Chapter 2
The role of international criminal law standards in combating bribery

Countries can significantly reduce corruption in business transactions by accepting a zero-tolerance policy toward companies and individuals that engage in corrupt acts. Criminal law is a key deterrent to bribery and corruption. However, legal offenses must cover all forms of corrupt behaviour, and must be reinforced by effective procedural measures, such as mutual legal assistance and the confiscation of proceeds of corruption.

International standards call for broad criminalization of bribery and corruption

Global standards for criminalization of bribery are put forward in international anti-corruption instruments, such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention) and the United Nations Convention against Corruption (UNCAC). These standards can shape national criminal law on bribery and corruption in Asia and the Pacific.

Both the OECD Anti-Bribery Convention and the UNCAC require countries to establish the offense of bribery of a foreign public official; thus far, few countries in Asia and the Pacific have done so. Increased transnational business, closer economic ties among countries, and regional and international economic integration make sanctioning of transnational bribery even more urgent.

Sanctions imposed on individuals who carry out bribe transactions may not deter bribery, especially in high value business transactions. Therefore, the OECD and UN Conventions further require countries to establish liability of legal persons for corruption and bribery.

Implementation of the standards is challenging

The standards embodied in these Conventions need to be translated into national laws and adequately enforced. Implementing—not merely acceding to or ratifying—these Conventions is therefore the real goal. Unfortunately, implementation remains a challenge, both in Asia and the Pacific and beyond.

It is with this difficulty in mind that the monitoring mechanism under the OECD Convention was created. This process of peer pressure and review has caused numerous countries to make significant changes so as to bring their legal systems up to the Convention's standards. The monitoring process is also responsible for the increased number of investigations and prosecutions of foreign bribery that have seen companies pay hundreds of millions of euros in fines and confiscation. This experience of treaty implementation through monitoring can be usefully shared in Asia and the Pacific.

UNCAC's Chapter II sets out 11 different offenses of corruption, bribery, and related crimes. These form the core of the Convention, and provide the point of reference for mutual legal assistance, asset recovery and other mechanisms.

Only 73% of countries which filed reports under the UNCAC self-assessment process consider that they have fully implemented the Convention's mandatory provisions on criminal law; more than one-third of reporting Parties had not yet criminalized bribery of foreign public officials.

Technical assistance and international experience is available to support implementation

An UNCAC support program provides technical assistance to help Parties fully implement its criminal law provisions. Many countries have requested legislative assistance, model legislation, and legal advice.

The monitoring process under the OECD Anti-Bribery Convention provides particularly valuable information to support implementation. The countries that have ratified the OECD Anti-Bribery Convention—the first instrument to require its Parties to criminalize foreign bribery and sanction legal persons for bribery abroad—have collected almost 10 years of experience in translating international standards into national law. This is valuable, especially as the standards in the OECD Anti-Bribery Convention and the UNCAC are very similar in substance.

Implementing the OECD Anti-Bribery Convention

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The OECD Anti-Bribery Convention[2] came into force in February 1999. Since then, the 38 Parties to the Convention have taken steps to implement the treaty and to monitor its implementation by all Parties. This paper will describe the experience of the Parties to the Convention in this regard. Ultimately, the paper hopes to spark discussion on how this experience can be shared with Asian and Pacific countries, so as to assist them in implementing international standards on the criminalisation of bribery.

Key features of the OECD Anti-Bribery Convention

The OECD Convention has a relatively narrow focus in that it is primarily concerned with the payment of bribes to foreign public officials in international business transactions. Parties to the OECD Convention are required to enact criminal offences outlawing such conduct (among other things). Expressed in more technical jargon, the Convention deals with the supply side of (i.e., active) bribery of foreign public officials that arises in the context of international business. This focus was chosen to stem the flow of bribes from companies in OECD countries.

Within this relatively narrow context, however, the OECD Convention covers a very broad range of conduct. It concerns not only giving, but also offering and promising bribes. It covers bribes to a foreign official given directly or indirectly through an intermediary. It includes bribes given to an official for the benefit of a third party. It covers bribes not only in money but also in any other form.[3]

The breadth of the OECD Convention can also been seen in the definition of a "foreign public official". The OECD Convention does not only cover bribery of officials in the executive branch of government; it also includes officials

holding legislative, administrative or judicial office, whether appointed or elected. Also covered are persons exercising a public function, including for a public agency or public enterprise. Officials and agents of public international organisations are also included.[4]

A key feature of the OECD Convention is that both individuals and companies ("legal persons") may be held liable for transnational bribery. Parties must take such measures as may be necessary, in accordance with their legal principles, to establish the liability of legal persons for the bribery of a foreign public official. They must also ensure that both individuals and companies who bribe are punished with effective, proportionate and dissuasive sanctions. Parties must also be able to seize and confiscate bribes and the proceeds of bribery.[5]

Beyond the core criminal offences, the OECD Convention also contains a number of complementary features that enhance the fight against transnational bribery. Parties are required to make laundering the proceeds of transnational bribery a crime. False accounting associated with transnational bribery must be punished. Parties must assist one another by providing mutual legal assistance and extradition where appropriate. They must also have sufficiently broad jurisdiction to prosecute offences that take place wholly or partly in their territories, and offences that take place abroad when committed by a national. Statutes of limitation must allow an adequate period of time for investigation and prosecution.[6]

Commonalities between the OECD Convention and the UNCAC

These key features in the OECD Convention are very similar to several provisions in the UN Convention against Corruption (UNCAC). A comparison of the relevant provisions of the OECD Convention and the UNCAC is included in the Annex. It is immediately apparent that the bribery offences in the two Conventions employ very similar language. Both criminalise the "promise, offering, or giving" of an "undue advantage", whether "directly or indirectly/through intermediaries", "for an official or another person or entity/third party" in relation to the official's "performance/exercise of official duties". For the transnational bribery offence, both Conventions refer to "the conduct of international business".

