
Introduction, Scope and Methodology

Criminalisation is a key component of a comprehensive anti-corruption strategy. It deters individuals and officials from engaging in corrupt behaviour. It can also disgorge the profits of the crime and recompense the victim and the state. Criminalisation is thus a vital complement to other anti-corruption efforts such as prevention and detection.

International anti-corruption instruments reflect the importance of criminalisation. Pillar 2 of the Initiative's Action Plan commits countries that have endorsed the Plan to ensure "the existence of legislation with dissuasive sanctions which effectively and actively combat the offence of bribery of public officials". Criminalisation is the focus of international instruments such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention). It is also one of the three major pillars of the UN Convention against Corruption (UNCAC).

However, implementing an effective regime of criminalisation can be a challenging task, as seen with the parties to the OECD Anti-Bribery Convention. Effective bribery offences need to address the different means in which the crime can be committed. These offences must be supported with investigative tools. The offences must also be implemented and enforced. Deficiencies in these areas are not always obvious. With this in mind, the Steering Group decided in November 2008 to conduct a Thematic Review on the criminalisation of bribery offences under the UNCAC. The purpose of the review is to provide suggestions on how the Initiative's members can strengthen their criminal legal and enforcement framework for fighting bribery.

The Steering Group also decided that this Thematic Review should draw heavily from the methodology used to monitor the implementation of the OECD Anti-Bribery Convention. Because of similarities between the OECD and UN Conventions, the lessons learned by OECD countries can help the Initiative's members avoid pitfalls on the road to UNCAC implementation. Two particular features of this methodology are worth noting. First, the review involves a

detailed, element-by-element analysis of offences. The mere existence of a bribery offence is not adequate; there must be a closer examination to verify whether an offence meets international standards. Second, laws are meaningful only when they are adequately enforced. The review therefore attempts to analyze the enforcement of bribery laws and the investigation of bribery offences in practice.

Because of limited resources, this Thematic Review cannot cover all 28 articles in UNCAC on criminalisation. Instead, the review examines in depth how the Initiative's members implement Articles 15, 16 and 26 of UNCAC (bribery of domestic and foreign public officials by natural and legal persons). Where relevant, the review briefly touches upon other corruption offences such as trading in influence, and illicit enrichment. The review also considers the UNCAC provisions on enforcement, including Articles 30 (prosecution, adjudication and sanctions), 31 (freezing, seizure and confiscation), 37 (cooperation with law enforcement authorities), 40 (bank secrecy), 42 (jurisdiction) and 50 (special investigative techniques). While this study only covers a limited part of UNCAC, the length of this report demonstrates the amount of effort and resources that is nevertheless required. A thorough examination of how the Initiative's members implement the remaining articles of UNCAC falls outside the scope of this study.

This Thematic Review is meant to complement but not duplicate efforts in other forums. For the three members that are party to the OECD Anti-Bribery Convention,¹ this Thematic Review will refer to the monitoring reports of the OECD Working Group on Bribery in International Business Transactions whenever appropriate. The same applies to the two members that are part of the Anti-Corruption Network for Eastern Europe and Central Asia.² This report will also refer to the work of other bodies in the anti-money laundering field³ where relevant.

These exceptions aside, the bribery offences of most members of the Initiative had not been externally analyzed prior to this Thematic Review. A few members participated in the UNCAC Pilot Review Mechanism⁴ but the resulting reports are not publicly available. Some members have also conducted "gap analyses" on UNCAC implementation. These exercises generally cover all articles of the Convention; their breadth of coverage largely precludes in-depth examination of each UNCAC provision. The 20 members that are States Parties to UNCAC (as of September 2010) will be examined under the Mechanism for the Review of Implementation that was adopted in November 2009. Whether the reviews under the Mechanism will go into the same depth as this Thematic Review remains to be seen. In any event, this Thematic Review should provide useful information for the UNCAC review process.

Work on this Thematic Review took place in 2009 and 2010. In January 2009, the Secretariat sent a detailed questionnaire to each member of the Initiative to collect relevant information, legislation, case law and statistics. Ten of the Initiative's 28 members responded to the questionnaire (Australia; Bhutan; Hong Kong, China; Japan; Kyrgyzstan; Macao, China; Nepal; Philippines; Singapore; and Thailand). The Secretariat also conducted extensive independent research to gather further information. The Secretariat then spent the balance of 2009 and part of 2010 drafting this report.

As with previous Thematic Reviews, this report consists of two parts. The first is an overview of the trends and issues in criminalisation of bribery in Asia and the Pacific. This cross-country analysis allows comparison of the different approaches among different members on specific issues. By identifying common challenges across the membership, the Initiative can design its future capacity-building activities to address these matters. The second part consists of individual reports on each of the Initiative's 28 members. Each report analyses a member's approach to criminalising bribery, identifying both strengths and areas for improvement.

The accuracy of the reports relies on the Initiative's members. Each member of the Initiative was given the opportunity to comment on successive drafts of its country-specific report and the horizontal report. Each member ultimately agreed to the text and accuracy of its country report and the horizontal report. If a member agrees, its country report will also contain recommendations for a way forward. The Steering Group also discussed the entire draft report at its meeting in September 2010 and adopted the final report (including the recommendations) by consensus.

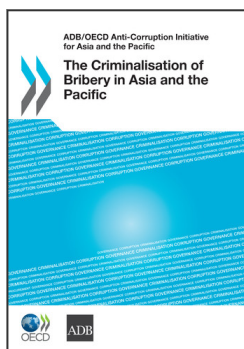
In line with previous Thematic Reviews, the Initiative will follow up developments in its members on the criminalisation of bribery after the finalisation of this report. Members are expected to provide regular updates during future Steering Group meetings on developments in their jurisdictions. Two years after this report's adoption, members will provide a follow-up report on the implementation of the report's recommendations that will be published. It is hoped that this process will encourage follow-up action to the review, including the enactment or amendment of relevant legislation, and the provision of technical assistance to members in need.

A brief explanation of terminology may assist those who are not specialists in this field. This review covers the crime of *bribery*; it does not cover other forms of *corruption*, such as embezzlement, illicit enrichment etc. The focus is on the bribery of *public officials*, not bribery of private individuals like company managers (which is often referred to as "private sector" or "private-to-

private” bribery). Bribery of public officials can in turn be subdivided into the offence of *active* bribery (the crime committed by a briber who gives, offers or promises a bribe to an official) and *passive* bribery (the crime committed by an official who solicits or receives a bribe). Bribery can also be subdivided into the offence of *domestic* bribery (when an individual bribes an official of his/her own country) and *foreign* bribery (when an individual bribes an official of a foreign country or a public international organisation). The OECD Anti-Bribery Convention and UNCAC also deal with bribery committed by a *natural person* (i.e. a human being) or a *legal person*, such as a corporation.

NOTES

- ¹ Australia, Japan and Korea.
- ² Kazakhstan and Kyrgyzstan.
- ³ The Financial Action Task Force (FATF) and the Asia/Pacific Group on Money Laundering.
- ⁴ Fiji, Indonesia, and the Philippines.



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