Lesotho government's

approach to the Swiss authorities eventually became a complex and multi-layered application involving a number of accounts in different cantons and the prompt response by the Swiss authorities kept the momentum going in circumstances where these prosecutions were receiving a lot of criticism in Lesotho.

14.2 Indispensable assistance was also received from OLAF, the EU anti-corruption agency. Several of the companies involved changed their corporate structures at about the time when these bribes were discovered, making it very difficult to link the bribes to a particular corporate entity. One such company was Spie Batignolles of France. Investigations in France by OLAF showed however that its merger with Schneider Electric SA had the effect that Spie Batignolles remained extant despite the merger. This in the end caused Spie Batignolles to plead guilty and agree to pay the fine to which I have referred. Similar and equally important assistance was received from OLAF in the current prosecution of the Italian company Impregilo.

14.3 Also the World Bank played a considerable part. As a major sponsor of the water project it showed an interest from early on and the bank's sharing of information with us with regard to several of the companies that we prosecuted helped us enormously. We in turn shared our information with the bank which contributed to the debarment of Acres as well as the current debarment proceedings against Lahmeyer.

15. One major hurdle when prosecuting international corruption (or any corruption for that matter) is that one is invariably met with a wall of silence. There is no obvious victim as in an assault or theft case who wants the perpetrator punished and is then willing to tell what happened. Here the victim is society. Also, those who know about the crime are invariably those also involved. In the present prosecutions, apart from Du Plooy who pleaded guilty, we have not been able to get one witness to actually come forward and give first hand evidence of corruption.

16. Closely related to this wall of silence is the public perception of the crime of bribery, which I have already touched upon. Many do not view it as a crime at all. Nobody was hurt and nobody's money was stolen. In fact, someone like Mr Sole is regarded by many in a country such as Lesotho as some kind of hero because he was able to turn the tables on these (this is the perception) rich and arrogant foreigners. Here I should point out though that my perception from working with French and Italian investigative magistrates is that this attitude to corruption, as not being a real crime, is not that different in these countries. The point is, if you do not find corruption morally reprehensible, why bother reporting it, particularly where it involves your colleague or even your boss? This is the attitude we found when prosecuting Mr Sole. The question we were never able to resolve was whether the resistance and silence we met in Mr Sole's former subordinates was the result of loyalty, complicity or simply a couldn't care attitude.

17. Only recently has an international consultant, Lahmeyer, decided to come forward and testify in a Lesotho court about bribery committed by it, in this case involving a Mr Mochebelele, the previous chief delegate of Lesotho on the Highlands Water

Commission, the body supervising the water project. Apart from possibly noble motives, such willingness must also be seen against the background of pressure resulting from close cooperation between the prosecution and international donor agencies, in this case the World Bank, illustrating the importance of international cooperation.

18. As to the role the international community and donor agencies can play in combating third world corruption, the Lesotho Court of Appeal had the following to say in the Lahmeyer case (at p 55 of the judgement):

"However, it is also incumbent on the international community and particularly the funding agencies to revisit those practices and procedures it has in place and to use those sanctions it has the power to impose whenever contraventions of the kind proved in respect of this project occur. One of the devices employed in various cases that served before this Court was the use of "representative agreements". They were used extensively as mechanisms through which payments intended as bribes were clothed with contractual respectability. They were in fact, in all the cases before us, used as cloaks to disguise and obfuscate the money trail. It required intensive research, expensive court procedures across international boundaries and tiresome and time-consuming efforts to obtain the necessary information to unravel the complex evidential strands required to determine and thus to provide the necessary evidence. Above all it required political will and the provision of the necessary resources. To their credit the Lesotho authorities did this in full measure. They should be commended for their resolve."

And at p 56:

"This Court trusts that the various funding agencies will have regard to the above comments; that it will revisit its practices and procedures in general, but for present purposes, more particularly the practice of the employment of representatives who can play the obfuscating role played so frequently in this mammoth project. But also, that it will be firm and resolute in enforcing its disciplinary proceedings on any agency, company, individual or institution who participates in the practice of bribing those employed on development projects."

19. Were international institutions to act firmly against contractors and consultants involved in third world corruption, this would firstly have the effect of deterring corruption of the nature we are dealing with in Lesotho. Equally importantly, this would have the effect of encouraging a country such as Lesotho in its efforts to fight corruption. Lesotho would be told that it is not alone in fighting corruption which, on the available evidence, was largely initiated outside Lesotho and more particularly in the countries where the contractors / consultants came from. Perhaps most importantly what such action would be saying is that corrupting officials in a third world country such as Lesotho is not in any way condoned by the authorities in the countries concerned or the donor / lending agencies.

20. In a country like Lesotho where international contractors/consultants do business it is from the vantage point of the recipient of the bribe that one is able to view matters. This brings about problems when having to deal with the payers of the bribes, such as bringing them before court and obtaining evidence from the countries where they are based. The obvious solution is for these countries themselves to prosecute the bribe payers, assuming that the country in question has in place legislation criminalising the bribing of foreign public officials. It would then not be necessary for a country such as Lesotho to also seek to prosecute the alleged payers, which in these cases it felt it had to, particularly where, as pointed out, the evidence at our disposal suggested that the initiative came from the briber and not the recipient of the bribe.

21. There is one big difference between prosecuting a natural person and prosecuting a company and that relates to punishment. A company cannot be sent to prison. The best the Lesotho courts can do is to impose fines which in most cases the companies can easily pay out of their profits. Or the company simply does not pay the fine, as was the case with Acres, which only paid after strong pressure from the World Bank. Here the problem is that criminal sanctions such as fines are normally not enforceable in other countries. What the solution here is I do not know but something must be done to ensure that companies cannot simply walk away.

22. Apart from the stigma attached to a conviction, which may or may not count for much, the only real punishment, as I see it, is being sanctioned by the international donor / lending agencies. Only the taking away of the contractor / consultant's means of livelihood would serve as a deterrent that could roughly be equated to the taking away of a natural person's liberty.

23. One final thought. Once all the legal and evidential hurdles have been overcome and the matter is before court, proving bribery is not that difficult. Where money changes hands, secretly, and the only known connection between the payer and the payee is that the former is seeking a contract and the latter is in a position to help, then in the absence of a convincing explanation, the irresistible inference, as a lawyer might put it, is that the payment was a corrupt one. Non lawyers would call it common sense.