The similarities between the provisions on liability of legal persons are equally striking. Both instruments require "criminal, civil or administrative liability" "in accordance/consistent with its legal principles" and with "effective, proportionate and dissuasive criminal or non-criminal sanctions, including

monetary sanctions". The complementary provisions on jurisdiction, money laundering and false accounting in the OECD Convention also have comparable counterparts in the UNCAC.

Monitoring the Implementation of the OECD Anti-Bribery Convention

Apart from these substantive provisions, one of the most important features of the OECD Convention is its mechanism to monitor its implementation. The OECD Convention requires Parties to co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation of the Convention.[7] In lay terms, this means that each Party must participate in a process for ensuring that all Parties do what the OECD Convention requires of them.

The monitoring process is carried out within the OECD Working Group on Bribery in International Business Transactions. The Working Group consists of all 38 Parties to the Convention and meets four times per year at OECD Headquarters in Paris, France. Delegates from the Parties may include prosecutors, officials from law enforcement and Ministries of Justice, and diplomats.

The Working Group carries out its monitoring function through a peer review process that comprises two phases (so far). In Phase 1, the Working Group examines whether each Party's domestic legislation conforms to the OECD Convention. The examination looks at all aspects of the Convention described above, i.e., it covers laws on the foreign bribery offence, corporate liability, money laundering, false accounting, etc. Phase 1 also looks at compliance with the 1996 OECD Council Recommendation on the non-tax deductibility of bribes.[8]

For each country assessment, two Parties are designated as examining countries. A questionnaire is sent to the examined country to collect relevant information. With assistance from the OECD Secretariat, the two examining countries analyse the legislation of the examined country and prepare a draft report for the Working Group. The Group then discusses and adopts the report, taking into account the views of the examined country. It also makes recommendations to the examined country.

In Phase 2, the Working Group goes beyond looking at legislation and studies the legal and institutional structures for enforcing these laws, as well as other measures for applying and implementing the OECD Convention. The procedure is largely similar to Phase 1—all aspects of the Convention are covered, two Parties are again designated as lead examiners for each country review, and a questionnaire is sent to the examined country to collect

information. Phase 2 also covers the implementation of other OECD anti-bribery instruments, including the 1997 Revised Recommendation of the OECD Council, which covers measures for detecting and preventing the bribery of foreign officials.[9] In Phase 2, the examiners and the Secretariat pay a five-day fact-finding on-site visit to the examined country. During the visit, the examining team meets with the police, prosecutors, judiciary, and government officials from relevant ministries (e.g., Ministries of Justice, Interior, Foreign Affairs, and Finance). To obtain different perspectives, the team also meets with the business sector, civil society, practising lawyers, the auditing and accounting professions, legislators, and academics.

After gathering the necessary information, the examining team prepares a draft Phase 2 report for the Working Group. The Group then discusses and adopts the Phase 2 report, and also makes recommendations to the examined country. Countries are required to present regular follow-up reports to the Working Group detailing their progress in implementing the recommendations.

As of December 2008, 37 of 38 Parties to the OECD Convention have completed their Phase 1 examinations and all but two have completed Phase 2. [10] The examination reports and recommendations are published on the Internet.[11] Phase 3 of the monitoring process is expected to begin in 2010.

Impact of the monitoring process

The monitoring process has identified a wide range of weaknesses within Parties' legislation. Some are straightforward, e.g., non-coverage of offering or promising a bribe, absence of liability of legal persons for foreign bribery, or very low sanctions. Other issues are much more complex. For instance:

- Bribing through intermediaries: Who constitutes an intermediary? Does the offence cover intermediaries who are not aware that they are being used to bribe?
- Bribes benefiting third parties: Who constitutes a third party? Does the offence cover a bribe that is transferred directly from the briber to a third party, i.e., by-passing the bribed official?
- Definition of a foreign public official: Is a person employed by a state-controlled enterprise considered a public official?
- Corporate liability: Are state-owned or -controlled companies liable for foreign bribery? When is a company liable for bribery by persons acting on its behalf? Should liability for bribery be triggered by the acts of any employee, or only by the acts of senior management and directors? What if one company bribes for the benefit of another member of the

same corporate group, such as a subsidiary or a parent company? What if bribery occurs even though the company has internal controls for preventing such acts? What if a country's constitution does not permit *criminal* liability of legal persons?

- Confiscation of the proceeds of corruption: How are the proceeds of corruption quantified, especially if the proceeds are derived from a contract for services (e.g., for building a bridge) that was obtained through bribery?
- Jurisdiction: When should a country exercise jurisdiction to prosecute foreign bribery that takes place abroad? What if the corrupt act is carried out by a foreign subsidiary abroad?
- Mutual legal assistance and extradition: Does bank secrecy impede the provision of mutual legal assistance? Does the requirement of dual criminality prevent co-operation if the requested state does not have a foreign bribery offence?

As a result of the monitoring process, many Parties to the OECD Convention have improved their legislation for fighting foreign bribery. For example, some Parties have established liability against companies and other legal persons for foreign bribery, while others have eliminated loopholes in their foreign bribery offences. Additional legislative changes include extending jurisdiction to prosecute nationals for foreign bribery committed anywhere in the world, and expressly prohibiting the tax deduction of bribe payments.

The monitoring process has also identified issues relating to the application and enforcement of the relevant laws. The Working Group has found instances in which a Party has not given sufficiently high priority to investigating and prosecuting foreign bribery cases. This often results in allegations that are not investigated or prosecuted, or in the early termination of investigations and prosecutions. In other cases, the Working Group has observed inadequate resources and skills for investigating foreign bribery. There were also examples in which Parties did not designate a specific agency to investigate and prosecute foreign bribery cases, resulting in allegations that were neglected.

The enforcement aspect of the monitoring process has also seen results. The number of foreign bribery investigations and prosecutions has increased steadily. As of October 2008, there have been at least 65 convictions for foreign bribery (roughly half in the United States) and 200 ongoing investigations (albeit some in very preliminary stages) among the 38 Parties. In one case, one jurisdiction levied fines and confiscation of over EUR 201 million against a single company. The same company then received further criminal and administrative penalties of USD 1.6 billion in a second jurisdiction.

Progress can also be seen in specific countries. For example, the Working Group noted in 2005 that one country had not designated a specific body for investigating and prosecuting foreign bribery cases. Consequently, a number of serious allegations were not being investigated. By 2008, the same country had designated a specific body to deal with foreign bribery cases and spent significant resources investigating such cases. It also had increased investigations and obtained its first conviction for foreign bribery.

Overall, it is fair to say that the monitoring process has had significant impact in improving both the laws relating to foreign bribery and the enforcement of those laws. Although there is room for improvement in most Parties, it is important to bear in mind that the OECD Convention has been in force for only 10 years and that its implementation remains work in progress. It is also important to recall that before 1999 most Parties did not have an offence of foreign bribery, and virtually all Parties allowed tax deduction of bribes. This makes a compelling case for a continuing, rigorous monitoring of the Convention's implementation.

Sharing the OECD's experience with Asia-Pacific countries

The knowledge and experience accumulated through the OECD Convention's monitoring process could be useful to Asia-Pacific countries. Because there are many commonalities between the OECD Convention and the UNCAC provisions on criminalisation of bribery, experience in implementing the OECD Convention is relevant to the implementation of the UNCAC. This will be particularly important to roughly half of the Initiative's members that are Parties to the UNCAC and will be required to implement the standards in the UN Convention.

Even for members that are not yet Parties to the UNCAC, meeting the criminalisation standards in the UN Convention is an important goal. Demonstrable compliance with these standards sends a strong message that a country has an effective anti-corruption framework. This, in turn, can help build a foundation for sustainable development by attracting investment into the country. It also makes that country's companies more welcome in foreign markets. Sound bribery offences are also crucial to recovering stolen assets from overseas, since obtaining domestic convictions and confiscation orders are vital to recovery. Compliance with international standards on criminalising bribery can have positive effects in many areas.

There are several ways to share the OECD experience and knowledge with members of the ADB/OECD Initiative. The Initiative's thematic review in 2009 will look at the bribery offences in its member countries and draw on the

experience under the OECD Convention. This will be similar to the earlier thematic review on extradition, mutual legal assistance, and asset recovery.[12] In addition, all of the Working Group's evaluations reports are available on the internet.[13] The 2006 *Mid-Term Study of Phase 2 Reports*[14] contains a wealth of information about cross-cutting issues that Parties to the Convention have had to overcome. Also available are technical publications such as *Corruption: Glossary of International Criminal Standards*,[15] which compares the OECD Convention, the UNCAC and the Council of Europe Criminal Law Convention on Corruption.

The OECD can also share its experience through technical events and conferences, such as this 6th Regional Conference of the ADB/OECD Initiative in Singapore. Other avenues can also be explored if there are sufficient interest and resources, e.g., missions by experts to interested countries to discuss common challenges, and regional expert workshops with the Initiative's members.

Conclusion

Since the OECD Convention came into force in 1999, the Parties to the Convention have rigorously monitored its implementation. As a result, the Parties have accumulated a wealth of knowledge on the criminalisation of foreign bribery in many countries. Given the similarities between the OECD Convention and the UNCAC, this body of information will be extremely useful to members of the ADB/OECD Initiative as they implement the UN Convention. By sharing this experience, it is hoped that the Initiative's members can avoid many of the mistakes and obstacles that arose in the Parties to the OECD Convention.