Guido Penzhorn SC
Durban South Africa

ANNEX 21

THE COMMONWEALTH SECRETARIAT & CHATHAM HOUSE
ANTI-CORRUPTION CONFERENCE
Chatham House, 24-25 April 2006
THE UN CONVENTION AGAINST CORRUPTION IMPLEMENTATION
& ENFORCEMENT: MEETING THE CHALLENGES

Recovery through the civil courts: Will it continue?
Tim Daniel, Partner, Kendall Freeman, Solicitors, London

This is an aide-memoire of points made by Tim Daniel in his talk at the Conference:

- Recovery through the civil courts is a vital part of the business of recovery of assets, particularly those looted by Heads of State and politically exposed persons (PEPs).

- Evidence has shown that action taken through the civil courts can be accomplished more quickly and more effectively than through criminal proceedings, although a combination of both is probably the most effective route of all.

- Experience gained in the Abacha proceedings (recoveries by Nigeria of monies looted by the late Head of State) demonstrates that the Mutual Legal Assistance (MLA) route can be slow, subject to challenge, and cumbersome. Civil action can provide a much speedier result.

- If the MLA route is long-drawn out and difficult, the question arises of how much more successful will MLA be under UNCAC?

- The whole edifice of UNCAC is built on States introducing legislation to assist each other in the criminal process. The experience of MLA in asset recovery / corruption cases is not encouraging when looking forward to implementation of UNCAC.

- One of the obstacles encountered in MLA proceedings can be the requirement for dual criminality: i.e. the actions complained of should be criminal both in the requesting and the requested state. Whilst this is becoming less of a practical problem, it was certainly one of the delaying factors in the Abacha proceedings.

- The only reference in UNCAC to civil recovery is in Article 53. Whilst civil action is clearly contemplated, very little is said about how it is to be accomplished. One of the main obstacles to civil recovery is the funding of actions. Governments find it difficult to allocate the necessary funding. The way forward may be through the International Donor Community.

- Civil action has the potential to enable a state to recover not only the looted assets,

but any profits deriving there-from. See the Privy Council case Attorney-General of Hong Kong v Reid.

- Extensive pre-action discovery of banking records etc can be obtained by seeking a Bankers' Trust v Shapira order in civil courts. Such actions were pioneered in England by liquidators seeking to trace stolen assets.

- Under English law (and this will be persuasive authority in the majority of commonwealth countries as well), it is possible to seek recovery of monies paid in bribes, not only from the recipient of the bribes but also from the party paying the bribe. The party paying the bribe will generally be a much more worthwhile target. The recipient may have sent the money into offshore jurisdictions, making it difficult to trace.

- The nature of the claims made in the civil courts is predominantly proprietary – i.e. the State will be claiming that its own money has been stolen. The onus on a Defendant to show that monies under his control represent legitimately acquired funds is usually too great to discharge.

- English courts will nevertheless allow a Defendant to draw down on frozen funds, payment of legal fees and living expenses, if the Defendant can produce convincing evidence that legitimate funds are mixed with illegally acquired assets.

- Although the Assets Recovery Agency (ARA) was set up under the Proceeds of Crime Act 2002 (POCA) specifically for the purpose of allowing civil recovery of funds, there has yet to be significant involvement by the ARA in grand corruption cases.

- The ARA does not have the funding or the resources to undertake large scale recovery cases on behalf of foreign governments. When the choice is between recovering large sums for the UK government and large sums for, say, the government of Nigeria, it is fairly obvious where the priorities will lie.

- Significant recoveries have been made in the Abacha case. Approximately $2.1 billion has either been handed over by the Abachas or returned by Switzerland: the balance is currently frozen. Recoveries have been made by a mix of criminal and civil procedures.

- The threat of proceedings and seizure of assets will often bring wrongdoers to the negotiating table. Care should be taken always to secure a full disclosure of assets before striking any deals.

- It is to be borne in mind that although civil recovery may be expensive in terms of paying lawyers' fees, the criminal authorities in various states routinely require a percentage of recoveries to be paid to themselves or their governments. Such payments are envisaged under UNCAC. These percentages are commonly much higher than legal fees.

The first meeting of States Parties to UNCAC is due to take place in Jordan in December 2006. Progress on legislation in the States Parties will be reviewed. It is anticipated that implementation is still some years away in many jurisdictions. When immediate action is necessary, the civil route may offer the most attractive way forward.

ANNEX 23

UNITED NATIONS CONVENTION AGAINST CORRUPTION 2005

PREAMBLE

The States Parties to this Convention,

Concerned about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law,

Concerned also about the links between corruption and other forms of crime, in particular organized crime and economic crime, including money-laundering,

Concerned further about cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States,

Convinced that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential,

Convinced also that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively,

Convinced further that the availability of technical assistance can play an important role in enhancing the ability of States, including by strengthening capacity and by institution-building, to prevent and combat corruption effectively,

Convinced that the illicit acquisition of personal wealth can be particularly damaging to democratic institutions, national economies and the rule of law,

Determined to prevent, detect and deter in a more effective manner international transfers of illicitly acquired assets and to strengthen international cooperation in asset recovery,

Acknowledging the fundamental principles of due process of law in criminal proceedings and in civil or administrative proceedings to adjudicate property rights,

Bearing in mind that the prevention and eradication of corruption is a responsibility of all States and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, if their efforts in this area are to be effective,

Bearing also in mind the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and to foster a culture of rejection of corruption,

Commending the work of the Commission on Crime Prevention and Criminal Justice and the United Nations Office on Drugs and Crime in preventing and combating corruption,

Recalling the work carried out by other international and regional organisations in this field, including the activities of the African Union, the Council of Europe, the Customs Cooperation Council (also known as the World Customs Organization), the European Union, the League of Arab States, the Organisation for Economic Cooperation and Development and the Organization of American States,

Taking note with appreciation of multilateral instruments to prevent and combat corruption, including, inter alia, the Inter-American Convention against Corruption, adopted by the Organization of American States on 29 March 1996[1], the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union, adopted by the Council of the European Union on 26 May 1997[2], the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Organisation for Economic Cooperation and Development on 21 November 1997[3], the Criminal Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 27 January 1999[4], the Civil Law Convention on Corruption, adopted by the Committee of Ministers of the Council of Europe on 4 November 1999[5], and the African Union Convention on Preventing and Combating Corruption, adopted by the Heads of State and Government of the African Union on 12 July 2003,

Welcoming the entry into force on 29 September 2003 of the United Nations Convention against Transnational Organized Crime[6],

Have agreed as follows:

CHAPTER I GENERAL PROVISIONS

Article1

Statement of purpose

The purposes of this Convention are:

(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

(b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

(c) To promote integrity, accountability and proper management of public affairs and public property.