Annex: Comparison between the UNCAC and the OECD Anti-Bribery Convention

Bribery Offences

UNCAC		***OECD Convention***
Article 15 Bribery of national public officials 1. 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 1 The offence of bribery of foreign public officials* 1. Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to **offer, promise or give** any **undue pecuniary or other advantage**, whether **directly or through intermediaries**, to a **foreign public official**, for that official or for **a third party**, in order that the official act or refrain from acting in relation to the **performance of official duties**, in order to obtain or retain business or other improper advantage in the **conduct of international business**.

Liability of Legal Persons

UNCAC	*OECD Convention*
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 2 Responsibility of Legal Persons* Each Party shall take such measures as may be necessary, **in accordance with its legal principles**, to establish the **liability of legal persons** for the bribery of a foreign public official. *Article 3 Sanctions* 1. The bribery of a foreign public official shall be punishable by **effective, proportionate and dissuasive criminal** penalties. (…) 2. In the event that, under the legal system of a Party, **criminal responsibility** is not applicable to legal persons, that Party shall ensure that legal persons shall be subject to **effective, proportionate and dissuasive non-criminal sanctions**, including **monetary sanctions**, for bribery of foreign public officials. (…) 4. Each Party shall consider the imposition of additional **civil or administrative sanctions** upon a person subject to sanctions for the bribery of a foreign public official.

NOTES

1 The opinions expressed and arguments employed herein do not necessarily reflect the official views of the OECD or of the governments of its member countries.
2 The full name of the Convention is: "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction". All OECD anti-bribery instruments are available at: www.oecd.org/daf/nocorruption
3 OECD Anti-Bribery Convention, Article 1(1).
4 *Ibid.*, Article 1(4)(a).
5 *Ibid.*, Articles 2 and 3.
6 *Ibid.*, Articles 4-11.
7 *Ibid.*, Article 12.
8 The full name of this OECD Council recommendation is: "Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials".
9 The full name of this OECD Council recommendation is: "Revised Recommendation of the Council on Combating Bribery in International Business Transactions".

[10] South Africa, which became a Party to the Convention in June 2007, has undergone its Phase 1 examination and is scheduled for Phase 2 in 2009. Israel became a Party in December 2008 and will soon undergo Phase 1 examination.
[11] www.oecd.org/topic/0,3373,en_2649_34855_1_1_1_1_37447,00.html
[12] The Report of the thematic review is available at www.oecd.org/dataoecd/28/47/37900503.pdf
[13] www.oecd.org/document/24/0,3343,en_2649_34859_1933144_1_1_1_1,00.html
[14] www.oecd.org/dataoecd/19/39/36872226.pdf
[15] www.oecd.org/dataoecd/59/38/41194428.pdf

Setting Global Standards — the Criminalization Chapter of the United Nations Convention against Corruption

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The United Nations Convention against Corruption is the first global instrument against corruption, with 128 States Parties and 140 signatories to date. More than half of the States participating in the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific are States Parties to the Convention, and a number of others are in the ratification process. The Convention is therefore the essential legal framework for their anti-corruption efforts, together with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Convention is based on four pillars: prevention, criminalization and law enforcement, international cooperation, and asset recovery. For various reasons, Chapter II on criminalization and law enforcement can be considered the core chapter of the Convention.

Criminalisation chapter: The core of the UNCAC

First, it is important to note that the Convention does not contain a definition of corruption, but provides a frame of reference through a wide range of 11 criminal offenses. Five are mandatory: bribery of national and foreign officials (Articles 15 and 16 para. 1), diversion of property by public officials (article 17), laundering of proceeds of corruption (Article 23), and obstruction of justice (Article 25). Additionally, six non-mandatory offenses are regulated, such as trading in influence (Article 18), illicit enrichment (Article 20) and bribery and embezzlement in the private sector (Articles 21 and 22).

Second, these 11 offenses do not only provide the basis for effective international criminalization of corruption. They also serve as the point of reference for the other chapters of the Convention — they provide the range of offenses for which international cooperation must be provided and to which the asset recovery provisions of Chapter V apply. They define the conduct that must

be established as an extraditable offense (Article 44), and set parameters for cases in which full mutual legal assistance must be afforded (Article 46). Further, if such conduct generates proceeds of crime, the Convention regulates the kind of mechanisms that States must have in place for the confiscation of such proceeds (Article 31) and for international cooperation for the purposes of confiscation (Articles 54 and 55). The proceeds of the conduct defined in those 11 offenses must be returned or disposed of according to Article 57 of the Convention. Given their role in the facilitation of international cooperation, the 11 offenses of the Convention have a central role as emerging global standards in criminal law.

Third, the 11 offenses regulated in the Convention are complemented by a number of provisions on enforcement. States are, inter alia, obliged to establish rules on the liability of legal persons (Article 26) and on the protection of witnesses, experts and victims (Article 32), and to establish a sufficiently wide jurisdiction for the adjudication of the offenses (Article 42). These complementary provisions ensure that the 11 offenses of the Convention are not symbolic, and can be used efficiently and effectively by law enforcement and the judiciary for the prosecution of offenders.

Implementing the Convention may be difficult

Implementing the Convention and making the criminalization and law enforcement provisions operational is not an easy task.