1 See E/1996/99. Official Journal of the European Communities, C 195, 25 June 1997.

2 See E/1996/99. Official Journal of the European Communities, C 195, 25 June 1997.

3 See Corruption and Integrity Improvement Initiatives in Developing Countries (United Nations publication, Sales No. E.98.III.B.18).

4 Council of Europe, European Treaty Series, No. 173.

5 Ibid., No. 174.

6 General Assembly resolution 55/25, annex I.

Article 2

Use of terms

For the purposes of this Convention: (a) "Public official" shall mean: (i) any person holding a legislative, executive, administrative or judicial office of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority; (ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party; (iii) any other person defined as a "public official" in the domestic law of a State Party. However, for the purpose of some specific measures contained in chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;

(b) "Foreign public official" shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise;

(c) "Official of a public international organisation" shall mean an international civil servant or any person who is authorized by such an organisation to act on behalf of that organisation;

(d) "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets;

(e) "Proceeds of crime" shall mean any property derived from or obtained, directly or indirectly, through the commission of an offence; (f) "Freezing" or "seizure" shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

(g) "Confiscation", which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority;

(h) "Predicate offence" shall mean any offence as a result of which proceeds have been generated that may become the subject of an offence as defined in article 23 of this Convention;

(i) "Controlled delivery" shall mean the technique of allowing illicit or suspect consignments to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in the commission of the offence.

Article 3

Scope of application

1. This Convention shall apply, in accordance with its terms, to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention.

2. For the purposes of implementing this Convention, it shall not be necessary, except as otherwise stated herein, for the offences set forth in it to result in damage or harm to state property.

Article 4

Protection of sovereignty

1. States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

2. Nothing in this Convention shall entitle a State Party to undertake in the territory of another State the exercise of jurisdiction and performance of functions that are reserved exclusively for the authorities of that other State by its domestic law.

CHAPTER II PREVENTIVE MEASURES

Article 5

Preventive anti-corruption policies and practices

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anticorruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.

3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organisations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

Article 6

Preventive anti-corruption body or bodies

1. Each State Party shall, in accordance with the fundamental principles of its legal

system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as: (a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies; (b) Increasing and disseminating knowledge about the prevention of corruption.

2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialised staff, as well as the training that such staff may require to carry out their functions, should be provided.

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

Article 7
Public sector

1. Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:

(a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude; (b) That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions; (c) That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party; (d) That promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialised and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.

2. Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office.

3. Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

4. Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.

Article 8

Codes of conduct for public officials

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.

2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.

3. For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organisations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.

4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

Article 9

Public procurement and management of public finances

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent

information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

(b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;

(c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;

(d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;

(e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.

2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:

(a) Procedures for the adoption of the national budget;

(b) Timely reporting on revenue and expenditure;

(c) A system of accounting and auditing standards and related oversight;

(d) Effective and efficient systems of risk management and internal control; and

(e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.

3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

Article 10
Public reporting

Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organisation, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

(a) Adopting procedures or regulations allowing members of the general public to obtain,

where appropriate, information on the organisation, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;

(b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and

(c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.

Article 11
Measures relating to the judiciary and prosecution services

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

Article 12
Private sector

1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

2. Measures to achieve these ends may include, inter alia:

(a) Promoting cooperation between law enforcement agencies and relevant private entities;

(b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;

(c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;

(d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;

(e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;

(f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.

3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts carried out for the purpose of committing any of the offences established in accordance with this Convention:

(a) The establishment of off-the-books accounts;

(b) The making of off-the-books or inadequately identified transactions;

(c) The recording of non-existent expenditure;

(d) The entry of liabilities with incorrect identification of their objects;

(e) The use of false documents; and

(f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.

4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct. Article 13 Participation of society 1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

(a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;

(b) Ensuring that the public has effective access to information;

(c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;

(d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:
(i) For respect of the rights or reputations of others;
(ii) For the protection of national security or ordre public or of public health or morals.

2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

Article 14
Measures to prevent money-laundering

1. Each State Party shall:

(a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

(b) Without prejudice to article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:

(a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;

(b) To maintain such information throughout the payment chain; and

(c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.

4. In establishing a domestic regulatory and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organisations against money-laundering.

5. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

CHAPTER III CRIMINALIZATION AND LAW ENFORCEMENT

Article 15

Bribery of national public officials

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Article 16

Bribery of foreign public officials and officials of public international organisations

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or

herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Article 17

Embezzlement, misappropriation or other diversion of property by a public official

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

Article 18

Trading in influence

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

Article 19

Abuse of functions

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

Article 20

Illicit enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

Article 21

Bribery in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

Article 22

Embezzlement of property in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.

Article 23

Laundering of proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

Article 24

Concealment

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

Article 25

Obstruction of justice

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of

offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

Article 26

Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

ARTICLE 27

Participation and attempt

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

ARTICLE 28

Knowledge, intent and purpose as elements of an offence

Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.

Article 29

Statute of limitations

Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or

provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

Article 30

Prosecution, adjudication and sanctions

1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.

6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

(a) Holding public office; and

(b) Holding office in an enterprise owned in whole or in part by the State.

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

9. Nothing contained in this Convention shall affect the principle that the description of the offences established in accordance with this Convention and of the applicable legal defences or other legal principles controlling the lawfulness of conduct is reserved to the domestic law of a State Party and that such offences shall be prosecuted and punished in accordance with that law.