Information-gathering is first step toward informed decision-making, and full ratification and implementation of the Convention. It also highlights States' challenges and technical assistance needs. In order to initiate the process of gathering information on the implementation to the Convention, UNODC developed a self-assessment checklist addressing specific issues, embedded in a user-friendly software application. The results were very encouraging. In November 2008, 73 States, including eight States participating in the ADB/OECD Anti-Corruption Initiative, had submitted their self-assessment reports.

In its resolution 2/1, the Conference of the States Parties welcomed the development of the self-assessment checklist. It further requested the Secretariat to explore the option of expanding the self-assessment checklist to create a comprehensive information-gathering tool. An expert group meeting was held in Vancouver, Canada, on 15–17 April 2008, on the formulation of comprehensive software to gather information on the implementation of the five crime-related international legal instruments that fall under the mandate of UNODC: The United Nations Convention against Corruption, the United Nations Convention against Transnational Organized Crime and the three Protocols thereto. After being

consulted and test-run with Member States, the final version of the comprehensive, computer-based tool will be presented for endorsement to the Conference of the States Parties at its third session.

Self assessment status on criminal standards

Considering the central role of Chapter II of the Convention, full implementation is essential for the implementation of the other parts of the Convention. The self-assessment reports on Chapter II seem positive at first glance: 73% of the reporting Parties consider the criminalization chapter fully implemented. This is a very high number, especially compared to the reported figures regarding the asset recovery chapter. However, on specific articles much remains to be done: 10 States Parties reported partial or non-criminalization of the offense of bribery of national public officials with all elements regulated in Article 15 of the Convention. In addition, the complex provision on money laundering provided particularly challenges, resulting in 16 States Parties that reported partial or non-implementation of Article 23. It is particularly serious that 24 States, more than one-third of the reporting Parties, reported partial or non-criminalization of foreign bribery in Article 16 paragraph 1.

The self-assessment checklist requests States Parties to report on their technical assistance needs and provide information on technical assistance already provided. This makes the self-assessment reports a valuable tool for the planning and coordination of technical assistance on the global and country levels. Of those States Parties that reported partial or non-implementation, 68% requested technical assistance. The types of technical assistance most frequently requested (both generally and for the provisions on criminalization) were legislative assistance, model legislation and legal advice, followed by the development of an action plan for the implementation of the relevant provisions and a site visit by an anti-corruption expert.

UNODC has provided technical assistance for the implementation of the Convention, anti-corruption policies, and judicial reform to a number of countries that also participate in the ADB/OECD Initiative. These countries include Bangladesh, Fiji Islands, Indonesia, Kyrgyz Republic, Thailand, and Vietnam. UNODC launched a mentor program in 2007, with the objective to provide top-level and long-term specialized expertise through the placement of anti-corruption experts within government institutions tasked with the control and prevention of corruption. Beneficiary countries that also participate in the ADB/OECD Initiative are the Kyrgyz Republic and Thailand.

The Fiji Islands, Indonesia, Mongolia. and the Philippines are participating in the Voluntary Pilot Programme for the Review of Implementation of the Convention run by UNODC. In the Pilot Programme, 29 countries from all regions are testing a variety of review methods, based on a peer review methodology. The program is gathering experience for the establishment of a mechanism to review UNCAC implementation. This experience will be reported back to the Conference of the States Parties at its third session. Further, the program entails an important technical assistance component. Taking the self-assessment as a starting point, countries are discussing their implementation gaps, technical assistance needs and technical assistance opportunities in detail with their reviewing partner countries and the Secretariat. At the request of the country under review, priorities for further action or an action plan can be developed.

Technical assistance to foster implementation

The Conference of the States Parties has established an Open-Ended Intergovernmental Working Group on Technical Assistance. In its resolution 2/4, titled "Strengthening coordination and enhancing technical assistance for the implementation of the Convention", the Conference renewed the mandate of the Working Group to advise and assist the Conference in the implementation of its mandate on technical assistance. The Working Group will hold its second intersessional meeting on 18-19 December 2008. It will review States' needs for technical assistance, give guidance on priorities for technical assistance and on coordination of activities, and discuss the mobilisation of necessary resources.

Implementing the Convention is a complex and challenging task. It is essential to support the Conference of the States Parties on the way toward its third session in Qatar in November 2009. It will be necessary to raise the number of ratifications, to collect more accurate and more comprehensive information, to prepare the establishment of a strong and efficient mechanism for the review of the implementation of the Convention, and to join forces in providing technical assistance toward the highest standards of quality and coordination. Good practices and the exchange of experience in the implementation of the Convention are an important part of this task. International criminal law standards are not set when a Convention enters into force; setting international criminal law standards is a dynamic process that requires full and ongoing commitment of States and the international community.

Effective Anti-Corruption Enforcement: Another Flight of Fancy?

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The advent of transnational crime and corruption has seen the dawn of the bewitching hour for all States. However, States must not take the attitude, as did the witches in Shakespeare's Macbeth, that "Fair is foul, foul is fair." States must always use effective but fair means to pursue and apprehend criminals involved in transnational crime.

Never has our common agenda in Asia and the Pacific been so symbiotic, mutually beneficial, and convergent—from combating piracy, drug trafficking, people smuggling, money laundering to bribery and corruption—all calling for greater regional and bilateral cooperation.

Developments over the past 20 years have resulted in several international treaties aimed at combating corruption or bribery. As a result, States more often than not have had to enact or amend domestic legislation to give effect to the anti-corruption treaty—in addition to revising or modifying how such crimes are investigated and prosecuted.

Naturally, fulfilling international obligations does not end with simply enacting legislation. Treaties are just words on a piece of paper. Effective compliance requires the substantive backing of a well-structured system of enforcement. The aim of this paper is to address the issue of enforcement, by illustrating the dichotomy between balancing domestic interests, which usually tend to promote economic interests of a State, especially developing economies. The ultimate objective is not to offer an exhaustive analysis of the international law relating to corruption, but rather to engender debate and discussion by highlighting some of the more vexed issues which have become apparent over the years.

Bribery in the international context—the phenomenon of globalization

Historically, the notion that certain regions of the world are more "corrupt" than others has been well documented. In the course of his impeachment trial for corruption, Warren Hastings, the first Governor of Bengal, argued before the House of Lords that the socio-political nature of Asia meant that the act of accepting bribes was perfectly acceptable, and that he should not be judged based on moral standards of the West. Hastings was acquitted.[2]

There is also the notion that only the lower echelons of a bureaucracy allow themselves to be tempted by corrupt payments. The corollary of this, of course, is that senior officials are in fact immune to such temptation and impervious to such attempts at inflection on their character.

Even a cursory glance at the events of the past 20 years would result in a universal rejection of the above presumptions. Centuries-old bias and stereotyping have to be discarded in light of numerous high-profile corruption scandals. From Marcos to Montesinos, Abacha to Chiluba, Heads of State, military rulers, intelligence chiefs, corporate executives, National Olympic Committee officials, cricket and football stars, probably no job or post has been immune to the pervasive reaches of the corrupt act. Indeed, it may well be that every person has a price at which she or he can be "bought". However, the dilemma for the global law enforcement community is that for many, the price is all too easily payable. Moreover, the phenomenon of globalization has created a borderless world, and cross-border transactions and interactions are commonplace. Likewise, improvements in technology facilitate the ease with which large sums of money can be moved around without raising suspicion. This has created more opportunities for bribery to occur at all levels.

It is not surprising, therefore, that the corresponding period has seen the advent of numerous international legal instruments, such as:

- 1996 Organization of American States Inter-American Convention Against Corruption (OAS Convention);
- 1997 Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention)
- 2000 United Nations Convention Against Transnational Organized Crime (UNTOC); and
- 2003 United Nations Convention against Corruption (UNCAC).

Let us now consider some key aspects of these Conventions.

Multilateral initiatives — "Put your money where your mouth is"

Monitoring

The OAS Convention, which entered into force in 1997, marked a major triumph in the fight against corruption. At the time, it was distinctive in that it included developed and developing countries, and displayed what can be regarded as a defiant rejection of corruption, given the various political upheavals which were plaguing the developing countries of the Americas region at that time. Compared with some later initiatives, the OAS Convention was ahead of its time in some aspects: It applied not only to active bribery (the giving of the bribe) but also to passive bribery (the receiving of the bribe), and required States to enact legislation criminalising such acts. Nevertheless, some critics view the OAS Convention as flawed, given its weak monitoring of implementation, which has only in the past five years picked up pace.

The OECD Anti-Bribery Convention, which entered into force in 1999, has the central focus on combating bribery of foreign public officials through the use of domestic law,[3] establishing the jurisdiction of domestic courts for offenses by their nationals which occur abroad—but does not apply to bribery which is purely domestic, and does not require legislation to criminalize bribery of a State's own public officials. However, unlike the OAS Convention, implementation of the OECD Anti-Bribery Convention is monitored closely. Monitoring is carried out by the OECD Working Group on Bribery, and takes place in two phases: Phase 1 monitoring assesses whether States Parties have in place legislation in conformity with the Convention's standards; Phase 2 assesses whether legislative and institutional frameworks are effective in practice.

Article 5 of the OECD Anti-Bribery Convention forbids any state, in investigating allegations of corruption, from taking into consideration "national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved." Therefore, States are required to develop and implement "hard" coordinated anti-corruption policies and legal frameworks to combat bribery of foreign public officials in accordance with the fundamental principles of their *own* legal systems. There is no requirement to establish or promote "soft" anti-corruption practices on the ground to prevent corruption. Furthermore, the periodic evaluation of anti-corruption laws and procedures is only discretionary and is also subject to the usual resource and time constraints that usually plague such evaluation processes.

The Convention against Corruption (UNCAC), approved by the Vienna negotiating ad hoc Committee, was adopted by the UN General Assembly by

resolution 58/4 of 31 October 2003. The UNCAC had the distinction of becoming the first legally binding, international anti-corruption instrument. Conceived and born out of the growing realization that corruption allows organized crime and terrorism to flourish, reduces foreign direct investment, and is an obstacle to social and economic development, it would not be surprising to expect the UNCAC to contain robust provisions on implementation and a strong review mechanism. In a most heavy and telling omission fraught with significance, the UNCAC does not actually contain any explicit review mechanism at all. Instead, its Article 63 (7) merely states is that the Conference of States Parties "shall establish, *if it deems necessary,* any *appropriate* mechanism or body *to assist* in the effective implementation of the convention." The use of such discretionary language appears to be an attempt by the negotiating States to display an ideological new bottle but which actually contained no new wine. Is the UNCAC therefore going to be a case where the paper rhetoric does not match the ground reality? Only time will tell.