10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

Article 31
Freezing, seizure and confiscation

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or com-

mercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

Article 32
Protection of witnesses, experts and victims

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

Article 33

Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

Article 34

Consequences of acts of corruption

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

Article 35

Compensation for damage

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

Article 36

Specialized authorities

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

Article 37

Cooperation with law enforcement authorities

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.

5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

Article 38

Cooperation between national authorities

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or

(b) Providing, upon request, to the latter authorities all necessary information.

Article 39

Cooperation between national authorities and the private sector

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

Article 40

Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

Article 41

Criminal record

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.

Article 42

Jurisdiction

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

(a) The offence is committed in the territory of that State Party; or

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party; or

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or

(d) The offence is committed against the State Party.

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals. 4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the

competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

CHAPTER IV INTERNATIONAL COOPERATION

Article 43

International cooperation

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

2. In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

Article 44

Extradition

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

6. A State Party that makes extradition conditional on the existence of a treaty shall:

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

Article 45

Transfer of sentenced persons

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

Article 46

Mutual legal assistance

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

(a) Taking evidence or statements from persons;

(b) Effecting service of judicial documents;

(c) Executing searches and seizures, and freezing;

(d) Examining objects and sites;

(e) Providing information, evidentiary items and expert evaluations;

(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;

(g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;

(h) Facilitating the voluntary appearance of persons in the requesting State Party;

(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;

(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;

(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

6. The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance.

7. Paragraphs 9 to 29 of this article shall apply to requests made pursuant to this article if the States Parties in question are not bound by a treaty of mutual legal assistance. If those States Parties are bound by such a treaty, the corresponding provisions of that treaty shall apply unless the States Parties agree to apply paragraphs 9 to 29 of this article in lieu thereof. States Parties are strongly encouraged to apply those paragraphs if they facilitate cooperation.

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and,

in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

15. A request for mutual legal assistance shall contain:

(a) The identity of the authority making the request;

(b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;

(e) Where possible, the identity, location and nationality of any person concerned; and

(f) The purpose for which the evidence, information or action is sought.

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

23. Reasons shall be given for any refusal of mutual legal assistance.

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

Article 47

Transfer of criminal proceedings

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of

justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

Article 48

Law enforcement cooperation

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the

States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organisations, to enhance the cooperation between their law enforcement agencies.

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

Article 49
Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

Article 50
Special investigative techniques

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

CHAPTER V ASSET RECOVERY

Article 51

General provision

The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

Article 52

Prevention and detection of transfers of proceeds of crime

1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organisations against money-laundering, shall:

(a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and

(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.

4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the

establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.

6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.

Article 53

Measures for direct recovery of property

Each State Party shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;

(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and

(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

Article 54

Mechanisms for recovery of property through international cooperation in confiscation

1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;

(b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and

(c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;

(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and

(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

Article 55
International cooperation for purposes of confiscation

1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting

State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.

2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

3. The provisions of article 46 of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final; (c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

5. Each State Party shall furnish copies of its laws and regulations that give effect to this article and of any subsequent changes to such laws and regulations or a description thereof to the Secretary-General of the United Nations.

6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a de minimis value.

8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

Article 56

Special cooperation

Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention.

Article 57

Return and disposal of assets

1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.

2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;

(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the

basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;

(c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.

5. Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by-case basis, for the final disposal of confiscated property.

Article 58

Financial intelligence unit

States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.

Article 59

Bilateral and multilateral agreements and arrangements

States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.

CHAPTER VI TECHNICAL ASSISTANCE AND INFORMATION EXCHANGE

Article 60

Training and technical assistance

1. Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its personnel responsible for preventing and combating corruption. Such training programmes could deal, inter alia, with the following areas:

(a) Effective measures to prevent, detect, investigate, punish and control corruption, including the use of evidence-gathering and investigative methods;

(b) Building capacity in the development and planning of strategic anticorruption policy;

(c) Training competent authorities in the preparation of requests for mutual legal assistance that meet the requirements of this Convention;

(d) Evaluation and strengthening of institutions, public service management and the management of public finances, including public procurement, and the private sector;

(e) Preventing and combating the transfer of proceeds of offences established in accordance with this Convention and recovering such proceeds;

(f) Detecting and freezing of the transfer of proceeds of offences established in accordance with this Convention;

(g) Surveillance of the movement of proceeds of offences established in accordance with this Convention and of the methods used to transfer, conceal or disguise such proceeds;

(h) Appropriate and efficient legal and administrative mechanisms and methods for facilitating the return of proceeds of offences established in accordance with this Convention;

(i) Methods used in protecting victims and witnesses who cooperate with judicial authorities; and

(j) Training in national and international regulations and in languages.

2. States Parties shall, according to their capacity, consider affording one another the widest measure of technical assistance, especially for the benefit of developing countries, in their respective plans and programmes to combat corruption, including material support and training in the areas referred to in paragraph 1 of this article, and training and assistance and the mutual exchange of relevant experience and specialised knowledge, which will facilitate international cooperation between States Parties in the areas of extradition and mutual legal assistance.

3. States Parties shall strengthen, to the extent necessary, efforts to maximize operational and training activities in international and regional organisations and in the framework of relevant bilateral and multilateral agreements or arrangements.

4. States Parties shall consider assisting one another, upon request, in conducting evaluations, studies and research relating to the types, causes, effects and costs of corruption in their respective countries, with a view to developing, with the participation of competent authorities and society, strategies and action plans to combat corruption.

5. In order to facilitate the recovery of proceeds of offences established in accordance with this Convention, States Parties may cooperate in providing each other with the names of experts who could assist in achieving that objective.

6. States Parties shall consider using subregional, regional and international conferences and seminars to promote cooperation and technical assistance and to stimulate discussion

on problems of mutual concern, including the special problems and needs of developing countries and countries with economies in transition.

7. States Parties shall consider establishing voluntary mechanisms with a view to contributing financially to the efforts of developing countries and countries with economies in transition to apply this Convention through technical assistance programmes and projects.

8. Each State Party shall consider making voluntary contributions to the United Nations Office on Drugs and Crime for the purpose of fostering, through the Office, programmes and projects in developing countries with a view to implementing this Convention.

Article 61

Collection, exchange and analysis of information on corruption

1. Each State Party shall consider analysing, in consultation with experts, trends in corruption in its territory, as well as the circumstances in which corruption offences are committed.