The issue of enforcement

Let us move away from the issue of *monitoring* implementation to the issue of *enforcement*. It is necessary to begin with UNTOC. The UNTOC was envisaged as a means to remove some of the problems which had hindered international law enforcement efforts against certain crimes commonly associated with organized criminal groups. For this purpose, it establishes a wide range of cooperation measures and technical assistance provisions. Corruption was one of the four key organized crimes that UNTOC identifies. UNTOC not only requires States to adopt laws to criminalize active and passive bribery, but also emphasizes that States "*shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions".*[4]

Unfortunately, the UNTOC is not without defects. Its Article 9(1) provides that a State Party is to take measures "appropriate and consistent with its legal system". Effectively, this means that States can avail themselves of an "exception" and avoid effective enforcement on constitutional grounds. Indeed, in some countries, Heads of State and Heads of Government and even other high-ranking officials enjoy immunity from criminal prosecution. This can thwart effective prosecution and also the tracing, seizure, and forfeiture of proceeds of corruption, especially if the immunities are absolute or broadly defined.

The UNCAC arrived soon thereafter, perhaps to address some of these issues. The UNCAC requires States to specifically provide for *enforcement* measures, such as the adoption of a code of conduct for public officials and the

establishment of anti-corruption units. Improving upon the OECD Anti-Bribery Convention, the UNCAC requires the criminalization of both active and passive corruption. Further, it also provides for the lifting of bank secrecy in relevant cases and establishes an extensive jurisdictional basis, specifically including passive personality jurisdiction.[5]

Having had a look at the parameters established by some recent international instruments, we now turn to a case study illustrative of some of the involved issues.

Case study—The BAE saga

The December 2006 decision by the UK's Serious Fraud Office (SFO) to abandon an investigation into alleged corruption involving BAE Systems and the Government of Saudi Arabia to procure lucrative defense contracts sparked large-scale media uproar.

On 14 December 2006—and no doubt aware of Article 5 of the OECD Anti-Bribery Convention—Attorney-General Lord Goldsmith informed the House of Lords that the SFO investigation into BAE was being discontinued. He explained that the decision had been taken after the SFO had considered that proceeding with the investigation would jeopardize the UK's national security interests in that it would damage important security ties with Saudi Arabia.

It appears that the UK authorities faced a dilemma: On the one hand, the investigation could have been halted without any difficulty based on domestic law; on the other hand, the strict requirements of the OECD Anti-Bribery Convention would not permit such an abrupt halt.

As mentioned above, the OECD Anti-Bribery Convention makes it clear that neither considerations such as national economic interest nor potential effects on relations with other States should influence the decision of whether or not to prosecute. Therefore, while it is debatable whether or not the decision to stop the investigation was a genuine case of protecting national security interests or simply a commercial decision, the fact remains that the resulting widespread media coverage, in the UK and abroad, brought into sharp focus the potential conflict between the interests of the State versus its international treaty obligations.

Whether or not the UK has complied with its obligations under the OECD Anti-Bribery Convention can be debated.[6] However, perhaps more importantly, one needs to consider what kind of impact the BAE case has had in the global fight against corruption. It would appear extremely difficult to avoid the

conclusion that the SFO decision may well have significantly weakened the UK's role and image in the worldwide fight against corruption. However, is this necessarily a new position? The UK's apparent failure to properly enforce laws prohibiting the bribery of foreign public officials had been identified as a weakness before: the OECD previously adversely cited the UK on the grounds that no prosecutions had been brought in the UK since the Convention was ratified in 1999!

However, this begs the question of whether prosecutions themselves or even conviction rates should be the sole or key criteria of a successful anti-corruption enforcement policy. I leave this difficult issue for further discussion during our workshop deliberations, to benefit from the collective wisdom of all the participants in this conference.

By way of comparison, and perhaps a model from which we in Asia and the Pacific can borrow from and adapt: the US Department of Justice and the Securities and Exchange Commission (SEC) actively police the US Foreign Corrupt Practices Act (FCPA). Authorities in the US have also been quick to apply the FCPA jurisdiction extra-territorially to non-US companies.

Going forward

As some commentators have pointed out, "it is one thing to tell the world that one's nation is participating in an international convention, and another matter altogether to actually live up to the convention itself."[7] Essentially, States Parties to a Convention have to take on board the idea that signing that Convention is just the beginning, not the end.

As the experiences in other jurisdictions that have implemented international anti-corruption initiatives show, there is a futility of purpose when there is little or no impact on the ground—this is pure lip service. The question is: how can we remedy this situation? How can we ensure that this does not happen?

It would seem that the answer to these questions has been with us, but we may have inadvertently let it slip by. Firstly, during the drafting of the UNCAC, Norway submitted a proposal for a two-phase evaluation based on the mechanism practiced for the OECD Anti-Bribery Convention. The first phase would focus on ensuring that domestic legislation is in line with the Convention, and a second phase would consist of a study of enforcement measures put in place.

This proposal is not novel as far as previous Conventions are concerned. Where it does get interesting, however, are Norway's proposals for

noncompliance, which included measures such as targeted technical assistance, as well as suspension from the Convention. However, this proposal did not garner much support, and never made it past the drafting stage for a variety of reasons. This was unfortunate. Recent lessons show that Norway's proposal, though seemingly far-reaching at the time, would not be such a bad thing from today's perspective—especially in relation to a soft-targeted technical-assistance-and-capacity-building approach, as opposed to a hard "name-and-shame" approach.

Additionally, the role that the UNCAC accords to civil society is weak: a mechanism may be established to "assist in the effective implementation of the Convention", but *only* if "it deems it necessary".[8] This allows States a large degree of leeway to decide if and how far to incorporate the Convention into domestic law. Notwithstanding its weaknesses, the monitoring mechanism practiced for the OECD Anti-Bribery Convention demonstrates that peer review and mutual evaluation can help raise public awareness. Likewise, the role of NGOs, such as Transparency International (TI), cannot be underestimated. Its lobbying and monitoring efforts around the world have kept alive the ideal of wiping out corruption on the global agenda, and have ensured that this does not remain a pious hope.

Conclusion

In his message to the Third Global Forum on Fighting Corruption and Safeguarding Integrity, former UN Secretary-General Kofi Annan said, "Corruption impoverishes national economies, undermines democratic institutions and the rule of law, and facilitates the emergence of other threats to human security, such as organized crime, human trafficking, and terrorism".

The formal or "official" position of companies is, of course, that bribes are unacceptable. When it comes to doing business, however, many companies will no doubt acknowledge (albeit in hushed tones) their fear that they will lose the deal to someone who *does* pay "facilitation payments" or "tea money".

Problems with enforcing the OECD Anti-Bribery Convention demonstrate the challenges of reducing corruption in practice. Although focused, widely ratified, and equipped with a well-planned monitoring system, it has yet to produce significant changes in reality. Likewise, the lack of consensus on developing a monitoring mechanism for the UNCAC, as seen at the UNCAC conference in Bali in January 2008,[9] translates into a lack of incentive for effective enforcement.

Therefore, what is required will be a sustainable, consistent, and coordinated effort not only by States to reaffirm their commitments under the respective Conventions, but also a considered effort by businesses to ensure that all transactions are corruption-free. Then, the issue will really turn on how far government coordination extends. If it extends to impressive lawmaking but not to effective law enforcement, then we are no better off than when the question of drafting a convention against corruption was raised for the first time during the Vienna negotiations for the Convention against Transnational Organized Crime almost a decade ago.

Let me conclude now—it has been said that the 21st century will be the century of *change*. It is believed that more things will change in more places in the next 10 years than in the past 100 years. We are already witnessing the tumultuous changes that the US subprime crisis brings and that has now already changed into an almost unprecedented global financial crisis. What will *not* change, however, is the scourge of corruption and the global threat it poses to developed and developing countries alike.

Corruption poses a serious threat to democracy, the rule of law, human rights, international peace and security—and strikes at the core values of the United Nations. International cooperation has never been so critical to preserve international peace and security.

It needs to be emphasized that international initiatives, regional treaties, and UN Conventions do not solve the corruption problem. Political commitment, lawmaking, and rigorous and unrelenting law enforcement are crucial, if these impressive documents should not remain just pretty words on paper. All States must play their part, and the UN's role in providing technical assistance and capacity building through its Global Program against Corruption is a critical step in the right direction—together with the work of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific.

We have heard of the three "T"s of the 21st century—Trade, Technology, and Terrorism—and that all three are deeply interconnected. They also bring the world to an important T-junction. There is also for us, here in Asia and the Pacific and in the world at large, a fourth T—THREAT of corruption. If we make a wrong turn, the road will lead to disaster. In the global fight against corruption, international initiatives combined with effective domestic legislation and efficient law enforcement have never been so critical to ensure international stability, regional peace, and security — AND a better life for all.

NOTES

1 The views expressed by the writer are his personal views and do not reflect the views of the Attorney-General's Chambers of Singapore or of the Government of Singapore.
2 The Impeachment of Warren Hastings, Papers from a Bicentenary Commemoration, 1989, Edinburgh University Press.
3 Art 1(1) of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention). The full text of the Convention is available at www.oecd.org/document/21/0,3343,en_2649_34859_2017813_1_1_1_1,00.html
4 Art 9(2) of the UNTOC.
5 Art 42 of the UNCAC.
6 The report regarding the UK by the OECD Working Group on Bribery, the body that assesses the implementation of the OECD Anti-Bribery Convention, is available at www.oecd.org/document/24/0,3343,en_2649_34859_1933144_1_1_1_1,00.html
7 Luz Esta Nagle, 'The Challenges of Fighting Global Organized Crime in Latin America', 26 Fordham International Law Journal (2003), 1649, at 1665.
8 Art 63(7) of the UNCAC.
9 TI has labelled this development as a 'major setback'. See www.transparency.org/news_room/latest_news/press_releases/2008/2008_02_01_uncac_final