2. States Parties shall consider developing and sharing with each other and through international and regional organisations statistics, analytical expertise concerning corruption and information with a view to developing, insofar as possible, common definitions, standards and methodologies, as well as information on best practices to prevent and combat corruption. 3. Each State Party shall consider monitoring its policies and actual measures to combat corruption and making assessments of their effectiveness and efficiency.

Article 62

Other measures: implementation of the Convention through economic development and technical assistance

1. States Parties shall take measures conducive to the optimal implementation of this Convention to the extent possible, through international cooperation, taking into account the negative effects of corruption on society in general, in particular on sustainable development.

2. States Parties shall make concrete efforts to the extent possible and in coordination with each other, as well as with international and regional organisations:

(a) To enhance their cooperation at various levels with developing countries, with a view to strengthening the capacity of the latter to prevent and combat corruption;

(b) To enhance financial and material assistance to support the efforts of developing countries to prevent and fight corruption effectively and to help them implement this Convention successfully;

(c) To provide technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of this Convention. To that end, States Parties shall endeavour to make adequate and regular voluntary contributions to an account specifically designated for that purpose in a

United Nations funding mechanism. States Parties may also give special consideration, in accordance with their domestic law and the provisions of this Convention, to contributing to that account a percentage of the money or of the corresponding value of proceeds of crime or property confiscated in accordance with the provisions of this Convention;

(d) To encourage and persuade other States and financial institutions as appropriate to join them in efforts in accordance with this article, in particular by providing more training programmes and modern equipment to developing countries in order to assist them in achieving the objectives of this Convention.

3. To the extent possible, these measures shall be without prejudice to existing foreign assistance commitments or to other financial cooperation arrangements at the bilateral, regional or international level.

4. States Parties may conclude bilateral or multilateral agreements or arrangements on material and logistical assistance, taking into consideration the financial arrangements necessary for the means of international cooperation provided for by this Convention to be effective and for the prevention, detection and control of corruption.

CHAPTER VII MECHANISMS FOR IMPLEMENTATION

Article 63

Conference of the States Parties to the Convention

1. A Conference of the States Parties to the Convention is hereby established to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation.

2. The Secretary-General of the United Nations shall convene the Conference of the States Parties not later than one year following the entry into force of this Convention. Thereafter, regular meetings of the Conference of the States Parties shall be held in accordance with the rules of procedure adopted by the Conference.

3. The Conference of the States Parties shall adopt rules of procedure and rules governing the functioning of the activities set forth in this article, including rules concerning the admission and participation of observers, and the payment of expenses incurred in carrying out those activities.

4. The Conference of the States Parties shall agree upon activities, procedures and methods of work to achieve the objectives set forth in paragraph 1 of this article, including:

(a) Facilitating activities by States Parties under articles 60 and 62 and chapters II to V of this Convention, including by encouraging the mobilization of voluntary contributions;

(b) Facilitating the exchange of information among States Parties on patterns and trends in corruption and on successful practices for preventing and combating it and for the return of proceeds of crime, through, inter alia, the publication of relevant information as mentioned in this article;

(c) Cooperating with relevant international and regional organisations and mechanisms and non-governmental organisations;

(d) Making appropriate use of relevant information produced by other international and regional mechanisms for combating and preventing corruption in order to avoid unnecessary duplication of work;

(e) Reviewing periodically the implementation of this Convention by its States Parties;

(f) Making recommendations to improve this Convention and its implementation;

(g) Taking note of the technical assistance requirements of States Parties with regard to the implementation of this Convention and recommending any action it may deem necessary in that respect.

5. For the purpose of paragraph 4 of this article, the Conference of the States Parties shall acquire the necessary knowledge of the measures taken by States Parties in implementing this Convention and the difficulties encountered by them in doing so through information provided by them and through such supplemental review mechanisms as may be established by the Conference of the States Parties.

6. Each State Party shall provide the Conference of the States Parties with information on its programmes, plans and practices, as well as on legislative and administrative measures to implement this Convention, as required by the Conference of the States Parties. The Conference of the States Parties shall examine the most effective way of receiving and acting upon information, including, inter alia, information received from States Parties and from competent international organisations. Inputs received from relevant non-governmental organisations duly accredited in accordance with procedures to be decided upon by the Conference of the States Parties may also be considered.

7. Pursuant to paragraphs 4 to 6 of this article, the Conference of the States Parties shall establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention.

Article 64
Secretariat

1. The Secretary-General of the United Nations shall provide the necessary secretariat services to the Conference of the States Parties to the Convention.

2. The secretariat shall:

(a) Assist the Conference of the States Parties in carrying out the activities set forth in article 63 of this Convention and make arrangements and provide the necessary services for the sessions of the Conference of the States Parties;

(b) Upon request, assist States Parties in providing information to the Conference of the States Parties as envisaged in article 63, paragraphs 5 and 6, of this Convention; and

(c) Ensure the necessary coordination with the secretariats of relevant international and regional organisations.

CHAPTER VIII FINAL PROVISIONS

Article 65

Implementation of the Convention

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

2. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating corruption.

Article 66

Settlement of disputes

l. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Convention through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Convention that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organisation of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 67

Signature, ratification, acceptance, approval and accession

1. This Convention shall be open to all States for signature from 9 to 11 December 2003 in Merida, Mexico, and thereafter at United Nations Headquarters in New York until 9 December 2005.

2. This Convention shall also be open for signature by regional economic integration organisations provided that at least one member State of such organisation has signed this Convention in accordance with paragraph 1 of this article.

3. This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organisation may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organisation shall declare the extent of its competence with respect to the matters governed by this Convention. Such organisation shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Convention is open for accession by any State or any regional economic integration organisation of which at least one member State is a Party to this Convention. Instruments of accession shall be deposited with the Secretary- General of the United Nations. At the time of its accession, a regional economic integration organisation shall declare the extent of its competence with respect to matters governed by this Convention. Such organisation shall also inform the depositary of any relevant modification in the extent of its competence.

Article 68
Entry into force

1. This Convention shall enter into force on the ninetieth day after the date of deposit of the thirtieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organisation shall not be counted as additional to those deposited by member States of such organisation.

2. For each State or regional economic integration organisation ratifying, accepting, approving or acceding to this Convention after the deposit of the thirtieth instrument of such action, this Convention shall enter into force on the thirtieth day after the date of deposit by such State or organisation of the relevant instrument or on the date this Convention enters into force pursuant to paragraph 1 of this article, whichever is later.

Article 69
Amendment

1. After the expiry of five years from the entry into force of this Convention, a State Party may propose an amendment and transmit it to the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the States Parties to the Convention for the purpose of considering and deciding on the proposal. The Conference of the States Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the States Parties.

2. Regional economic integration organisations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Convention. Such organisations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Convention and any earlier amendments that they have ratified, accepted or approved.

Article 70

Denunciation

1. A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary- General.

2. A regional economic integration organisation shall cease to be a Party to this Convention when all of its member States have denounced it.

Article 71

Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Convention.

2. The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

ANNEX 24 BIOGRAPHICAL INFORMATION ABOUT THE SPEAKERS AND MODERATORS

Emmanuel Akomaye received his B.A (History), LL.B and B.L from the Universities of Calabar, Ibadan and the Nigerian law School respectively in 1986, 1990 and 1991.

As pioneer Director-General and later Secretary to the EFCC, he heads the Secretariat/Administration of the Commission which is today leading in the fight against corruption in Nigeria.

Mr. Akomaye presently chairs the Working Group on Money Laundering Typology of the Economic Community of West African States (ECOWAS) Inter-Governmental Action Group Against Money Laundering in Africa, (GIABA), and FATF styled regional body. He had earlier coordinated activities to operationalise the body in 2004 and participated in the meeting of experts involving officials of the IMF and the World Bank, to prepare its Strategic Action Plan for 2004 - 2006.

Mr. Akomaye is also a Solicitor and Advocate of the Nigerian Supreme Court.

Mr. Nicola Bonucci is the Director of Legal Affairs with the Organisation for Economic Co-Operation and Development. He originally joined the OECD in 1993 as a Legal Counselor, and served as Deputy Director from 2000 until becoming Director in 2005.

Since 1997, Mr. Bonucci has been closely involved in the monitoring and follow-up of the OECD Anti-Bribery Convention, serving as a representative of the Legal Directorate in the follow-up and monitoring of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. As Acting Head of the Anti-Corruption Division in 2004, he handled all management issues of the division, as well the substantive supervision of the staff involved with the monitoring of the Anti-Corruption Convention. Also in connection with this, Mr. Bonucci was a member of the examining team performing on-site visits in the US, Canada, Japan, Mexico and Italy, among other countries.

Mr. Bonucci is a regular speaker and lecturer on international organisations.

Mr. Bonucci holds a DEA in Public International Law from the University of Paris X – Nanterre, a DESS in International Administration from the University of Paris II – Assas, and a Master of International and Comparative Law from the University of Notre Dame.

Mr. Stanley Chan graduated from the University of Hong Kong in 1980 with a degree of Bachelor of Social Sciences. Subsequently, he was awarded a legal scholarship provid-

ed by the Hong Kong Government and studied law at the University of Hong Kong. He graduated in 1986 and was called to the Bar in 1987.

He then joined the Prosecutions Division of the then Attorney General's Chambers as Assistant Crown Counsel. He obtained a degree of Master of Public Administration in 1993 and another degree of Master of Social Sciences.

He has worked in a number of areas in the Prosecutions Division, in particular, in the areas of commercial crime and corruption, both in the private sector and public sector. At present, he is a Senior Assistant Director of Public Prosecutions.

Mr. M.K. Chouhan is Chairman of Mahendra & Young Knowledge Foundation & Vice Chairman of Global Advisory Board of the Asian Centre for Corporate Governance (ACCG). He is also Vice Chairman & Managing Director of Mahendra & Ardneham Consulting (P) Ltd. He has an MBA degree, a science degree and is a 'Practicing International Management Advisor', having pioneered the Board Practice & Practice on Corporate Governance in India.

He is a member of the prestigious 'Corporate Governance Committee of Securities Exchange Board of India' (SEBI). He advises large companies on building cohesive & high performing Boards and the selection of Independent Directors. He is member of advisory board for Asia, Stern Stewart & Company (The EVA company of USA).

Datuk Seri Zulkipli Bin Mat Noor is currently the Director General of the Malaysian Anti-Corruption Agency.

He holds a Diploma in Public Administration (UiTM) and a Bachelor Degree in Political Science. He has also a Masters Degree in Strategic Studies & International Relations from Lancaster University, England.

Since 1969 he has been working for the Police Services. He started as a Police Inspector and was eventually appointed to Commissioner of Police. He was seconded to the Anti-Corruption Agency of Malaysia as Director General in 2001.

Mr. Tim Daniel is a partner at the London solicitors' firm Kendall Freeman, and co-author of 'Corruption and Misuse of Public Office'. (OUP 2006)

Mr. Guy Dehn is the director of Public Concern at Work, the whistleblowing charity. The charity, set up in 1993, has three key activities:

– free help for individuals concerned about wrongdoing at work but unsure whether or how to raise the matter;

– professional services for organisations; and

– policy and campaign work on the public interest.

The charity, which is now self-funding, was closely involved in settling the scope and detail of the UK's Public Interest Disclosure Act 1998 and advises on comparable legislative initiatives in the international sphere.

Mr. Dehn is a practising barrister.

Mr. Wayne Dunn is a Stanford Business School educated, award winning international leader in Corporate Social Responsibility. He has worked on over 50 social license/CSR projects throughout Africa and around the world; helping businesses, civil society and governments to address financial, social and environmental challenges. His clients have included major global firms, governments and international agencies and his work has been recognised with several prestigious international awards including the World Bank Development Innovation Award, the Nexen Award for Corporate Social and Ethical Responsibility and the World Bank Development Marketplace People's Choice Award. One of his projects was recently made into a case study by the Stanford Business School.

Wayne is a Stanford University Sloan Fellow and holds an M.Sc. in Management from the Stanford University Graduate School of Business. He is a frequent lecturer and writer on international development, economic and strategy issues.

Sir Brian Fall was a career member of HM Diplomatic Service, who retired in 1995 as Ambassador to the Russian Federation and other Former Soviet Republics. He had previously served as High Commissioner to Canada and as Minister (Deputy Head of Mission) at the British Embassy in Washington. He was Principal of Lady Margaret Hall, Oxford, from 1995 to 2002. He has been an Adviser to Rio Tinto since retiring from the Diplomatic Service, and Chairman of the ICC(UK) Committee on Anti-Corruption since 2005.

Ms Ferrieux-Patterson is currently working as a solicitor in private legal practice in Port Vila.

In France she achieved BAs in Political Sciences, English and Linguistics and an MA in Urban and Rural Planning in Grenoble, before going to the USA to do a Masters in Sociology at the University of Columbia, South Carolina.

In mid 1994 she was appointed the First Ombudsman of the Republic of Vanuatu since Independence in 1980. The mandate was for five years. While she served as the Vanuatu Ombudsman, Ms Ferrieux Patterson wrote and published 69 public reports including cases of corruption at the highest level of government. (See web page http://www.undp.org.fj/vanombud/).

The job involved conducting enquiries into complaints of maladministration in the public sector, and also inquiries into alleged breaches of the Leadership Code by politicians including the Council of Ministers in accordance with the Leadership Code Act.

From 1999 to the present time, she has been a volunteer member of the Vanuatu chapter of the worldwide anti-corruption organisation, Transparency International, which she helped to set up. She is currently the President of that organisation.

Stephen Foster has been a British Police Officer serving in the Metropolitan Police Service for 23 years. After having performed general policing duties in London he rose to the rank of Detective Chief Inspector and then to specialist positions, such as implementing a serious crime group for North London investigating murders and serious crime, and heading the unit's intelligence unit supporting operational teams.

In 2000 he was transferred to the Anti Corruption Command (ACC) in the role of Senior Investigating Officer handling complex and sensitive internal corruption cases. Later he headed the ACC's Intelligence Development Unit where he was responsible for the collection, assessment, development and dissemination of intelligence on corruption and misconduct.

In 2003 he assisted the Bulgarian Government to develop intelligence structures to detect police corruption.

In December 2003 he was seconded to Romania to head a joint British and Spanish project for the European Union as 'Pre Accession Advisor', attached to the Minister of Interior.

Dr. Maria Gavouneli is a Lecturer in International Law at the University of Athens, Research Associate of the Hellenic Institute of International & Foreign Law and editor-in-chief of the Revue hellénique de droit International.

She currently serves as Vice-Chair to the Working Group on Bribery, Organisation of Economic Cooperation and Development (OECD).

She was President of the Committee on Transnational Justice (PC-TJ), Council of Europe.

She is currently counsel to the Ministry of Justice on international issues and serves in the Appeal Committee for Asylum, appointed by the Athens Bar Association. She practices law in Athens.

Dr. Stuart C. Gilman is currently the Programme Manager for the United Nations Global Programme Against Corruption and is Head of the UN Office on Drugs and Crime's Anticorruption Unit. In this role he is responsible for effective technical implementation of the United Nations Convention Against Corruption.

His work has focused on integrity and anti-corruption systems in government and the private sector. Dr. Gilman has provided counsel and training for a variety of individuals; from corporate chief executive officers to cabinet secretaries and ministers, from heads of anti-corruption agencies to local judges and prosecutors.

He has been an ethics consultant for state governments and federal agencies, for large corporations and non-profit organisations, as well as multinational organisations – such as the World Bank, the Inter-American Development Bank, the Organisation of American States, the Organisation for Security and Cooperation and the Organization for Economic Development and Cooperation. Dr. Gilman has been an organisational integrity consultant for countries as diverse as Egypt, Japan, South Africa, Argentina, Turkey, Romania, Italy and the Philippines.

Dr. Gilman has given speeches and presentations on ethics at universities, government programmes and international forums around the world.

Paul Gully-Hart is a partner in Schellenberg Wittmer, one of the largest law firms in Switzerland with offices in Geneva and Zurich. He has developed a strong practice in white-collar crime and international criminal law with an emphasis on international mutual assistance, extradition and seizure of assets. He has also been active in banking and commercial law and is involved in major litigation and international arbitration.

Mr. Gully-Hart is a former Chairman of Committee W (Business Crime) in the Section of Business Law of the International Bar Association and continues to be active in this organisation.

He speaks regularly at international conferences and seminars on topics of international criminal law.

Professor John Hatchard is Professor of Law at the Open University and Secretary General of the Commonwealth Legal Education Association. He has held senior academic positions at universities in Zambia, Zimbabwe, the UK and the USA. He has served as Chief Mutual Legal Assistance Officer at the Commonwealth Secretariat and was a Senior Fellow at the British Institute of International and Comparative Law.

He has published extensively in the area of criminal law, constitutional and administrative law, human rights (all with special reference to the Commonwealth). He has undertaken consultancy work for a range of international organisations, particularly in the field of corruption, good governance and human rights.

He is Editor of the Corruption Case Law Reporter and Commonwealth Legal Education, Joint Editor of the Journal of African Law and a member of the Editorial Board of the Commonwealth Law Bulletin and Journal of Commonwealth Law and Legal Education.

The **Rt. Hon Don McKinnon** is a New Zealander with a long and distinguished career in international politics and diplomacy.

He was elected to his current position as Commonwealth Secretary-General at the November 1999 Commonwealth Heads of Government Meeting (CHOGM) in Durban, South Africa. He secured a second term in the job in December 2003 at the CHOGM in Abuja, Nigeria.

Mr. McKinnon became Commonwealth Secretary-General after a 21-year career in New Zealand politics.

After being elected to Parliament in 1978, Don McKinnon was New Zealand's longest serving Minister of Foreign Affairs and Trade. He has held a number of senior posts within the government, including Deputy Prime Minister (1990 to 1996), Minister of Foreign Affairs and Trade (1990-1999) and Leader of the House of Representatives (1992-1996).

Mrs Betty Mould-Iddrisu is the Director, Legal and Constitutional Affairs Division, at the Commonwealth Secretariat.

She was involved in the administration of Intellectual Property Rights both in Ghana and regionally in Africa. She worked as a consultant for the UN and other international and regional bodies on both Intellectual Property and multi-lateral trade issues.

Mrs Mould-Iddrisu co-founded the African Women Lawyers Association (AWLA) and chaired the group until 2003.

Kenneth Nyaga Mwige is the principal attorney and personal assistant to the director/chief executive of the Kenya Anti-Corruption Commission. He is an advocate of the High Court of Kenya, and in 1999 was appointed by The Hon. Attorney-General as one of six Public Prosecutors for The Prevention of Corruption Act (repealed 2003) and for other offences involving corrupt transactions.

He has developed a specialised private and public sector consultancy practice. His Anti-Corruption and Good Governance consultancy practice revolves around work with Members of Parliament aligned to the Kenya Anti-Corruption Coalition, the former Parliamentary Select Committee on Corruption and the African Parliamentarian Network Against Corruption-Kenya (APNAC-Kenya Chapter).

He worked closely with the Permanent Secretary, Mr. John Githongo, in the establishment phase of the Department of Governance and Ethics in the Office of the President.

Felix Ntrakwah is the senior partner of Ntrakwah & Co., a corporate and commercial law firm in Accra, Ghana. He started private legal practice in 1981 when he left the civil

service as an Assistant Registrar General with responsibilities for the registration of companies, and trademarks, among others.

Mr. Ntrakwah obtained his LLB [Hons] degree from the University of Ghana in 1973. He was called to the Ghana Bar in 1975 after a two year professional training at the Ghana School of Law. He also holds a Post-graduate Diploma in International Tax Law [RKU, Switzerland].

In addition to specialising in corporate and commercial litigation and counseling, Mr. Ntrakwah takes special interest in corporate governance and corporate social responsibility issues. His wealth of experience in corporate governance is derived from his practice and directorship of companies. He is the Chairman of the Financial Investment Trust of Bank of Ghana, Eximguaranty Company of Ghana Limited and Export Finance Company Limited. He was for many years a director of Ghana Commercial Bank Limited.

Guido Heinz Penzhorn is an advocate who has been practising in Durban, South Africa, since 1973. Appointed as Senior Counsel by the President of South Africa on 8 May 1991, he has a wide ranging Senior Counsel's practice.

He is acting for the Lesotho Government as lead prosecuting counsel in the corruption and fraud prosecutions relating to the multi billion dollar Highlands Water Project, a joint project between Lesotho and South Africa.

Since 1999, he has held a number of appointments as Acting Judge of the High Court of South Africa.

Martin Polaine is a Crown Prosecutor with the Crown Prosecution Service of England & Wales, currently seconded to the Commonwealth Secretariat. A barrister, he has previously practised at the criminal bar and as a lawyer at the IPCC.

He is a member of the OECD Working Group on Bribery (WGB) and has been a 'lead examiner' for the WGB's peer review process. In the field of anti-corruption, he has also undertaken country evaluations and training on behalf of the EC/EU, UN and other international and regional bodies, and has advised on law, procedure and drafting in Central and Eastern Europe, Asia and the Pacific.

He has written and spoken widely on anti-corruption law and practice, and on related topics, including anti-money laundering, economic and financial crime, international cooperation and proactive/covert evidence gathering.

Dr Enery Quinones joined the EBRD in June 2004 as Head of the Compliance Office. The Compliance Office, which is also the anti-money laundering office of the Bank, provides a range of advice and assistance to all Bank departments in assessing and evaluating

integrity and reputational risks relating to proposed, as well as on-going, Bank transactions.

Dr. Quinones represents the EBRD in the Financial Action Task Force, the OECD Anti-Corruption Network for Transition Economies, MoneyVal, Transparency International's Steering Committee on the Business Principles for Countering Corruption, and numerous other international fora.

Prior to joining EBRD, Dr. Enery Quinones was Head of the Anti-Corruption Division in the Organisation for Economic Co-Operation and Development (OECD). Having played a key role in developing the OECD's anti-bribery instruments, she then developed and oversaw the implementation of the first international mechanism to monitor compliance among States Parties to a multinational anti-corruption treaty, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

A United States national, Dr. Quinones received her University degree in Economics from New York University and her Juris Doctor from Harvard Law School.

Graham Rodmell is Director of Corporate and Regulatory Affairs, Transparency International (UK).

Following his admission as a solicitor in 1959, Graham held a number of appointments in local government service (1959 - 1967). This was followed (1968 - 1975) by a period with City firm, Simmons & Simmons.

From 1976 until 1996, Graham was employed in the Legal Department of CDC, the UK government's bilateral development finance institution, now known as CDC Group plc, whose investment funds are managed by Actis. From 1987 onwards, he was General Counsel with responsibility also for the corporate secretariat.

Since 1996, his consultancy in legal and development matters has involved extensive UK and overseas government contacts and has included work on corporate governance and the combat of corruption.

Mr. M Akram Sheikh is a Senior Advocate of the Supreme Court of Pakistan.

Throughout his legal career, Mr. Sheikh has been involved in various critical cases which have effected major changes in areas such as Constitutional and Human Rights.

He has held numerous national and international positions including Current Member of the Pakistan Bar Council, President of the Supreme Court Bar Association of Pakistan, Ambassador at Large (with the status of Federal Minister) and Roving Ambassador of Pakistan. In 1997, he represented Pakistan in the United Nations Human Rights Sub-Commission on 'Prevention of Discrimination and Protection of Minorities.'

Elizabeth Wilmshurst is an International Law Fellow, Chatham House. She is also a visiting Professor of International Law at University College London. She was formerly a Deputy Legal Adviser at the United Kingdom Foreign and Commonwealth Office.

Mrs. Jean Au Yeung joined the Hong Kong Government as an officer responsible for, among other duties, the detection of passport and visa forgeries in the Immigration Department. She joined ICAC in 1989 and is now the Assistant Director of the Corruption Prevention Department of ICAC Hong Kong.

The Corruption Prevention Department is responsible for reforming public sector practices and procedures to minimise opportunities for corruption, enhancing civil service integrity and promoting good governance. Mrs. Au Yeung oversees the corruption prevention work in the public sector as well as a dedicated advisory service group which helps private sector organisations adopt corruption resistant measures in their internal control systems.

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